

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.

PETITION FOR PANEL REVIEW

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PETITION FOR PANEL REVIEW

Pursuant to 6 Cir. Rule 40, SPECTRUM JUVENILE JUSTICE SERVICES (“SJJS”), Petitioner herein, requests this Panel to review its Order in SJJS’s Cross-Petition against the NATIONAL LABOR RELATIONS BOARD (“NLRB”), Case Nos. 17-1098/1159, in light of the following facts and law which SJJS believes the Panel either overlooked or misapprehended (a copy of SJJS’s Cross-Petition and the Panel’s Order are attached hereto):

ARGUMENT

In Its Order, the Panel Asserted SJJS’s Decision Not to Pursue Interviews with Employees as to Their Vote Does Not Excuse Its Failure to Support Its Claim with Evidence.

Under the NLRB rules and regulations, a party has but seven days in which to object to election results. In this situation, to garner evidence that the Board’s own conduct tainted the election would have required SJJS to interview all 155 eligible voters, all of whom were guards, within that seven day time frame. Perhaps not an impossible task in a factory situation, but exceedingly more difficult, if not impossible, in a juvenile detention facility, which the law requires constant around-the-clock supervision of the detainees. Further, under the Board rules concerning such interviews, the subject employees are not required to tell the truth or even consent to the interview. If SJJS knew which thirty five employees

voted under a challenged ballot or other voters who were affected by the challenged ballot situation, it would have made such interviews possible within the seven day time frame.

Unlike almost all challenged elections situations, it was the NLRB's own egregious conduct which created a serious breach in the "laboratory conditions", and NLRB's own rules and regulations which impeded and/or prevented SJJS from gathering the necessary evidence to support its claim that the election was tainted by the NLRB's conduct. This created a "Catch 22" situation which SJJS had no chance on prevailing. Simply put, SJJS was left arguing that its speculation that the NLRB's egregious conduct caused the election outcome to be tainted is much more credible than the NLRB's speculation that its conduct did not taint the election results. Common sense would dictate that is so.

Under the NLRB's Long-Standing Precedents, Where the NLRB Agent's Conduct Affected the Votes of Employees Determining an Election, the Intent of the Voter Is Not the Only Test to Apply, and the NLRB Would Reject Post Election Statements the Intent of the Voters and/or Potential Voters as a Basis for Setting Aside an Election.

By its own precedent, the NLRB applied the wrong standard in denying SJJS' objections to the election when the conduct being complained of was the NLRB agent's conduct.

The NLRB holds its agents to high standards of accuracy and neutrality in the conduct of elections and sets aside elections in which its agents do not meet those high standards. In *Athbro Precision Eng'g Corp.*, 166 NLRB No. 166-167, 65 LRRM 1699 (1967), the NLRB's interest in protecting the integrity of the election process caused it to set aside an election where the ballot box was left unsealed and unattended for only two to five minutes. The NLRB found, even in the absence of testimony from employees that they had changed their vote based on the Board Agent's conduct, setting aside the election was proper because "the behavior of the Board Agent gave an appearance of irregularity to the conduct of the election, thus departing from the standards of integrity with the Board seeks to maintain." The Board rejected the Regional Director's conclusion that whether the Board Agent's conduct was shown to have affected the votes of employee was the test to apply. Rather, the Board instructs, that where the conduct of the Board Agents themselves destroy confidence in the Board's election process, it is appropriate to set aside the election:

The Employer does not claim any violation of the integrity of the ballot box, nor does it claim that the conduct of the Board Agent had any effect upon the four employees who later voted. Rather, it objects that the behavior of the Board Agent gave an appearance of irregularity to the conduct of the election, thus departing from the standards of integrity which the Board seeks to maintain.

The Regional Director, while observing that a Board Agent in charge of an election should not fraternize with a

representative of one of the parties in the interim between two balloting periods, nevertheless did not recommend setting aside the election. **Although the Board Agent's conduct did not affect the votes of employees, we do not agree that this is the only test to apply.**

The Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures. The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election. *Athbro Precision*, supra. (Emphasis added).

Likewise, in *Garda World Security Corp, dba Garda CL Atl., Inc.*, 356 NLRB No. 91, LRRM 1055 (2011), the NLRB sustained the employer's objections, set aside the election, and directed that a new election be held, where the NLRB agent had closed the polls a few minutes early during the morning session due to the fact that there was a possibility a determinative number of voters were disenfranchised. In *Kerona Plastics Extrusion Co.*, 196 NLRB No. 179, 180 (1972), where an NLRB agent inadvertently closed the morning voting session early, the NLRB found:

The employer contends, *inter alia*, that this mistake, made in the presence of employees waiting to vote, gave rise to rumors that the Board agent favored the Employer and that said rumors created an atmosphere of confusion, bias, and prejudice against the Employer, which affected the votes cast in the afternoon session.

It has long been established that “[t]he Board is responsible for assuring properly conducted elections and its role in the conduct of elections must not be in question.” *New York Telephone Co.*, 109 NLRB 788, 790. It is impossible here to determine whether the aforementioned irregularity affected the outcome of the election. However, we find that the laboratory conditions have been disturbed to such a serious extent that in the interest of maintaining our standards there appears to be no alternative but to set this election aside and to direct a new election. *New York Telephone Co., supra*, at 790-791.

Based on NLRB precedent, evidence that employees actually changed their votes based on the conduct of the election is not the appropriate test to apply. Rather, where Board Agent conduct in conducting an election tends to “destroy confidence in the Board’s election process, or which could be reasonably interpreted as impugning the election standards [laboratory conditions] we seek to maintain, is a sufficient basis for setting aside that election.” *The Dayton Malleable Iron Co.*, 123 NLRB No. 203 (1959).

In *Dayton Malleable* , the Board explained that it is the Regional Director’s obligation to investigate objections to the conduct of elections where Board Agent conduct is argued to have possibly affected the outcome of the election. Further, in that analysis, the Regional Director may not rely on post-election statements of employees regarding whether they voted, how they voted, and/or whether they were affected by Board Agent’s conduct the proper method of determining voting intentions:

We are not persuaded from the Regional Director's investigation and the analysis of the results of his investigation that only three employees were prevented from voting because of the late starting. We note, for example, that in addition to the three employees in question, four other employees were not available for interviewing and an additional four employees claimed that they had actually voted. Among the reasons given by an undisclosed number of a group of 68 employees who did not vote were such subjective statements as "personal reasons" and "just not interested enough to vote." Moreover, in our opinion, the investigation by the Regional Director and his reliance upon the impressions of employees in question obtained at various times and under varying circumstances after the instant election is not a proper method of determining voting intentions. **Indeed, we have consistently refused to accept postelection statements regarding the intent of voters as a basis for setting aside elections or changing the results of secret ballots, and parity of reasoning precludes us from accepting from eligible voters subjective reasons as to why they did not vote.** Under all the circumstances, and particularly since the large number of nonvoters could have affected the results of the election, we find that the deviation from our normal election procedures created doubt and uncertainty as to the results of the instant election which warrant setting aside the election and holding a new one. *The Dayton Malleable Iron Company*, supra (footnotes omitted; emphasis added).

The facts of this case establish that Board Agent errors resulted in 35 employees being left off the voter eligibility lists. Those errors certainly disrupted the Board's long-standing requirement of laboratory conditions. The mistakes were exposed in the presence of employees waiting to vote and created an atmosphere of confusion, and may have biased employees against and prejudiced the Employer. In such circumstances it is incumbent on the Board to order a new election.

Yet here, the NLRB decided its own disenfranchisement of almost 27% of those employees who voted, no matter that it was temporary in nature, had no effect on the outcome of the election – let alone the effect it may have had on a myriad of other voters who witnessed the confusion and consternation caused by the NLRB’s gross negligence. The NLRB simply refused to face up to its own mistakes which would have been determinative as to the outcome, and decided that the 56 employees who voted against unionization were of no consequence.

Respectfully submitted,

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Dated: January 11, 2018

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.

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2018, 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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APPENDIX

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UNITED STATES COURT OF APPEALS
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Case No. 17-1098

v.

SPECTRUM JUVENILE JUSTICE SERVICES

Respondent /Cross-Petitioner.

**PETITION FOR ENFORCEMENT FROM THE NATIONAL LABOR
RELATIONS BOARD AND CROSS-PETITION FOR REVIEW FROM
SPECTRUM JUVENILE JUSTICE SERVICES**

**BRIEF OF SPECTRUM JUVENILE JUSTICE SERVICES'
CROSS-PETITION FOR REVIEW**

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 17-1098

Case Name: NLRB v Spectrum Juvenile Justice Svcs

Name of counsel: Sheryl A. Laughren

Pursuant to 6th Cir. R. 26.1, Spectrum Juvenile Justice Services

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

N/A

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

N/A

CERTIFICATE OF SERVICE

I certify that on January 30, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Sheryl A. Laughren

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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29 U.S.C. §160 iv

JURISDICTIONAL STATEMENT

United States Courts of Appeal cannot directly review representation issues such as those underlying this matter. See, *AFL v. NLRB*, 308 U.S. (1940). An employer seeking a judicial review of election issues must refuse to bargain with the union. The validity of the election can then be challenged in the ensuing unfair labor practice proceeding. *Id.*; see also *Twin City Hosp. Corp. v. NLRB*, 889 F2d 1559 (6th Cir. 1989).

Having refused to bargain with the victorious union pursuant to the Board's Bargaining Order, the Board charged Spectrum Juvenile Justice Services ("Spectrum") with an unfair labor practice pursuant to Subsection 8(a)(5) of 29 U.S.C. §158. Agency Record ("AR"), Case 17-1098, Doc. 17, NLRB Decision and Order p. 82. The Board then sought to enforce its final decision and Order in this Court pursuant to Subsection 10 (a) and (e) of 29 U.S.C. §160.

This Court has jurisdiction of the Board's Petition for Enforcement pursuant to Subsection 10(e) of 29 U.S.C. §160.

The Board petitioned this Court for enforcement of its Order granting Summary Judgment on January 30, 2017, and Spectrum filed a Cross-Petition for Review on February 10, 2017.

STANDARD OF REVIEW

The Sixth Circuit Court of Appeals reviews the National Labor Relations Board decision to issue a Bargaining Order rather than order a new election for abuse of discretion. *NLRB v. General Fabrications Corp.*, 222 F2d 218, 232 (6th Cir. 2000).

Since there are no factual issues in dispute in this matter, this Court need not give deference to the Board concerning its finding of fact. However, this Court must decide whether the Board abused its discretion in issuing a Bargaining Order, instead of holding a new election, in that the Board had no reasonable basis in law -- “either because the proper legal standard was not applied or because the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning.” *NLRB v. Schuler Engineering, Inc.*, 309 F3d 362, 367 (6th Cir. 2002; *Van Dorn Plastic Mach. Co., v. NLRB*, 736 F3d 343, 347(6th Cir. 1984) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

Finally, this Court must review the Board’s application of the law to the particular facts under the substantial evidence standard, although this Court reviews the Board’s conclusions of law de novo. *NLRB v. ProMedica Health Sys.*, 206 Fed Appx. 405 (6th Cir. 2006), cert denied, *ProMedica Heath Sys. v. NLRB*, 127 S. Ct. 2033 (2007).

STATEMENT OF ISSUES PRESENTED

Did the Board abuse its discretion by issuing a Bargaining Order, rather than holding a new election, when the Board Agents conducting the election caused the names of 35 eligible voters (22% of the 158 eligible voters) to be deleted from Spectrum's Voter List (which had been properly and accurately supplied by Spectrum) causing those 35 voters to "vote under challenge", thereby destroying the "laboratory conditions" required by the Board for conducting elections. AR, Case 17-1098, Doc. 17, Regional Director's Decision and Certification of Representative pp.70-71.

Respondent/Cross-Petitioner answers "Yes".

Petitioner/Cross-Respondent answers "No".

CONCISE STATEMENT OF THE ISSUES PRESENTED

The Board's Regional Director admitted to the conduct at issue concerning the election. Clearly, since the Regional Director's own agents conducted the election, she knows to a certainty that the facts set forth in Employer's Objection were true and accurate. AR, Case 17-1098, Doc. 17, Regional Director's Decision and Certification of Representative pp.70-71.

In her Decision, the Regional Director admits that the Employer's Voter List fully comported with the requirements set forth in §102.62(d) of the Board's Rules and Regulations, Series 8, as amended. *Id.* Further, it cannot be denied that the Regional Director's own agents, who conducted the election, took it upon themselves to divide the Voter List into two parts, one listing the eligible voters who worked at Spectrum's Calumet facility and the other listing the eligible voters who worked at Spectrum's Lincoln Center facility. In so doing, those agents carelessly omitted a total of 35 eligible employees from Spectrum's Voter List of 158 eligible employees. All 35 employees were permitted to vote under a challenged ballot. *Id.* When the omission errors in the lists were discovered after the vote, all the challenges were dismissed prior to the vote count. Finally, as to the vote count, 74 voted in favor of the union and 56 voted against the union. *Id.* at p. 70.

The Regional Director correctly acknowledges the basis for Spectrum's Objection to the Conduct of the Election, to wit: Due to the Board Agents' omission of the names of 35 eligible voters, those voters were forced to vote under challenge, and some, or many, of those 35 employees believe, or may have believed, that Spectrum purposely and intentionally left them off the Voter List to try to deprive them of their right to vote. As a result of which, those voters may have decided to vote for the union instead of against the union. *Id.* at p, 71. Finally, it cannot be denied that it would have taken only 9 out of the 35 such voters to cause a defeat of the union's attempt to organize Spectrum's employees.

In reaching her decision, the Regional Director concluded that the Board Agents' omission of the names of 35 eligible voters, which caused their votes to be contested in a close election, did not destroy the required "laboratory conditions," did not interfere with the conduct of the election and did not constitute Board Agent misconduct. *Id.* at p. 71.

As to the procedural aspects of this matter, the NLRB held a unionization election on March 3, 2016. *Id.* at p. 69. On March 10, 2016, Spectrum filed an Objection to Election. AR, Case 17-1098, Doc. 17, Spectrum's Objection to Election pp. 4-5. On March 24, 2016, the Board's Regional Director overruled Spectrum's Objection to Election and issued an Order to bargain in her Decision and Certification. AR, Case 17-1098, Doc. 17, Regional Director's Decision and

Certification of Representative pp. 69-72. On April 5, 2016, Spectrum filed a Request for Board Review of the Regional Director's Post-Election Decision. AR, Case 17-1098, Doc. 17, Spectrum's Request for Board Review pp. 7-9. On June 1, 2016, the Board issued its Order denying Spectrum's Request for Review. AR, Case 17-1098, Doc. 17, NLRB Order p. 20. When Spectrum failed to bargain with the union, the Union filed an unfair labor practice charge against Spectrum with the Board on July 19, 2016. The Board's General Counsel moved for a Summary Judgment on the pleadings on October 4, 2016. AR, Case 17-1098, Doc. 17, Motion for Summary Judgment on the Pleadings pp.31-39. The Board granted the Summary Judgment on November 22, 2016. AR, Case 17-1098, Doc. 17, Board's Decision and Order pp. 82-84.

SUMMARY OF THE ARGUMENT

In reaching her Decision and Certification of Representative, the Regional Director concluded that the Board Agents' removal of the names of 35 eligible voters, which caused their votes to be contested in a close election, did not destroy the required "laboratory conditions," did not interfere with the conduct of the election, and did not constitute Board Agent misconduct. AR, Case 17-1098, Doc. 17, Regional Director's Decision and Certification of Representative p.71.

Since the Board's 1948 decision in *General Shoe Corp.*, 77 NLRB 124, 127 (1948), it has continuously maintained that it is the Board's function to provide "laboratory conditions" in an election vote to determine "the uninhibited desires" of the eligible employees. It is Spectrum's contention that such laboratory conditions were not present during the vote by Spectrum's employees -- either because the Board did not apply the proper legal standard or because the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning.

ARGUMENT

Over the years, the Board has often spoken to the procedural standards and conditions under which union elections are to be conducted, to wit:

General Shoe Corp., 77 NLRB 124, 127 (1948)

In election proceedings, it is *the Board's function to provide a laboratory in which an experiment* may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

New York Telegraph Co., 109 NLRB 788, 790-791 (1954)

The Board is responsible for assuring properly conducted elections and its role in the conduct of elections must not be open to question. Where ... the irregularity concerns an essential condition of an election, and such irregularity exposes to question a sufficient number of ballots to affect the outcome of the election, in the interest of maintaining our standards there appears no alternative but to set this election aside and direct a new election.

Polymers Inc., 174 NLRB 282 (1968), enfd 414F.2d 999 (2nd Cir. 1969), cert. denied 396 U.S. 1010 (1970).

Election procedures prescribed by the General Counsel or a Regional Director are obviously intended to indicate to field personnel those safeguards of accuracy and security thought to be optimal in typical election situations. These desired practices may not always be met to the letter, sometimes through neglect, sometimes because of exigencies of circumstance. The question which the Board must decide in each case in which a challenge to conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election.

While objections to elections rarely arise from the Board's conduct of an election, it does occasionally occur. However, a Board conduct case has never arisen under the uncontested facts present in this matter.

Nonetheless, the Regional Director relied exclusively on the Board's decision in *Sweetener Supply Corporation*, 349 NLRB 453 (2007). AR, Case 17-1098, Doc. 17, Regional Director's Decision and Certification of Representative p. 71. In that decision, the Board adopted the hearing officer's findings that using an incorrect list of eligible voters in a rerun election, i.e. the original list used in the prior election instead of Employer's updated list, did not destroy the "laboratory conditions," interfere with the conduct of the election, and did not constitute Board Agent misconduct. What the Regional Director failed to mention, much less explain, is why the Board's decision in *Sweetener* should be applied in such a factually disparate case as this.

In *Sweetener*, 16 employees voted, and of those 16, there were sufficient challenged ballots to be determinative as to the result of the rerun election. Three of the challenged ballots were the result of the Board Agent using the initially submitted list in a rerun election where the employer had properly submitted an updated list which contained the names of those three employees. In *Sweetener*, the Board Agent had not altered either list submitted by the employer. Whereas, in this matter, the Board agents had substantially altered the Voter List properly

provided by Employer by omitting the names of 35 eligible employees who were eligible to vote. Unlike *Sweetener*, where the Employer knew of the issue and had failed to raise an objection to holding the election before it had occurred, Spectrum was not informed at the pre-election meeting that the Board Agents had altered the Voter List by omitting the names of 35 eligible voters. Therefore, unlike *Sweetener*, Spectrum had no chance to object to running the election based on this conduct.

Without specifically questioning those 35 employees whose votes were challenged as to how they voted and why they voted in the manner they did, it is impossible to determine the effect of having their votes challenged. Further, the questioning of such employees would have undoubtedly resulted in further unfair labor practice charges being filed.

Furthermore, it must be noted that voting at each facility was available at two times during the day of the vote, i.e. in the early morning and mid-afternoon. AR, Case 17-1098, Doc. 17, Regional Director's Decision and Certification of Representative p.70. Unlike *Sweetener* where the 16 employees voted at the same time, the employees in this matter had many hours between voting periods to discuss with one another the meaning and implications of having their votes challenged.

If the Board's oft-articulated requirement of conducting votes under "laboratory conditions" is to have any meaning and substance, common sense alone would dictate that such "laboratory conditions" were not maintained. Clearly, they were not, and the Board should have ordered a new election be held.

Finally, although the Board agents' preparation of the revised Voter Lists may have been inadvertently careless, their conduct might be construed as, or tended to imply, partiality by the Board to the Union.

CONCLUSION

Spectrum seeks this Court to deny the Board's Petition for Enforcement and grant Spectrum's Cross-Petition for Review requiring the Board to hold a new certification election.

Dated: April 3, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 6th Cir. R. 32(a), the undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 2,200 words. The brief has been prepared in proportionately-spaced typeface using Microsoft Word 2010, in Times New Roman 14-point font, and counsel relies upon the word count feature of said software for purposes of this certification. If the Court requests, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

Dated: April 3, 2017

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PROOF OF SERVICE

Sheryl A. Laughren hereby states that on the 3rd day of April, 2017, she caused to be electronically filed a copy of Spectrum's Petition for Enforcement from the National Labor Relations Board and Cross-Petition for Review from Spectrum Juvenile Justice Services and Brief of Spectrum Juvenile Justice Services' Cross-Petition for Review. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

I declare that the statements above are true to the best of my information, knowledge and belief.

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 17-1098/1159

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 27, 2017
DEBORAH S. HUNT, Clerk

NATIONAL LABOR RELATIONS BOARD,)
)
Petitioner/Cross-Respondent,)
)
v.)
)
SPECTRUM JUVENILE JUSTICE SERVICES,)
)
Respondent/Cross-Petitioner.)
)

ON APPEAL FOR
ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR
RELATIONS BOARD

ORDER

Before: KEITH, COOK, and THAPAR, Circuit Judges.

The National Labor Relations Board (the Board) petitions for enforcement of an order in which it found Spectrum Juvenile Justice Services (Spectrum) in violation of § 8(a)(5) & (1) of the National Labor Relations Act (the Act). (Codified at 29 U.S.C. § 158(a)(5) & (1)). Spectrum cross-petitions for review from that order. The parties have not requested oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Spectrum operates two maximum security juvenile detention centers in Highland Park, Michigan—the Calumet facility and the Lincoln facility. In March 2016, a secret ballot election was held at these two facilities where Spectrum’s security officers voted in favor of representation by the International Union, Security, Police and Fire Professionals of America (the Union).

Spectrum filed an objection to the conduct of the election. It stated that, before the election, the Board’s agents divided the list of eligible voters provided by Spectrum into two lists—one containing the Calumet facility voters; the other, the Lincoln facility voters. However,

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the Board mistakenly omitted thirty-five eligible voters from these two lists. Consequently, Board agents challenged the ballots of these thirty-five voters during the election. Ultimately, it was agreed that the challenged voters were, in fact, eligible voters. Upon counting the challenged ballots with the others, seventy-four employees voted in favor of union representation, fifty-six were opposed.

Spectrum alleged that it was “entirely probable” that some of the thirty-five voters “believed that [Spectrum] purposely left them off the List, and as a result, voted for the Union based on this apparent snub.” Spectrum contended that if only “nine of [the thirty-five] voters had changed their votes, the Union would have lost the election.”

The Regional Director overruled Spectrum’s objection and certified the Union as the security officers’ representative, concluding that, although faulty voter lists were used, neither the “rights of the voters” nor “the laboratory conditions required for a fair and free election” were disrupted. Further, the Regional Director rejected as speculative Spectrum’s claim that some of the thirty-five voters might have changed their votes in favor of representation because they believed that Spectrum intentionally left them off the voter lists.

Spectrum sought review of the Regional Director’s decision, but the Board denied its request, concluding that there were “no substantial issues warranting review.”

In July 2016, the Union filed a charge (later amended) that Spectrum refused to bargain with it in good faith, and a complaint issued. Spectrum admitted that it refused to recognize and bargain with the Union but contested the underlying certification of the Union. General Counsel filed a motion for summary judgment, and the case was transferred to the Board.

In November 2016, the Board issued a decision and order granting the motion for summary judgment, concluding that Spectrum had engaged in unfair labor practices by failing and refusing to recognize and bargain with the Union in violation of § 8(a)(5) and (1) (29 U.S.C. § 158(a)(5) & (1)) of the Act. The Board ordered Spectrum to cease and desist from refusing to bargain with the Union.

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The Board petitions for enforcement of its order. Spectrum cross-petitions for review, arguing that “laboratory conditions” were not present during the election and that this court should require the Board to hold a new election.

Although direct judicial review of the Board certification in representation proceedings is unavailable, an employer who refuses to bargain with an elected union, as Spectrum did here, may challenge the ensuing unfair labor practice decision. See *Am. Fed’n of Labor v. NLRB*, 308 U.S. 401, 409-10 (1940); *NLRB v. Precision Indoor Comfort Inc.*, 456 F.3d 636, 638 (6th Cir. 2006); *NLRB v. V & S Schuler Eng’g, Inc.*, 309 F.3d 362, 366-67 n.5 (6th Cir. 2002).

Because “Congress has given the Board a broad range of discretion in supervising representation elections and establishing their procedures,” this court “is limited to determining whether the Board abused that discretion and whether the Board’s findings are reasonable.” *V & S Schuler Eng’g, Inc.*, 309 F.3d at 367. The Board abuses its discretion when its orders lack a “reasonable basis in law,” meaning that “either . . . the proper legal standard was not applied or . . . the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning.” *Id.* (quoting *Pannier Corp., Graphics Div. v. NLRB*, 120 F.3d 603, 606 (6th Cir. 1997)). The Board’s factual findings and application of law to the facts are reviewed under the substantial evidence standard, which requires “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 367, 371-72 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

On appeal, the gravamen of Spectrum’s argument is that the Board’s omission of thirty-five employees from the voter lists and the challenged-vote procedure that followed disrupted the “laboratory conditions” of the election.

In order to ensure that employees are exercising a free choice, the Board strives for “laboratory conditions” in representation elections by maintaining “an atmosphere in which employees are free from pressure, coercion and undue influence from either the employer or the union.” *Comcast Cablevision-Taylor v. NLRB*, 232 F.3d 490, 494 (6th Cir. 2000) (quoting *NLRB v. Tenn. Packers, Inc.*, 379 F.2d 172, 180 (6th Cir. 1967)). However, “such conditions are rare, ‘and elections are not automatically voided whenever they fall short of perfection.’” *NLRB v.*

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Dickinson Press, Inc., 153 F.3d 282, 284 (6th Cir. 1998) (quoting *NLRB v. Duriron Co.*, 978 F.2d 254, 256 (6th Cir. 1992)).

Rather, “[a] party seeking to overturn the results of a representation election bears ‘the burden of showing that the election was not conducted fairly.’” *Contech Div., SPX Corp. v. NLRB*, 164 F.3d 297, 305 (6th Cir. 1998) (quoting *NLRB v. Superior Coatings, Inc.*, 839 F.2d 1178, 1180 (6th Cir. 1988)). “In order to satisfy its burden, the objecting party must demonstrate that ‘unlawful conduct occurred which interfered with employees’ exercise of free choice to such an extent that it materially affected the result of the election.’” *Id.* (quoting *NLRB v. Shrader’s, Inc.*, 928 F.2d 194, 196 (6th Cir. 1991)).

We conclude that Spectrum’s argument fails because it is entirely speculative. Spectrum has offered no evidence that any of the thirty-five employees blamed it for being left off of the voter lists, perceived this omission as an intentional “snub” by Spectrum, and changed their votes to favor representation as a consequence. Accordingly, it has failed to meet its burden of proving that the Board’s use of faulty lists interfered with the voters’ free choice and materially affected the election results. *See NLRB v. Oesterlen Servs. for Youth, Inc.*, 649 F.2d 399, 400 (6th Cir. 1981) (rejecting employer’s unsupported argument that employees may not have voted because the Board’s agent left the polling area for ten minutes); *see also Durham Sch. Servs., LP v. NLRB*, 821 F.3d 52, 61 (D.C. Cir. 2016) (holding speculative assertions of harm are insufficient to overturn an election).

Spectrum attempts to justify its lack of evidence by arguing that the Board’s own rules practically prevent it from obtaining evidence in support of its argument. It points to various Board decisions recognizing that employees fear reprisal when questioned by their employer about how they voted. However, this court has endorsed the view that “an employer has the right to interview employees in order to discover facts relevant to the issues raised in an unfair labor practices complaint” as long as certain safeguards are followed. *See ITT Auto. v. NLRB*, 188 F.3d 375, 389 (6th Cir. 1999). That Spectrum decided not to pursue this mechanism does not excuse its failure to support its claim with evidence.

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Additionally, Spectrum argues that the Board's rejection of its argument is itself based on "unfounded assumptions." Essentially, Spectrum believes that the Board should have to disprove its contention that some employees may have voted in favor of the Union because they believed that Spectrum left them off of voter lists. However, it is Spectrum's burden to prove that the election was unfair, not the Board's burden to prove that it was fair. *See Contech*, 164 F.3d at 305.

Accordingly, because the Board did not abuse its discretion, we **GRANT** the Board's petition for enforcement of its order. We **DENY** Spectrum's cross-petition for review.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk