

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FIRST REGION

SEIU Local 509,	)	
Petitioner	)	
	)	
and	)	1-RC-103308
	)	
C.L.A.S.S., Inc.,	)	Before Hearing Officer
Employer	)	Megan M. Millar

**Employer's Exceptions To Hearing Officer's Report and  
Recommendations On Employer's Objections**

Respectfully submitted by  
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## DISCUSSION

### **I. Introduction**

On July 26, 2013, Hearing Officer Megan M. Millar (“HO”) issued her Report and Recommendations on Objections (“Report”) in the above captioned matter. Pursuant to the provisions of Section 102.69 of the National Labor Relations Board’s Rules and Regulations, the Employer, C.L.A.S.S., Inc. (“CLASS” or “Employer”) hereby files exceptions to this Report with the Executive Secretary of the National Labor Relations Board.

The Board should grant review in this case because there are compelling reasons to do so. As outlined below, based on the HO’s Report and Recommendations, there are substantial questions of law and policy because of the departure from Board precedent, the decision on substantial factual issues are clearly erroneous on the record and such error prejudicially affects the rights of the Employer, and there are compelling reasons for reconsideration of an important Board rule or policy. See Section 102.67(c), National Labor Relations Board’s Rules and Regulations.

CLASS takes exception to the HO’s determination with regards to Objections 1, 2, and 6. Specifically, with regards to Objection 1, the HO’s determination on page 8 of her Report that any conduct occurring at the North Andover election site was too remote to be considered within the electioneering zone and thus constitute the appearance of surveillance is in direct conflict with Board precedent. Similarly, the HO’s finding on pages 12 and 13 that the interrogation of voters was not prolonged enough to sustain its objection is a misinterpretation of Board precedent.

With regards to Objection 2, the HO relied on the “overall probabilities” – rather than any actual evidence - to disregard the time stamp on a tweet that, based on that time stamp, was

posted on Twitter before the end of voting announcing a union victory. Report, p. 17. This is a substantial factual error and severely prejudices the rights of the Employer.

Lastly, the Employer renews its Objection under Objection 6 that the Board currently lacks a quorum, based on the decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), and therefore has no authority to authorize or conduct a representation election. The HO based her decision to disregard the ruling of the Federal Circuit Court on a recent Board decision. Report, p. 5. Such decisions do not take precedence over Federal Circuit Court decisions and, therefore, Employer's Objection 6 should be allowed.

## **II. Relevant General Facts**

A secret ballot election was conducted on May 29, 2012 pursuant to a Stipulated Election Agreement dated April 29, 2013. Report, p. 2. This election was conducted among certain employees of CLASS. Id. That election resulted in 48 votes for the Union and 46 votes against the Union, with one challenged ballot. Id. CLASS timely filed objections on June 5, 2013. Id. A hearing was held on June 27 and 28, 2013, before the Hearing Officer during which both parties presented their evidence and arguments. Id. at p. 3. The Hearing Officer issued her Report and Recommendations on July 26, 2013. Id. at p. 20.

## **III. The Hearing Officer Erred in Recommending That The Board Overrule Objection No. 1 (Interference with the conduct of the election; appearance of surveillance/interrogation of employees about how they voted).**

In her recommendations, the HO dismisses the entirety of Employer's Objection 1. Report, p. 13. The Employer takes exception with two specific aspects of the HO's report and recommendations regarding Objection 1. First, the HO's determination regarding the Union's activities at the North Andover voting site during the election is based on a misinterpretation of Board precedent and would establish a potentially destructive policy wherein unions and

employers could effectively act with impunity during elections as long as they were at least 8-10 feet away from the polls. Second, the HO's recommendation that the interaction between Ms. Roselyn Plaza and SEIU organizer Mr. Keegan Cox was not "prolonged" enough to be objectionable (even though within 8-10 of a line of voters waiting to vote) again misapplies Board precedent and creates a dangerous policy for future elections.

**a. Union Presence at North Andover Voting Site.**

The HO, in her Recommendations, states that "[t]he Union's presence outside the North Andover voting site during the voting hour is not disputed." Report, p. 7. Moreover, the HO found that witness testimony established the group of Union organizers was located at or near the entrance to a karate studio, which, the HO found, is "approximately eight to ten feet or one to two car lengths from the entrance to the Employer's facility," where voting was taking place. The actual polling place was just inside that entrance. Report, p. 6. Based on these findings, the HO recommended that this portion of the objection be dismissed because "[a]ny conduct that remote from the polling area cannot be considered to be in the no-electioneering area." Report, p. 8.

The testimony was that initially there were approximately 30 employees in line outside the transportation facility waiting to vote. TR 128.<sup>1</sup> This line would have had to snake down the transportation steps into the parking lot, and was certainly longer than the 8-10 feet at which the Union representatives were standing. See E-6, 8 and 9. Even if only 1 foot were allocated for each voter in line, that is a 30 foot line of voters, so at 8-10 feet from the entrance the Union representatives were closer to the polling area than 2/3ds of the voters. Since the HO found that "the Board agent's direction to waiting voters not to congregate at the immediate entrance to the

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<sup>1</sup> "TR" means transcript, with the page number following.

voting are, but to line up to vote, is taken to establish a no-electioneering zone”, this conclusion alone puts the Union representatives well within the no-electioneering zone, contrary to the HO’s conclusion. It is thus incredible to suggest that employees in line to vote would not have seen these organizers or overheard comments made to voters such as “how did you vote?” By any reasonable standard this configuration constitutes the appearance of surveillance of the voters by the Union representatives.

Consistent with Ms. Rodriguez’s testimony, Union Organizer Joao Baptista stated that he represented the Petitioner at the North Andover walk-through of the polling location. TR 177. Mr. Baptista did not deny being in the parking lot where Ms. Rodriguez said he was, but he could “not recall” if he was with a group of 5 or not. Later, however, he contradicted himself and admitted that he was there along with Union representatives/organizers Keegan Cox, John Grossman and Orlando. TR 181.<sup>2</sup> Only lines later, however, again contradicted himself and claimed he was alone, or “maybe Orlando was there.” *Id.* He did “not recall” any conversations between people in his group and voters. TR 182. Keegan Cox, on the other hand, claimed he “never went near the building.” TR 188.

Even though the Board agent may not have specifically designated a non-electioneering zone, these Union organizers were certainly “at or near the polls,” which is the forbidden area as established in the Case Handling Manual<sup>3</sup> and is plainly stated on the Election Poster. Indeed, section 11326 of the Case Handling Manual specifically provides that:

No electioneering will be permitted at or near the polling place during the hours of voting, nor should any conversation be allowed between an agent of the parties and the voters in the polling area or in the line of employees waiting to vote. **Indeed, agents of**

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<sup>2</sup> “Orlando” was identified as Orlando Pena, a Union representative, by Ms. Strangie. TR 71.

<sup>3</sup> The Board’s standard election poster, used in this case, expressly states that “Electioneering will not be permitted at or near the polling place.”

**the parties (other than observers) should not be allowed in the polling area during the election hours.** (emphasis supplied)

As the HO discusses, the Board has found that in cases where the Board agent fails to designate a non-electioneering area, the Board will only apply its rules regarding electioneering to the customarily proscribed area, which is “at or near the polls.” Report, p. 8. The HO, however, unreasonably extended the definition of “at or near the polls” to exclude an area less than 8-10 feet away from the polls, which according to the testimony was closer to the polls than 2/3ds of the voters waiting in line. This finding is unsupported by Board precedent. For example, in the case cited by the HO, *Bally’s Park Place, Inc.*, 265 NLRB 703 (1982), the Union representatives were 130 feet away from the polling place, which the Board found to be not at or near the polls. Similarly, in *Star Expansion Industries Corp.*, 170 NLRB 47 (1968), the Board found that “at or near the polls” described a 50-foot radius. Additionally, in *Claussen Baking Co.*, 134 NLRB 10 (1961), the Board found electioneering that occurred within 15 feet of the voting to be objectionable.

Moreover, if the Board were to uphold the HO’s recommendations regarding what “at or near the polls” means, then both Union and Employer representatives would be allowed to remain as little as 8 feet away from a polling location if a Board agent does not specifically direct otherwise, even if those representatives were closer to the poll than many voters. Such a precedent has the potential to create a more hostile election environment in which conduct would only be objectionable if it was less than eight feet from the voting site. Instead of dissuading electioneering, there would be increased potential for inappropriate influences on voters as Employers and Unions would only need to remain 8 feet outside the actual poll.

**b. Union Interaction with Voters at North Andover Voting Site.**

The HO also recommended that the Employer's objection relating to the conversation between a union organizer and an employee did not constitute objectionable conduct. Report, p. 13. The HO found that this interaction was not *prolonged* enough to warrant a finding of objectionable conduct. Id. CLASS takes exception to this recommendation as it misconstrues Board precedent and could lead to poor policy outcomes.

At the hearing, Ms. Roselyn Plaza testified for the employer that she and her mother, also a voter, attended the free breakfast provided by the Union at the café at the end of the North Andover driveway. TR 126-127. She then walked with the group of voters up the driveway to the building entrance and waited in line to vote. TR 127. Using Exhibit E-9, she showed where Union representatives were standing during the voting period, marked with a "B". TR 127-129. After she voted she heard Union representatives asking voters if they had voted yes. TR 129-130. One Union representative approached her after she voted and asked her if she had voted yes. TR 130. She identified that person at the hearing; he later testified and identified himself as Keegan Cox, the Union's lead organizer. TR 130-132; 183. Ms. Plaza had had prior conversations with him before about the Union, so she knew who he was, TR 131-132, and specifically identified him by name later in her testimony. TR 142-143. She also identified Orlando [Pena] and Joao Baptista. TR 144. She also testified that she saw Ms. Rodriguez sitting on the nearby bench. TR 134. Voters in line were clearly in earshot of the conversation she had with Mr. Cox about how she voted since he was only 8-10 feet away and, as noted above, the line extended beyond that. TR 147. Ms. Plaza testified that when Mr. Cox asked her how she voted she "high fived" him, obviously in plain sight and hearing of voters in line waiting to vote and was only about 8 feet away from them. TR 156-157.

Mr. Cox was asked “Did you have any interactions with Rosalyn, as she described in her testimony after she voted?” His answer was “Not that I recall.” TR 191. Mr. Cox also testified to having participated in numerous elections and that he was well aware of electioneering rules. TR 183. He stated that during the pre-election walkaround at the 1 Parker Street location, the Board Agent said that no one could be in the building, they had to be outside, although he did “not recall” any discussion about electioneering at all. TR 184, 186. In that location, the voting room was up an internal flight of stairs to the second floor and down a hallway. TR 184-185. He tried to suggest that from that conversation, his understanding for no-electioneering rules was that he could be outside, he just couldn’t be inside, and that understanding applied to the North Andover location as well. TR 187-188. This suggestion of Mr. Cox simply is not credible and, frankly, borders on foolish given that all witnesses described the North Andover polling area as just inside the entrance door.

Contrast that with the far more reasonable understanding of Ms. Strangie, who testified that her understanding was that no one other than voters should be on the North Andover property at all during the voting period, though. TR 76. She also testified that at the 1 Parker Street walk-through the Board Agent instructed that no one should be within 200 feet of the polling area, and that in North Andover no one could be hanging around outside the polling area. TR 74-75. Mr. Strangie’s understanding and recollection seems far more consonant with traditional Board policy than the Union’s version.

The Employer’s view is that this activity constituted objectionable conduct for a number of reasons. First, it constituted electioneering in violation of the *Milchem* rule. While there is no evidence that these Union organizers had any specific conversations with voters in line, they were clearly only 8-10 feet away and obviously within earshot of voters. Voters still in line had

to have heard Keegan Cox ask Rosalyn Plaza how she voted with voters only 8-10 feet away. It defies credulity to believe that no voter heard or could have heard that exchange. Similarly, this exchange reinforces the Employer's objection of these Union representatives creating the appearance of surveillance. If effectively standing beside voters in line, and asking at least one how she had voted, does not create the impression of surveillance, the Employer does not know what does. If an employee waiting in line to vote is aware that he or she is going to be interrogated by the Union representatives upon his or her exiting the poll, that is coercive conduct by any reasonable standard.

This case is similar to *Claussen Baking Co.* in which three supervisors stood approximately 15 feet outside the door of the voting area and urged employees to vote against the union. 134 NLRB No. 10, \*\*2 (1961). These individuals remained at this location for much of the voting period. Id. A no-electioneering area was not established, unlike in *Nathan Katz*. 251 F.3d 981 (D.C.Cir. 2001). The HO and Board in that case found the conduct to be objectionable. *Claussen Baking Co.*, 134 NLRB No. 10, \*\*2 (1961). Applying the same reasoning to the present case, where at least three, if not five, non-employee Union representatives were standing within 8-10, rather than 15, feet of the entrance to the voting area and were heard asking people how they voted, it would seem to be the same type of conduct the Board found to be objectionable. This would appear to be especially so when one considers that in a voting unit of about 100 employees, the election came down to a razor-thin 2 vote margin with one challenged vote.

Additionally, if the Board were to adopt the HO's recommendations, it would create a policy where both the Employer and Union could position themselves relatively close to the polling area (8-10 feet) and speak to voters about how they voted. Such "exit polling" so close

to the polls would seemingly be allowed based on the HO's recommendations, which does not seem consistent with Board cases and policy. Such a policy would necessarily increase the hostility of representation elections and cause employees to avoid the voting process or experience unnecessary stress.

Any one of these violations are independently objectionable and had the ability to interfere with voters' free choice, and in an election where the difference was two votes (with one challenged vote) these violations mandate a rerun election.

#### **IV. The Hearing Officer Similarly Erred in Recommending That the Board Overrule Objection No. 2 (Objectionable Election Day Twitter Postings).**

CLASS presented evidence of Twitter postings from the Union's account that showed, among other things, two CLASS employees holding a piece of paper with a caption about them celebrating the union win at CLASS. The HO, however, disregarded this evidence, instead finding that the Union likely posted the picture after the election and not in an attempt to show voters that the result of the election was a foregone conclusion.

As was presented at the hearing, the Union's own Twitter feed had a post with a time stamp of 2:01 pm on May 29, 2013. E-3. This post states that the Union won the election and contains a photograph of two voters holding what purports to be the tally sheet. However, there was another voting period yet to come, from 2:00 – 4:30 pm on the same date. Thus the election was not yet over when the Union announced victory. The Union could not explain how or why that post bore a time stamp of almost 2 ½ hours before the closing of the polls, although it controls its own Twitter postings. TR 208. The Union's own Twitter "expert" could not explain the 2:01 post, despite it being the Union's own post which he posted himself. That same "expert" also testified that the time stamp is the actual time a post was posted. TR 207. He also

testified that there is no way to change the time stamp or to “retroactively change anything you’ve tweeted”; Twitter assigns the time stamp, not the poster. TR 216-217.

While the Union suggested that Ms. Strangie manipulated the time stamp somehow, even though its own Twitter “expert” firmly stated that a time stamp simply could not be changed once posted, TR 207-208, even the HO did not accept that. The plain fact is that the Union controls its own Twitter feed and it had a 2:01 posting announcing victory before the election was over. E-3 is the Union’s own document downloaded from its Twitter page.

The HO, however, disregarded these facts, relying instead on “the overall probabilities” that the Union would not fabricate such a posting, despite little or no evidence to support those “overall probabilities.” Report, p. 17. As the Union’s Twitter expert testified, the time stamp on a tweet cannot be changed. Report, p. 15, TR 207-208. The fact of the matter is that this tweet, regardless of “probabilities”, represents that it was posted at 2:01pm, almost 2 ½ hours before the close of the polls. Additionally, regardless of whether any direct evidence was presented about who saw the tweets, the fact that they were posted before the end of the election should be considered *per se* objectionable conduct, especially when the election spread was only two votes, meaning that a change of only one vote could have changed the result. This conduct defies every precept of laboratory conditions in an election and should not be countenanced by the Board. The Union “expert” stated that he did not believe any voters were “followers” of the Union’s Twitter site, but that is beside the point. As was clear from Ms. Strangie’s testimony, anyone can log onto Twitter and view the Union’s Twitter feed – one does not have to be a “follower” to access the Union’s Twitter feed. Just go <https://twitter.com/SEIU509> and the Board can see for itself.

The Employer's view is that announcing an election victory in a public forum prior to the closing of the polls and the tally is obvious and *per se* objectionable conduct and a rerun election is required. It would seem axiomatic that a credible public announcement of a union victory in an election, while there are still 2 ½ hours of voting yet to be done, has the tendency to interfere with employees' free choice since for the remaining voters the election is a *fait accompli*. Who knows how many voters did not bother to vote because of this posting, or decided to vote "Yes" just to get on the bandwagon. If an employer announced that it had won the election before the end of the voting, that would certainly constitute objectionable conduct.

It is the Union's own Twitter feed, it was the Union's own posting, the Union controls its own postings and content, and it could not explain away the 2:01pm posting. On the face of it, that posting warrants a rerun election. This is especially so with an election decided by only two votes, with one challenged vote. With the closeness of the election result, the Board should be concerned about the conduct described above. This type of Twitter situation, while relatively new, is likely to occur more and more in the future and should be snuffed out now.

**V. The Board is Without Authority to Conduct this Hearing Because it Lacks a Quorum.**

The Board had no authority to authorize or conduct a representation election since at all relevant times the current Board lacked and continues to lack a quorum. Please see, among other cases, *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010); *NLRB v. New Vista Nursing and Rehabilitation*, --- F.3d ---, 2013 WL 2099742 (3<sup>rd</sup> Cir. 2013); and *Noel Canning v. NLRB*, 705 F.3d 490 (D.C.Cir. 2013). The HO mischaracterized the Federal District Court's decision in *Noel Canning* as a "claim." Report, p. 5. The decision in *Noel Canning* fundamentally affected the power of the Board, and without any further judicial clarification, the Board is without the

authority to conduct this representation election. The HO misapplied federal court precedent to the current case and her recommendations should be overturned with respect to Objection No. 6.

#### **IV. Conclusion**

For all the above-discussed reasons, CLASS respectfully requests that the Board overrule the excepted to recommendations of the Hearing Officer and grant CLASS' objections in this case.

Respectfully submitted,  
By the Employer C.L.A.S.S., Inc.  
By its attorneys

/s/ Geoffrey P. Wermuth

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Dated: August 9, 2013

#### **CERTIFICATE OF SERVICE**

I, Geoffrey P. Wermuth, hereby certify that on this 9<sup>th</sup> day of August, 2013, I filed a true copy of this document upon the Region via the Board's e-filing service, and by email upon counsel for the Petitioner, Patrick Bryant, Esq., Pyle, Rome, Ehrenberg, P.C., 18 Tremont St. Suite 500, Boston, MA 02108.

/s/ Geoffrey P. Wermuth

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