

**UNITED STATES OF AMERICA
THE NATIONAL LABOR RELATIONS BOARD**

**PLANNED LIFESTYLE SERVICES,
AFFILIATED WITH AND RELATED
TO, PLANNED COMPANIES,**

Employer

and

**SERVICE EMPLOYEES
INTERNATIONAL
UNION, LOCAL 32BJ,**

Petitioner

Case 22-RC-255558

**PETITIONER SEIU LOCAL 32BJ'S OPPOSITION TO EMPLOYER'S
REQUEST FOR REVIEW**

Petitioner SEIU Local 32BJ (the "Union") respectfully requests that Planned Lifestyle Services/Planned Companies' (the "Employer") Request for Review ("R for R") be dismissed as it raises no issues warranting review. The Employer presents no evidence that calls into question the fairness or validity of the election Board law is clear that holding a hearing on baseless objections frustrates the will of the voters and is a waste of the Board's and the parties' time, effort and money. *Frontier Hotel*, 265 NLRB 343 (1982). The Employer cannot show a prejudicial error warranting review of the Regional Director's cogent and compelling decision. Section 102.67(d) of the NLRB's Rules and Regulations.

I. Allegations

The Regional Director ("RD") set forth the Employer's offer of proof as follows:

In its offer of proof, the Employer asserts that named witnesses will testify that at the pre-election conference immediately preceding the third voting session, the Board Agent conducting the session showed the parties a copy of the voter list that had been marked reflecting which employees had already voted. The Employer's witnesses will further

testify that the Union agent had sufficient time to review the list to note which employees had voted.

Report on Objections, p. 2.

The RD's Report's rendition of the Employer's allegations is materially indistinguishable from the allegations in the R for R (p. 4). Hence, the RD did not resolve any factual dispute, and the Employer's claim is solely that the RD reached an incorrect legal conclusion.

II. The Regional Director's Report On Objections

The Regional Director's Report cogently found that even if credited, the evidence showed only that the "Board Agent erred by showing the parties the marked voter list." It goes on to stress that there was no evidence Union made a list, communicated with voters because of the list or engaged in any other conduct because of the list. Report at 3. The RD concluded that the evidence raised no reasonable doubt about the fairness or validity of the election and that no hearing was warranted. *Id.*

III. Legal Standard

The Board does not set aside elections lightly, strongly presumes the validity of the elections it conducts and imposes a heavy burden of proof on those seeking to overturn elections. *Safeway, Inc.*, 338 NLRB 5225 (2002).

To reverse a RD's dismissal of objections without a hearing the objecting party must present evidence or description of evidence "if credited at a hearing, would warrant setting aside the election." *Park Chevrolet-Geo, Inc.*, 308 NLRB 1010, 1010 fn. 1 (1992). Dismissing baseless objections without a hearing is essential to proper administration of the Act.

Since our rules require a hearing only in cases in which material facts are in dispute, hearings in all other cases would waste time, money, and effort for all concerned, while unduly

delaying resolution of the question concerning representation and unjustifiably denying unit employees their right to have their election choice implemented through the appropriate certification. *Frontier Hotel, supra*.

The Board will set aside an election based on Board Agent misconduct only if there is “a reasonable doubt as to the fairness and validity of the election,” *Polymers, Inc.*, 174 NLRB 282, 282 (1969). The Employer’s allegations, even if credited, fall far short of causing doubt as to the fairness of the election.

The Employer claims that the Board agent’s misconduct resulted in a violation of the prohibition against parties keeping lists of voters. *Piggly Wiggly*, 168 NLRB 792 (1967). The rule is intended to prevent parties from coercing voters concerning their free choice whether to vote or not and/or how they would vote. Therefore, the Board will not overturn an election unless a significant number of voters are aware of the list.

Second, even if they did maintain a list, we would not find it necessary to set aside the election. In *Southland Containers*, 312 NLRB 1087 (1993), the Board stated that it will set aside an election on the basis that a voting list other than the official eligibility list was kept only if it can be shown or inferred from the circumstances that employees were aware that their names were recorded.

Indeck Energy Services, 316 NLRB 300, 301 (1995).

IV. Employer’s Criticism on the RD’s Report Is Unavailing

The Employer makes two arguments. First, it argues that the Board agent’s conduct “is in itself destructive of the high Agency standards kept for conducting elections.” (R for R, p. 7).

The Employer also argues that a hearing is warranted because “Petitioner may have used this information to selectively ‘turn out’ the vote of those employees who had not yet vote.” *Id.* It

repeats that “[i]mportantly a hearing is also necessary to determine whether the Petitioner did in fact exploit the improper disclosure . . .” *Id.*

The Employer supports its first argument only with citations about the general nature of election standards. It provides no cases that set aside elections on anything even vaguely resembling the facts of the instant case. In fact, the Board has refused to set aside elections with more serious Board agent misconduct, *e.g. Newport News Shipbuilding Co.*, 239 NLRB 82(1987), *enf’d den’d on other grounds*, 594 F.2d 8 (4th Cir. 1979) (Board agent allowed election observer into his room with liquor); *Ensign Sonoma LLC*, 342 NLRB 933 (2004) (Board agent told observers that companies don’t like unions because they cannot fire or hire anyone and they cannot take benefits from the staff).

The Employer does not explain how the conduct at issue in the instant case affects the fairness or validity of the election. In essence, the Employer argues that any deviation from established procedure is sufficient to overturn an election. This is not the law. *Polymers, supra* (rejecting proposition that “any deviation from these rules by a Board agent would *require* nullification of an election” when board agent did not handle ballot box and ballots properly — emphasis in original).

The claim that the Union **might** have communicated with potential voters rests on pure speculation. The Employer admits it presented no evidence of Union communication with potential voters. (R for R, p. 8). In fact, the Employer’s does not claim that the Union made use of the opportunity to review the list or noted who had not yet voted. Since it produced no evidence that the Union communicated with any of the potential voters, it certainly do not claim that the Union’s hypothetical communication was coercive. It provided no evidence that any

employees were aware that the parties saw a list of voters. It does not claim that the Union acted differently than management with regards to the list of voters.

The Employer asks to be excused from the requirement to present evidence because of an asserted difficulty in obtaining it (R for R at 8). There is no basis in Board law for this position. Difficulties in obtaining evidence are a daily fact of life in Board proceedings as, for example, when an employer covertly unlawfully assists a decertification petitioner or intimidates an employee from speaking to the union about objectionable conduct. If hearings were allowed because witnesses might not voluntarily cooperate with the objecting party, then virtually every election would result in post-election hearings.

The Employer argues that the dissent in *Jacmar Food Service*, 365 NLRB No. 35 (February 22, 2017) supports holding a hearing in the instant case. The Board agent in *Jacmar* allegedly failed to use the voter list and relied on the observers to determine how many employees were eligible to vote, possibly gave two ballots to a single voter and showed favoritism in her tone of voice in instructing voters and counting the ballots. The Board majority upheld the RD's dismissal of the objections without a hearing. The differences between the allegations in *Jacmar* and the instant case underline how extraordinarily weak the Employer's argument is here.

The dissent found that the “most important[.]” reason for a hearing stemmed from finding one ballot folded up inside another (*Id.*, Slip Op at 3). The dissent sought a hearing to determine “whether and how” a voter was given two ballots. Hence, there was direct evidence of a problem going to the heart of the election's validity in *Jacmar*—whether each voter received one and only one ballot. There is nothing similar in the instant case.

The offer of proof in *Jacmar* demonstrated Board agent bias. The Board views any breach of the “indispensable perception of Board neutrality” as an extremely serious problem. *Ensign Sonoma LLC*, 342 NLRB 933 (2004). Facts were alleged concerning the Board agent's

biased tone of voice when giving instructions to the voters, as well as during the vote count and a display of bias in emphasizing the “yes” votes by counting them more often than the “no” votes. The majority and the dissent disagreed on the significance of these allegations. But, unlike the instant case, evidence of what the dissent considered serious misconduct was present. The *Jacmar* dissent provides no support to the Employer in the instant case since the Employer here is relying on sheer speculation to manufacture a threat to the fairness of the election.

V. Conclusion

The Employer has failed to present evidence that, if credited, would result in setting aside the election. Hence, it is not entitled to a hearing. It has no evidence that indicates the election did not fully and fairly reflect the will of the voters. It may not gain a hearing because it fervently hopes that a hearing will produce the evidence it so clearly lacks. The Union respectfully requests that the Request for Review be denied.

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