

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEWARK PORTFOLIO JV, LLC

Employer,

And

Case 22-RC-081108

LABORERS INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 55

Petitioner

POSITION STATEMENT ON REMAND OF REGION 22

1. INTRODUCTION

By letter dated December 12, 2016, the National Labor Relations Board (“the Board”) advised the parties and Region 22 of the Board that it had decided to accept the remand in *Newark Portfolio JV, LLC v. NLRB*, 658 F. App’x 649 (3d Cir. 2016), denying enforcement to 362 NLRB No. 108 (2015). In *Newark Portfolio JV, LLC v. NLRB*, the Third Circuit granted the petition for review of Newark Portfolio, JV (“the Employer”) of a Board order certifying the Laborers International Union of North America, Local 55 (“the Union”) as the collective bargaining representative for a unit of the Employer’s employees and denied the Board’s application for enforcement of an order to the Employer to bargain with the Union. By letter dated January 3, 2017, the Board set January 17, 2017 as the deadline for position statements by the parties and the Region with respect to the issues raised by the remand. This position statement is submitted by Region 22 pursuant to the January 3, 2017 letter.

2. PROCEDURAL BACKGROUND

Pursuant to a petition filed by the Union, Region 22 conducted an election on June 27, 2012 among ten employees of the Employer, which manages residential apartment buildings in Newark. The employees eligible to vote were site superintendents, porters and maintenance employees. The Union won the election by a single vote, with six votes in favor of the Union and four votes against. The Employer filed objections to the conduct of the election, pointing to alleged electioneering by Union agents near the site of the election and an alleged anti-Semitic slur as sufficient basis for setting aside the results of the election. After conducting a hearing on the objections, a Hearing Officer on behalf of Region 22 issued a report and recommendation to overrule the objections. The Employer filed exceptions with the Board to the Hearing Officer's Report.

After considering the exceptions, the Board, on February 27, 2013, issued a Decision and Certification of Representative adopting the findings and recommendations of the Region 22 Hearing Officer and certifying the Union as the collective bargaining representative of certain employees of the Employer. *See Newark Portfolio JV, LLC*, 2013 WL 754063 (NLRB).

Subsequently, the Employer refused to bargain in order to test the Board's certification of the Union. On May 31, 2013, the Board issued a Decision finding that the Employer's refusal to bargain violated Section 8(a)(5) of the National Labor Relations Act ("the Act") and ordered the Employer to recognize and bargain with the Union. *See Newark Portfolio JV, LLC*, 359 NLRB No. 124 (2013). Thereafter, the Employer filed a petition for review in the United States Court of Appeals for the Third Circuit.

While the petition for review was pending, the Board, on June 27, 2014, set aside its May 31, 2013 decision in light of the decision of the United States Supreme Court in *NLRB v. Noel*

Canning, 134 S. Ct 2550 (2014). *See Newark Portfolio JV, LLC*, 2014 WL 2929765 (NLRB). After reconsidering the representation and unfair labor practice cases, the Board, on November 12, 2014, adopted and incorporated by reference its February 27, 2013 decision in the representation case and issued a certification of representative. *See Newark Portfolio JV, LLC*, 361 NLRB No. 98 (2014). In the refusal-to-bargain case, the Board issued a notice to show cause in order to determine if the Employer had recognized and bargained with the Union after its earlier bargaining order issued. *Id.* Ultimately, on June 5, 2015, the Board found again that the Employer unlawfully refused to recognize and bargain with the Petitioner, and again ordered the Employer to bargain with the Union. *See Newark Portfolio JV, LLC*, 362 NLRB No. 108 (2015). The Board sought enforcement of the Board order in the Third Circuit case.

The Third Circuit granted the Employer's petition for review and denied the Board's cross-application for enforcement. *See Newark Portfolio JV, LLC v. NLRB, supra*, 658 F. App'x at 654. The Court found that the Board's certification was not supported by substantial evidence on the record as a whole because the Board had disregarded reliable testimony that the Board Agent had designated a specific no-electioneering area. *Id.* at 653. This testimony was relevant to the "multifactor, totality-of-the-circumstances test" applied by the Court to assess electioneering conduct as stated by the Board in *Boston Insulated Wire*, 259 NLRB 1118, 1118-19 (1982). *See id.* at 652. One of the factors under *Boston Insulated Wire* is whether the electioneering at issue is conducted within a designated "no electioneering" area or contrary to the instructions of the Board Agent. The Court concluded that the Board Agent had prohibited electioneering in front of the building where the election was held, and that the Union had engaged in unlawful electioneering in front of the building. *Id.* at 653.

In light of its conclusion that the Board erred by not finding the Union's activities to be electioneering against the Board Agent's instructions, the Court did not rule on the second objection. *Id.* It did approve the Hearing Officer's use of the Board's analysis for measuring appeals to racial and religious prejudice articulated in *Sewell Manufacturing, Inc.*, 138 NLRB 66 (1962), which requires that race or ethnicity be a significant and sustained aspect of the campaign for the remark to be objectionable. *Id.* at 651. The Court reasoned that "because the Board did not consider the anti-Semitic remark . . . in the context of the Union's violation of the Agent's prohibition on electioneering," the Board did not determine "whether that remark could be found harmless under either *Boston Insulated Wire* or *Sewell*." *Id.* at 653. This position statement addresses that issue, and whether the election should be set aside.

3. ARGUMENT

a. There Was Insufficient Evidence To Conclude That a Single Alleged Anti-Semitic Remark Might Reasonably Have Affected the Election.

Sewell Manufacturing, Inc., above, holds that campaign propaganda calculated to inflame racial or ethnic prejudice, that deliberately seeks to overemphasize and exacerbate racial feeling or anti-ethnic feeling by irrelevant, inflammatory appeals is a basis for setting aside an election. However, as stated above, *Sewell* requires that race or ethnicity is a significant and sustained aspect of a campaign for the Board to find objectionable conduct. In *Sewell*, for four months, the employer distributed anti-African-American propaganda materials focused on the union's support for the civil rights movement, including a photo (mailed two weeks before the election) of a white union official dancing with an African-American woman, together with a story about "race mixing." *Sewell* at 66-68. Thus, *Sewell* itself involved a party's sustained course of conduct, deliberate and calculated in intensity, to appeal to racial prejudice. The Board in *Sewell*

distinguished such conduct from isolated, casual, prejudicial remarks. *Id.* at 69. The Board has adhered to this distinction. Compare *Coca-Cola Bottling Co. Consolidated*, 232 NLRB 717 (1977), in which the Board overruled an objection involving a supervisor's statements to a number of employees that a potential union steward did not like blacks, finding that such conduct did not rise to the level of a sustained appeal to racial prejudice of the type condemned in *Sewell*, with *YKK (U.S.A.) Inc.*, 269 NLRB 82 (1984), in which the Board sustained an objection based on a union's campaign involving, *inter alia*, racially inflammatory remarks made at two of its pre-election meetings, the union's dissemination of racially oriented and inflammatory remarks in several of its handbills, the wearing of shirts bearing racially oriented slogans by two employees who were also officials of the union, and racially oriented graffiti.

In its objections, the Employer alleged that a single anti-Semitic remark was made concerning its owners. One voter testified that while approaching the building inside of which the election was to be held, he heard an unidentified woman shout, "These Jews don't care about you, they only care about the money." Hearing Officer's Report ("HOR"), p. 15. There was no dispute that the Employer's owners are Jewish. *Id.* The voter did not testify whether the comment was made toward him although he was the only voter approaching the building at the time. *Id.* He turned to look at the woman and observed she was wearing an orange T-shirt. *Id.* Earlier in the morning, the voter had witnessed people wearing orange T-shirts with the Union's logo. HOR, p. 4. There was no other evidence that anyone else saw the woman, no evidence that the remark was overheard by anyone, and no evidence that the remark was disseminated to anyone.

The Board found, when considering the Employer's exceptions to the Hearing Officer's Report, that there was no evidence adduced "suggesting religious tensions existed in the

workplace or that the [Union] sought to engender conflict through a broader inflammatory campaign theme.” 2013 WL 754063 *2. Thus, there was no evidence that ethnicity was a significant and sustained aspect of the campaign. In contrast, the remark was limited and isolated and should not be held objectionable under *Sewell*. Moreover, the remark is not elevated to a significant and sustained aspect of the campaign because it was made in a no-electioneering zone. Even in a no-electioneering zone, the remark remains an isolated, prejudicial remark which the Board has distinguished from the sustained, inflammatory appeal that will set aside an election.

The remark was also insufficient to set aside the election under *Boston Insulated Wire*, *supra* in which the Board wrote:

The Board considers not only whether the conduct occurred within or near the polling place, but also the extent and nature of the alleged electioneering, and whether it is conducted by a party to the election or by employees. The Board has also relied on whether the electioneering is conducted within a designated “no electioneering” area or contrary to the instructions of the Board Agent.

The remark was not made within or near the polling place. The remark was made by an unidentified person on a public sidewalk outside of the building where voting was to occur, away from the interior room that served as the polling place. The remark was limited in extent. Only one voter heard the single remark and there is no evidence that he disseminated it. There was no evidence that the remark was made by a Union representative. These factors outweigh the fact that the remark was made in a no-electioneering area, as found by the Third Circuit. Thus, under *Sewell* or *Boston Insulated Wire*, the alleged remark was insufficient to set aside the election.

b. The Election Should Not Be Set Aside.

The record does not support the conclusion that the election should be set aside because of electioneering. Here again, the Board should apply *Boston Insulated Wire* to the facts. The electioneering was not proximate to the voting. The Region conducted the vote in the laundry room near the rear entrance of one of the Employer's buildings. HOR, p. 3. As the Board found, "the credited testimony indicates that the [Union's] representatives stood on the front steps leading to the building in which the polling site was located, as well as on the public sidewalk." 2013 WL 754063 *1. Concededly, they engaged in electioneering in a no-electioneering area as the Third Circuit found, but the "electioneering did not take place at or near the polling place," and "was not directed at employees who were waiting in line to vote." *Id.* Moreover, "[t]he conduct at issue occurred outside the building, away from the interior room that served as the polling place and from any voters who may have been in line to vote. *Id.* The Hearing Officer found that none of the electioneering could be heard inside the polling area. HOR, p. 14. Furthermore, "the Employer did not protest the [Union]'s conduct during the polling period, when the Board Agent might have addressed it." 2013 WL 754063 *1.

The Hearing Officer also found that the credited testimony did not establish that the Union by its agents, made any coercive statements when, as contended by the Employer, the Union's agents allegedly informed voters that they would have less protection without Union protection, or that the Employer could replace them. HOR, p. 14. The Hearing Officer relied on *Smith Co.*, 192 NLRB 1098, 1101 (1971), longstanding Board law that:

Employees are generally able to understand that a union cannot obtain benefits (or follow through on threats of loss of benefits) automatically by winning an election but must seek to achieve them through collective bargaining. Union promises are easily recognized by employees to be dependent on contingencies beyond the Union's control and do not carry

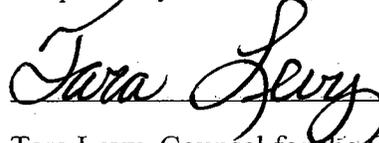
with them the same degree of finality as if uttered by an employer who has it within his power to implement promises or benefits.

Here, although the electioneering took place in a no-electioneering zone, the conduct did not occur within or near the polling place. While attributable to the Union, the electioneering was not coercive, and no party objected to it when it could be addressed by the Board Agent. On balance, the lack of proximity of the electioneering and its lack of coercive character predominates and requires the conclusion that the electioneering would not reasonably have had an impact on the employees' free choice. Accordingly, the electioneering was not objectionable conduct requiring a new election. *Boston Insulated Wire, supra.*

4. CONCLUSION

Based on the facts as found by the Hearing Officer and the Board, as described above, and their reasoning, taking into account the decision of the Third Circuit Court of Appeals, neither objection, viewed singly or together, supports a conclusion that the Union engaged in objectionable conduct. The election should not be set aside.

Respectfully submitted,



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AFFIDAVIT OF SERVICE OF: Position Statement on Remand of Region 22

I, the undersigned employee of the National Labor Relations Board, being duly sworn say, that on January 17, 2017, I served the above entitled document by electronic mail upon the following persons, addressed to them at the following addresses:

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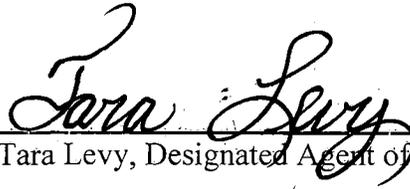
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January 17, 2017

A handwritten signature in cursive script that reads "Tara Levy". The signature is written in black ink and is positioned above a horizontal line.

Tara Levy, Designated Agent of the NLRB