

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

STRUCTURAL CONCRETE PRODUCTS, LLC
Employer

and

Case 05-RC-116939

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 77, AFL-CIO
Petitioner

REPORT ON OBJECTIONS

Pursuant to a Stipulated Election Agreement¹ approved by the Regional Director on November 25, 2013,² an election by secret ballot election was conducted on December 13, with the following results:

Approximate number of eligible voters.....	9
Void Ballots.....	0
Votes cast for Petitioner.....	4
Votes cast against participating labor organization.....	3
Valid votes counted.....	7
Challenged ballots.....	0
Valid votes counted plus challenged ballots.....	7

The Challenged ballots are not sufficient in number to affect the outcome of the election.

On December 20, the Employer timely filed objections to conduct of the election and conduct affecting the election,³ a copy of which is attached as Exhibit A. Those employees eligible to vote are described in the unit who were employed during the payroll period ending November 16.

¹ The unit is: "All full-time and regular part-time Equipment Operators and Mechanics employed by the Employer at its Manassas, Virginia facility, but excluding all office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act."

² All dates are in the year 2013 unless noted otherwise.

³ The petition was filed on November 13. I will consider on its merits only the alleged interference which occurred during the critical period which begins on and includes the date of the filing of the petition and extends through the election. *Goodyear Tire and Rubber Co.*, 138 NLRB 453 (1962).

Objection No. 1:

Since on or about October 1, 2013, and at all times thereafter, the above-named labor organization, by its officers, agents, and representatives, (hereinafter sometimes the “Union”) has restrained and coerced employees of SCP in their exercise of the rights guaranteed in Section 7 of the National Labor Relations Act.

In support of its Objections, the Employer submitted three witness affidavits. It submitted the affidavit of Employees A and B, as well as the affidavit of the Employer’s Finance Manager/General Counsel.

Objection No. 1 is a “catch all objection” which does not point to a specific instance of objectionable conduct. No specific evidence is advanced and the objection lacks the specificity contemplated by the Board’s Rules. *Smithfield Packing Co.*, 344 NLRB 1, 172 (2004).

Accordingly, Objection No. 1 is overruled.

Objection No. 2

Since on or about October 1, 2013, and at all times thereafter, the above-named labor organization, by its officers, agents, and representatives, threatened employees about voting against the Union, in violation of 8(b)(1)(A) of the National Labor Relations Act, including without limitation misrepresenting that employees would be forced to leave their jobs in the event the Union was unsuccessful in its Representation Petition and the election.

In support of Objection No. 2, the Employer relies on the signed statement of Employee B. Employee B states that in a conversation with an unnamed union representative, the representative told him that he was not sure if the company wanted to go union and that if that was the case, employees would have to walk out. Neither the Objection nor Employee B’s statement points to a specific date on which the conduct is alleged to have occurred, indicating only that it occurred after October 1, 2013.

The critical period is the period between the filing of the petition and the date of the election. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961). Here, the critical period was from November 13 through December 13. It is the objecting parties’ burden to show that the conduct occurred during the critical period. *Accubuilt, Inc.*, 340 NLRB 1337 (2003).

The Employer has failed to show whether this conduct occurred between November 13 and December 13. Rather, the conduct is alleged to have occurred sometime between October 1 and December 13. Therefore, I find that the Employer has failed to meet its burden to show that the conduct occurred during the critical period.

Assuming *arguendo* that the conduct did occur during the critical period, the Board will consider whether the conduct has a tendency to interfere with employee free choice. The Employer's stated objection is that the Petitioner's representatives threatened employees with job loss. The statement itself is that if the company did not want to go union, employees would have to walk out. The Board has found that an assertion by a union that employees would lose their jobs if they voted against the union is not objectionable. *Janler Plastic Mold Corp.*, 186 NLRB 540 (1970). Whether the statement is a threat of job loss or as a threat of an unfair labor practice strike, it does not constitute objectionable conduct. Accordingly, Objection No. 2 is overruled.

Objection No. 3

In addition to the actions of the Union prior to the election which contributed to a coercive and improper atmosphere, on December 13, 2013, the following actions, inactions or events by the parties or the NLRB were in violation of the rights of the SCP and of its employees to choose freely and fairly whether to be represented by the Union:

- (a) At the pre-election conference, the NLRB representative indicated that the company supervisors had to leave the property, and they did.
- (b) After the pre-election conference, the Union representatives asked SCP if they could remain on the property, and this was not objected to, but then those representatives took up a position to surveil the employees as they entered and left the property, helping to create a coercive and improper atmosphere.
- (c) There was considerable discord including a verbal and possibly physical altercation between employees of Structural Concrete Products, LLC, at the location of the election, which caused a coercive, dissonant and improper atmosphere during the election, in violation of the rights of all concerned to a free and fair election.
- (d) In addition to the general coercive and dissonant atmosphere, the situation caused at least one employee to become visibly agitated and nervous when entering the election area and making comments to which the observer was not allowed to respond; with the encouragement of the NLRB representative this employee did not to exercise his right to vote in the election.

(e) Representatives of SCP were told they could not be on the premises during the election, so the company was not able to address the situation, to make an objection or even to ascertain what had occurred until after the election.

In support of Objection No. 3(a), (b), and (e), the Employer relies on the affidavit of the Employer's General Counsel who states that at the pre-election conference, he asked the Board agent whether he could remain on the property during the election and was informed that he should leave. He also states that after the pre-election conference, the union representative asked if the General Counsel objected to their remaining on the property during the election and he replied that he did not object to union representatives sitting in their vehicle in the parking lot. He was subsequently informed that the agents parked their vehicle so as to have a view of voters entering the property. The General Counsel's affidavit does not provide the name of the witness who informed him of the positioning of the union representatives' vehicle.

By his own account, Union representatives sat in their cars in the parking lot with the permission of the Employer's general counsel. Even if the union representatives watched employees as they walked into the facility or engaged in electioneering in the parking lot, the Board has found that the *Milchem* Rule prohibiting contact with voters during polling does not apply to conversations with prospective voters unless the voters are in the polling area or waiting in line to vote. *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195 (2004) relying upon *Milchem, Inc.*, 170 NLRB 362 (1968) and *Harold W. Moore & Son*, 173 NLRB 1258 (1968).

The Employer has failed to present evidence to show that from where the Union representatives were parked, they could see anything more than individuals entering the main door to the facility. No evidence was presented suggesting that voters walked past the Union representatives on their way to the polling site or that they observed them sitting in their vehicle. While the Board has found objectionable the mere presence of company officials standing 10 to 15 feet from the entrance to the voting area, *Electric Hose Rubber Co.*, 262 NLRB 186 (1982),

it has not found objectionable the presence of company officials standing between 20 and 54 feet from the door of the facility during polling, *J.P. Mascaro & Sons*, 345 NLRB 637, 639 (2005) citing *Blazes Broiler*, 274 NLRB 1031, 1032 (1985).

The Employer's Objection 3(a) concerns instructions provided to the parties by the Board agent during the pre-election conference. The General Counsel's affidavit states that he was directed to leave the premises during the polling times. Indeed, the Board's Casehandling Manual for Representation Cases states at § 11326 that agents of the parties should not be allowed in the polling area during the election hours. The Board is responsible for assuring properly conducted elections. The Board, in order to preserve an atmosphere of impartiality, imposes certain limitations or methods on campaigning. *United Aircraft Corp.*, 103 NLRB 102 (1953).

In support of Objection No. 3(c) through (e), the Employer relies on the affidavit of Employee A. Employee A states that during the election she heard, but did not see, an altercation between employees. She also states that one voter indicated a hesitation about voting; the Board agent informed the voter that he could vote yes or no, or not vote. The voter did not vote. Subsequently, Employee A was told about the altercation by an employee and from this concluded that the altercation impacted the laboratory conditions of the election.

The party seeking to set aside election results must submit *prima facie* evidence of a kind which would be admissible into evidence at a hearing. *Grants Furniture Plaza, Inc.*, 213 NLRB 410 (1974). Specific evidence is required and the objecting party's burden is heavy. *NLRB v. Claxton Mfg. Co.*, 613 F.2d 1364, 1366 (5th Cir. 1980). Here, the Employer failed to provide specific evidence to show that an altercation occurred, that voters were aware of the altercation, that it arose from the election, or that it was sufficiently disruptive to amount to objectionable conduct. The affidavit of Employee A references an investigation about the incident, but does

not provide specific details about whether the altercation was determined to be related to the election or whether the voter's hesitation about voting was related to that incident.

Even assuming the alleged altercation did occur between third party employees and not agents of either party to the election, to be grounds for setting aside election results this conduct must be shown to have created a general atmosphere of fear and reprisal rendering a free election impossible. *Westwood Horizons Hotel*, 270 NLRB 802 (1984). The Board has consistently held that the Act's goal is better served by requiring a more compelling showing to set aside an election when the source of the alleged coercion is the conduct of third parties rather than the conduct of the employer or union. If third-party conduct were not subject to a heightened standard, the possibility of obtaining quick and conclusive election results would be substantially diminished, with an extraordinary potential for disruption of the election process and frustration of employee choice. *Mastec Direct TV*, 356 NLRB No. 110, p 3 (2011), citing *Orleans Mfg. Co.*, 120 NLRB 630, 633-634 (1958). Additionally, the majority argued in *Mastec Direct TV*, because unions and employers cannot control nonagents, "there are equities that militate against taking away an election victory because of conduct by a nonagent." Here, the affidavit of Employee A provides her subjective view of the impact of an altercation on the election results. It does not provide any objective evidence or information about the existence of any such evidence that the altercation was in any way connected to the election or that any employee was disenfranchised by the incident. The burden of proof on the party seeking to have the election results set aside is a heavy one and the Employer here has not met its burden here.

Finally, Employee A states that when the voter discussed above made comments about whether he should vote, the Board agent asked the Employer's observer not to respond to the voter, and then informed the voter of his options to vote yes, no, or not at all. Section 11318.2 of the Board's Casehandling Manual for Representation Cases, provides that the Board agent should cover with the observers the prohibition of observers' electioneering and discourage

unnecessary conversation with voters. The Board agent's instruction to the observer not to engage in a discussion with the hesitant voter was proper and in keeping with Agency policy, as discussion between the observer and voter had the potential to interfere with the "laboratory conditions" the Board strives to create. Even had the Board agent's comments been incorrect or inappropriate, the Board has upheld election results notwithstanding improper comments by Board agents. For example, in *NLRB v. Allen's I.G.A. Foodliner*, 652 F.2d 594, 595 (6th Cir. 1980), enfg. 236 NLRB 1342 (1978), where the Board agent stated to the observer that if the employees had been treated right she would not be there holding the election. Here, the Board agent's instruction to the observer was made in the presence of one voter; however, it does not rise to the level of impropriety as to raise a reasonable doubt as to the fairness and validity of the election, and is not sufficient to warrant setting aside the election. Rather, the instruction was proper and in accord with the Board's casehandling rules and procedures.

SUMMARY

Based on the investigation of the Employers' objections, by failing to establish the existence of substantial or material issues within the critical period, the Employer has failed to set forth a prima facie case that would warrant setting aside the election results. Accordingly, I recommend that all of the Employer's objections be overruled and that the Certification of Representative issue.

Dated at Baltimore, Maryland, this 15th day of January 2014.

/s/ Wayne R. Gold

Wayne R. Gold, Regional Director
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 S. Charles St., Suite 600
Baltimore, MD 21201

Right to File Exceptions: Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8 as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on **January 29, 2014** at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁴ A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

⁴ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

STRUCTURAL CONCRETE
PRODUCTS, LLC,

* Employer, *

and

* Case No.: 5-RC-116939

INTERNATIONAL UNION OF
OPERATING ENGINEERS,
Local Union No. 77,

* Petitioner.*

EMPLOYER'S ELECTION OBJECTIONS

Employer Structural Concrete Products, LLC ("SCP"), by and through undersigned counsel, submits the following objections to the election held on December 13, 2013 in the above referenced case:

1. Since on or about October 1, 2013, and at all times thereafter, the above-named labor organization, by its officers, agents, and representatives, (hereinafter sometimes the "Union") has restrained and coerced employees of SCP in their exercise of the rights guaranteed in Section 7 of the National Labor Relations Act.

2. Since on or about October 1, 2013, and at all times thereafter, the above-named labor organization, by its officers, agents, and representatives, threatened employees about voting against the Union, in violation of 8(b)(1)(A) of the National Labor Relations Act, including without limitation misrepresenting that employees would be forced to leave their jobs in the event the Union was unsuccessful in its Representation Petition and the election.

3. In addition to the actions of the Union prior to the election which contributed to a coercive and improper atmosphere, On December 13, 2013, the following actions, inactions or events by the parties or the NLRB were in violation of the rights of SCP and of its employees to choose freely and fairly whether to be represented by the Union:

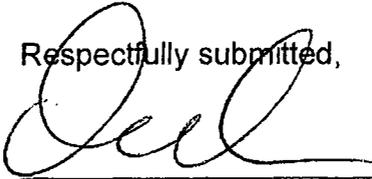
- (a) At the pre-election conference, the NLRB representative indicated that the company supervisors had to leave the property, and they did.
- (b) After the pre-election conference, the Union representatives asked SCP if they could remain on the property, and this was not objected to, but then those representatives took up a position to surveil the employees as they entered and left the property, helping to create a coercive and improper atmosphere.
- (c) There was considerable discord including a verbal and possibly physical altercation between employees of Structural Concrete Products, LLC, at the location of the election, which caused a coercive, dissonant and improper atmosphere during the election, in violation of the rights of all concerned to a free and fair election.
- (d) In addition to the general coercive and dissonant atmosphere, the situation caused at least one employee to become visibly agitated and nervous when entering the election area and making comments to which the observer was not allowed to respond; with the encouragement of the NLRB representative this employee did not to exercise his right to vote in the election.

(e) Representatives of SCP were told they could not be on the premises during the election, so the company was not able to address the situation, to make an objection or even to ascertain what had occurred until after the election.

For the foregoing reasons, Structural Concrete Products, LLC, respectfully requests that the election be set aside and rescheduled so that the will of the employees can be ascertained in a free and fair election.

As provided in the rules, SCP will submit supporting information in a subsequent filing or filings.

Respectfully submitted,



Daniel K. Maller
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Objection was transmitted to the Petitioner on the 20th of December, 2013, addressed to "Steve@iuoelocal77.com"



Daniel K. Maller