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Jacmar Food Service Distribution *and* Food, Industrial & Beverage Warehouse, Drivers and Clerical Employees, Teamsters Local 630, International Brotherhood of Teamsters. Case 21–RC–175833

February 22, 2017

ORDER

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

The Employer's request for review of the Acting Regional Director's Report on Objections[1] and Certification of Representative is denied as it raises no substantial issues warranting review.[2]

Dated, Washington, D.C. February 22, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

ACTING CHAIRMAN MISCIMARRA, dissenting in part.

Contrary to my colleagues, I would grant the Employer's request for review with respect to the Acting Regional Director's decision to overrule, without a hearing, Objection 1, involving the solicitation of authorization cards, and Objection 4, which alleges Board agent misconduct during the conduct of the election. I want to emphasize that, at present, the Board cannot and should not assume that Employer Objections 1 and 4 have merit. However, unlike my colleagues, I believe the Employer's objections sufficiently raise factual issues warranting a hearing with respect to these matters.[1]

Objection 1 alleges misconduct in the solicitation of union authorization cards from two unit employees. In support of this objection, the Employer indicated that, prior to the filing of the petition on May 9, 2016, an employee-driver allegedly coerced a probationary employee-driver (Driver #1) into signing a union authorization card by threatening Driver #1's job. Specifically, the offending employee-driver reportedly stated that if Driver #1 did not sign the card, the employee-driver would

[1] We have treated the Acting Regional Director's "Report on Objections" as a Decision on Objections. See 79 Fed. Reg. 74412 fn. 464 (Dec. 15, 2014).

[2] We have no difficulty rejecting the contentions of the Employer and our dissenting colleague that the Acting Regional Director erred in overruling the Employer's objections without a hearing. An objecting party has the duty of furnishing evidence or description of evidence that, if credited at a hearing, would warrant setting aside the election. *Transcare New York, Inc.*, 355 NLRB 326, 326 (2010). The Employer's proffered evidence here does not meet that standard.

With respect to Objection 1, the Employer contends (1) that a probationary employee-driver would testify that he signed a union authorization card only because another employee-driver told him that if he did not sign, the employee-driver would tell his supervisor that he was not a good worker, so that he would not pass his probationary period; and (2) that another employee would testify to his belief that he signed an authorization card involuntarily, i.e., only to be part of the group of drivers. As to the alleged threat involving the probationary employee, the Employer has proffered no evidence whatsoever indicating that the employee who assertedly made the threat was an agent of the Union, or was in a position to carry out the alleged threat. In any case, as the Acting Regional Director correctly explained, the alleged threat is clearly distinguishable from the sort of pre-petition conduct involving the solicitation of authorization cards that the Board has found objectionable. (In adopting the Acting Regional Director's findings on this objection, we do not rely on his citation to *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1443 (2010), as the Board did not reach the administrative law judge's findings regarding the election objections. Id. at 1422.)

As to the second employee who claims he signed his card involuntarily "in order to be part of the group," there is absolutely no hint of objectionable conduct by the Union, and we reject our dissenting colleague's speculation that examining this employee's situation at a hearing would somehow shed light on the asserted threat against the first employee. Lastly, we note that neither the alleged threat to the probationary employee nor the alleged circumstances relating to the second employee would meet the test for objectionable third-party conduct under *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).

With respect to Objection 4, the Employer alleges various instances of misconduct by the Board agent conducting the election. As to this objection, our dissenting colleague argues that the Board should grant review (1) because the Acting Regional Director did not address the contention that the Board agent failed to use the voter list and determine how many employees were eligible to vote; (2) because a hearing is warranted to evaluate whether or how a single voter may have been given two ballots; and (3) because the Acting Regional Director did not adequately address the Employer's allegation that the Board agent showed favoritism toward "yes" votes by her tone of voice. We disagree. Assuming arguendo that the Board agent had spare ballots, that is customary Board practice in the conduct of elections, as extra ballots are necessary in the event that a voter spoils a ballot. See Case Handling Manual (CHM) Sec. 11322.3 Spoiled Ballots. Similarly, having the observers check off employee names as the employees vote is the accepted standard procedure for the conduct of Board elections. CHM Sec. 11322.1, Procedure at Checking Table. Further, with respect to a blank ballot that was allegedly discovered folded together with a marked ballot at the tally of ballots, the Board agent properly preserved the blank ballot; and, in any event, that employee's vote would not have affected the results of the election. Lastly, the Employer's contention that the Board agent "seemed" to favor "yes" votes when she explained how to vote does not demonstrate that the Board agent's instructions affected the integrity of the voting process.

[1] I agree that the Employer has not established grounds for review of the Acting Regional Director's decision to overrule Objections 2 and 3.

inform Driver #1's supervisor that Driver #1 was not a good worker, so that Driver #1 would not pass his probationary period and would be fired. As a result of this alleged threat, Driver #1 signed the authorization card. The Employer also indicates that another employee-driver (Driver #2) reportedly did not sign his authorization card voluntarily.

This allegedly objectionable conduct occurred before the Petitioner filed its representation petition and, as a general matter, the Board views "the date of filing of the petition . . . [as] the cutoff time in considering alleged objectionable conduct in contested cases." *The Ideal Electric and Manufacturing Co.*, 134 NLRB 1275, 1278 (1961). Yet, the Board has consistently recognized an exception to this rule for prepetition misconduct involving the solicitation of authorization cards. See *Gibson's Discount Center*, 214 NLRB 221, 221 (1974) (prepetition offer to waive union fees, condemned by the Supreme Court in *NLRB v. Savair Mfg.* Co., 414 U.S. 270 (1973), is "ground for setting aside an election"); *Lyon's Restaurants*, 234 NLRB 178, 179 (1978) (union's prepetition solicitation of authorization cards on the basis of a proscribed statement that the employees may well have believed the union could have carried out was objectionable) (citing cases); *Royal Packaging Corp.*, 284 NLRB 317, 317–318 (1984) (prepetition statement to an employee that, if she and her daughter signed authorization cards, her daughter would be recalled from a six-month layoff was objectionable). In both *Gibson's Discount Center* and *Lyon's Restaurants*, the Board "reasoned that the unlawful prepetition activity was instrumental in obtaining employees' signatures on authorization cards and that the existence of such signed cards might have created an impression of employee support that could have had an impact on the election." *Royal Packaging Corp.*, supra at 317.

Here, the alleged misconduct—an employee's threat to engineer a probationary employee's discharge through false reports to his supervisor—was serious on its face and well within the employee's ability to carry out. I disagree with any implication in the Acting Regional Director's decision that the alleged conduct was not objectionable simply because "the statements made to the employee-driver do not appear enough to sway the outcome of an election which was not close." It would, in my view, be inconsistent with the precedent cited above to dismiss this alleged conduct on that basis.

In addition, the failure to address certain critical factual matters surrounding this objection makes it impossible to evaluate the potential merits of the objection. For example, the Acting Regional Director stated that it *appeared* the employee who made the statement to Driver #1 was not a representative of either party, but he did not resolve this question. In my view, the Board must determine the agency status of the employee who allegedly made the threat. This determination, based on a record developed at a hearing, should take into account facts relating to apparent authority (or other types of authority), as well as the Employer's argument, to be tested on a factual record, that the Petitioner had no choice but to use employees to conduct organizational activities, such as obtaining authorization cards.

As noted above, the Employer also indicates, in support of Objection 1, that Driver #2 signed an authorization card but reportedly believes his signing of the card was not voluntary. Standing alone, a report from one employee-voter that he involuntarily signed an authorization card would not normally establish objectionable conduct (as is also alleged in the proffered evidence supporting Objection 1). However, given the potential seriousness of the alleged threat made to Driver #1, the circumstances relating to Driver #2 may reasonably shed light on the objection as it relates to Driver #1.[2] Accordingly, for this limited purpose, I believe the hearing should encompass additional evidence regarding Driver #2. In sum, I respectfully believe that the Acting Regional Director's decision left too many factual matters unresolved, and that the only way to resolve them—and to properly analyze the merits of the objection—is through a record developed at a hearing.

Objection 4 identifies several incidents of alleged Board agent misconduct.

- During the election, the Board agent allegedly did not use the voter list. Instead, the observers for the Employer and the Union reportedly checked names off the voter list when unit employees came to vote. Then, when the Board agent gave employees their ballot, she reportedly explained how to mark a "yes" vote or a "no" vote, and it is alleged that she used a more favorable tone referencing a "yes" vote.
- During the ballot count, the Board agent allegedly announced "yes" votes more enthusiastically than when she announced "no" votes, and at the conclusion of the count, the agent reportedly counted the "no" votes three times while initial-

[2] Insofar as the Employer seeks review of the Acting Regional Director's decision to overrule the portion of Objection 1 addressing Driver #2, I agree with the Acting Regional Director that the objection does not allege any specific *conduct* with respect to Driver #2. However, I would not rely on the Acting Regional Director's statement that, regardless of Driver #2's "fear," he later acted as an Employer observer.

ly only counting the "yes" votes twice, although the agent then proceeded to count the "yes" votes a third time. Just before preparing the tally of ballots form, the Board agent also allegedly said, "Now that we have the fun part over with. Well maybe not the fun part."

- During the ballot count, the Board agent allegedly showed the parties two ballots that were folded together with each other; it appears that the two ballots may have been given to a single employee-voter. During the ballot count, one of the ballots was blank, and the other ballot was marked "yes."

The principles relevant to a Board agent's conduct during an election are well established. To safeguard our election process and ensure the integrity of secret-ballot elections, we "must maintain and protect the integrity and neutrality of [our] procedures[,]" and a Board agent's conduct must not "tend[] to destroy confidence in the Board's election process, or . . . reasonably be interpreted as impairing the election standards [the Board] seek[s] to maintain . . . ." *Athbro Precision Engineering Corp*., 166 NLRB 966, 966 (1967). Indeed, "through its entire history," the Board "has gone to great lengths to establish and maintain the highest standards possible to avoid any taint of the balloting process[.]" *Austill Waxed Paper Co*., 169 NLRB 1109, 1109 (1968); see also *Polymers, Inc*., 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970).

One of the core obligations involved in ensuring the integrity of the election process is a Board agent's duty to safeguard and properly handle the election ballots. See, e.g., *Jakel, Inc*., 293 NLRB 615, 616 (1989); *Paprikas Fono*, 273 NLRB 1326 (1984). The ultimate question, where that duty allegedly has not been met, is whether there is a "reasonable doubt as to the fairness and validity of the election." *Polymers*, supra; *Rheem Mfg. Co.*, 309 NLRB 459, 460 (1992). Another core responsibility of Board agents is to "maintain strict neutrality in what they say while conducting Board elections" so as not to undermine "[c]onfidence in the Board's election process[.]" *Sonoma Health Care Center*, 342 NLRB 933, 933 (2004) (citing *Hudson Aviation Services*, 288 NLRB 870 (1988)).

Contrary to my colleagues, I believe that the Employer has raised substantial factual issues that, taken together, warrant granting review regarding this objection and remanding this case with instructions to the Region to hold a hearing. I am concerned that the Acting Regional Director failed to address the contention, based on proffered evidence, that the Board agent failed to use the voter list and determine how many employees were eligible to vote. The voter list is essential for keeping track of which employees have voted and ensuring the integrity of the voting process. Although our procedures allow observers to check off the names of voters (see Casehandling Manual 11322.1), the Employer's contention raises the question whether the Board agent in this case referred to the voter list or relied exclusively on the observers.

Most importantly, I believe that a hearing is warranted to evaluate whether or how a single voter may have been given two ballots. I do not prejudge whether this occurred, and if it did, I would normally assume it resulted from nothing more than an inadvertent error. Nonetheless, this type of irregularity, if it occurred, clearly raises a significant concern about the integrity of the election process. Our elections are determined by majority vote, and there should never be a situation where a single voter is given multiple ballots during the election. Therefore, I believe it is improper to overrule this allegation without conducting a hearing to determine, for example, (i) whether the agent gave each voter a blank ballot that was folded up (which may encourage the voter to re-fold his or her ballot after marking it, thereby helping to preserve confidentiality when the ballot is inserted into the ballot box), (ii) whether there is any other explanation why two ballots appeared to be folded together during the ballot count, and (iii) whether it is possible that other voters—if they received multiple ballots folded together—may have cast multiple votes.

Finally, I believe the Acting Regional Director did not adequately address the Employer's allegation that the Board agent showed favoritism toward "yes" votes beyond stating, as part of the Regional Director's overall analysis, that the manner in which the Board agent counted votes and announced them did not affect laboratory conditions or the integrity of the election process. In my view, these allegations are sufficiently serious to warrant having them addressed at a hearing.

Again, I emphasize that the information provided by the Employer at this stage involves nothing more than mere allegations. The Regional Director and the Board may ultimately conclude that the objections have no evidentiary support. However, the Board has a long history of conducting representation elections in a fair and even-handed manner. This track record instills confidence in the integrity of our elections. It warrants vigilance when, as in the instant case, certain aspects of the election are alleged not to have been conducted in a fair and regular manner.

Accordingly, I would find that the Employer has identified substantial issues regarding its Objections 1 and 4 that warrant review, and I would remand this case to the

Region for the purpose of conducting a hearing as described above.

Dated, Washington, D.C. February 22, 2017

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Philip A. Miscimarra, Acting Chairman

NATIONAL LABOR RELATIONS BOARD