ManorCare of Kingston PA, LLC *and* Laborers International Union of North America Local 1310, Petitioner. Case 04–RC–109516

April 29, 2014

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on September 6, 2013, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 34 for and 32 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has decided to adopt the hearing officer's findings[1] and recommendations[2] only to the extent consistent with this decision, and finds that a certification of representative should be issued.

We disagree with the hearing officer's recommendation to sustain Objection 2, which alleges that certain prounion employees, who are not union agents but third parties to the election, made election-related threats to employees and their property that interfered with the election. Specifically, the objection pertains to a statement by employee Lucy Keating to employee Harriet Robinson that if the Union did not get in and employees started complaining about their working conditions, she was going to start punching people in the face, and a statement by employee Juanita Davis to employees Robinson, Amy Kovac, and Krista Renfer that if the Union did not get in, she would do damage to people's cars and cause bodily harm to employees who voted against the Union.

The hearing officer found that both statements were made in a casual and even light-hearted fashion. Specifically, the hearing officer found that the statement by the diminutive Keating, who had no history of violence, to the taller Robinson was flippantly made, and elicited a laughing response. Similarly, the hearing officer found that, in context, Davis' statement to Robinson, Kovac, and Renfer was viewed as joking in nature. However, the hearing officer found that employee Robinson (later an Employer observer during the first session of the election) thereafter repeated Keating's and Davis' statements to additional employees. Because those additional employees were not in a position to judge how the original statements were intended—especially with respect to the threat to vehicles,—or to determine that Keating and Davis would not have followed through on their "threats," the hearing officer sustained Objection 2 and recommended that the election be set aside. We disagree and overrule the objection.

The Board will not set aside an election based on third-party threats unless the objecting party proves that the conduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); see also *Mastec Direct TV*, 356 NLRB 809, 811 (2011); *Lamar Advertising of Janesville*, 340 NLRB 979, 980 (2003); *Cal-West Periodicals*, 330 NLRB 599, 600 (2000). In assessing the seriousness of an alleged threat, the Board considers the following factors: (1) the nature of the threat itself; (2) whether it encompassed the entire unit; (3) the extent of dissemination; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that employees acted in fear of that capability; and (5) whether the threat was made or revived at or near the time of the election. *Westwood*, supra at 803.

Applying the *Westwood* standard here, contrary to the hearing officer, we find that the Employer failed to show that the employees' conduct created a general atmosphere of fear and reprisal rendering a free election impossible. The hearing officer determined that both comments were made in a joking and casual manner. As characterized by the hearing officer, neither one rose to the level of objectionable third-party threats.[3] The statements were disseminated by other employees not in the presence of the speakers who actually made the comments and were apparently characterized out of context. In other words, these were characterizations by those who had not made the statements and, further, repeated to employees who did not have the benefit of hearing them and evaluating them personally.

Historically, the Board has been reluctant to set aside an election where employees circulate third-party statements that have been stripped of their original context. See generally *Central Photocolor Co.*, 195 NLRB 839, 839 (1971) (objections overruled where third party "threats and communication of rumors of misconduct

[1] The parties have excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co*., 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule Employer's Objection 3.

[3] At worst, the statements were no more than bravado and bluster by nonagent employees, which the Board has recognized are likely to be discounted by other employees. See *Mastec Direct TV*, above, 356 NLRB 809, 812.

and predictions of Union pressure did not create a general atmosphere of fear and reprisal"). This is such a case. The objection should not be sustained on what essentially was a version of the "game of telephone." To do so would open the door to objections being substantiated by rumors devoid of any truth, and encourage false attributions in order to influence election outcomes. In the circumstances of this case, statements which were not threats when made, did not, through the repetition by others, become transformed into objectionable conduct.

Accordingly, as the tally of ballots shows that the Petitioner has received a majority of the valid votes cast, we shall issue the appropriate certification of representative.[4]

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Laborers International Union of North America Local 1310, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> INCLUDED: All full-time and regular part-time CNAs (who worked an average of four or more hours per week during the 13 weeks preceding July 23, 2013) employed by the Employer at its 200 Second Avenue, Kingston, Pennsylvania facility.
>
> EXCLUDED: All other employees, LPNs, RNs, maintenance employees, office clerical employees, guards and supervisors as defined in the Act.

[4] Contrary to his colleagues, Member Johnson would sustain Objection 2. Although a close case, the statements as disseminated were threats to person and property. Both statements were disseminated to other eligible voters who did not actually hear the alleged threats being made. Furthermore, there were no countervailing circumstances that would lend an objective observer to believe these comments were exaggerated or were intended in a joking manner. More fundamentally, whatever was actually said and in whatever manner, a significant number of employees were exposed to these threatening statements. The appropriate standard by which the Board evaluates third-party conduct is whether it creates a "general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984), and the hearing officer found this is precisely what occurred here in an election where a single changed vote would have altered the outcome. In agreement, Member Johnson would find the statements objectionable based on their impact, regardless of the original intent of the speakers.