

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

_____)	
KINGS READY MIX INC.)	
)	Employer
and)	Case No. 29-RC-119421
)	
BUILDING MATERIAL TEAMSTERS)	
LOCAL 282, AFFILIATED WITH THE)	
INTERNATIONAL BROTHERHOOD)	
OF TEAMSTERS)	
)	
)	Petitioner

SUPPLEMENTAL DECISION ON OBJECTIONS AND NOTICE OF HEARING

On December 20, 2013, Building Material Teamsters Local 282, Affiliated with the International Brotherhood of Teamsters, herein called the Petitioner, filed a petition in this matter seeking to represent certain employees employed by Kings Ready Mix, Inc., herein called the Employer.

Pursuant to a Decision and Direction of Election, issued by the undersigned on January 28, 2014,¹ an election by secret ballot was conducted on March 6 among the employees in the following unit:

All ready-mix drivers employed by Kings Ready Mix Inc. at its facilities located at 692 McDonald Avenue, Brooklyn, NY; 303 Johnson Avenue, Brooklyn, NY; 16 Derick Court, Staten Island, NY; and 280 Henry Street, Inwood, NY; but excluding office clerical employees, sales employees, guards and supervisors defined in Section 2(11) the Act.

¹ All dates hereinafter are in 2014 unless otherwise indicated.

The Tally of Ballots made available to the parties pursuant to the Board's Rules and Regulations showed the following results:

Approximate number of eligible voters	44
Number of void ballots	0
Number of ballots cast for the Petitioner	26
Number of votes cast against participating labor organization	12
Number of valid votes counted	38
Number of challenged ballots	2
Number of valid votes counted plus challenged ballots	40

Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes counted plus challenged ballots has been cast for the Building Material Teamsters Local 282, Affiliated with the International Brotherhood of Teamsters.

The Employer filed timely objections to conduct affecting the results of the election. The Employer's objections are attached hereto as Exhibit "A."

Pursuant to Section 102.69 of the Board's Rules and Regulations, the undersigned caused an investigation to be conducted concerning the above-mentioned Employer's objections, during which the parties were afforded full opportunity to submit evidence bearing on the issues. The investigation revealed the following:

Objection No. 1

In its first objection, the Employer alleges that the Regional Director engaged in objectionable conduct by denying the Employer's request for a postponement of the election following a fire at the Employer's main office which occurred on March 3, three days before the election. The Petitioner asserts that this objection is without merit.

In its offer of proof, the Employer states that Michael Falcone and Jonathan Falcone, two principals of the Employer, will testify that on March 3, three days before the election, there was

a fire at the Employer's main office located at 451 Dahill Road in Brooklyn, New York. This office was not a polling place for the election. The Employer's witnesses will testify that there was substantial physical destruction to the Employer's main office, including destruction of the Employer's computers which contained campaign propaganda and speeches. Specifically, the Employer could not access a final speech which the Employer planned to deliver at a captive audience meeting on March 4. In this speech, the Employer planned to speak to employees about the Petitioner's pension fund, which the Employer alleges is severely underfunded. The Employer requested a postponement of the election. The Regional Director denied this request. The Employer asserts that it was prejudiced by the Regional Director's decision not to postpone the election.

The independent investigation showed that on March 3, the Employer wrote to the Region asking for a 30 day postponement of the election due to the fire. The Employer stated that the "fact that the Employer cannot focus on campaigning or the delivery of a '25th Hour' speech, and will have their attention focused on assisting the Police/Insurance in their ongoing investigation over the coming weeks, is highly prejudicial, and has put Management in an impossible situation." The Employer further stated that Section 11284 of the Board's Casehandling Manual for Representation Proceedings provided for the postponement of the election.

The Petitioner opposed the Employer's request on the grounds that the fire did not occur at a polling location. The Petitioner further stated that the Employer continued to operate its business and the employees in the petitioned-for unit reported to work and continued to perform their regular work despite the fire. The Petitioner renews this position in opposition to the Employer's objection.

On March 4, the undersigned issued an Order Denying Request to Postpone Election in this matter. In denying the Employer's request, the Order stated:

The Undersigned fully appreciates the hardship that [the fire] has caused the Employer. However, as the fire did not occur at either polling place and the employees in the petitioned-for unit continue to work as scheduled, the hardship to the Employer does not outweigh the Board's obligation to protect the Section 7 rights of employees, including the right to choose their collective bargaining representative in a timely manner.

In addition, the Petitioner states that named employees will testify that the Employer was able to hold its captive audience speech on March 4 despite the damage caused by the fire.

Discussion

The Board has held that the mechanics of an election, such as date, time, and place are left to the discretion of the Regional Director. See Ceva Logistics U.S., Inc., 357 NLRB No. 60 (2011) (in which the Board held that the Regional Director acted within his discretion when he directed an election on a day on which employees were scheduled to attend a meeting at the Employer's facility, but were not scheduled to work); San Diego Gas & Electric, 325 NLRB 1143 (1998) (in which the Board stated that a Regional Director has broad discretion in determining the arrangements for an election); Manchester Knitted Fashions, 108 NLRB 1366 (1954) (in which the Board stated that the Regional Director has the discretion to determine the time and place for an election).

In this case, the Regional Director considered the arguments set forth by the Employer and the Petitioner before the election. Due to the fact that the operations of the employees in the petitioned-for unit and of the polling places had not been disrupted by the fire, the Regional Director determined that the better course was to allow employees to proceed to the election. Such a decision is well within the discretion of the Regional Director. See San Diego Gas & Electric, 325 NLRB 1143, supra; Manchester Knitted Fashions, 108 NLRB 1366, supra.

Moreover, I note that in its request for an adjournment, the Employer cites Section 11284 of the Board's Casehandling Manual for Representation Proceedings. This section provides that although "it is anticipated that a Board-directed election will be held within the time provided in the direction, there are situations when additional time may be necessary." This section further states: "The Regional Director should decide whether it is necessary to provide additional time, after considering the positions of the parties." Thus, the Board's Manual explicitly provides that the decision to allow additional time before an election is within the Regional Director's discretion.

Further, the Employer has not presented evidence that its alleged inability to deliver its speech on March 4 could have affected the results of the election or employees' freedom of choice in the election. I note that the Petitioner asserts that the Employer did in fact deliver a final campaign speech on March 4. Even assuming the Employer was not able to deliver its speech as planned on March 4, the resulting impact is too speculative to support an objection. See Rockwell Industries Inc., 123 NLRB 644, 646 fn. 4 (1959) (in which the Board found that the impact of the union circulating the employer's objections was "too speculative to warrant a hearing").

For the reasons stated above, I overrule the Employer's first objection.

Objection No. 2

In its second objection, the Employer alleges that at the McDonald Avenue polling location, Luis Gonzales, a vocal Union supporter, and Juan Aguilar, the Union's observer at that location, engaged in an extended conversation regarding the Petitioner's campaign in the polling place while the polls were open and employees were present and waiting to vote. The Petitioner asserts that this objection lacks merit.

In its offer of proof, the Employer states that a named employee will testify that after Gonzales voted, he remained in the voting area and spoke with Union observer Juan Aguilar for a period of five to ten minutes. The Employer's witness will further testify that this conversation occurred in the polling place while the polls were open and employees were waiting to vote.

The Petitioner denies these allegations. The Petitioner states that named employees will testify that Aguilar and Gonzalez did not converse in the polling place while the election was being conducted. Moreover, these witnesses will testify that there was not a line of voters in the polling area waiting to vote while Gonzalez was in the polling place.

Discussion

The Board has long held that the "final minutes before an employee casts his vote should be his own, as free from interference as possible." Milchem, Inc., 170 NLRB 362, 362 (1968). As a result, the Board has prohibited conversations between parties and voters waiting to vote as a means of preventing electioneering in polling places. Id.; see also Pepsi-Cola Bottling Company of Petersburg, Inc., 291 NLRB 578 (1988) (in which the Board found that employee supporters of the union, although not agents of a party, interfered with the conduct of an election by engaging in "boisterous, prounion conduct" within the no-electioneering area). The Board recognizes that elections must be judged by realistic and practical standards. In Milchem, Inc., supra, the Board stated: "The rule contemplates that conversations between a party and voters while the latter are in a polling area awaiting to vote will normally, upon the filing of proper objections, be deemed prejudicial without investigation into the content of the remarks. But this does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election." Milchem, 170 NLRB at 363. The Board examines additional factors, such as whether the conduct occurred within or near the polling place, the extent and nature of the alleged electioneering, whether the electioneering was

conducted by a party or by employees, and whether it was conducted in a no-electioneering area or contrary to the instructions of the Board Agent. Boston Insulated Wire & Cable Co., 259 NLRB 1118, 1119 (1982).

The foregoing conduct of a Union supporter and a Union observer conversing about the Petitioner's campaign for an extended period of time in the polling place while employees were waiting to vote, if true, could have affected the outcome of the election and would, therefore, warrant setting aside the election.² In view of the conflicting positions and facts asserted by the parties regarding the alleged conversation between a Union supporter and the Union observer in the polling place during the election, I find that the Employer's second objection raises material and substantial issues of fact that would be best resolved by a hearing. Accordingly, I direct that a hearing be held regarding the Employer's second objection.

SUMMARY AND RECOMMENDATIONS

In summary, I have directed that a hearing be held regarding the Employer's second objection. I have overruled the Employer's first objection.

Accordingly, pursuant to the authority vested in the undersigned by the National Labor Relations Board, herein called the Board,

IT IS HEREBY ORDERED that a hearing be held before a duly designated hearing officer with respect to the issues raised by Objections No. 2.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting such hearing shall prepare and cause to be served upon the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board, as to

² See Milchem, Inc., 170 NLRB 362 (1968); see also Boston Insulated Wire & Cable Co., 259 NLRB 1118 (1982).

the issues raised. Within fourteen (14) days from the date of the issuance of such report, any party may file with the Board, an original and seven copies of Exceptions to the report, with supporting briefs, if desired. Immediately upon the filing of such Exceptions, the party filing the same shall serve a copy thereof, together with a copy of any brief filed, upon the other parties. A statement of service shall be made to the Board simultaneously with the filing of Exceptions. If no Exceptions are filed thereto, the Board, upon the expiration of the period for filing such Exceptions, may decide the matter forthwith upon the record or make any other disposition of the case.

PLEASE TAKE NOTICE that on April 7, 2014, at 9:30 a.m., and on consecutive days thereafter until concluded, at Two MetroTech Center, 5th Floor, Brooklyn, New York, a hearing will be conducted before a hearing officer of the National Labor Relations Board on the issues set forth in the above Report, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony.

Right to File Request for Review

Pursuant to the provisions of Sections 102.69 and 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this Supplemental Decision by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based. 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 and that are not included in the Supplemental Decision, 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 Supplemental Decision shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing a Request for Review

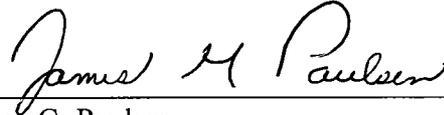
Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on April 9, 2014, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it 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 a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.³ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab, click on E-Filing, and follow the detailed instructions. The responsibility for the receipt

³ 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.

of the request for review rests exclusively with the sender. A failure to timely file the request for review 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.

Dated at Brooklyn, New York, on March 26, 2014.



James G. Paulsen
Regional Director, Region 29
National Labor Relations Board
Two MetroTech Center
Brooklyn, New York 11201



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March 13, 2014

VIA FACSIMILE & REGULAR MAIL

James G. Paulsen, Regional Director
National Labor Relations Board
Region 29
Two Metro-Tech Center, 5th Floor
Brooklyn, New York 11201-3838

Re: Kings Ready Mix
Case #29-RC-119421

Dear Mr. Paulsen:

As your files should reflect, the undersigned represents Kings Ready Mix as it concerns the above referenced Petition. Pursuant to NLRB Rules & Regulations, Section 102.69(a), please accept this correspondence as my client's Objections to the conduct of the Election held on March 6, 2014.

Specifically, those Objections are as follows:

1. The Order denying the Request to Postpone the Election dated March 4, 2014, which in turn stems from my March 3, 2014 request that an Arson which occurred in the main offices of the Employer located at 451 Dahill Road in Brooklyn was prejudicial error by this Region.
2. At the McDonald polling location, Luis Gonzalez, a vocal Union supporter, and Juan Aguilar, the Union Observer, were permitted to stand in close proximity to the voting booth and engage in conversation regarding Local 282's campaign on behalf of Petitioner for an extended period of time, while other voters were present during the voting period.

In support of the first Objection, the Employer will supply the testimony of Michael Falcone and Jonathan Falcone, two (2) of the principals of the Employer. Both of these witnesses will testify to the extent of the physical destruction to the Employer's operations, as well as the disarray that it caused not only to the operations, but the campaigning that my client was attempting to perform in the days before the Election. Specifically, the computers of the Employer contained all of the campaign propaganda and speeches that were generated prior to the Arson, but could not be accessed and disseminated to the employees for obvious reasons. The Employer was not even offered a reasonable amount of time to attempt to reconstruct its campaign materials. In this regard, Michael Falcone will testify that he was the primary spokesperson on behalf of the Employer during the Election campaign and for the "Captive Audience" Speech that was to be held on March 4, 2014. The fact that Michael and Jonathan Falcone had to devote virtually all of their working hours on March 3rd, 4th, 5th and 6th to the Arson investigation (and subsequent insurance matters), resulted in their inability to adequately conduct the final segment of a structured campaign, and could not adequately present to the employees the

Exhibit A.

James G. Paulsen, Regional Director
March 13, 2014
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arguments against unionization with Local 282. To this end, there exists substantial disadvantages to unionization through Local 282 that my client could not adequately disseminate, specifically relating to this Union's Pension Fund, which is underfunded in the amount of over \$300,000,000.00. The Employer, as an explicit campaign strategy, was holding back on a massive campaign push relative to this Union's Pension Fund as it is unlikely that the Pension Fund would even be in existence in the twenty (20) year vesting period. This was part of a calculated campaign strategy that was intentionally being held in reserve for a final campaign blitz against this Union. Therefore, the fact that the Regional Director failed to adjourn or postpone the Election severely prejudiced my client, and mandates that a new Election be conducted.

The Regional Director also misstates the reason for the postponement of the Election, by stating that "The employer requested that the Election be postponed for thirty days because of the hardship to the employer in the aftermath of the fire and because the employer's attention would be diverted from the Election." (Emphasis Added). This statement is an inaccurate minimization by the Regional Director of the rationale behind the request. Rather, the email makes clear that the fire destroyed all business records, computer mainframes, telephone systems, etc. These computers contained all of the remaining campaign propaganda and speeches that were to be delivered in the Employer's "final push" prior to the Election. This Employer should not be punished for actions of third parties which were clearly an attempt to destroy their business operations.

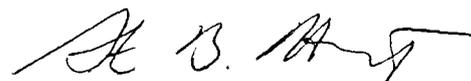
As to the second Objection, my client intends to make available Joseph Gallo, who will state that he observed Luis Gonzalez in the polling area after he cast his vote, for an extended period of time, campaigning for Local 282 by talking to Local 282's Observer, Juan Aguilar, who at that time was a Union Agent. As this Region is well aware, the Board has long held that prolonged conversations with voters near the polls is conduct, that in and of itself, will invalidate an Election. This is a strict rule that holds that the content of the conversation is irrelevant. See Milchem, Inc., 170 NLRB 362 (1968), Flex Steel Industries, 311 NLRB 257, 270 (1993) and Rheem Mfg. Co., 309 NLRB 459 (1992). This conversation between Luis Gonzalez and Juan Aguilar in the voting area while waiting on line to vote, while the polls were open, was an obvious attempt to sway and/or coerce voters into casting their ballots in favor of Local 282. The evidence will also reflect that Mr. Gonzalez's time in the voting area speaking with Aguilar was not isolated, but was rather prolonged over at least a five (5) to ten (10) minute period of time.

Therefore, for the above stated reasons, request is hereby made that the Region conduct an investigation into these Objections, and that the Employer be permitted to present witnesses and other documentation related thereto.

Thank you for your attention and cooperation to this matter.

Very truly yours,

HOROWITZ LAW GROUP, LLC



Steven B. Horowitz, Esq.
shorowitz@horowitzlawgroup.com

SBH:pls

c: Kings Ready Mix (via email only)