

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
TWENTY-SEVENTH REGION**

SAVAGE TRANSPORTATION MANAGEMENT, INC.,

Employer

and

UNITED STEELWORKERS AFL-CIO-CLC,

Case 27-RC-126023

Petitioner.

---

**REGIONAL DIRECTOR'S REPORT AND RECOMMENDATIONS ON EMPLOYER  
OBJECTIONS AND ORDER APPROVING WITHDRAWAL OF OBJECTION 1**

---

**I. Introduction**

This report contains the Regional Director's conclusions and order regarding three objections to the election filed by Savage Transportation Management, Inc. (Employer). The objections allege that United Steelworkers AFL-CIO-CLC (Petitioner) distributed literature and delivered a captive audience speech within 24 hours of the start of the election; that the Petitioner distributed campaign literature to employees that conveyed the message that their votes would not be secret; and, that the Board agent who conducted the election improperly challenged a voter *sua sponte* on behalf of the Petitioner. The Employer asserts that the objections warrant setting aside the election.

On May 20, 2014, the Employer requested to withdraw its Objection 1 alleging that the Petitioner distributed literature and delivered a captive audience speech within 24 hours of the

start of the election. The Employer's request to withdraw Objection 1 is approved. As described below, it is concluded that the Employer's remaining Objections 2 and 3, nor the investigation thereof, raise substantial and material questions of fact, to warrant a hearing. Based on the evidence presented, it is recommended that the Board overrule the Employer's remaining objections in their entirety.

## **II. Procedural History**

Based on a petition filed on April 7, 2014,<sup>1</sup> and pursuant to a Stipulated Election Agreement approved on April 15, an election by secret ballot was conducted on May 14 and 15, for the following unit of employees (unit):

**Included:** All full-time and regular part-time employees employed by the Employer as a Track Laborer, Switchman, and Mechanic providing services to FMC Corporation, TATA Chemicals of North America, Inc., and Church & Dwight, Inc., in the Green River Trona Formation area in the vicinity of Green River, Wyoming, including those employees providing services at the Alchem Yard.

**Excluded:** Office clerical employees, professional employees, all other employees, and guards and supervisors as defined in the Act.

The results of the election as disclosed by the tally of ballots served upon the parties after the ballot count on May 15 were as follows:<sup>2</sup>

---

<sup>1</sup> All dates hereinafter refer to calendar year 2014.

<sup>2</sup> In footnote 1 of its Objections, the Employer states that the ballots of two voters were challenged but that the tally of ballots only reflects one challenged ballot. A review of the *Excelsior* list marked during the election reveals that of the 21 eligible voters, 19 voters cast unchallenged ballots, one voter was challenged (Zachary Owens, who is the subject of Employer's Objection 3), and one voter did not cast a ballot. The Board agent challenged another employee's ballot because his name was not on the *Excelsior* list. The parties agreed that this individual was not eligible to vote and his name had not been included on the voting eligibility list because he was hired after the stipulated eligibility date. Had this been an eligible voter and the ballot been counted, the tally would have reflected a total of 20 valid votes counted in addition to one challenged ballot (Owens). Had the challenge to the ballot been unresolved by the parties, the tally would have reflected a total of 19 valid votes counted in addition to two challenged ballots. Since the parties are in agreement and the record supports a finding that this challenged individual was not eligible to vote, that ineligible ballot is not reflected on the tally of ballot. Accordingly, the May 15 tally of ballots accurately reflects that there was only one remaining challenged ballot.

Approximate number of eligible voters.....	21
Number of void ballots.....	0
Number of votes cast for Petitioner.....	11
Number of votes cast against participating labor organizations .....	8
Number of valid votes counted.....	19
Number of challenged ballots.....	1
Number of valid votes counted plus challenged ballots.....	20

Challenges are not sufficient in number to affect the results of the election.

On May 22, the Employer filed timely objections to conduct affecting the results of the election.<sup>3</sup>

### **III. The Objections**

#### **Objection 1**

The Employer asserts that the Petitioner distributed literature and delivered a captive audience speech within 24 hours of the start of the election.

On May 20, the Employer requested to withdraw its Objection 1. It is hereby ordered that the Employer’s request to withdraw Objection 1 is approved.

#### **Objection 2**

The Employer asserts that the Petitioner, through the distribution of campaign literature, conveyed a message to employees that their votes would not be by secret ballot. The literature in question is a flyer regarding unionization. The Employer contends that one section of the flyer regarding dues was objectionable. Specifically, the section of the flyer at issue in its entirety states:

---

<sup>3</sup> A copy of the Employer’s objections is attached hereto.

Question:

Membership dues [:] How much are they? When do we begin paying?

Answer:

As in any nonprofit organization, dues are used to pay the operating expenses. In the Union that includes office space, representatives' salaries, printing, phones, arbitration, legal costs, strike fund contributions, training programs, etc.

- *NO INITIATION FEE FOR NEWLY ORGANIZED MEMBERS LIKE YOURSELVES.*
- *NO ONE PAYS DUES UNTIL AFTER A CONTRACT HAS BEEN NEGOTIATED AND ACCEPTED BY THE MEMBERS THROUGH A MAJORITY VOTE.*

Dues are paid based on the amount you make. There is no set monthly rate. Dues are 1.45% of your gross. There is a cap of 2.8 times your hourly rate per month if you work a lot of overtime. There is also a 2 cents per hour contribution for an organizing fund.

**Even if you vote yes to have representation, it does not mean you will start paying dues. You only pay dues after a majority of the employees vote to accept a contract.**

*You will be able to see the improvements to wages and benefits a contract brings before you pay dues.* (Emphasis in original.)

The Employer argues in support of its Objection 2 that the statements are directed at a reader on an individual basis as they refer to “1.45% of your gross” and “your hourly rate” and “if you work a lot of overtime.” (Emphasis supplied by the Employer.) The Employer asserts that the phrasing in second-person along with a statement that a “yes” vote would not lead to a dues payment obligation, conveyed to voters that the identity of those who cast “yes” votes would be known to the Petitioner. The Employer has not cited any case authority in support of its argument.

In determining if campaign literature is objectionable, the Board relies on its holding in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), wherein the Board announced that it would not set aside elections on the basis of misleading campaign statements. In *Midland*, the

Board relied on its view in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311, 1313 (1977) that employees are “mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it.” In *Durham School Services*, 360 NLRB No. 108 (2014), the Board adopted the Regional Director’s findings and recommendations, which overruled the employer’s objection without a hearing, that the union therein engaged in objectionable conduct by distributing a campaign flyer containing pictures of eligible voters and statements misrepresenting their intent to vote for the union. In overruling the employer’s objection, the Board relied on the *Midland* standard for finding there was no claim or evidence of forgery, it was undisputed that the flyer was easily recognizable as campaign propaganda, and, at most, the evidence suggested a possible misrepresentation of an employee’s sentiments which provided no basis for setting aside the election. *Id.*

In the instant case, the Petitioner’s flyer is more innocuous than the flyer not found objectionable in *Midland*. Here, the Petitioner’s flyer does not expressly concern the election or how employees intend to cast their ballots. The Employer argues that the second-person phraseology on the flyer led employees to believe that the balloting would not be secret. The Employer has not shown how the use of plain language about dues could logically lead a reasonable employee to conclude that the balloting at the Board’s election would not be by secret ballot. Nor has the Employer shown that the language could reasonably be read to convey any information other than when the Petitioner would begin collecting dues if it won representation. Based on the Board’s holding in *Midland*, there is no basis for finding that the Petitioner’s distribution of this campaign flyer or its language constituted objectionable conduct.

Accordingly, it is recommended that the Board overrule Employer's Objection 2.<sup>4</sup>

### **Objection 3**

In Objection 3, the Employer asserts that the Board agent who conducted the election engaged in objectionable conduct by challenging the ballot of Zachary Owens *sua sponte* on behalf of the Petitioner. In support of this Objection, the Employer provided details of the pre-election conference during which the Employer had initially designated Owens to serve as the Employer's observer.<sup>5</sup> The Employer contends that the Petitioner objected to Owens serving as an observer on the basis he was a statutory supervisor. The Employer asserts that the Board agent accurately explained that if the Employer used Owens as its observer and it was later determined that Owens was a statutory supervisor, it could be grounds for setting aside the election if timely objections were filed over the matter.

There is a discrepancy in the Employer's proffered evidence as well as a dispute between the Employer and the Petitioner concerning the circumstances surrounding the challenge to

---

<sup>4</sup> In affirming that no hearing was necessary on the similar objection filed by the employer in *Durham School Services*, supra, the Board reiterated the principle that "[t]he burden is on the objecting party to present evidence that raises substantial and material factual issues" under controlling law, i.e., to "establish[ ] a prima facie case in support of its objections." *Park Chevrolet-Geo, Inc.*, 308 NLRB 1010, 1010 fn. 1 (1992), citing Board's Rules and Regulations, Section 102.69." Similar to the Board's analysis in *Durham School Services*, there is no claim or evidence of forgery in the present case nor is there any dispute that the Union's flyer was easily recognizable as campaign propaganda. Applying the *Midland* standard in the present case, an evidentiary hearing is not necessary since Objection 2 does not raise substantial and material issues.

<sup>5</sup> In its objections, the Employer states that an unidentified friend of the Board agent accompanied him to the election site and was present at the pre-election conference on May 14, 2014. In footnote 2 of the Employer's objections, the Employer states that this unidentified individual was present during the proceedings prior to the polls reopening on May 15, 2014, and also during the ballot count on the same date. The Employer offers that this individual is believed to have sat in a vehicle used by him and the Board agent to transport themselves to the election site and that the vehicle was parked in a lot adjacent to the voting site while the polls were open. The Employer does not allege nor has any evidence been produced which would suggest that this individual's presence at any time during the proceedings is a basis to set aside the election.

Owens' ballot.<sup>6</sup> The discrepancy in the Employer's supporting evidence is between the version offered by Owens as compared to the version of the employee who substituted for Owens as the Employer's observer. According to Owens, the Board agent challenged his vote after he announced his name and neither the Petitioner's observer nor the Employer's observer said anything or indicated they were in agreement with the challenge. In his slightly different version, the Employer's observer asserts that the Board agent announced Owens' vote was being challenged and the Petitioner's observer nodded his head in agreement. According to the Employer's evidence in support of its objections, after Owens cast his ballot, he informed three other eligible voters at some unspecified time during the election that his ballot had been challenged by the Board agent and not by the Petitioner's observer.

The Petitioner contends that, as Owens was entering the polling area, its observer did articulate to the Board agent that he intended to challenge Owens. The Petitioner argues that even if Owens had been allowed to vote unchallenged, the election results of 11 for, 8 against and one nondeterminative challenged ballot would not have been impacted.

The Employer argues that the Board agent's *sua sponte* challenge of Owens was contrary to Board procedures as set forth in the Casehandling Manual, Section 11338.2(b) and that this alleged conduct compromised the Board's neutrality. The Employer cites *Galli Produce Co, Inc.*, 269 NLRB 478 (1984), wherein the Board stated in a footnote:

FN1. In Objection 1, the Employer contends that the Board agent improperly challenged a voter on behalf of the Union. As found by the hearing officer, the Board agent reminded the Union's observer of the Union's intent, stated at the preelection conference, to challenge a certain voter. Sec. 11338 of the Board's Casehandling Manual admonishes Board agents not to make challenges on behalf of the parties. When a party believes that it has good cause to

---

<sup>6</sup> It is undisputed that the parties did not resolve the challenge to Owens' ballot before the ballot count and that his nondeterminative challenged ballot remains sealed in the challenged ballot envelope.

challenge a voter, the party's observer, not the Board agent, has the responsibility to follow through and make the challenge. However, as there is no basis here for finding that the Board agent's conduct affected the results of the election, we shall overrule Objection 1.

The Employer contends that the results of the election in the instant case stand in sharp contrast to the results in *Galli* where the vote tally was 11 votes for union representation, 5 against union representation and 2 challenged ballots. The Employer asserts that the vote margin in *Galli* was likely the reason for the Board's conclusion that there was no basis for finding that the Board agent's conduct affected the results of the election. The Employer asserts that the election results herein were much closer and speculates that a swing of one or two votes would have resulted in the Petitioner not receiving a majority of ballots cast.

Where conduct is attributable to a Board agent, the question is whether "the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election." *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 414 F. 2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970). Although the Employer argues that the Board agent's alleged *sua sponte* challenge of Owens was contrary to Section 11338.2(b) of the Casehandling Manual, the provisions of the Casehandling Manual are not binding procedural rules. Rather, the Casehandling Manual is issued by the General Counsel, not the Board, and is intended to provide guidance to regional personnel in the handling of representation cases. *Patient Care Of Pennsylvania, Inc.*, 360 NLRB No. 76 (2014), *citing Solvent Services*, 313 NLRB 645, 646 (1994). "Purported noncompliance with those provisions does not warrant setting aside an election, absent a showing that the deviations from the guidelines raised a reasonable doubt as to the fairness and validity of the election." *Id.*, slip op at 2-3.

Applying these principles and viewing the evidence in a light most favorable to the Employer, there is no basis for a finding that the Board agent's alleged conduct raises a reasonable doubt as to the fairness and validity of the election. The Employer asserts that the

Board agent made a *sua sponte* challenge on behalf of the Petitioner even though the Petitioner had its own observer present at the time Owens presented himself to vote. It is well settled, as the Employer asserts, that the parties are responsible for challenging voters when they have good cause to believe that a voter is ineligible to vote. *Solvent Services*, supra. *Lakewood Engineering*, 341 NLRB 699 (2004). Board agents assume the responsibility for challenging voters in only narrow limited circumstances. *Id.*

However, the Employer has not produced evidence demonstrating that the Board agent's alleged conduct affected the results of the election. While the Employer's evidence suggests that Owens told three employees during the course of the election that his ballot had been challenged by the Board agent, the *Excelsior* list reveals that all but one employee voted in the election. The employee who did not cast a vote was not one of the employees Owens talked to during the election about his challenged ballot. Thus, none of the three employees who learned about the Board agent's alleged conduct were discouraged from voting. Additionally, there is no evidence to suggest that these three employees, or the parties' observers who witnessed the Board agent's conduct, were influenced to change their vote based on the Board agent's alleged conduct.

The Employer posits that the Board's decision in *Galli* to overrule the objection was based on it being numerically unjustified as the one challenged ballot at issue was not determinative. Contrary to the Employer's conjecture, the Board did not indicate that it would have sustained the objection if the challenged ballot in *Galli* had been determinative. Even assuming the Employer's argument is correct, the same would hold true here where Owens' ballot was not determinative of the election results. To the extent that the Employer argues that the three employees Owens spoke to during the election should be taken into consideration with respect to the vote margin, as discussed above, no evidence was produced demonstrating that

those employees were discouraged from voting or were influenced to vote contrary to their intentions. The speculative possibility that the three employees might have been influenced by Owens telling them that his ballot had been challenged by the Board Agent does not raise a reasonable doubt as to the fairness and validity of the election. Thus, there is no evidence that the Board agent's alleged conduct had any effect on the results of the election.

Accordingly, it is recommended that the Board overrule Employer's Objection 3.<sup>7</sup>

#### **IV. Summary and Recommendations**

Having ordered that the Employer's request to withdraw Objection 1 be approved, having recommended that the Employer's remaining Objections 2 and 3 be overruled in their entirety, and the investigation thereof having failed to disclose evidence of other conduct which would warrant setting aside the election, it is further recommended that a Certification of Representative issue.

Under the provisions of Section 10.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington, D.C. by July 1, 2014. 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

---

<sup>7</sup> As was the case with Objection 2, an evidentiary hearing is not necessary regarding Objection 3 since the Employer has not raised substantial and material issues of fact.

included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceedings.

Dated at Denver, Colorado this 17<sup>th</sup> day of June 2014.

/s/Wanda Pate Jones  
Wanda Pate Jones  
Regional Director  
National Labor Relations Board, Region 27  
1961 Stout Street, Suite 13-103  
Denver, CO 80294