UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DURHAM SCHOOL SERVICES, L.P.,

Employer

and Case No. 05-RC-103218

TEAMSTERS LOCAL UNION NO. 570,
a/w INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,

Petitioner

Brendan Keough, Esq., for the Regional Director
Charles P. Roberts III, Esq. (Constangy, Brooks & Smith, LLP), of Winston-Salem, North Carolina, for the Employer
James R. Rosenberg, Esq. (Abato, Rubenstein & Abato, P.A.), of Baltimore, Maryland, for the Petitioner

RECOMMENDED DECISION ON OBJECTIONS

MICHAEL A. ROSAS, Administrative Law Judge. Upon a petition filed on April 19, 2013 by Teamsters Local Union No. 570, a/w International Brotherhood of Teamsters (the Union) and pursuant to a Stipulated Election Agreement, an election was held on May 31 in the following Unit:

> All full-time and regular part-time school bus drivers and monitors employed by the Employer at its Rosedale, Maryland facility; but excluding all maintenance employees, mechanics, dispatchers, safety coordinator, office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

The tally of ballots showed that of 149 eligible voters, 62 votes were cast for the Union, 75 votes were cast against the Union.[1] The Union filed 5 timely objections to conduct affecting the results of the election.[2]

On June 26, 2013, the Regional Director issued a Report on Objections and Notice of Hearing in which he found that the Union's Objections raised substantial and material issues which could best be resolved on the basis of record testimony at a hearing.

A hearing was held before me in Baltimore, Maryland, on July 18-19, 2013. Based upon the record and my observation of the demeanor of the witness and the briefs submitted by the Petitioner and the Employer on August 23, 2013, 2011, I make the following Recommended Decision.

FINDINGS OF FACT

OBJECTION 1

> During the critical period, the Employer, by its supervisors and agents, threatened employees in order to dissuade them from supporting the Petitioner. Specifically, on or about May 22, 2013, Employer supervisors and agents told employees that they would lose their routes if the Union were elected to represent them.

On the morning of May 30, the day prior to the election, LaVern Harris, a school bus monitor, approached a picnic table outside the Employer's Rosedale facility. At the time, General Manager Daryl Owens was speaking about employee bus routes for the upcoming school year with five employees: Eric Cherry, Rhonda Budd, Stephanie Howard, Brian Hurd and Clarence Marshall. The conversation began a few minutes earlier with Owens explaining the uncertainty of upcoming assignments due to a loss of bus routes resulting from changes in the Employer's contract with the City of Baltimore. Cherry interjected at one point, commenting that the route reassignments were one reason why employees would be voting in favor of the Union. Owens acknowledged the role that would be played by the Union if it came in, but preferred that employees vote in favor of the Employer. He added, however, that it did not matter, as assignments would now be based on performance, as well seniority.[3]

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[1] Board Exh. 3.

[2] Five ballots were initially challenged, but were resolved at the hearing and withdrawn. (Board Exh. 1(h) and (m).

[3] Harris and Owens provided fairly consistent testimony about much of this conversation, especially the lack of guarantee as to assigned routes, as well as Owens's preference that employees vote against the Union in the upcoming election. However, Harris conceded on cross-examination that she arrived on the scene while the discussion was underway and I did not find credible her statement that Owens said that routes would be lost "due to the Teamsters." (Tr. 113-117.) Owens provided a more specifically detailed and credible version of the conversation. (Tr. 274-282, 286-288.)

The Union contends that Owens conveyed an impermissible prediction about the effect of unionization on employee bus routes and this prediction implicitly threatened employees with a loss of a benefit—their preferred bus routes. The Employer argues that Owens' comments were too vague to constitute threats or promises, and that Board law permits the type of comment Owen made.

An employer may communicate his views on union affiliation, provided the comments do not contain threats of reprisal or force, or promises of benefits. *NLRB v. Gissle Packing Co*., 395 U.S. 575, 618 (1969). Further, an employer can make predictions about the precise effects of unionization if based on reasonably probable consequences beyond the employer's control. *Id*.

Owens communicated to the six employees present on May 30 that recent changes to the Employer's contract with the City of Baltimore might have effects on the employees' bus routes. While he also advocated for employees to vote against the Union in the upcoming election, his comments did not rise to the level of an implicit threat or a promise of benefit; Owens acknowledged the role of the Union in the process, but stated that shift assignments would be affected by the reduced shits resulting from the new contract with the City of Baltimore. Under the circumstances, the Owens did not engage in objectionable conduct which was likely to affect the election outcome. See *Cambridge Tool & Mfg. Co.,* 316 NLRB 716 (1995). Objection 1 is overruled.

OBJECTION 2

> During the critical period, the Employer, by its supervisors and agents, appealed to racial prejudice in order to dissuade groups of employees from supporting the Petitioner. Specifically, on or about May 21, 2013, the Employer countenanced, through inaction, racist name-calling by employees towards other employees who supported the Union. By this conduct, the Employer improperly affected the free choice of the employees in voting for or against representation by the Petitioner.

On May 21, the Employer convened a meeting to discuss the upcoming representation election. About 85 to 100 employees were packed into a room measuring about 25' by 45' in dimension. At the meeting, Human Resource Manager John Kemblowski told the employees that he was surprised and disappointed that they would reach out to the Union to address their workplace issues. Kemblowski explained that, while his family benefited from union affiliation when he was younger, unions no longer served the interests of their members; he asserted that Unions spent members' dues on questionable expenditures and referred to a book detailing the connection of Unions to organized crime.

At one point, Elabas Abdelnaby, an employee seated in the front row, rose and asked Kemblowski why he had not addressed employees' concerns after they were previously raised in December 2011. He also questioned why Kemblowski was denigrating unions if they were good enough to help his family when he was growing up. At that point, a co-worker, Frank McNeil, seated nearby in the fourth row, hurled a vicious racial epithet, called Abdelnaby stupid and told him to learn English or return to Africa. Kemblowski looked at McNeil, but did not respond. Martin Fox, a coworker and union supporter also seated in the

first row next to manager Eric Owings, was about to stand and respond. Owings, however, place his hand on Fox's leg and told him that he would be ejected from the meeting if he said anything. Abdelnaby, a dark-complexioned man with an accent from his native Egypt, replied that he spoke three languages. The statements by Abdelnaby and McNeil were loud enough to be heard by all present, including Kemblowski and Owings. Some in the audience laughed at the exchange, causing Kemblowski to tell everyone to calm down and the meeting continued without Kemblowski or Owings addressing McNeil's comments.[4]

On May 31, after the election, Abdelnaby called in a complaint to the Employer's hot line about McNeil's racist remarks at the May 21 meeting. Shortly thereafter, in accordance with the Employer's policy prohibiting discrimination based on national original, the Employer issued McNeil written discipline for his remarks on May 21.[5]

The Union contends that McNeil's comments created an atmosphere fear and likely dissuaded foreign-born employees from speaking out about the election or from voting for the union. The Employer argues that McNeil's comments did not create such an atmosphere of fear and reprisal to justify a new election.

Appeals to racial prejudices are not tolerated in Board elections. *Sewell Mfg. Co.*, 138 NLRB 66, 71 (1962). However, not all inappropriate expressions of racial prejudice rise to the level required to mandate a new election. *Id*. To determine whether an election is void due to improper racial prejudice, the Board's ultimate consideration is whether the action "lowered the standards of campaigning to the point where it may be said that the uninhibited desires of the employees cannot be determined in an election," *Id*. For such conduct to warrant setting aside an election it must be shown that it created "an atmosphere of fear and reprisal such as to render a free expression of choice impossible." *Crosse Pointe Paper Corp.,* 330 NLRB 658,660 (2000).

McNeil's remark was a derogatory racial slur that had no place in society, especially the workplace. Nevertheless, the Union failed to demonstrate that McNeil's expression of racial hatred created an atmosphere of fear and reprisal such that it rendered impossible the employees' free choice in the election. Although extremely offensive, his remarks were not demonstrably inflammatory to the point that they created an atmosphere of fear and reprisal. *Crosse Pointe*, 330 NLRB at 659 (rumor involving a derogatory racial remark did not amount to a threat and did not relate to a core issue in the campaign, thus did not render free choice impossible). Nor was any evidence presented that McNeil's remarks engendered discussion or consternation among other employees.

[4] Notwithstanding Abdelnaby's omission of the vilest part of McNeil's remarks in his written complaint filed 10 days later, his credible testimony was corroborated by Fox, as well as the Employer's subsequent disciplinary action against McNeil. Moreover, considering that Abdelnaby's reply was followed by laughter in the audience, as well as the proximity of the managers to Abdelnaby and McNeil, it is quite clear that McNeil's remarks were heard by Kemblowski and Owings. (Tr. 125-131, 133-135, 139, 141-143.) Under the circumstances, I do not credit Kemblowski's testimony that he only heard that portion of McNeil's remarks urging Abdelnaby to return to Africa (Tr. 229-231, 236-237.) or Owings's testimony that he only heard Abdelnaby's reply that he was fluent in several languages. (Tr. 304-308.)

[5] Abdelnaby's credible testimony is corroborated by the Employer's record of the complaint and the subsequent discipline issued by the Employer. (Tr. 135, 229-232, 237; Emp. Exh. 5.)

McNeil's racist diatribe, standing alone, falls short of the kind of aggravated threats by employees that the Board has on occasion found objectionable. Cf. *PPG Industries, Inc.,* 350 NLRB 225 (2007) (multiple threats of physical harm and property damage if employees crossed picket line); *Westwood Horizons, supra* (multiple threats of physical harm if employees did not vote for union, as well as physical intimidation and force directed at employees seeking to vote).

Moreover, the Employer's failure to repudiate McNeil's racist remarks, coming ten days before the election, is insufficient to set aside the election. For example, in *Shawnee Manor,* 321 NLRB 1320 (1996), the Board concluded that even assuming, *arguendo,* the applicability of *Sewell* to third-party racial remarks, isolated racial remarks by a pro-union employee did not warrant setting aside the election since they "did not so inflame and taint the atmosphere in which the election was held that a reasoned basis for choosing or rejecting a bargaining representative was an impossibility." *Id.* at 1320-21 (quoting *Sewell*). Similarly, in *Catherine's, Inc.,* 316 NLRB 186 (1995), the Board, in refusing to set aside an election, held that a union's references to the employer's "Jewish law firm," while irrelevant to the campaign, "were not inflammatory in nature and did not occur on the election eve, they were not part of a recurrent or persistent campaign appeal to the religious or racial prejudice of the eligible voters, and the Union did not reiterate the subject in campaign literature." The Board has adhered to the distinction between *Sewell's* condemnation of a "sustained course of conduct, deliberate and calculated in intensity, to appeal to racial prejudice" and "isolated, casual, prejudicial remarks." *Beatrice Grocery Products, Inc.,* 287 NLRB 302, 302 (1987), *enf'd,* 872 F.2d 1026 (6th Cir. 1989) (Table). See also *Seda Specialty Packaging Corp.,* 324 NLRB 350, 352 n. 5 (1997) (employer's comments in single meeting that union agent was racially prejudiced did not warrant overturning election). Here, there was no demonstration of a sustained appeal to racial prejudice. Objection 2 is overruled.

OBJECTION 3

> During the critical period, the Employer, by its supervisors and agents, granted employees benefits in order to dissuade them from supporting the Petitioner. Specifically, on or about May 24, 2013, Employer supervisors and agents provided supplemental cash payments to selected employees. By this conduct, the Employer improperly affected the free choice of the employees in voting for or against representation by the Petitioner.

On May 24, Gayle Gray, the Employer's Assistant General Counsel for Labor Relations, and Dean Kpere-Daibo, the Employer's outside labor counsel, arrived at the Rosedale facility in preparation for the upcoming representation election. It was also Friday, the day when employees collected their weekly pay checks at the dispatcher's office. A recurring problem was shortages in the pay checks, which was the subject of pending wage litigation. The Employer's customary practice was to have employees submit notes listing their pay shortages and then distribute the amounts owed in the following week's paycheck. This date was no exception, as numerous employees filed into the dispatcher's office to collect their paychecks and, once again, found them short. On this occasion, however, the Employer responded to the paycheck complaints with uncharacteristic speed and attention. Working out of the dispatcher's

office, Gray, Kpere-Daibo, Kemblowski and Owings stepped up and expedited the processing of 92 wage claims over the next two days. Gray and Kpere-Daibo initially advised employees that the Employer would send their checks by overnight mail or process direct deposits as soon as possible. However, a few hours later, Gray decided to process the wage claims that same day and directed Owings to use his company credit card to obtain $10,000 in cash. Later that afternoon through the next day, Gray, Owings, and Pat Healey, the Employer's Regional Safety Manager, distributed the supplemental cash payments along with an apology letter. [6] The apology letter was signed by Owings and stated:

> Please allow me to personally apologize for the error on your paycheck, today. It is totally frustrating for you, and I understand that. Trust me, it is totally frustrating to me, too. You work hard for your pay and we should have gotten it right.
>
> Durham is trying to correct this error today, by determining how much you are owed and issuing cash payments for the amount missing in this paycheck, only, to as many folks as we can.
>
> I'm sincerely sorry for this error.
>
> Best safe regards for the Memorial Day weekend.[7]

The Union contends that the Employer's action of departing from past practice and giving employees cash for the shortages in their paychecks conferred an impermissible benefit and was calculated to affect the outcome of the election. In response, the Employer denies that it actions constituted an employee benefit and that it merely corrected a payroll error and no employee received anything more than what they were legally owed.

The Board has held that benefits granted during an election campaign are not unlawful if the employer shows that its action was governed by factors other than the pending election. *Waste Management of Palm Beach*, 329 NLRB 198, 198 (1999). Here, it is not disputed that the Employer departed from its established policy of reimbursing shortfalls in employee future paychecks and, instead, handed out cash on the same day. However, while such a departure from past practice occurred shortly before the election, the reimbursement of wages owed is not actually a "benefit" but rather, a transaction falling into the category of the "paycheck process." Employers are only prohibited from making changes in the "paycheck process" twenty-four hours before an election. In the instant case, the Employer made the change in how it distributed payment for shortages in paychecks a week before the election, thus complying with the Board's rule stated in *Kalin Construction Co.,* 321 NLRB 649, 652 (1996).

Moreover, the Employer's change in the paycheck process did not destroy the requisite laboratory conditions by impeding the implementation of a fair election. *See Fred Myer Stores*

[6] The facts relating to this objection are undisputed. (Tr. 56-57, 60-62, 71-78, 83-88, 95-96, 100-106, 140-146, 253, 290-291, 293-295, 315, 319-330, 332-333, 335-340, 342-343; Emp. Exh. 6 at 27.)

[7] U. Exh. 1.

Inc., 355 NLRB No. 92, 2010 WL at *3 3279403 (2010) (employer corrected a payroll error from previous week by doubling up on union payments deducted from employees' paychecks but never informed employees). Contrary to *Fred Myer Stores,* where deductions from employees' paychecks were attributed to the union, and this misperception was never corrected, in the instant case, the Employer reimbursed employees what they were owed and there is no evidence that the Employer's actions created ill will toward the Union. Thus, although the employer departed from past practice, the reimbursement of funds falls into the category of the paycheck process, and, thus, within the permissible range of conduct outlined by the Board in *Kalin Construction.* In sum, there is no showing by the Union that this pre-election change in payroll practice impacted the election. Objection 3 is overruled.

OBJECTION 4

> During the critical period, on the day of the election, the Board Agent was significantly late for the pre-election conference. As a result, (a) the polls opened late,[8] (b) the polls opened without the Board Agent having instructed the observers, (c) the polls opened without the Board Agent having posted signs directing voters and banning electioneering in the polling place, (d) the polls opened without the Board Agent having made arrangements for the proper flow of voters into and out of the polling place and in regards to the distribution of employee paychecks, (e) the polls were open for a period of time during which the Employer's and the Petitioner's representatives were present in the polling place, (f) there was insufficient time for the parties to review the Excelsior list and determine who would be challenged and (g) the polling place was left unattended by the Board Agent while she moved her vehicle to a proper parking space. This conduct spoiled the laboratory conditions under which NLRB election must be run.

Prior to the election on May 31, a pre-election conference was scheduled to be held at 7:15 a.m., but the Board Agent did not arrive until 7:50 a.m. Richard Brown, Moses Jackson, Sean Cedeño, Christopher Price and Stephen Hanson were present on behalf of the Union; Kpere-Daibo and Kemblowski were present on behalf of the Employer. As the Board Agent hurriedly prepared the polling location and constructed the ballot box, she and the parties' representatives discussed and amended the Excelsior List. Between 8:03 and 8:05 a.m., the Board Agent announced the opening of the polls. At that time, representatives of both parties went outside to the hallways area to jointly delineate the route voters would take to the polls, post signs and block-off the polling site from the remainder of the facility. Around 8:15 a.m., the Board agent left the voting area for about a minute, while holding the ballot box in plain view, in order to properly park her car. After she returned to the voting room, the parties' representatives left around 8:20 a.m. No voters were in the hallway or near the voting room

[8] At the hearing, following the issuance of a final tally of ballots, the parties stipulated that subparagraph (a) of Objection 4 regarding the late opening of the polls was no longer in issue. (Board Exh. 2).

prior to 8:20 a.m., as drivers and aides were out on their morning routes and did not normally return until after 9:00 a.m.[9]

The Union alleges that the Board Agent's actions caused the election to be "chaotic" and, thus, breached the "laboratory conditions" required for representation elections. The Employer disputes that assertion, insisting that the election was conducted without any significant irregularities.

There is no per se rule requiring that an election be set aside following any procedural irregularity. *Fresenius USA Manufacturing Inc.,* 352 NLRB 679, 680 (2008). The Board requires more than speculation of harm and will set aside an election only if the irregularity is sufficient to raise a reasonable doubt as to its fairness and validity. *Id*. Further, the burden is on the objecting party to show specific evidence of prejudice to an election. *Affiliated Computer Services, Inc.,* 355 NLRB No. 163 (2010).

It is not disputed that the Board Agent arrived later than scheduled, preparations for the election were rushed, the Board Agent briefly left the polling location to move her vehicle and the election began a few minutes late. However, there is no evidence that these irregularities prejudiced the conduct of the election or somehow affected its results. Moreover, even if the pre-election instructions were rushed or somehow insufficient, there was no evidence that observers, voters or anyone else engaged in improper conduct. See *Laidlaw Transit*, 322 NLRB 895, 896 (1997); *Convalescent Hospital*, 252 NLRB 274, 274-275 (1980); *Worcester Woolen Mills Corp*., 69 NLRB 425, 428 (1946).

The Union's reliance on *Fresenius USA,* 352 NLRB at 680, is unavailing. In *Fresenius USA*, the cumulative effect of irregularities was sufficient to overturn an election. The Board Agent was color blind and there was a serious question as to whether the employees were properly instructed on how to vote and whether the votes were counted properly. Moreover, the Board Agent took the ballot box home over the weekend and the possibility of tampering could not be excluded. Serious allegations of that magnitude are nonexistent here. Objection 4 is overruled.

[9] The credible evidence suggests that the parties expected the Board Agent to arrive by 7:15 a.m., but she did not arrive until 7:50 a.m., hurriedly prepared the polling site while instructing the participants and announced the opening of the polls between 8:03 and 8:05 a.m. To the extent that testimony diverges over timing of events or instructions by the Board Agent, however, I credit the credible testimony of Kpere-Daibo over the sometimes contradictory and inconsistent testimony of Brown, Jackson and Gregory (Tr. 15-27, 31-39, 47-50, 189, 204-212, 248-252, 259-260, 268.), as well as Kemblowski. (Tr. 225-227.)

CONCLUSIONS AND RECOMMENDED ORDER[10]

Representation elections are not lightly set aside. *NLRB v. Hood Furniture Mfg.*, 941 F.2d 325, 328 (5th Cir. 1991); the burden of proof is on the party seeking to set aside a Board-supervised election to show that the specific conduct in question had a reasonable tendency to affect the outcome of the election. *Affiliated Computerizing Services*, 355 NLRB No. 163 (2010). Here, the election results were not very close, as the Employer prevailed by a 13 votes out of 137 votes cast. As described above, the election on May 31 was less than perfect and was preceded by several notable instances of management advocacy during the week leading up to it. One of those instances was interrupted by the vile dissemination of racial hatred by one employee at a coworker as the latter expressed support for the Union; management did nothing to address the outburst at the time. However, there is insufficient evidence demonstrating that the irregularities interfered with the employees' freedom to choose a representative or otherwise have a reasonable tendency to affect the outcome of the election. See *Delta Brands, Inc.*, 344 NLRB 252 (2005); *Avante At Boca Raton*, Inc., 323 NLRB 555, 560 (1997); *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989).

As there no evidence of irregularities sufficient to question the fairness and validity of the May 31 election, I recommend that Union Objections 1, 2, 3 and 4 be overruled in their entirety and not set aside the results of the election. Accordingly, I recommend that the Regional Director for Region 5 certify the results of the election consistent with my findings and conclusions herein.

Dated: Washington, D.C. September 12, 2013

Michael A. Rosas
Administrative Law Judge

[10] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington DC by September 26, 2013.