

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner/Cross-Respondent, Case No. 17-1098; 17-1159

v.

SPECTRUM JUVENILE JUSTICE SERVICES,

Respondent/Cross-Petitioner.

REPLY BRIEF OF SPECTRUM JUVENILE JUSTICE SERVICES

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ARGUMENT IN REPLY

The National Labor Relations Board (“the Board”) expects this Court to simply rubber-stamp its decision to issue a bargaining order rather than hold a new election regarding its egregious negligence in mutating the otherwise proper Voter List prepared by Spectrum Juvenile Justice System (“SJJS”) by leaving the names of 35 eligible voters off the List (22% of the 155 employees eligible to vote).

Due *solely* to the negligence of the Board agents conducting the election, 35 employees were required to vote under a challenged ballot. Many others witnessed the havoc caused by the Board and may have changed their intended votes from “no” to “yes” due to what appeared to be employer-sponsored disenfranchisement of co-workers and their right to vote. It was the Board’s opinion that its conduct did not impact on any employee’s vote and did not affect the outcome of the election. The Board’s decision rests on pure speculation and flies in the face of common sense. Interestingly, the Board also asserts that this Court cannot accept SJJS’s position that a new election is mandated in this factual situation because SJJS’s position is based on speculation. However, what the Board purposefully fails to disclose is that the Board’s Decisions and Regulations provide SJJS no practical way to ascertain the affect of the Board’s negligence and the confusion and mistrust it caused. Any attempt by the employer to ask its employees about

their vote and the reason for their vote would have resulted in the Board prosecuting SJJS with allegations of unfair labor practices.

The Board has held, “[A]ny attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his [National Labor Relations Act] rights.” *See, Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1359 (D.C. Cir. 1997) (quoting *Struksnes Const. Co.*, 165 NLRB 1062 (1967)). Further, the Board continues to hold, that employers who interrogate individual employees in preparation for Board proceedings must “among other safeguards”,¹ give the employee explicit assurance against reprisal for refusing to answer and for the substance of any answer given. *See, Caravan Knight Facilities Mgmt, Inc.*, 362 NLRB No. 196; slip op. at 8, 204 LRRM 1706 (2015).

Moreover, the Board has recognized that “the secrecy of balloting ... is a hallmark of our election procedures.” *See Fessler & Bowman, Inc.*, 341 NLRB 932, 934 (2004). The Board has also consistently recognized that an employer’s interrogation of an employee concerning how that employee intends to vote, or

¹ The Board generally examines the surrounding circumstance, including the time, place and personnel involved, and the known position of the employer (i.e. the employer’s reason for the interrogation). *See, Blue Flash Express*, 109 NLRB 591 (1954).

has voted, in a secret ballot election violates the Act, notwithstanding the employee's open advocacy for the Union. *See, e.g. Gladioux Food Services*, 252 NLRB 744, 746 (1980) ("Employer questions and statements relating directly to an employee's vote in a Board election . . . violate Section 8(a)(1) in that such interrogation tends to undermine the principle of the secret ballot."). Further, an employee's interest in maintaining the confidentiality of his or her vote in a union election continues to outweigh other interests. *See, Chinese Daily News*, 353 NLRB 66 (2008).

Given the long-standing restrictions the Board has placed on employer interrogation of employees as to how they voted or intend to vote, in order for SJJS to avoid (if possible) committing unfair labor practices, SJJS would have to interview each of the 155 employees who were eligible to vote. After giving each of those employees the explicit assurance against reprisal for refusing to answer or for the substance of any answer given (in addition to the other required admonitions), SJJS would then have to inquire as to which of those employees voted and eliminate non-voters from further interrogation. Of course, the accuracy of that information depends on whether the employee responds to the inquiry in a truthful manner, if at all. Then, assuming that all the employees truthfully responded that they had voted, SJJS would have to inquire whether or not they had to vote by challenged ballot or saw the confusion caused by the bad

lists generated by the Board agents. Again, assuming that all employees truthfully responded that they either voted by challenged ballot or saw the chaos, SJJS would be forced to interrogate those employees to determine both how they voted and whether their vote may have been affected by mayhem or mistrust caused by the Board's negligence.

All this employee interrogation would have had to have been done within 7 days after the election when SJJS was required to file objections to the election, and the accuracy of the results of the interrogations would be totally dependent on whether each of the interrogated employees agreed to voluntarily participate and thereafter provided truthful information. Further, there can be no doubt that if SJJS endeavored to provide evidence which met the Board's requirement that such evidence be "non-speculative," the union, if not the Board itself, would have filed a myriad of unfair labor practice charges against SJJS for improperly interrogating employees in a manner interfering with their statutory rights under the NLRA.

The Board assertion that SJJS's objection that the negligence of the Board agents compromised the integrity of the election process is simply based on a "string of unfounded assumptions." Clearly, the Board's own unfounded assumptions that an employee forced to vote a challenge ballot or who witnesses what *appeared* to be employer-sponsored disenfranchisement of co-workers by

leaving them off the Voter List would not interfere in the least with the manner in which any employee voted is beyond common sense.

Any employee who had been employed by SJJS for one or many years, may naturally speculate (just prior to voting) as to why SJJS left him/her off the Voter List, to wit: Was the employer seeking to take away his/her right to vote? What was the employer's motive for leaving his/her name off the Voter List? Such thoughts just prior to voting may easily sway the employee to vote for unionization when previously he/she intended to vote "no" to unionization. Furthermore, employees who witnessed the fact that co-workers were not on the list would have similar questions about why the *employer* left them off the list.

Not surprisingly, the Board asserts that the integrity of this election was not compromised by the Board agents' removing the names of 35 eligible voters from the Voter List. The Board attempts to persuade this Court that the election had integrity by describing and/or characterizing the Board agents egregious negligence as a "minor irregularity." Further, the Board attempts to compare the facts in its decision in *Sweetener Supply Company*, 349 NLRB 1122 n. 3, 1124-25 (2007) as the equivalent to the facts presented here. As explained in its Principal Brief at pp. 2-3, SJJS set forth significant factual differences between these cases. Whether it is willing to acknowledge it or not, the Board has never had case where the Board agents engaged in such egregious negligence as occurred in this matter.

It is for this Court to acknowledge that the Board agents' conduct *may have* upset the "laboratory conditions" and affected the outcome of the election.

CONCLUSION IN REPLY

The choice of whether to unionize or not belongs solely to those employees of SJJS who were eligible to vote – not the employer, the union or the Board. That is the purpose of conducting the election "under laboratory conditions". Certainly, the conduct of the election is not required to be perfect. When there are minor imperfections, the Board is at liberty to make a determination as to the validity of the election unless the party objecting to the conduct of the election produces some evidence that something occurred which deprived the employee(s) of their fullest possible freedom of choice. SJJS contends that the Board's egregious negligence in removing the names of 35 eligible voters is simply not a minor imperfection in the voting procedure, and common sense alone is sufficient to find that the integrity of the election had been compromised.

SJJS asks that this Court reject the Board's request to enforce its bargaining order, and if the Board wishes to conduct a new election, it must inform the affected employees that the first election was set aside due to an error of the Board.

Dated: June 30, 2017

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

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