UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MCI COMMUNICATIONS SERVICES, INC. d/b/a VERIZON BUSINESS,	:	
Employer,	:	
and	:	CASE NO. 4-RC-123386
COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 2-13, AFL-CIO CLC	:	
Petitioner	:	

PETITIONER'S ANSWERING BRIEF TO EMPLOYER'S EXCEPTIONS TO THE ACTING REGIONAL DIRECTOR'S REPORT AND RECOMMENDATION ON OBJECTIONS TO ELECTION

I. INTRODUCTION

Petitioner, Communications Workers of America, District 2-13, AFL-CIO CLC ("Petitioner") hereby files this Answering Brief to the Exceptions ("Exceptions") filed by the Employer, MCI Communications Services, Inc. d/b/a Verizon Business ("Employer" or "Verizon") to the Acting Regional Director's Report and Recommendation on Objections to Election ("RD Report"), which was issued by the Acting Regional Director on June 20, 2014. The Acting Regional Director correctly concluded that the Employer's Objections were wholly without merit, and properly recommended that those Objections be overruled by the Board, and that the election results should be certified.

II. PROCEDURAL HISTORY

On February 28, 2014, the petition in this case was filed with the Regional Office, seeking "an Armour/Globe election to include the petitioned-for employees in the parties' existing collective bargaining unit covering the Commonwealth of Pennsylvania." On March 13, 2014, a hearing was held before Hearing Officer Kathleen O'Neill.

On April 8, 2014, the Regional Director issued the Decision and Direction of Election ("DDE") in this case. The DDE reflects, in its opening sentence, the sole issue in the case – "The Petitioner seeks an *Armour-Globe* election to add four or five [STFs], who are currently represented, to an existing unit." DDE at 1. The DDE went on to resolve that issue by finding "I shall conduct an *Armour-Globe* election to determine whether STFs wish to be included in the existing unit." DDE at 10 (footnote omitted).

The DDE, in the Direction of Election section, specifically stated that "[t]he ballot will ask: Do you wish to be represented for the purposes of collective bargaining by **Communications Workers of America, District 2-13, AFL-CIO?**" DDE at 10 (emphasis in original). The DDE then explained that: [i]f a majority of valid ballots are cast by the [STFs] for the Petitioner, they will be taken to have indicated these employees' desire to be included in the existing unit covered by the [CBA] between [the CWA], on behalf of its affiliated Local 13000 and [the Employer]." DDE at 10-11. This formulation of the ballot question and accompanying explanation is consistent with the practice followed by the Board ever since it first decided The Globe Machine and Stamping Co., 3 NLRB 294, 300-301 (1937) in the early days of the Wagner Act.

On April 22, 2014, the Employer filed a Request for Review ("Request") of the DDE. However, while the Request took issue with the DDE's determination concerning the scope of the unit, review was not sought of the DDE's formulation of the ballot question, or of the identity of the union designated on the ballot. On May 7, 2014, the Board denied the Request for Review.

In the meantime, by letter dated April 22, 2014, the Regional Office sent the parties the Notice of Election. Consistent with the DDE, and as required by Representation Case Handling Manual Section 11306.2, the Sample Ballot on the Notice indicated that the union involved was "Communication Workers of America, District 2-13, AFL-CIO" Likewise, consistent with the DDE, and as required by Representation Case Handling Manual Sections 11091, 11091.2(a), and 11314.5, the Notice of Election contained, verbatim, the statement in the DDE set forth above regarding the effect of the results of the election. The Notice of Election also set the dates of the election as being May 5 and May 8, 2014. At no time prior to the election being conducted did Verizon notify the Regional Office that it believed there was any issue resulting from the contents of the Notice or the ballot, or that those documents would somehow "confuse" the voters.

III. ARGUMENT

A. Exception No. 1 Should be Denied.

In Exception No. 1, the Employer contends that the Regional Director has no statutory authority to take action in this matter, relying on the Supreme Court's decision in NLRB v. Noel Canning, ___ U.S. ___, 2014 U.S.LEXIS 4500 (June 26, 2014).

As a threshold matter, the Employer waived this argument by failing to raise a challenge to the Regional Director's authority in the Request for Review of the DDE. See e.g., D.R. Horton, Incorporated v. NLRB, 737 F.3d 344, 351 (5th Cir. 2013) (challenges to the Board's composition are nonjurisdictional); NLRB v. RELCO Locomotives, Inc., 734 F.3d 764 (8th Cir. 2013) (same); GGNSC Springfield LLC v. NLRB, 721 F.3d 403(6th Cir. 2013) (same); but see NLRB v. New Vista Nursing and Rehab., 719 F.3d 2013 (3d Cir. 2013) (holding challenge to Board's composition is a non-waivable jurisdictional objection).

In this regard, there is no question that the Request for Review, filed on April 22, 2014, was submitted to a Board that was fully confirmed, with the undisputed power to act. Nevertheless, the Employer did not in any way challenge the Regional Director's authority to hold the underlying representation hearing in this case, or to issue a determination after that hearing. The Employer, having deprived the Board of the

opportunity to address the Regional Director's status before the election was conducted, should not be permitted to assert such a claim only after losing the election.

Finally, the Board has held that "NLRB Regional Directors remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment." SSC Mystic Operating Company, LLC, 360 NLRB No. 68, slip op. at 1, n.1. (March 31, 2014). Under these circumstances, Exception No. 1 should be denied.

B. Exceptions No. 2-8 Should be Denied.

As reflected in the RD Report, the Employer claimed, in Objection 1, "that the election should be set aside because 'the ballot question posed to eligible voters was, in the circumstances underlying this secret-ballot election, ambiguous and limiting, such that it undermined employee free choice." RD Report at 2. In sum, the Employer's Objection complained both about the form of the ballot, and the identity of the union on the ballot, even though no such concerns were raised by the Employer at any time prior to the election being conducted.

Preliminarily, the Company should not be permitted to complain about matters which it knew about, but failed to raise, prior to the election. See Liquid Transporters, Inc., 336 NLRB 420, 420 (2001) (employer may not raise issue of alleged supervisory status of a union's observer for the first time in post-election objections); see also

Europa Auto Imports, Inc. 357 NLRB No. 67 at 2 (2011) (employer may not raise issue of employee's appropriate classification in post-election objections where it failed to do so "to the Board in its request for review . . . or, at the very latest, any time before the polls closed").

In any event, the findings contained in the RD Report are well-reasoned and amply supported by Board law, and should be affirmed. In particular, as the RD Report observed, the Employer has a "'heavy' burden of establishing that the election should be set aside.'" RD Report at 3 (citing Safeway, 338 NLRB 525 (2002)). However, other than asserting that the Region "cherry-picked only select facts," and then analyzed those facts "in a vacuum," to conclude that Objection 1 should be overruled, see Exceptions at 11, the Employer failed to produce any "evidence that any employee was actually confused by the ballot, the Notice of Election, or the Hearing Officer's statements, or that any employee misunderstood the purpose of the election." RD Report at 2.

In fact, it is the Employer that has engaged in "cherry-picking" and speculation to support this Objection. Thus, in its Exceptions, the Employer cites to a few places the hearing transcript to questions and comments from the Hearing Officer regarding the scope of the unit, see Exceptions at 12 (citing Hearing Transcript ("Tr.") at 9, 205), and the Employer submitted, in support of its Exceptions, 30 pages out of the 207 page transcript.[1] That "evidence" is woefully inadequate to support the Exceptions.

[1] A complete copy of the Hearing Transcript will be filed along with this Answering Brief.

Indeed, the Employer has not adduced any evidence that an eligible voter was even in the hearing room when the Hearing Officer made the allegedly "confusing" statements; that if an eligible voter was in the room, that the voter was paying attention to the colloquies between the Hearing Officer and counsel for the parties regarding the unit; or that anything they may have heard "confused" them. Nor is there any other evidence that anything the Hearing Officer said played any role whatsoever in how the voters cast their ballots in the election which was conducted almost two months after the hearing.

The reason for the Employer's failure to do so is plain when one reviews the record as a whole. As the Transcript reflects, the hearing took place over the course of an entire day. See Tr. 1, 207:2. Notably, the only issue at the hearing was whether the SFTs shared a community of interest with the Employer's existing state-wide CWA bargaining unit, such that an Armour-Globe election was appropriate.

For example, at the outset of the hearing, Employer's counsel explained that the Verizon. opposed such an election because "[w]e don't believe there's a community of interest that exists between the Petitioners on the one hand and the bargaining unit on the other hand." Tr. 11:4-6. Union counsel then argued for an Armour-Globe election, explaining the Union's position: "[W]e believe there's a community of interest. . . . the existing collective bargaining unit has approximately 5,000 members across the

---

The Hearing Transcript will be cited as follows: "Tr. [page number: lines numbers]."

Commonwealth of Pennsylvania . . . [a]nd to leave a group, at this point, of four workers out in an individual unit we think is contrary to Board precedent, policy, and really makes no rational sense whatsoever." Tr. 11:20-12:10. Six hours of testimony then ensued over whether the Union's position, or the Employer's position, would prevail.

Likewise, with respect to the identity of the bargaining agent, the fine distinctions between the CWA, and its affiliated District 2-13 and affiliated Local 13000 now made by the Employer were nowhere in evidence at the hearing. Rather, the Hearing Officer, counsel, and many of the witnesses (including three of the eligible voters in the election) simply referred to Petitioner generically as the "CWA." See e.g. Tr. 20:4 ("CWA represented BEM's and SET's); Tr. 53:12-13 ("CWA represented employees in Verizon Pa"); Tr. 54:15-22 ("CWA represented employees"); Tr.55:12-14 (a "CWA person" would work on switching equipment); Tr. 101:14-15; 103:18-21; 111:23-112:22; 115:10-12 (testimony of William Redding); Tr. 133:16-134:3; 135:2-138:11; 140:23 (testimony of William Yezusko); Tr. 154:16-20; Tr. 155:1-7; 156:18-23 (testimony of John Comstock); Tr. 202 (regarding benefit plans for "the represented employees, the CWA represented employees"). Under these circumstances, and in the absence of any contrary evidence from an actual eligible voter, or any evidence that the identity of the Union on the ballot was, in any way, an issue in the election, the Company failed to meet the "heavy burden" needed to sustain this Objection.

Finally, the RD Report correctly concluded that "any isolated statements by the pre-election hearing officer during the course of the hearing, if they caused any

confusion at all, were superseded by the [DDE] and Notice of Election, which correctly identified the unit and terms of the Armour-Globe [election]." RD Report at 3. In response to this common sense observation, the Employer makes the extraordinary claim that the explicit language of the official Board documents notifying the parties and the voters of the terms of the election should be disregarded because it is "wishful thinking" that voters actually take the time to read the carefully drawn documents issued by the Board in representation cases, and understand "the consequences of a 'yes' vote." Exceptions at 14.

Such a position is absurd, and demeaning to the voters. Exceptions No. 2-8 should be denied.

C. Exception No. 9 Should be Denied.

The final exception filed by the Employer concerns its argument that the Regional Office should have conducted a "meaningful investigation into the Company's second Objection." Exceptions at 18. That Objection, however, concerned the Company's argument regarding the scope of the unit, and the RD Report concluded, correctly, that the Objection was simply an effort to relitigate an issue that it had pursued unsuccessfully in pre-election proceedings, including a Request for Review to the Board. RD Report at 4.

Contrary to the Employer's exception, the Board's Rules and Regulations do not require the Region to investigate an objection of the sort set forth in Objection 2. Thus, Rule 102.69(a) permits objections to be filed only "to the conduct of the election or to conduct affecting the results of the election." It is plain from the face of the Objection that it has nothing to do with either "the conduct of the election" or to "conduct affecting the results of the election," as those phrases are interpreted under the Act.

Rather, Objection 2 concerns an issue which was fully litigated by the parties to the Region and the Board in pre-election proceedings. Under these circumstances, no investigation of that objection is necessary. Indeed, Rule 102.69(c)(1) only provides that the Regional Director must "initiate an investigation" if such is "required." In the present case, there was no need for an investigation, as the issue had been litigated and considered by the Board. As such, the RD Report properly recommended that this Exception be denied.

IV. CONCLUSION

The Acting Regional Director correctly concluded that the Employer's Objections failed to satisfy the heavy burden necessary to overturn the result of the election conducted in this matter. As such, the Employer's Exceptions should be denied, and an appropriate certification should be issued.

Respectfully submitted,

WILLIG, WILLIAMS & DAVIDSON

BY: *s/Laurence M. Goodman*

Laurence M. Goodman, Esquire
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103
(215) 656-3600
lgoodman@wwdlaw.com

Attorneys for Petitioner, Communications Workers of America, District 2-13, AFL-CIO CLC

Dated: July 18, 2014

CERTIFICATE OF SERVICE

I, Laurence M. Goodman, hereby certify that I have this day caused a true and correct copy of the foregoing Answering Brief to Employer's Exceptions to Acting Regional Director's Report and Recommendation on Objections to Election to be served by electronic mail, upon the following:

Dennis P. Walsh
Regional Director
National Labor Relations Board, Region 4
615 Chestnut Street, 7th Floor
Philadelphia, PA 19106

James S. Urban, Esquire
Jones Day
500 Grant Street
Suite 4500
Pittsburgh, PA 15219
jsurban@jonesday.com
Attorney for Employer

s/Laurence M. Goodman
Laurence M. Goodman, Esquire

Dated: July 18, 2014