

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

**MANORCARE OF ALLENTOWN PA, LLC
D/B/A MANORCARE HEALTH SERVICES –
ALLENTOWN,**

Case No. 06-RC-186558

Employer,

and

**RETAIL, WHOLESALE AND DEPARTMENT
STORE UNION, RWDSU, UNITED FOOD AND
COMMERCIAL WORKERS, AFL-CIO,**

Petitioner.

**PETITIONER'S BRIEF IN OPPOSITION TO
THE EMPLOYER'S REQUEST FOR REVIEW**

Pursuant to Section 102.67(e) of the Rules and Regulations of the National Labor Relations Board, Petitioner Retail, Wholesale, and Department Store Union, RWDSU, United Food and Commercial Workers, AFL-CIO ("Union" or "Petitioner") submits this brief in opposition to the Employer's request for review of the Regional Director's Second Supplemental Decision on Objections and Certification of Representative dated February 10, 2017. For the reasons expressed herein and for the reasons given by Regional Director Wilson in her Corrected Decision and Direction of Election dated November 16, 2016, Supplemental Decision on Objections dated December 14, 2016, and Second Supplemental Decision on Objections and Certification of Representative dated February 10, the Employer's objections in this case are without merit and the National Labor Relations Board should deny the Employer's request for review. The Employer's endless motions in this matter, including its request for review, are a frivolous attempt to delay bargaining with the Union and ignore the free choice of its employees. None of the grounds

enumerated in Section 102.71(a) of the Rules and Regulations are met in the Employer's request for review.

I. The General Counsel has the authority to transfer this case *sua sponte* to Region 6 *nunc pro tunc*

There was nothing improper by the General Counsel transferring this case to Region 6 *nunc pro tunc*. By transferring this case to Region 6, the General Counsel rightly avoided any appearance of bias or impropriety by keeping the petition in this case in Region 4.

The Employer complains in its brief that the General Counsel took this action *sua sponte*. There is no requirement under the rule, however, that the General Counsel can only order a transfer upon a motion made by a party. The General Counsel's order is basically a *nunc pro tunc* order and is consistent with his authority under Section 102.72 of the Rules and Regulations of the National Labor Relations Board and with precedent. *See Wheeling Steel Corporation*, 8 NLRB 102 (1938) (observing *nunc pro tunc* transfer by Board from Region 8 to Region 9), *see also Lyric Opera of Chicago*, 322 NLRB 865, 865 n.1 (1997) (noting that the General Counsel transferred representation proceedings from Region 13 to Region 19 for decision). Section 102.72 allows the General Counsel, "at any time after a petition has been filed with a Regional Director pursuant to Section 102.60, order that such petition and any proceeding that may have been instituted with respect thereto . . . be transferred to and continued in any other Region, for the purpose of investigation . . ." The General Counsel's order here was nothing more than an administrative action to quickly and efficiently process the petition to allow employees to vote on whether they desire Union rerepresentation but the Employer naturally sees it as part of the Board's vast conspiracy against it.

The Employer argues in its brief that the petition in this case should have been filed in Region 4. Brief, p. 14.¹ “Had the Petitioner filed it with Region 4”—the site with the alleged conflict of interest involving Regional Director Dennis Walsh—“in accordance with the Board’s regulations, the Board could then have considered transfer under its transfer procedures, but that did not happen.” *Id.* In other words, the Employer argues that the petition had to be filed in a Region that could not accept it. Under the Employer’s view, the petition should have been filed in Region 4, but then transferred, possibly to Region 6, which in turn should then transfer it again to someplace else. The Board is not required to engage in such a foolish errand.

The General Counsel ordered the transfer of 04-RC-159640, the former petition, to Region 4 “to effectuate the purposes of the National Labor Relations Act, and to avoid unnecessary costs and delay.” Order, dated, April 22, 2016. For the same reason, it was proper to file the withdrawal of the petition in 04-RC-159640 with Region 6, along with the petition in 06-RC-186558, namely, to avoid the very costs and delay that the Employer wants the Board and the parties to engage in. After the General Counsel transferred the case to Region 6, the case was properly with that Region and the Region processed it correctly.

II. *Lufkin* language was not warranted on the Notice of Election because it was a new election in a new case, not a re-run election in the old case (04-RC-159640)

The Employer states that the “taint of the objectionable conduct creating the appearance of impropriety and bias” by Regional Director Walsh “and its effect on the minds of prospective voters in this case . . . remained when the Petitioner filed the new petition in this case. Region 6 did nothing to cure this taint.” Brief, p. 20. How exactly Regional Director Walsh’s alleged bias could be magically transmuted “in[to] the minds of eligible voters” because of Regional Director

¹ Citations to “Brief” are to the Employer’s Request for Review dated March 6, 2017.

Wilson's processing of the petition in this case is impossible to explain, and indeed, the Employer doesn't even try. Instead, the Employer bombastically asserts that "prospective voters were left confused and with the taint of the appearance of impropriety and bias that the supplemental objections in Case No. 04-RC-159640 complained about", Brief, p.21, that the election notice required language in accordance with *Lufkin Rule Co.*, 147 NLRB 341 (1964).

On its face, the Employer's assertion is utterly ridiculous for the Employer is saying that no election can ever be conducted anywhere in the United States at any Region of the NLRB without first putting workers on notice of Regional Director Walsh's appearance of impropriety. And if so, what is the point of the Employer asking that Region 6 transfer the case to some other Region. It is apparent that the Employer is proceeding in bad faith.

In *Lufkin*, the Board included language in the notice of an election which merely explained that the election was being re-run because "certain conduct of [a party in the previous election] interfered with the employees' exercise of a free and reasoned choice." *Lufkin* has nothing to do with the instant matter because the old election is not being re-run. The old case is closed. The certification of the Union having won the election has been voided. The election in the old case is a nullity.

The Union elected to obtain a new showing of interest. It filed a new petition and a new election was held in this case, with the Union winning by a significant margin. Regional Director Walsh did not oversee the election in the instant case. Therefore there is no basis or any other objectionable conduct under *Lufkin* to include any language in the Notice of Election about what happened in the election in 04-RC-195460.

In point of fact, the Employer was completely uninterested in having language in a Notice of Election which accurately traced what actually happened to the previous petition. When the Union proposed a rerun of the election in 04-RC-195460, the Union was willing to stipulate to including language in the notice of the rerun which stated: “The election conducted on October 1, 2015 was set aside by mutual agreement of the parties after it was alleged that objectionable conduct interfered with the employees’ exercise of free and reasoned choice.” In his letter of September 26, 2016, Attorney Nelson, counsel for the Employer, rejected this proposal, contending that only if the Union stipulated to language saying it admitted to engaging in objectionable conduct would the Employer agree to a rerun. Unwilling to so stipulate, the Union chose to obtain a new showing of interest in support of a new petition.

Now the Employer is insisting on additional hearings and a finding that there was objectionable conduct committed by the Union and Regional Director Walsh, and further that Regional Director Walsh dismissed the Employer’s objections because he was biased in favor of the Union. (Of course, this presupposes that objectionable conduct was committed and that Regional Director Walsh’s dismissal was not due to the objections lacking any merit.) The Region must reject the Employer’s assertion that “Region 6 compounded and extended the alleged bias of Director Walsh from the first election into the second.” Brief, p. 21. Clearly, to argue that the instant petition is barred because a different case was not litigated to its conclusion as desired by the Employer, is nonsensical.

III. No disclaimer was needed on the leaflet issued by the Union in its organizing drive

The Employer’s objection of the Union’s dissemination of a leaflet with a sample election ballot is baseless. The Employer argues that under *Ryder Memorial Hospital*, 351 NLRB 214 (2007), those ballots were per se objectionable since they did not contain the NLRB’s disclaimer

language that is found on every election ballot and sample ballot *printed by the NLRB*. But the Union's leaflet here, unlike in *Ryder*, was not a reproduction of the NLRB's sample ballot but rather a document of its own creation. The leaflet clearly indicated that the author was the "RWDSU Organizing Committee" and there was no NLRB or governmental seals on the leaflet. *Ryder* is inapposite here—the Employer's offered facts do not raise the possibility of objectionable conduct. Accordingly, no disclaimer was required and this objection should be rejected.

IV. Employer's Objection No. 2 (Brief, p. 4)

Regarding the Employer's complaint about the withdrawal being approved while its objections were pending, it should be noted that the Case Handling Manual's statement at Section 11116.1 that "normally" a withdrawal is not processed under such circumstances clearly means that there are circumstances where a withdrawal should be processed while objections are pending. This point is reinforced by the language in the Case Handling Manual which stresses that a Regional Director is expected to follow the Manual's guidelines, but in the "exercise of professional judgment and discretion, there will be situations in which they will adapt these guidelines to circumstances." National Labor Relations Board Casehandling Manual, Part Two, Representation Proceedings, p. 1. Regional Director Wilson therefore had the discretion to allow the Union to withdraw the petition in the old case while objections were pending. For the sake of efficiency and economy, Regional Director Wilson rightly granted the request.

V. Employer's Objection No. 5 and Supplemental Objections (Brief, pp. 4-5)

Any appearance of impropriety or bias that the Employer complains of in Objection number 5 and supplemental objections was cured nearly a year ago when the General Counsel directed Region 6 to investigate the Employer's previous election objections and then when Region

6 was selected by the General Counsel to process the election petition in this case. The General Counsel rendered Employer's objection moot long ago.

It must be emphasized again that the Office of the Inspector General's report with respect to Regional Director Walsh, and the discipline of Regional Director Walsh, have zero bearing on this case and provide no basis for questioning Regional Director *Wilson's* decision-making in the matter. The Employer fails to point to any specific conduct, statements, or even alleged biases toward Petitioner or Petitioner's counsel or against Employer or Employer's counsel on the part of Regional Director Walsh or Regional Director Wilson. The Employer also fails to point to any facts or circumstances arising from this particular matter that call into question the determinations made by Regional Director Wilson in this case.

The smokescreen of Regional Director Walsh's alleged bias is not a proper element of this case. There is absolutely nothing to suggest that Regional Director Walsh's investigation of the Employer's objections in the previous case was tainted in any way. Region 6 processed this case instead of Region 4 precisely to avoid any appearance of bias or impropriety. Notwithstanding, the Employer objects to this action and nonetheless assumes that the alleged bias traveled westward from Philadelphia to Pittsburgh. By the Employer's absurd thinking, Regional Director Walsh's acts on behalf of the Peggy Browning Fund poisoned the neutrality of all Regions of the National Labor Relations Board. There is accordingly no remedy that would satisfy the Employer. The most it could have gotten in the previous case had the Union not withdrawn the petition was a new election. The Employer got that result in any event, although sooner than it would have liked, and the Union prevailed a second time.

VI. Employer's Objection No. 9 (Brief, p. 5)

The Union adopts the reasoning of Regional Director Wilson in her Second Supplemental Decision on Objections and Certification of Representative dated February 10, 2017 in overruling Employer's objection number 9. In addition, the Employer's allegations in Objection 9 are also unsupported by the evidence and, even if true, could not have affected the outcome of the election. Indeed, in the face of having no evidence in support of Objection 9, Employer counsel's petulance resulted in counsel telling the Hearing Officer that the proceeding was a "kangaroo court" (Tr. 13:14-16) and throwing his chair during the proceeding (Tr. 13:18-24).²

Even under less than ideal circumstances, an election result should be upheld. The NLRB's view on this is a practical one:

We seek to establish ideal conditions insofar as possible, but we appreciate the actual facts in light of realistic standards of human conduct. It follows that elections must be appraised realistically and practically, and should not be judged against theoretically ideal, but nevertheless artificial, standards. In this connection, we note that a realistic appraisal of the effect of antecedent conduct upon a Board election must, of course, be concerned with particular acts and their effect upon those of the voters who are directly involved; it must also be concerned, however, with the overall picture of how the totality of the conduct affects not only the voters directly involved, but any others who may or may not be indirectly affected because they are within the voting unit. In some cases, a nice balancing of these considerations may be required. *Basically, we feel that the results of a secret ballot, conducted under Government sponsorship and with all the safeguards which have been developed throughout the years, should not be lightly set aside.* Like any other contest in which the stakes are high, the losing party is likely to protest the result, but this Board cannot be influenced by any subjective considerations. Our job is to make reasonably certain that the election reflected the true sentiments of the voters. An evenhanded application of an objective test is the best protection against arbitrary administrative action

The Liberal Market, Inc., 108 NLRB 1481, 1482 (1954) (emphasis added). Thus, there is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect

² Citations to "Tr." are to the transcript of the hearing held on December 20, 2016 before Hearing Officer Dalia Belinkoff.

the true desires of the employees. Accordingly, the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. The objecting party must show that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the election. *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005) (internal quotations and citations omitted). The record is clear that the Employer in the instant matter cannot meet this heavy burden.

With respect to Objection 9, the Employer alleges that the Union, through its agents, “threatened eligible voters and made employees fearful of implicit retaliation by offering to turn over authorization cards” to the Employer if the Union lost the election. Brief, p. 5. In support of the allegation, the Employer said it would offer that witnesses will testify that (1) agents of the Union made statements (2) to eligible voters that the Union had a certain number of authorization cards, and (3) expected that number of votes for the Union.

The Employer failed to adduce any evidence consistent with its offer of proof. First, the Employer improperly called a Union organizer (an employee of the Union) as its witness in its case-in-chief, Luis Lopez. The Petitioner renews objection in this regard. Tr. 26:2-17. Notwithstanding, the testimony elicited by the Employer only established that Mr. Lopez brought signed union authorization cards with him to a hearing and gave them to Union counsel Larry Cary on October 28, 2016. Tr. 43:7-45:22. Why it would be fatal to an upcoming election for a union agent to present authorization cards to the Union's legal counsel at a hearing makes no sense. In any event, Mr. Lopez denied ever offering the cards to Attorney Nelson at the hearing. Tr. 40:14-23.

The Employer further adduced no evidence that Mr. Lopez or any other agent of the Union made statements *directly to* eligible voters. If anything, Mr. Lopez denied showing the

authorization cards to Mr. Nelson who is legal counsel to the employer, certainly not an employee of the Employer and an eligible voter. Tr. 40:1-23. Even if one concludes that Mr. Lopez did speak with Mr. Nelson, no other evidence adduced at the hearing establishes that he (1) told Mr. Nelson the number of cards he had and (2) had any expectation whatsoever that an equal number of people would vote “yes” for the Union. Clearly, this allegation is unsupported by the evidence.

The Employer also alleges that the Union offered to show copies of Union authorization cards to the Employer. Brief, p. 26. The evidence on this point reflects a run-of-the-mill communication between counsel for both the Union and Employer—Mr. Cary offered to show authorization cards to Employer counsel Mr. Nelson. Mr. Nelson declined. Tr. 53:14-20. Further, the transcript of the hearing held on October 28, 2016 in this matter before Hearing Officer Smith shows that Mr. Cary offered to put the authorization cards into evidence so the Employer could inspect them, but the Hearing Officer declined. Transcript of Hearing 70:22-71:4.

Routine communications between counsel cannot be allowed to be twisted into objectionable behavior with no other corroborating evidence of wrongdoing. The Employer's witness, Mona Padilla, testified that employees in the gallery overheard discussion of the cards, but what difference does it make? This isolated conversation without any additional context, which none was provided in the Employer's case, amounts to nothing. No evidence showed that these employees, who were not identified, were coerced in any way, shape, or form. Discussing authorization cards, or having them in one's line of sight, is not per se objectionable, as Employer would have the Board believe.

Even if the four employees saw the authorization cards, or knew what they were, and this somehow affected their vote, it is insufficient to overturn the results of the election. It is well-settled that the NLRB will set aside an election when the objectionable conduct so interfered with

the necessary “laboratory conditions” as to prevent the employees’ expression of a free choice in the election. The Board overturns election results if the objectionable conduct, taken as a whole, had the tendency to interfere with the employees’ freedom of choice and could well have affected the outcome of the election. *Sanitation Salvage Corp.*, 359 NLRB No. 130 (2013) (internal quotation and citations omitted). In an analogous case to this, where five employees were possibly affected by objectionable conduct by the employer, the NLRB refused to set aside the election because it would not have affected the outcome of the election given the margin of loss. *See Werthan Packaging*, 345 NLRB 343 (2005), *Sanitation Salvage Corp.*, 359 NLRB No. 130 (refusing to overturn election where objectionable misconduct affected two employees, and union lost by 21 votes).

Here, out of 64 eligible votes, the Union prevailed: 39 votes were cast for the Union and 16 votes were cast against. Accordingly, the objectionable conduct asserted by the Employer in Objection 9, even if true, could not have possibly affected the outcome since the Union won by 23 votes, far more than the four employees who allegedly witnessed nefarious activity on November 29.

VI. The Board’s election regulations comply with the National Labor Relations Act, Administrative Procedures Act, and U.S. Constitution.

The United States Court of Appeals for the Fifth Circuit has already ruled, on June 15, 2016, that the Board’s expedited rules are lawful. *Associated Builders and Contractors of Texas, et al., v. NLRB*, 826 F.3d 215 (5th Cir. 2016); *see also Chamber of Commerce of the United States v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015); *Cablevision Sys. Corp.*, 2016 NLRB LEXIS 481 (N.L.R.B. June 30, 2016). But equally important, this Employer, who was represented by the same counsel as it was in 04-RC-159640, which involved the same petitioner and the identical bargaining unit, failed to raise this issue in that case when it stipulated to an election which was

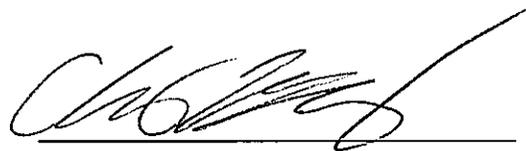
approved on September 11, 2015. Notably, the petition in 04-RC-159640's election was filed after the expedited rules had gone into effect, September 2, 2015. In any event, as noted by Regional Director Wilson in her Corrected Decision and Direction of Election dated November 16, 2016, the Employer did not raise this issue at the pre-election hearing and, therefore, this objection is waived.

VII. Conclusion

In conclusion, for the foregoing reasons, the Employer has not provided any grounds under Section 102.71(a) that warrant review of the Regional Director's Second Supplemental Decision on Objections and Certification of Representative. The results of the election should be certified immediately. Boiled down to its essence, the Employer's request for review is premised on a grand conspiracy and cover-up by the Board against it. The Board processed this case according to its own rules and regulations and it was proper for Region 6 to process this case in order to rid the petition of any appearance of bias by Region 4 (which of course there was none to begin with). Stunned by the Union's two decisive victories, the Employer is clinging to alternative paranoid explanations for its losses instead of the simple truth that its employees want to be represented by the Union for collective bargaining.

With respect to Employer's Objection 9, Regional Director Wilson correctly ruled that there was no credible evidence presented that the Union threatened eligible voters by turning over authorization cards to the Employer if it lost the election. In addition, routine communication about authorization cards is not wrongful and, even if it occurred in front of eligible voters and affected their vote—which is totally speculative—it could not have affected the outcome given the Union's large margin of victory in the election. The NLRB cautions that election results should not be overturned, and there is no reason to do so in this instance.

Dated: New York, New York
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