

CASE NO. 20-60515

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

RANDALLS FOOD & DRUGS, L.P.,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

**ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD, 16-RC-251484**

**BRIEF OF PETITIONER/CROSS-RESPONDENT
RANDALLS FOOD AND DRUG, L.P.**

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CERTIFICATE OF INTERESTED PERSONS

Petitioner/Cross-Respondent Randalls Food and Drug, L.P. (hereafter “Randalls” or “Tom Thumb”) certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1. Petitioner/Cross-Respondent:

Randalls Food and Drug, L.P.

2. Respondent/Cross-Petitioner:

National Labor Relations Board

3. Intervenor:

International Brotherhood of Teamsters, Local Union 745

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STATEMENT REGARDING ORAL ARGUMENT

Petitioner/Cross-Respondent Randalls Food and Drug, L.P. requests that the Court grant oral argument in this case. The NLRB's decision involves core issues of labor law regarding the laboratory conditions by which an election involving union representation are to be maintained.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction in this matter pursuant to Section 10(f) of the National Labor Relations Act (“NLRA” or “the Act”) because Respondent/Cross-Petitioner National Labor Relations Board’s (“NLRB” or Board”) “Decision and Order” is a final order. 29 U.S.C. § 160(f). Petitioner/Cross-Respondent is a party aggrieved by said Decision and Order. Randalls transacts business within this judicial circuit, as defined in 28 U.S.C. § 41, by owning and operating stores in Louisiana and Texas and a Tom Thumb distribution center in Texas.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the Board issue a Decision and Order supported by substantial evidence that Tom Thumb violated the Act by refusing to bargain with Union based upon its legitimate objections to the NLRB's certification of the Union as the bargaining representative for Tom Thumb's employees?

STATEMENT OF THE CASE

On June 5, 2019, Teamsters Local Union 745 filed a petition with the Board seeking to represent certain employees working at the Tom Thumb distribution center in Roanoke, Texas. Pursuant to a Stipulated Election Agreement between the parties, an election was conducted at Tom Thumb's location in Roanoke, Texas on June 28-30, 2019 in the following unit:

INCLUDED: All full-time and regular part-time Drivers and Spotters.

EXCLUDED: Dispatchers, Mechanics, Managers, Warehousemen,

Human Resource Personnel, Watchmen and Supervisors as defined by the Act.

During the polling period, a high-ranking non-employee Union officer presented himself to the security gate and represented himself as a Company employee to secure a temporary security badge allowing him unrestricted access to Company property contrary to Company policy, and thereafter engaged in electioneering. ROA.55, 264. During the polling period, specifically voting that was to begin at 10:30 p.m. on Saturday evening, the NLRB agent responsible for conducting the election during that time, Taylor Whetsel, arrived at approximately 10:45 p.m., which had the effect of denying voters the opportunity to vote during their assigned shift. ROA.106, 264. During the polling periods on Sunday, June 30, 2019, the Union's observer Stacey Bess wore clothing prominently displaying union

insignia. ROA.210-211, 264. During the polling periods, numerous employees maintained prominent signage in their vehicles' windshields facing the polling area that constituted electioneering in that it encouraged other employees to vote for the Union. ROA.118-119, 264, 280-282. During the Critical Period, at least one union organizer wearing a Teamsters 745 vest solicited other eligible voters to raise money to assist another eligible voter. ROA.91-92, 94, 153-154, 264.

By the above and other conduct, the Union interfered with, coerced, and restrained eligible voters with regard to the exercise of their Section 7 rights under the National Labor Relations Act, destroyed the "laboratory conditions" necessary for the conduct of a fair election, and interfered with employees' ability to exercise a free and reasoned choice in the election. Moreover, the campaign conducted by the Union and its representatives, employees, agents, supporters, and/or others acting in concert with them, created a pervasive atmosphere of fear and reprisal, rendering free choice impossible. These acts and other conduct taking place during the critical pre-election and actual voting periods were sufficient to affect the results of the election.

The Tally of Ballots showed that of 78 eligible voters, 44 cast votes for the Union and 31 cast votes against the Union along with one potentially nondeterminative challenged ballot. On July 8, 2019, the Tom Thumb filed timely Objections to Election, a copy of which was served on the Union. A hearing was

held on July 29, 2019 and on August 30, 2019, the Hearing Officer issued her Report containing her conclusions and recommendations. On October 7, 2019, Tom Thumb filed a Request for Review of Regional Director's Decision and Certification of Representative with the Board, which the Board denied on March 26, 2020. On June 22, 2020, Tom Thumb timely filed this appeal seeking to reverse the Board's decision certifying the Union as the employees' bargaining representative.

SUMMARY OF THE ARGUMENT

The Board has long held that laboratory conditions must be maintained when employees are voting to determine whether to hire a Union to be their bargaining representative. This is especially so in the period immediately preceding the vote and during the voting process itself. The Board characterizes this as the "critical period." When a party disrupts those laboratory conditions, the Board will disregard the election results and either order a rerun election or will simply dismiss the petition.

When employees vote for unionization and the Board certifies the election without objection, an employer upon request to bargain must then negotiate with the Union under longstanding Board law. If, however, the employer, like Tom Thumb here, timely objects to the certification, it need not commence bargaining until it has exhausted its legal right to challenge the certification. Tom Thumb has properly challenged that certification both procedurally and substantively.

As shown below, the Union engaged in several actions that disrupted the laboratory conditions. In so doing, the Union deprived the employees of a fair election and the Board erred in certifying the Union. Tom Thumb requests that the Court reverse the Board and remand the case to the NLRB for further proceedings.

I. STANDARD OF REVIEW

The Fifth Circuit will enforce the Board's decision "if it is reasonable and supported by substantial evidence on the record considered as a whole." *D.R. Horton*, 737 F.3d 344, 349 (5th Cir. 2013) citing *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 518 (5th Cir. 2007); see also 29 U.S.C. § 160(e). But this Court has held it will overturn the Board's decision on factual disputes relating to representation matters if it finds the decision to be unsupported by substantial evidence. *Gulf Coast Auto. Warehouse Co. v. NLRB*, 588 F.2d 1096 (5th Cir. 1979) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951)). Finally, "[w]hile the Board's legal conclusions are reviewed *de novo*, *Strand*, 493 F.3d at 518, its interpretation of the NLRA will be upheld 'so long as it is rational and consistent with the Act.'" *Id.* (internal citations omitted).

Despite any deference generally accorded to the Board's decision, the Board clearly failed to abide by long-standing labor law principles ensuring that employees' vote for union representation is conducted under laboratory conditions. This Court is empowered to right that wrong.

II. ARGUMENT

A. Introduction

The procedures for the conduct of elections are designed to ensure that the outcome reflects a free and fair choice of the voters. “It has long been established “[t]he Board is responsible for assuring properly conducted elections.” *Kerona Plastics Extrusion Co.*, 196 NLRB 1120 (1972) (quoting *New York Tel. Co.*, 109 NLRB 788, 790 (1954)). The Board’s goal is to conduct elections “in a laboratory under conditions as ideal as possible to determine the uninhibited desires of employees” and to provide “an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasonable choice.” *Sewell Mfg. Co.*, 138 NLRB 66, 70 (1962). Further, the Board is “especially zealous in preventing intrusions upon the actual conduct of its elections.” *Claussen Baking Co.*, 134 NLRB 111, 112 (1961). Under these standards, and as shown below, the Board erred in concluding that the complained of conduct was insufficient to disturb the laboratory conditions. Accordingly, Tom Thumb requests that the Court reverse the Board’s decision and remand the matter to the Board for it to order a new election.

B. The Union business agent engaged in electioneering near the polling place that disturbed the laboratory conditions.

Employer Exhibit 1 (ROA.272-274), reproduced in part by the Hearing Officer on page 10 of her Report (ROA.317), showed that the Union business agent, referred to by the Hearing Officer as the “Organizer” accessed the property during the second voting session on June 28 at 9:56 p.m. and did not log out until 10:40 p.m. Employer Exhibit 1 and Report, P. 10 (ROA.317). Contrasted with his other entry times coming and going, this length of time was extraordinary in duration, especially how long it took for him to exit once the pre-election conference ended. Indeed, he extended his stay because he remained near the polling place in order to electioneer with voting employees. This was observed by Bill Herrera, referred to in the Report as the “Consultant.” Herrera testified that he saw the organizer talking with a group of employees at the bottom of the stairs leading to the voting area. ROA.115. Herrera, consistent with his compliance with the Act, did not remain for more than a few seconds as the voting was about to begin.

The Organizer’s lengthy stay is coupled with his actions on June 30 when he informed the security guard as he was trying to access the property that he was an “employee.” ROA.55. The security guard’s testimony on this point was disputed by the Organizer but there was nothing in the record to establish that the non-employee guard was not credible or was mistaken in his testimony. Indeed, the Hearing Officer acknowledged that it was possible the Organizer had misrepresented

his status as an employee, but she said that he may have made the misrepresentation only to expedite his access to avoid being late. Report, P. 13 (ROA.320). The Board erred in adopting the Hearing Officer's finding which had her creating her own explanation for the lie and completely discounting the possibility it was done to gain access to electioneer as he had on June 28. His motives are relevant to show he engaged in improper conduct. Further, he clearly lied when he testified that he did not tell the guard he had identified himself as an employee which the Hearing Officer should have noted and relied upon to discount his testimony.

The Board has long held that “regardless of the content of the remarks exchanged,” prolonged conversation by representatives of any party with prospective voters in the polling area “constitutes conduct which, in itself,” will invalidate an election.” *Milchem, Inc.*, 170 NLRB 362 (1968) (emphasizing the importance of ensuring [t]he final minutes before an employee casts his vote should be his own, as free from interference as possible”). See also, *Brinks Inc.*, 331 NLRB 46 (2000) (finding for the employer under the *Boston Insulated Wire* factors because the person who electioneered was “an agent of the Union at the time of his misconduct” and “party electioneering during the voting...is a serious interference with the election process”); *In re Star Expansion Industries Corp.*, 170 NLRB 364 (1968) (holding for the employer because a union observer “acting on behalf of the [union] was engaged in electioneering activities in close proximity to the polls” even

though he never entered the polling area during the polling period); *Tyson Fresh Meats, Inc.*, 343 NLRB 1335 (2004) (setting aside election where agents of the union sat at a table near voting room entrance for approximately an hour and engaged employees in conversations of at least five to 10 minutes outside of polling area while employees waiting to vote).

Here, it is undisputed that the Organizer remained on the premises on June 28 for at least 10 minutes after voting began at the 10:30 session and was observed talking with employees near the voting area. The conduct standing alone warrants overturning the election. His misconduct in this regard is amplified by his misrepresentations to a third party-employed security guard to gain access to the property.

C. The Board agent engaged in misconduct by arriving late for a voting period.

Tom Thumb is not contending that the Board agent arrived late intentionally or otherwise intended to disturb the voting times. But she did arrive late as the Hearing Officer concluded. ROA.325. The Hearing Officer nevertheless overruled this objection because of the lack of evidence that her tardiness interfered with voters' ultimate ability to cast a vote. Tom Thumb contends that is not the appropriate analysis. Rather, the Board looks to the "possible" effect of agent misconduct. Indeed, the Board has set aside elections where there were departures from the scheduled voting period involving either delayed openings (as is the case

here) or early closing of the polls. Where a Board agent arrived 40 minutes late, the election was set aside because the votes of those “possibly excluded” from voting may have affected the outcome, and notably “the ensuing votes may have been affected by the conduct of the Board agent.” *B & B Better Baked Foods*, 208 NLRB 493 (1974). In another case involving a delayed opening, the Board set aside the election even though the number of eligible voters who did not vote could not have affected the outcome; the Board agreed with the regional director’s finding that “the votes cast may have been affected by conduct of the Board agent.” *Nyack Hosp.*, 238 NLRB 257, 260 (1978).

Tom Thumb contends that the Board erred by failing to follow the reasoning of these two cases and failing to conclude that the agent’s late arrival could have possibly excluded voters (Herrera testified that he knew one voter who lost the opportunity to vote due to the Board agent’s later arrival. Report, P. 17 (ROA.324).) and otherwise affected subsequent votes mandating that the election result should be set aside.

D. The Union observer Stacey Bess improperly wore clothing prominently displaying clothing with a union insignia that disturbed the laboratory conditions.

It is undisputed that Stacey Bess wore clothing showing his support for Teamsters 745 during the time he was serving as a union observer. Report, P. 19 (ROA.326). The Hearing Officer also noted that during a prior voting time, the

Board Agent suggested the observer should not wear union-related clothing and the observer removed a union vest. Where the Hearing Officer erred was concluding that this was insufficient to set aside the election.

The Board, consistent with the Agent's admonition, has stressed that observers should refrain from wearing clothing that connects them to a party. *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195 (2006) ("The Board discourages...observers from wearing campaign insignia."). This preference is meaningful in that it shows the possibility that such conduct could disrupt laboratory conditions. That is what occurred here and supports an order reversing the Board and setting aside the election.

E. Employees maintained signage in their vehicles near the voting area and during voting times supporting the union.

Once again, the facts here are not in dispute. The Hearing Officer correctly found that while employees were voting, there was pro-union signage visible in vehicles that were close to the voting area. Report, P. 20-22 (ROA.327-329). The Board adopted the Hearing Officer's conclusion that they didn't disturb the laboratory conditions because they were too far away from the voting. This conclusion is inconsistent with Board law and otherwise ignores the reality that regardless of their positioning they remained visible to eligible voters throughout the voting periods. See, e.g., *Nathan Katz Realty, LLC v. NLRB*, 251 F. 3d 981, 991-993 (D.C. Cir. 2001) (holding that the conduct of two union employees in a car

parked outside the election location “substantially impaired the employees’ exercise of free choice.”); *Pearson Education, Inc.*, No. CA-26182, 2000 BL 24960 (holding that a “poster, which was in plain view of all persons who were going to vote” warranted setting aside the election results).

As with the other objections discussed above, this one is another example of an indication that voters were deprived of true laboratory conditions and as such warrants setting aside the election.

F. An employee wearing a Teamsters 745 vest solicited other eligible voters to raise money to assist another eligible voter and in so doing disturbed the laboratory conditions. Tom Thumb also maintains the Board erred in finding that the individual responsible for the solicitations was not a union agent.

While voting was ongoing, one or more employees who were conspicuous union supporters by virtue of their clothing and rhetoric during the post-petition period, sought donations from other employees to purportedly assist another voting employee with alleged financial difficulties. Report, P. 25 (ROA.332). Where the Board erred was failing to recognize the likely impression that this was the Union stepping in to assist the employees in place of the Employer. Indeed, the soliciting employee referred to as a Union Committeeman by the Hearing Officer had previously sought to have Tom Thumb raise the funds but was not successful in that effort due to Tom Thumb’s concern about the perception of “buying” votes. ROA. 153-154. This left employees with the clear impression that the Union was engaged

in trying to raise money for another voting employee. This effort went on throughout the three days of voting. ROA.91-2, 153-154.

Under these circumstances, there is no doubt the Board erred in concluding that this misconduct did not affect the laboratory conditions. *See MeadWestvaco Corp.*, No. RC-6684, 2009 BL 420720 (“During...the critical period, conduct that creates an atmosphere rendering improbable a free choice by employees warrants invalidating an election”).

Likewise, the Board erred by finding that the Committeeman was not acting as a union agent while engaging the solicitations. Again, it is undisputed that he was wearing a bright Teamsters 745 vest (ROA.94, 154); and it is undisputed the union identified him as a committeeman in a letter it sent to the Tom Thumb. ROA.283. Under these circumstances, he was presenting himself to his co-workers as a union agent. *See Tyson Fresh Meats, Inc.*, 343 NLRB 1335 (2004) (where the Board found the union stewards involved were agents of the Union when they spoke to voters waiting in line to vote, placing probative value on the alleged agents' union steward positions inasmuch as the union encouraged employees to perceive stewards as representatives of the union by giving them the responsibility of orienting new hires to the benefits of unionization, the collective bargaining agreement provided that stewards had express authority to present grievances on behalf of employees, the stewards involved participated in labor management meetings throughout the year

and wore purple hats signifying their status as union stewards); *In Re Bio-Medical Applications of Puerto Rico, Inc.*, 269 NLRB 827 (1984) (where the totality of the evidence, including the employees traveling with union officials to a plant other than the one where they worked and introducing themselves to employees as the union's representatives, indicated agency status).

Accordingly, the Board erred in failing to find that this constituted objectionable conduct warranting the election be set aside.

G. The Board erred in failing to conclude that the totality of the objectionable conduct disturbed the laboratory conditions.

Tom Thumb has shown, and the record supports, five separate objections, each of which warrants setting aside the election. As noted at the outset of this brief, the Act and NLRB law mandate that the Board and here the Regional Director ensure that an election be held without conduct “which prevent[s] or impede[s] a reasonable choice.” *Sewell Mfg. Co.*, 138 NLRB 66. Tom Thumb presented substantial evidence that the Union engaged in conduct that did prevent or impede a reasonable choice. This is made even more clear by the totality of the misconduct. The Board erred in failing to find that the amalgamation of the misconduct, even if not singularly objectionable so as to warrant a set aside election, was nevertheless objectionable by its totality.

This is consistent with the Board’s approach where, as is the case here, the record shows multiple instances of misconduct that taken together support a

conclusion that the election should be set aside. See e.g., *Aramark Sports, Inc./SFS*, No. RC-21685, 2011 BL 489298 (setting aside the election because “the cumulative effect of the sustained objections is sufficient to question the fairness and validity of the election”); *Community Medical Ctr.*, 354 NLRB 232 (2009) (holding that “the cumulative effect of the...sustained objections amounts to conduct that is more than de minimis and, therefore, warrants a second election.”). Accordingly, based upon the totality of the misconduct the Court should reverse the Board’s decision and remand the case to the Board for further proceeding.

CONCLUSION

Tom Thumb respectfully requests that this Court grant its Petition for Review and decline enforcement of the Board’s June 9, 2020 Decision and Order because the Union’s misconduct disrupted the laboratory conditions of the election such that the Board should not have certified it as the employees’ bargaining representative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing instrument has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure on October 5, 2020, on all registered counsel of record, has been served on the following by depositing a true and correct copy of same in the U.S. Mail with sufficient postage thereon to reach its destination, and has been transmitted to the Clerk of the Court.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(A)(7)(B) because:

- the brief contains 3,385 words, as counted by the word processing system used to prepare it, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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- the brief has been prepared in a proportionally spaced typeface using Microsoft Word with a 14-point font named Times New Roman.

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Dated: October 5, 2020