

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

GADecatur SNF LLC)
d/b/a East Lake Arbor)
)
Employer,)
)
)
and) Case 10-RC-249998
)
)
Retail, Wholesale and Department Store Union)
Southeast Council, UFCW)
)
Petitioner.)

**PETITIONER RETAIL, WHOLESALE AND
DEPARTMENT STORE UNION SOUTHEAST COUNCIL, UFCW's
STATEMENT IN OPPOSITION TO REQUEST FOR REVIEW**

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I. INTRODUCTION

Pursuant to Section 102.67 (f) of the Board's Rules and Regulations, as amended, Retail, Wholesale and Department Store Union, Southeast Council, UFCW (the "Union" or the "RWDSU") hereby submits this Statement in Opposition to Request for Review. The Union requests that the Board decline to review the Regional Director's decision in this matter.

II. STATEMENT OF THE CASE¹

The Union filed a petition on October 15, 2019 to represent certain employees of GADecatur SNF LLC, d/b/a/ East Lake Arbor ("East Lake" or the "Employer"). Of 48 eligible votes, 22 were cast for representation and 17 against with 4 challenged ballots. (HOR at 1). The Employer timely filed objections and a hearing was scheduled for November 26, 2019.

At the commencement of the hearing the Employer withdrew two of its three objections. (HOR at 2). The Employer's remaining objection claims that the Union destroyed the laboratory conditions for a free and fair election when it "escorted a terminated employee into the voting area and the terminated employee engaged in an outburst." *Id.* At the hearing, however, the Employer clarified its position and claimed that its objection concerned only the Union's conduct and not the terminated employee. *Id.*

On December 20, 2019 the Hearing Officer issued her Report on Objections, recommending that the Regional Director overrule the Employer's objection and certify the Union as the collective bargaining representative for the appropriate unit. The Employer timely filed exceptions to the Hearing Officer's Report. The Regional Director overruled those exceptions and

¹ References to the Hearing Officer's Report on Objections are written, "(HOR at [page number]). References to the Regional Director's Decision and Certification of Representative are written, "(D&CR at [page number]).

certified the Union as the employee's Representative on February 4, 2020. The Employer timely filed a Request for Review.

III. OPPOSITION TO REQUEST FOR REVIEW

East Lake's Request for Review in this case centers on a brief incident that occurred with only five minutes remaining in the election. The final session of voting ended at 4:00 pm on November 12, 2019. At approximately 3:55 pm former employee Tabatha Martin presented herself at the facility to vote. Ms. Martin had arrived earlier in the day to vote but had been denied access to the facility. East Lake terminated Ms. Martin on November 4 and the Union filed an Unfair Labor Practice charge. Ms. Martin was eligible to vote, if under challenge.

At 3:55, then, Ms. Martin arrived with representatives of the Union in an effort to secure her statutory right to vote in the Board election. The Employer, by way of its Manager Lesly Gervil and attorney John Chobor, again demanded that she leave without voting. For approximately five minutes Gervil, Chobor, and the Union representatives argued about whether Ms. Martin should be allowed to vote. At approximately 4:00 pm the Board Agent conducting the election emerged from the voting room to announce the closing of the polls. Upon seeing the parties' altercation the Board Agent correctly noted that, because her name appeared on the eligibility list and her termination was the subject of a ULP, Ms. Martin was eligible to vote under challenge. Only then did the Employer allow Ms. Martin to enter the polling room to vote.

The Employer makes much of the incident's potential impact on a single voter, yet the incident only occurred because of the Employer's relentless efforts to keep one voter from voting. The Employer's Request for Review is heavy on conclusory statements and light on supporting authority. It cites no cases finding objectionable an altercation between a union and an employer about whether an eligible employee should be allowed to vote. Instead it relies on cases regarding

electioneering at the polls and surveillance, neither of which are even alleged in this case.² The Regional Director correctly determined that the alleged conduct does not warrant setting aside the election and the Board should deny the Employer's Request for Review.

- A. *The Hearing Officer Correctly Applied Board Law in Finding that the Altercation Between the Union and Employer at the Close of the Polls Does Not Necessitate Setting Aside the Election.*

Applying the *Avis Rent-a-Car*³ factors, the Regional Director properly determined not to set aside the results of the election in this case. The Regional Director's Decision and Certification of Representative addresses each of the factors and discusses the applicable record evidence in detail. The Regional Director determined that seven of the nine *Avis* factors weighed against overturning the election. This was not a result of a mere tabulation of factors for and against setting aside the election, but was rather a reasoned discussion of each factor and an ultimate determination that facts of the incident did not warrant setting aside the election.

The Regional Director determined that the altercation in this case was not severe because it was short in duration, occurred only once, and occurred during the last five minutes of the polling session.⁴ (D&CR at 6). She also noted that an argument between the Union and the Employer regarding whether an employee is eligible to vote "is unlikely to cause fear among employees in the voting unit." *Id.* The Employer objects to this determination as legal error because "the eligibility to vote would have been foremost on the minds of potential voters who would have been

² Nor could they be. The record contains no evidence whatsoever that the Union communicated with any employees at East Lake's facility during the incident other than the manager, attorney, and receptionist, all of whom are non-unit employees.

³ 280 NLRB 580, 581 (1986)

⁴ Strangely, the Employer excepted to the Hearing Officer's determination that the dispute occurred during the last five minutes of the polling session and continues to state that the altercation lasted ten minutes. The Employer's own witness testified that this was the case. (Tr. 52, ln. 15-22; Tr. 71, ln. 7-16; Tr. 42, ln. 3-5).

disinclined to enter the fray if another potential voter's eligibility was being questioned in a loud and hostile manner." (Request for Review at 10).⁵ The Employer cites no authority for this blanket proposition which, in any event, undercuts its own position. The only party questioning an employee's eligibility to vote was the Employer. Under the Employer's reasoning, then, the election it lost should be set aside because of its own conduct. When asked during the hearing, Lesly Gervil testified that the only behavior he considered aggressive or threatening by the union was demanding that Ms. Martin be allowed to vote (which she was lawfully entitled to do) and that the Union did not leave immediately when the Employer doubled down on its unlawful position. (Tr. 69, ln. 2-7; Tr. 73, ln. 5-24; Tr. 74, ln. 6-11). The altercation was not threatening and did not likely cause fear in the unit or interfere with free choice. The Employer cites no authority to the contrary.

The Employer's allegations that the Regional Director did not adequately consider the closeness of the final vote count are unfounded. The Regional Director found that the closeness of the tally weighed in the Employer's favor of the Employer but that the remaining factors weighed against it. Notably, the Regional Director upheld the Hearing Officer's determination that the Employer did not provide sufficient evidence to support a finding that eligible voters witnessed the altercation *and* could have been affected by it. (D&CR at 6). An eligible voter may have witnessed the altercation, but their vote would not have been affected if they had already cast a ballot. That the incident occurred during the last five minutes of the voting session makes it imperative that the employer present some evidence that eligible employees who had not yet voted witnessed and were affected by the altercation. The Hearing Officer and Regional Director

⁵ Gervil testified that he did not see any employee approach the polling room while the altercation was ongoing.

correctly took little from Gervil's conclusory testimony that eligible voters saw the altercation. (D&CR at 7; HOR at 5-6). Gervil could not recall how many eligible voters allegedly saw the altercation nor could he identify a single one. (Tr. 74-75; Tr. 36-37). When asked how he knew that any of the witnesses to the altercation were eligible voters he said it was because they were employees. (Tr. 36-37). It is not the case that any employee witnessing the altercation is grounds to set aside the election. It must have been an employee that was eligible to vote; and it must have been an eligible voter who *had not yet voted*. The Board's established policy is not to overrule a hearing officer's credibility determinations unless the clear preponderance of all the relevant evidence establishes that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). The Employer provided no evidence whatsoever that could lead the Board to determine that eligible voters who had yet to cast a ballot witnessed the altercation.

The cases cited by the Employer regarding the effect of close elections are inapposite to the facts at hand. In *Jurys Boston Hotel* the Board found that the Employer had maintained objectionable policies prohibiting loitering, solicitation, and wearing buttons or other paraphernalia. 356 NLRB 927, 928 (2011). For each of those policies the Board cited specific authority establishing that maintenance of that policy violated the Act, and the objectionable conduct lasted for the duration of the election period. *Id.* In *Cambridge Tool & Mfg. Co.* the Board set aside an election where supervisors threatened bargaining unit employees, interrogated them about their union sympathies, and prohibited them from lawfully distributing union literature. 316 NLRB 716, 716 (2000). Both of those cases feature clearly established objectionable conduct directed at unit employees; this case features nothing of the sort. Notwithstanding, the Regional Director determined that the closeness of the final tally and the proximity to the election were both *Avis* factors which weighed in favor of the Employer. (HOR at 6). No single *Avis* factor is

determinative, however, and the Regional Director properly concluded that these two factors were balanced by the remaining factors – particularly the number of employees affected by the conduct. *Id.*

The Regional Director also correctly considered the Employer’s misconduct when weighing the *Avis* factors. The final *Avis* factor asks the degree to which the misconduct is attributable to the party against whom the objection is filed. The Union does not argue that the union personnel involved in this case are not agents of the Union, but the altercation would not have occurred if the Employer had not unlawfully and brazenly attempted to prevent an eligible voter from voting. The Board has held that “any individual who presents himself at the polls has a right to cast at least a challenged ballot.” *Sabine Towing & Transp. Co.*, 226 N.L.R.B. 422, 422 (1976). Furthermore, any individual has the right to make a claim of eligibility to vote and “no party has a right to prejudge that claim or prevent the individual from presenting it to the Board agent.” *Id.* The Board may overrule a party’s objections where their own misconduct in the election renders their hands unclean. *Marines’ Memorial Association*, 261 NLRB 1357, n2 (1982).

East Lake attempts to distinguish its unlawful conduct from that of the Union by claiming that the Union’s presence gave the impression that the Employer “was powerless to protect its own legal rights in a confrontation with the Union.” *Phillips Chrysler Plymouth*, 304 NLRB 16, 16 (1991). *Phillips Chrysler* presents entirely difference facts from this case and the Employer misplaces its reliance on it. In that case, two union organizers placed themselves on the employer’s shop floor for forty-five minutes prior to polls opening and engaged in electioneering conduct. *Id.* The union agents remained until the vote began despite the employer’s repeated requests that they leave. *Id.* Even the arrival of the police did not cause the union to leave, and the Board reasoned that such conduct made it appear as though the employer had no power to confront the union. *Id.*

The Board went on to note that, because there was “no evidence of any misconduct on the part of the Employer to weigh against the misconduct of the Petitioner’s agents ... [i]n these circumstances, we find that the Petitioner’s conduct reasonably tended to interfere with the employees’ free and uncoerced choice in the election.” Here the Union remained for only the final five minutes of the polling session, engaged in no electioneering, was not confronted by police, and the Employer engaged in substantial misconduct that outweighs any actions of the Union. In *Station Operators, Inc.*, the Board distinguished the employer’s citation of *Phillips Chrysler* in a way that closely parallels this case. In *Station Operators, Inc.*, union organizers entered company meetings on three occasions for five or six minutes each time to belligerently call the company liars and urge employees to disregard them. 307 NLRB 263 (1992). The Board did not consider that misconduct sufficient to set aside the election because, unlike in *Phillips Chrysler*, the incidents were short and the union did not remain after police were called. *Station Operators*, 307 NLRB at 263.

The Regional Director’s Decision and Certification of Representative is well-reasoned and appropriately applies extant Board law to the facts of this case. The Union did not engage in any conduct that warrants setting aside the election.

B. The Hearing Officer Appropriately Distinguished the Cases Cited by the Employer in Support of Its Position.

In reaching the decision to overrule East Lake’s objection, the Regional director distinguished the three cases cited by the Employer: *Nathan Katz Realty LLC v. NLRB*, 251 F.3d 981 (2001), *Electric Hose and Rubber Co.*, 262 NLRB 186 (1982) and *Performance Measurements Co.*, 148 NLRB 1657 (1964). *Nathan Katz* is not a Board decision. In that case, the DC Court of Appeals remanded a case to the Board because the Board did not adequately explain its reasoning. 251 F.3d at 992. The underlying facts showed that union agents sat in a car

close to the polling area and honked and waived at employees passing to vote. *Id.* In *Electric Hose* the employer's supervisors remained within 10 or 15 feet of the entrance to the polling area for virtually the entire election. 262 NLRB at 216. The Board set aside that election, reasoning that "without any explanation for a supervisor to be "stationed" outside the voting area, it can only be concluded that his purpose in observing the event was to effectively survey the union activities of the employees and to convey to these employees the impression that they were being watched." *Id.* In *Performance Measurements* the employer's president stood within feet of the polling location and nearly every voter had to pass him to vote. 148 NLRB at 1659. The Board found that such a continual presence near the polls without justification was objectionable conduct. *Id.* In so finding, the Board cited only *Belk's Department Store of Savannah, Georgia, Inc.* which found that the presence of employees at the polls checking names off voter lists with the apparent authorization of management created a coercive environment that justified setting aside an election.

Aside from involving substantially longer periods of misconduct, *Katz*, *Performance*, *Belk*, and *Electric Hose* are electioneering or surveillance cases. All three rely on the principle that communications with employees near the polls or pointed observations of employees near the polls constitute objectionable misconduct. There is no evidence or allegation in this case that the Union engaged in any communication or interactions with East Lake's employees at the time of the altercation – electioneering or surveillance. The Employer's assertion that the closeness of the election in this case renders *Katz*, *Performance*, *Belk*, and *Electric Hose* determinative authority finds no basis in those cases or the established Board law. If anything, the closeness of the vote tally is counterbalanced by the fact that the incident occurred during the last five minutes of the

election and was thus unlikely to affect any prospective voters. The cases cited by East Lake are inapposite and the Hearing Officer and Regional Director properly distinguished them.

IV. CONCLUSION

For the foregoing reasons the Union requests that the Board deny East Lake's Request for Review.

Respectfully submitted this 26th day
of February, 2020,

/s/ Nicolas M. Stanojevich

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2020 I served a copy of the foregoing via electronic mail on the following parties:

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2020 I served a copy of the foregoing via electronic filing on the Acting Regional Director of Region 10.

Respectfully submitted,

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