THE NATIONAL LABOR RELATIONS BOARD

In the matter of:	)	
	)	
BIO-MEDICAL APPLICATIONS OF ALABAMA, INC. d/b/a FRESENIUS KIDNEY CARE DAUPHIN ISLAND PARKWAY	)	
	)	
Employer,	)	
	)	
and	)	**Case No. 15-RC-201753**
	)	
RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 932	)	
	)	
Petitioner.	)	

PETITIONER RWDSU'S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW

I. INTRODUCTION

Comes now the Petitioner, Retail, Wholesale and Department Store Union, Local 932 ("RWDSU" or "Union") and hereby files its Opposition to the Employer, Bio-Medical Applications, Inc. d/b/a Fresenius Kidney Care Dauphin Island Parkway's ("employer" or "Fresenius") request to review of the Regional Director's report and recommendation dismissing its objections to the election in this case.[1] As the Union shows below, the Employer has failed to state any grounds for the Board to grant its Petition for Review.

II. PROCEDURAL BACKGROUND

The Union filed it petition in this case on July 5, 2017. A stipulated *Sonotone* election was held on August 2 and 3, 2017 and the Union won the election 13 to 7 and in which the

[1] The Employer's filing with the Board was styled "Employer's Exceptions to Regional Director's Report and Recommendation on Objections". It appears, however, that it is being treated as request for review under the Board's Rules and Regulations, §102.69(c) (2).

professional employees voted in favor of a combined professional and non-professional unit. The employer filed its objections to the election on August 10, 2017 and on July 19, 2018 the Regional Director issued her Report and Recommendation on the objections and recommended that all of the objections be dismissed. On August 2, 2018, the employer filed its Exceptions to the Regional Director's Report and Recommendation on Objections.

III. STANDARD FOR GRANTING A REQUEST FOR REVIEW

The Board will grant a request for review only where "compelling reasons" exist. Accordingly, such requests must be based on one or more of four grounds:

(1) A substantial question of law or policy is raised because of the absence of or the departure from officially reported Board precedent;

(2) The regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party;

(3) The conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; or

(4) Compelling reasons exist for reconsideration of an important Board rule or policy.

NLRB Rules and Regulations §102.67(d). While the employer in this case contends that grounds 1, 2 and 4 exist for granting the request for review, its request like its objections are without support and do not constitute grounds to grant review in this case.

IV. ARGUMENT

The Regional Director correctly set forth the standard for setting aside a representation election when an election is conducted under the auspices of the Board and its attendant procedural safeguards. *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000). The burden of proof on the party seeking to overturn a Board supervised election is a heavy one. *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005). In this case, it is clear that the employer's objections

even considered in a light most favorable to the employer, do not rise to the level of conduct sufficient to warrant the overturning of the results of an election that the Union won with 65% of the vote.

A. The Employer's Objection Based on Section 8(g) of the Act

The employer's objection regarding the Union's failure to give a section 8(g) notice before it engaged in alleged picketing on July 11, 2017 is without merit. Three weeks prior to the election date on or about July 11, 2017, two Union organizers stood outside the Dauphin Island clinic with small signs asking for support for the Union.[2] There was no patrolling, no blocking of ingress or egress and no confrontation between the organizers and any employees or patients. The organizers were present for only a short period of time and the offer of proof made by the employer failed to provide any evidence that and employees were involved in the conduct or threatened in any way by the conduct. The only purported "evidence" that the employer posits is that the clinic manager, an employee relations manager (both supervisors) and one registered nurse saw the union organizers with signs standing on the sidewalk near the clinic. There is no evidence that any employees had their freedom of choice interfered with by the Union's conduct on July 11, 2017 for a little more than two hours (if you were to believe the employer's alleged timeline) more than three weeks before the election.

[2] The employer filed charges against the Union that it did not give 10 days' notice of its intent to picket pursuant to section 8(g) of the Act. See NLRB cases, 15-CG-204234 (Magnolia), 15-CG-204243 (Dauphin Island Parkway) and 15-CG-204253 (Azalea City). The charges were dismissed by the Region on September 29, 2017 because it found among other reasons, that the conduct did not constitute picketing. The employer appealed only cases 15-CG-204243 and 15-CG-204253 and the General Counsel sustained the appeal on February 2, 2018. The Union entered into an informal settlement agreement with a non-admission clause which was approved by the Regional Director on March 30, 2018 in which it agreed to not in engage in any picketing without giving notice pursuant to section 8(g) of the Act. The Union complied with the settlement and the cases are closed on compliance.

Moreover, fatal to the employer's claim here is that the Union engaged in similar conduct at the employer's Azalea City clinic in Mobile on the same date (see NLRB Case 15-CG-204253) but the employer chose not to file any objections to that election, which the Union also won. If the Union's simple act of failing to give notice to the employer at Dauphin Island before it conduct on July 11, 2017 was an unfair labor practice under section 8(g) of the Act and cause to overturn the results of an election that the Union won by an almost 2 to 1 margin, then one would assume the employer would have filed the same objection at Azalea City. It did not, and that fact alone undercuts any argument here that the conduct on July 11, 2017 somehow interfered with employee free choice.[3]

Quite possibly even more important is that the unfair labor practice that the employer complains of in this case is the failure of the Union to give notice of its intent to picket on July 11 and 12, 2017 pursuant to section 8(g) of the Act, not the alleged picketing itself. This is a distinction with a difference. In essence, the Union committed a technical violation of the Act by failing to give the required notice. No employees of the employer were involved. There were no threats and no restraint or coercion of any employees. There are no allegations that its actual conduct at Dauphin Island (or the other clinics) was unlawful, violent, blocked ingress or egress, or was confrontational in any way. The employer admits that the Board has held that picketing in violation of section 8(g) "does not have a significant connection with the threat of restraint or coercion of employees such that it warrants setting aside an election". Thus, a violation of section 8(g), without more, cannot serve as a basis to overturn and election because there is no

[3] The employer also fails to note that it filed the same charges against the Union for conduct occurring on or about July 12, 2017 at its Magnolia clinic where an election was also going to be held on August 2 and 3, 2017. See, NLRB Case 15-CG-204234. The Union lost the election at that clinic. It is clear that the Union's conduct at these clinics had no effect on the outcome of the elections at any of the clinics.

restraint or coercion involved. See, *Ara Living Ctrs. Co.*, 300 N.L.R.B. 888 (1990) (violation of section 8(g) cannot serve as a basis for overturning the results of an election because there is no restraint or coercion involved); and *Renaissance Senior Living Management, Inc. and SEIU Local 415*, 2004 NLRB Reg. Dir. Dec. LEXIS 109, *4-5 (2004) (Regional Director found that picketing in violation of 8(g) at nursing home did not merit setting aside election as a violation of section 8(g) has no connection to restrain or coercion of employees). Despite this fatal admission, it contends that the mere fact that the Union did not give notice on July 11, 2017 was so horrible that the Union's conduct could have affected the results of the election. The underlying offer of proof however shows no conduct that could be considered coercive or threatening in any way that would inhibit employees' free choice especially when it occurred more than three weeks before the election. The employer's attempt to shoehorn an alleged violation of section 8(g) into picketing that restrained or coerced employees must fail. The employer's objection regarding the Union's conduct on July 11, 2017 is without merit and the Regional Director was correct in in dismissing it.

B. Objection Regarding Union Representative in the Polling Area

Similarly, the employer's objection regarding the Union representative being present in the polling area was properly dismissed. The employer's offer of proof does not establish that the Union representative was observing voters or that she interfered with election procedures. When the Union representative realized she was early, she left immediately and went outside. There was no proof offered that the Union representative spoke with any eligible voters and the employer did not provide any evidence that she observed or interfered with any eligible voters entering the polling place after she left the building or that any voters saw her. The employer wants the Board to assume without evidence that the mere presence of the Union representative

for a short period of time interfered with the election proceedings. Again, the burden on the party seeking to overturn a Board supervised election is a heavy one and the employer in this case has failed to sustain that burden. Moreover, contrary to the employer's contention in its brief, the Union submits that the case of *Roney Plaza Management Corp.*, 310 NLRB No. 58 (1993) relied on by the Regional Director to dismiss this objection is directly on point with this case.

C. Objection Regarding Union Observer with Cell Phone

The employer's objection that the Union observer was in possession of a cell phone was properly dismissed by the Regional Director. The employer's offer of proof provided no evidence of any interference with the election, actual or otherwise. The employer admits that it presented no evidence that the Union and it observer were using the cell phone to communicate with other employees or engaging in improper electioneering. Despite this critical flaw in its proffer of evidence, the employer states that it should be allowed the opportunity to develop factual evidence to provide proof of its objection. If this was the standard the Board permitted, then a party could file frivolous or vague objections and then embark on a fishing expedition to try and find evidence to support an objection to overturn an election. That is not the process the Board applies to overturn a Board conducted election and this objection is singularly devoid of any merit.

D. Objection Involving Union Observer Paid by Union

The employer once again tries to fashion an objection out of whole cloth in this instance. Relying on a so-called "overheard" conversation that the Union was paying its observer to act as an observer in the election, which is permitted, the employer makes the unsupported leap that such a payment must have been unreasonable. It does not so by making the supposition that if

the observer was paid, he must have been paid for the whole day based on the alleged comment. This unsupported leap of fact must be rejected. Once again, the employer wants to toss around factually unsupported objections without any basis in fact (or a sufficient proffer of evidence) to go on a hunt for evidence to support its frivolous objection. This is not a process contemplated or supported by the Board's rule and regulations or its precedent. If this were to be the case, then any party can file an objection based on the thinnest reed, force a hearing and then go on a hunt for the evidence to support that objection. By arguing that the Union is in "exclusive possession" of the evidence it needs to prove its objection shows just how absurd the employer's argument is. I am sure that an employer such as Fresenius will love a process that when it wins an election the union is allowed to file an objection based on surmise and conjecture and then be afforded a hearing where it can subpoena the employer and its officials in an effort to find the evidence to support its objection. The Union submits that the employer in this case would be crying foul loud enough to be heard in Washington, D.C. if the Union was allowed to do what it seeks to do in this case.

It is well settled that absent excessive of unreasonable payments, union reimbursements to employee election observers do not in themselves constitute grounds for overturning the results of an election. See, *JRTS, Ltd.*, 325 NLRB 970 (1998); *Quick Shop Markets*, 200 NLRB 830 (1972); *Kux Mfg. v, NLRB*, 890 F.2d 804 (6th Cir. 1989); and *Heavenly Ski Area v. NLRB*, 552 F.2d 269 (9th Cir. 1977). Even if the Union reimbursed its election observer in this instance, there is no evidence that such payments were excessive or unreasonable. And as the Regional Director correctly pointed out, the employer presented no evidence that those who heard the alleged comment had any reason to believe that the payments were excessive or unreasonable. At bottom, the employer wants to be granted a hearing for the opportunity to find support for its

unsupported objections in an effort to forestall its obligation to bargain with the Union. The Board should reject that debilitating invitation.

E. Objection Regarding Union Observer Politicking in Election Area

Once again, the employer failed to submit any evidence that the Union's employee observer engaged in conduct which interfered with the election or the employees' free choice. The fact that the Union observer was seen talking to other employees prior to the election, even if for approximately ten minutes as alleged by the employer does not serve as a basis to overturn the election. There was no evidence supplied by the employer that the employee, Martavious Hall, engaged in impermissible electioneering in the area of the polls or anywhere else for that matter. The employer wants everyone to assume, without proof, that Mr. Hall was engaged in electioneering when the offer of proof was that Mr. Hall talked to other employees in the patient treatment area (not the polling area or near the polling area). No proffer of any evidence was submitted by the employer that Mr. Hall, when he spoke to these other employees engaged in improper electioneering. Instead, the employer wants all involved to assume that is what he did but that assumption, without proof, is insufficient to form the basis of an objection to overturn an election. The employer submitted absolutely no evidence that Mr. Hall was campaigning for the Union when he was speaking to these employees.

In addition, the *Milchem, Inc.*, 170 NLRB 362 (1968) rule relied on by the employer is not mechanically applied in instances of alleged electioneering. See, *The Developing Labor Law*, Ch. 9.II.A.3.c. (2), p. 9-28 (7th Ed. 2017) (and cases cited therein). In this case, there is no evidence that Mr. Hall was in fact speaking to employees for "prolonged" periods of time or that he spoke for approximately 10 minutes to employees as alleged by the employer in its brief. (See Employer Brief, p. 24). Rather, the employer's offer of proof (attached to its Request for

Review) states that "after the pre-election conference and about 10 minutes before the start of the voting at Dauphin Island Parkway, Union observer Martavious Hall, who was off-duty, went into the patient treatment area in violation of company policies and state regulations and talked with numerous employees." The offer of proof does not allege that Mr. Hall spoke with employees for approximately ten minutes prior to the start of the election and the employer's argument in its brief is misleading at best on this point. And the employer submitted no evidence to support it claim that Mr. Hall spoke to employees for ten minutes. It has been held that conversations at the polling place lasting between two and five minutes may not be sustained or prolonged within the meaning of the *Milchem* rule to warrant the overturning of an election. *Ibid.* In this case the Regional Director properly dismissed the employer's objection as there is no evidence of prolonged or sustained conversations in the polling area (or adjacent to it) and no evidence of coercion that constitutes objectionable conduct.

V. CONCLUSION

Based in the above and foregoing, and for the reasons set forth in the Regional Director's Report and Recommendation on Objections, the Union respectfully submits that the employer's request for review is due to be denied.

Respectfully submitted,

s/*George N. Davies*

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2018, the foregoing was filed using the NLRB's electronic filing system and served via email to the following:

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