

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

BAKER DC, LLC)	
Employer,)	
)	
and)	Case No.: 05-RC-135621
)	
OPERATIVE PLASTERERS &)	
CEMENT MASONS INTERNATIONAL)	
ASSOCIATION LOCAL 891.)	
)	
Petitioner.)	

PETITIONER’S BRIEF IN OPPOSITION TO EMPLOYER’S OBJECTION 2

On December 28, 2015, the National Labor Relations Board granted Baker DC’s Request for Review of the Regional Director’s Supplemental Decision and Second Supplemental Decision with respect to Employer’s Objection 2 in the above-captioned matter. For the reasons set forth below, Employer’s Objection 2 is without merit, and the Board should affirm the Regional Director’s Second Supplemental Decision overruling Objection 2.

BACKGROUND

On October 23, 2014, the cement masons employed by Baker DC (“Employer”) elected Petitioner Operative Plasterers & Cement Mason International Association Local 891 (“Union”) as their exclusive bargaining representative in an election conducted under the supervision of an agent of the National Labor Relations Board (“Board”). The October 23 representation election was conducted over two separate voting periods, including a morning voting session held at Employer’s Washington, D.C., office.

The morning polling location was located within the Employer’s office at 1110 Vermont Avenue, NW, Suite 850, in Washington, D.C., which was accessible to voters only by taking an

elevator from the multi-use office building's ground-floor lobby to the Employer's eighth-floor offices. *See* Supplemental Decision & Notice of Hearing (Nov. 25, 2014), at 3 n.5. Prior to the election, the supervising Board agent did not designate the building's lobby—or any other areas—to be “no electioneering” zones. *Id.* The Employer alleges, however, that the Union engaged in objectionable conduct because, allegedly, “Union agents remained by the lobby doors and watched employees enter the building to vote and remained by the front doors of the polling location until every employee had voted and left the facility.” *Id.* at 3. On these facts alone, the Employer objected to the election results, claiming that “the Union and/or its agents or supporters improperly engaged in surveillance or created the impression of surveillance of eligible voters.” *See* Employer's Objections to the Conduct of the Election and to Conduct Affecting the Results of the Election, Objection 2 (Oct. 30, 2014).

The Regional Director found that these allegations, even if accepted as true, did not amount to objectionable conduct. Describing the evidence that the Employer presented in support of its objections, the Regional Director stated

[T]he Employer did not contend, nor present evidence showing that any representative of the Union was present in the immediate area where polling occurred, or that the Union representatives were ever in the presence of voters queued in the polling area. Rather, the Employer contends that Union representatives were positioned in the lobby of the building in which the election was conducted, and would be, by their very presence, at the location engaging in objectionable surveillance. However, the election was conducted eight floors above the lobby, and the lobby was not an area that the Board agent had . . . designated as a no-electioneering area. Further, the Employer presented no evidence that any Union representative was in a position to observe the polling area or a line of employees waiting to vote in the polling area. There is no contention that any representative of the Union engaged in objectionable conduct in the polling place at a time when the polls were open, or campaigned with voters waiting in line to vote.

See Second Supplemental Decision at 2 (June 26, 2015). Stated differently, the only “evidence” of Union surveillance that the Employer offered was its bare-bones assertion that Union

representatives remained in the ground-floor lobby while employees voted on the eighth floor.

Supplemental Decision & Notice of Hearing at 3. On this record, the Regional Director

overruled Employer's Objection 2 its entirety without setting the matter for hearing:

Here, the Union representatives were allegedly eight floors away from the polling place, as well as any voting queue, too far from the polling area or any voters in line to vote to constitute objectionable surveillance. Further, the alleged location of the Union representatives was not in an area prohibited by the Board agent. Accordingly, I find the Employer's asserted facts are insufficient to conclude that the Union engaged in objectionable conduct that would warrant overturning the election, and therefore, I recommend that Objection 2 be overruled.

Second Supplemental Decision at 3.

As set forth in detail below, this decision falls within well-settled Board precedent, and therefore, the Board should affirm the Regional Director's denial of the Employer's Objection 2.

ARGUMENT

The Employer argues that the mere presence of Union representatives eight floors below the polling location—with no access to, or view of, employees in line to vote—is, by itself, impermissible surveillance sufficient to overturn the election results. As we now show, and as the Regional Director has already held, Employer's Objection on this basis has no merit. First, the Employer has not met its heavy burden of proof that the Board requires for overturning election results. Second, the Board treats allegations of union surveillance differently from allegations of employer surveillance, and the Employer's allegations of union surveillance here plainly do not constitute objectionable conduct. Third, even under the Board's stricter employer surveillance standard, the Employer presented insufficient evidence to overturn the election results.

A. Standard of Review

As the Board has long held, “[r]epresentation elections are not lightly set aside.” *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000) (quoting *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991)). Accordingly, “[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees, *Lockheed Martin*, 331 NLRB at 854 (internal quotation marks and citations omitted), and “the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one,” *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (internal quotation marks and citations omitted). To meet this burden of proof, the Employer here must prove “that the conduct in question affected employees in the voting unit” or that such conduct “reasonably tended to interfere with the employees’ free and uncoerced choice in the election.” *Lockheed Martin*, 331 NLRB at 854.

As we show below, when this standard is applied, it is clear that the Employer has utterly failed to meet its burden.

B. The Employer’s Allegation That the Union Was Present in the Lobby of the Office Where Voting Took Place Does Not Establish Improper Union Surveillance

The Employer’s challenge fails at the threshold because it asks the Board to apply the standard for determining improper *employer* surveillance to analyzing whether the *union* engaged in improper conduct. Proving fatal to the Employer’s argument is that the Board has long recognized that different standards apply given that an “employer occupies a far different position with regard to the coercive impact of its actions upon employees than does a Union.” *Louis-Allis Co. v. NLRB*, 463 F.2d 512, 517 (7th Cir. 1972). The Board adopted this standard because “an employer, unlike a Union, has virtually absolute control over employees’ terms and conditions of employment.” *Nathan Katz Realty, LLC*, 2002 WL 1883790, at 10 (NLRB Div. of

Judges Aug. 12, 2002) (citing *Randell Warehouse of Arizona*, 332 NLRB 1034, 1037 (1999), *enfd. denied on other grounds*, 252 F.3d 445 (D.C. Cir. 2001)). In recognition of this fact, the Board and courts instead have regularly applied “*differing standards* to certain types of employer and Union conduct during election campaigns.” *See id.* (emphasis added); *see also Good Samaritan Hosp.*, 2009 WL 981075, at 12 (NLRB Div. of Judges Apr. 7, 2009); *Louis-Allis Co.*, 463 F.2d at 517 (“The Board, recognizing this difference, has frequently applied different standards to the actions of the employer than it has to similar actions of a union.”); *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969) (“An Employer in an unorganized plant, with his almost absolute control over employment, wages, and working conditions, occupies a totally different position in a representation contest than a Union, which is merely an outsider seeking entrance to the plant.”).

For that reason, while the Board has long held that an *employer* engages in objectionable conduct when a supervisor is stationed outside the polling area for the purpose of observing the event and “to convey to [] employees the impression that they are being watched,” *Electric Hose & Rubber Co.*, 262 NLRB 186, 216 (1982), a *union’s* mere presence at or near the polls, without more, is insufficient to set aside an election. Instead, the Board has made clear that a union engages in impermissible surveillance only if it “is deemed to have a reasonable tendency to coerce employees.” *Nathan Katz, supra*, 2002 WL 1883790, at 10. In explaining that standard, the Board has stressed that “absent evidence that employees might reasonably fear violence or other reprisals by a Union that watches them going into vote, such conduct is not coercive” and, therefore, not objectionable union surveillance. *See id.* at 11.

A long and unbroken line of Board decisions have reached the same result. For example, in *Choctaw Provision Co.*, 122 NLRB 474 (1958), the Board held that a union agent’s hour-long

presence in the polling area was insufficient to warrant overturning election results because there was no “evidence of coercive statements or willful violations of the Board agent’s instructions.” *Id.* at 475. Similarly, in *McDonough Co.*, 118 NLRB 1511 (1957), the Board found that “the mere presence of union representatives at or near the polling place is not sufficient ground for setting aside an election.” *Id.* at 1516; *see also Aaron Med. Transp., Inc.*, 2013 WL 3090117 at n.3 (NLRB Div. of Judges June 19, 2013) (“[W]e find that the mere presence of union agents in the parking lot and sixth floor of the Employer’s premises, without more, does not constitute objectionable conduct sufficient to overturn the election” where “there is no contention that any union representatives were stationed in a no-electioneering zone, made any statements or threats to voters during the critical period, or violated the orders of any Board agent.”); *Blazes Broiler*, 274 NLRB 1031, 1032 (1985) (overturning employer’s surveillance objection where union agent remained outside the polling area in an area open to the public and had no view of voters in line or casting ballots). Courts reviewing Board decisions have concurred. *See Harlan No. 4 Coal Co. v. NLRB*, 490 F.2d 117, 121 (6th Cir. 1974) (evidence of union representatives’ presence at or near the polling place, “in the absence of evidence of coercion or other objectionable conduct, is insufficient to warrant setting aside an election”); *NLRB v. Connecticut Foundry*, 688 F.3d 871, 880 (2d Cir. 1982) (union officials’ three brief incursions into a polling area were not objectionable conduct because they were “technical infractions” that did not “interfere[] in any manner with the election”). In short, in order to establish that the Union engaged in impermissible surveillance, it is not enough to allege that the Union was present at or near the polling area, as the Employer has alleged here. Instead, the Employer must prove (i) that the Union made threats of violence or other “coercive” statements to employees while waiting to vote or (ii) that the Union engaged in willful violations of the Board agent’s instructions.

The Employer has alleged no such facts here. As set forth above, the Employer's single allegation is that Union representatives remained in the lobby of the building during the morning voting session in the representation election. It is undisputed that the lobby was neither in sight of the polling area, which was located eight floors above the lobby, nor in an area designated to be a "no electioneering" zone by the Board agent. Accordingly, the Employer's allegations, even if accepted as true, do not establish that the union engaged in either any threats of violence or other coercive activity or willfully violated the instructions of the Board Agent regarding electioneering. For those reasons, the Regional Director was correct to find that the Employer failed to meet the "heavy" burden of proof to overturn the election. Accordingly, the Employer's challenge to that decision has no merit and must be rejected.¹

C. The Employer's Objection Lacks Merit Even Under the Board's Standard Applicable to Assessing an Employer's Election Conduct

While the foregoing is dispositive, it bears noting that, even if the Board were to apply the stricter employer standards to the Union's alleged conduct here, Baker DC still has not put forward sufficient evidence to warrant overturning the election results.

On this point, *J.P. Mascaro & Sons*, 345 NLRB 637 (2005), is dispositive. There, the evidence showed that balloting occurred during two separate voting periods in a "high traffic"

¹ The Employer's request for review relies heavily on *Electric Hose*, 262 NLRB 186 (1982), and *Performance Measurements*, 148 NLRB 1657 (1964). These cases do not provide any basis to overturn the Regional Director's decision, as both cases involved allegations of objectionable employer surveillance. See *Good Samaritan Hospital*, supra, 2009 WL 981075, at 12 (distinguishing *Electric Hose* and *Performance Measures* on the grounds that "those case[s] involved continued *supervisory* presence near the polling area") (emphasis added).

The Employer's reliance on *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001), a case which did involve allegations of objectionable union surveillance, fares no better. As set forth above, the Board, on remand from the D.C. Circuit, made clear that "absent evidence that employees might reasonably fear violence or other reprisals by a Union that watches them going into a vote, such conduct is not coercive" and, therefore, not objectionable union surveillance. See 2002 WL 1883790, at 11. As we have shown, the Employer proffered no evidence that any Baker DC employee feared violence or other Union reprisal.

snack room in the employer’s facility. *Id.* at 637. This room was connected to the larger plant by a 10-foot wide hallway that led to the front door of the work facility. *Id.* During the voting, the employer’s president stood between 30 and 54 feet from that front door. *Id.* at 639. While stationed there, the president occasionally engaged in brief, casual conversations with prospective voters potentially headed to the polling area. *Id.* at 638. On these facts—and relying on the same three cases cited by Employer here in support of its Objection 2 (*Katz, Electric Hose, and Performance Measurements*)—the Regional Director in *J.P. Mascaro & Sons* originally held that the president’s mere continued presence “in a place where employees have to pass in order to vote” was objectionable surveillance. *Id.*

The Board, however, reversed, holding that the facts in *J.P. Mascaro & Sons* were distinguishable from *Katz, Electric Hose, and Performance Measurements*. The Board observed that, in each of those prior cases, “company officials were either much closer to the voting area . . . or employees had to pass the company officials as they entered the polling area,” 345 NLRB at 639. In *J.P. Mascaro & Sons*, conversely, the employer’s president remained at least 30 feet from the entrance to a hallway leading to the polling location and therefore did not have a direct view of the polling area. 345 NLRB at 639. Accordingly, the Board held that the union’s allegations of objectionable employer surveillance were insufficient to set aside the result of the election. *Id.*

The same outcome necessarily follows here. Like the employer’s president in *J.P. Mascaro & Sons*, the Union’s representatives, under the facts as alleged by the Employer, remained a great distance away from the polling location and lacked a direct view of the balloting area. As the Employer’s own allegations confirm, the morning polling site was located in an internal conference room on the eighth floor of a multi-tenant office building.

Accordingly, at all times during the balloting, the Employer's own allegations confirm that the Union's representatives were separated from the polling area by eight floors and therefore had no view whatsoever of the polling location. To the extent that any voter passed by Union representatives, this encounter was not "as they entered the polling area," *J.P. Mascaro & Sons, supra*, 345 NLRB at 639, but rather as they entered the ground-level lobby of a public, multi-use office building before taking an elevator eight stories up, walking down a shared hallway, entering Employer's general offices, and then proceeding into a separate conference room to vote. On these facts, Employer has not alleged impermissible surveillance even under the stricter standards for employer conduct set forth in *J.P. Mascaro & Sons*. It is clear, therefore, that the Regional Director correctly overruled Objection 2, and the Board should affirm that decision.

CONCLUSION

For the foregoing reasons, the Board should affirm the Regional Director's Second Supplemental Decision which correctly overruled Employer's Objection 2.

/s/ Matthew Clash-Drexler

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CERTIFICATE OF SERVICE

I certify that on February 10, 2016, the foregoing was e-filed on the NLRB's E-Filing system and served by first-class mail (and electronic mail on February 11, 2016) upon:

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