

EXHIBIT A

CASE NO. 20-60515

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

RANDALLS FOOD AND DRUG, L.P.,

Petitioner Cross Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross Petitioner

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

**BRIEF OF INTERVENOR INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL UNION 745**

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STATEMENT REGARDING ORAL ARGUMENT

International Brotherhood of Teamsters, Local Union 745 (“the Union”) agrees with the National Labor Relations Board (“the Board”) that this case is one of simply applying settled law to the underlying straight-forward facts. As such, the Union does not view oral argument as necessary to decide this case. Should the court determine oral argument would benefit the resolution of the issues in this case, the Union requests permission to participate in oral argument.

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I. STATEMENT OF THE ISSUES

At its core, this case presents one primary issue for review: whether the Board acted within its discretion when it overruled Randalls Food and Drug, L.P.’s (“the Company” or “Randalls”) election objections and certified the Union as the representative of a unit of the Company’s employees. If the answer to this primary issue is yes, then it is beyond dispute that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

II. SUMMARY OF THE ARGUMENT

In evaluating the Company's objections, the Board applied well-established precedent that has been in existence for decades. The Board carefully scrutinized the documentary evidence and oral testimony, and properly determined that the Company did not meet its burden of proving election misconduct or interference with employees' exercise of free choice. In this appeal, the Company merely raises arguments that the Board has already heard and rejected. Simply put, there is no basis for overturning the employees' election of the Union as their bargaining representative. For these reasons, this Court should (1) deny the Company's petition, (2) grant the Board's cross-application for enforcement of the Board's order that the Company cease and desist from refusing to recognize and bargain with the Union and that it engage in collective bargaining with the Union.

III. ARGUMENT

A. Standard of Review is Limited and Deferential to the Board.

A court's review of a decision and order by the NLRB "is limited and deferential." *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 714 (5th Cir. 2018). The Board's legal conclusions are reviewed *de novo* and will be upheld if they are reasonably based on the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("the Act"). *In-N-Out Burger*, 894 F.3d at 714; *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 518 (5th Cir. 2007).

The Board's fact-finding will be upheld so long as it is supported by substantial evidence. 29 U.S.C. §160(e). "Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. It is more than a mere scintilla, and less than a preponderance." *El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 656 (5th Cir. 2012). Substantial evidence is also understood as relevant evidence sufficient that a reasonable person would rely on it in coming to a conclusion. *J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003).

The court gives significant deference to the Board's application of the law to the facts due to "the Board's primary responsibility for administering the Act and its expertise in labor relations," and the court "will not disturb 'plausible inferences [the Board] draws from the evidence, even if we might reach a contrary result were we deciding the case *de novo*.'" *In-N-Out Burger* at 714 (quoting *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001)). Identical standards are applied to the decision of an administrative law judge when the Board adopts the administrative law judge's decision. *In-N-Out Burger* at 714.

"Congress has given the Board wide discretion in the conduct and supervision of representation elections, and the Board's decision warrants considerable respect from reviewing courts." *Con-Way Freight, Inc. v. NLRB*, 838 F.3d 534, 537 (5th Cir. 2016), citing *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991).

"Our review is limited to determining whether the Board has reasonably exercised its discretion, and if the Board's decision is reasonable and based upon substantial evidence in the record considered as a whole," the Board's decision will be upheld. *Id.* "There is a strong presumption that ballots cast under specific [Board] procedural safeguards reflect the true desires of the employees." *Id.* "A party seeking to overturn a Board-supervised election bears a heavy burden. Its allegations of misconduct must be supported by specific evidence of specific events from or about specific people. Further, an election may be set aside only if the objectionable activity, when considered as a whole . . . influence[d] the outcome of the election." *Con-Way Freight* 838 F3d. at 837, citing *Boston Insulated Wire & Cable Sys. v. NLRB*, 703 F.2d 876, 880 (5th Cir. 1983).

B. The Board Properly Concluded That the Union Organizer Did Not Engage in Electioneering Near the Polling Place That in Any Way Disturbed the Laboratory Conditions.

On pages 16-18 of its Brief, the Company attempts to argue that the union organizer appearing at the plant for the standard pre-election conference with the Board agent and representatives of Randalls management engaged in electioneering near the polling place that somehow disturbed the laboratory conditions for the election. This is in no way supported by the facts adduced at the NLRB objections hearing, and the Board properly exercised its considerable discretion to deny the Company's objection.

Carlos Mendez, the Union organizer and business agent, identified himself as Carlos Mendez from the Union at the security gate to be able to participate at the opening and closing of the polls on each day of the election. (ROA. 316). The security officer(s) were well-aware of who Mendez was, and allowed Mendez to get into the polling place. (ROA. 316-17). At no time did Mendez engage in any electioneering while on Company premises on those days, and merely went from his car to the polling place and back on all days of the polling period. (ROA. 320-21). There is no evidence that Mendez went anywhere else on the Company premises on those polling days or was ever at the polling place during the applicable times that the polls were open. Mendez simply greeting a couple of employees and having a brief conversation with such employees who were neither at the polling place nor in line to vote is not remotely sufficient to destroy the “laboratory conditions” for a fair election. Board law is clear on this.

The Board does not set aside elections based on electioneering “at or near the polls” regardless of the circumstances, as “it is unrealistic to expect parties or employees to refrain totally from any and all types of electioneering in the vicinity of the polls.” *Boston Insulated Wire*, 259 NLRB 1118 (1982). In determining whether electioneering warrants an inference that it interfered with employee’s free choice, the Board considers (1) the nature and extent of electioneering, (2) whether it was conducted by a party or employees, (3) whether the conduct occurred in a

designated no-electioneering area, and (4) whether the conduct contravened instructions of a Board agent. *Id. at 1119*; see also *J. P. Mascaro & Sons*, 345 NLRB 637, 638 (2005). In the event there is not a designated no-electioneering area, the Board will treat the area “at or near the polls” as equivalent for the purposes of this standard. See *Pearson Education, Inc.*, 336 NLRB 979, 979–980 (2001) (citing *Bally’s Park Place, Inc.*, 265 NLRB 703 (1982)).

The Board has found various types of electioneering conduct unobjectionable. See, e.g., *J. P. Mascaro & Sons*, 345 NLRB 637, 638 (2005) (conversations that took place outside the front entrance, away from any no-electioneering zone, that did not violate any Board agent instructions); *American Medical Response*, 339 NLRB 23, 23 fn. 1 (2003) (pro-union poster affixed to tree 100 feet from polling area and distributing pro-union flyers 50 to 80 feet from polling area); *Del Ray Tortilleria*, 272 NLRB 1106, 1107–1108 (1984) (union organizer shaking hands and speaking briefly with voters outside the polling place); *Boston Insulated Wire*, 259 NLRB at 1118–1119 (passing out leaflets and speaking to employees as they entered building where glass-paneled doors effectively insulated voters from the electioneering); see also *Marvil International Security Service*, 173 NLRB 1260 (1968) (union representatives conversed with voters at foot of 10-foot staircase leading to second floor where polling area was 20 to 25 feet down a hallway, beyond no-electioneering area established by Board agent); *Harold W. Moore & Son*, 173 NLRB 1258 (1968)

(conversations taking place 30 feet from building entrance, which was itself 30 feet from polling area); *Sewanee Coal Operators' Assn.*, 146 NLRB 1145, 1147 (1964) (persons wearing pro-union placards circulated about voting line outside of polling area and Board agent had not designated no-electioneering area); *NLRB v. Le Fort Enterprises, Inc.*, 791 F.3d 207, 213–214 (1st Cir. 2015) (electioneering and name-calling engaged in by employees outside of any no-electioneering area which could not be heard in polling place not objectionable).

Pursuant to the above-cited Board precedent, Mendez's conduct in greeting a few employees while on his way out from the pre-election meeting with the Board agent at a location outside of the polling place in no way destroyed the laboratory conditions of the election. In this vein, the conduct in this case almost exactly matches the conduct that the Board determined not to be objectionable or inappropriate in *Del Ray Tortilleria*, 272 NLRB at 1107–1108 (1984) (union organizer shaking hands and speaking briefly with voters outside the polling place); *Marvil International Security Service*, 173 NLRB 1260 (1968) (union representatives conversed with voters at foot of 10-foot staircase leading to second floor where polling area was 20 to 25 feet down a hallway, beyond no-electioneering area established by Board agent).

From the foregoing, it is beyond doubt that the Board's decision to deny the Company's objection to Mendez's actions in greeting a few employees away from

the polling area was fully-supported by both the facts adduced at the objections hearing as well as the clearly-established Board law on this issue.

C. The Board Properly Determined That the Board Agent Arriving a Few Minutes Late to a Voting Session Did Not Impact the Fairness or Validity of the Election.

Apparently, the NLRB agent got lost trying to find the Employer's location and was several minutes late (ROA. 323-24). However, no one complained that they were denied the right to vote due to the late opening of the polls that evening. *Id.* Furthermore, seventy-six employees out of seventy-eight eligible employees voted in the election, leaving only two employees who did not vote. (ROA. 309). Assuming, *arguendo*, that these two employees tried to vote during the time period that the NLRB agent was not present, it still would not impact the election since the tally was forty-four to thirty-one.¹ (ROA. 309).

“The Board ‘does not set aside an election based solely on the fact that the Board agent conducting the election arrived at the polling place later than scheduled, thereby causing the election to be delayed.’” *Midwest Canvas Corp.*, 326 NLRB 58 (1998) (quoting *Jobbers Meat Packing Co.*, 252 NLRB 41 (1980)). The Board may set aside the election only if: (1) the number of voters who were “possibly excluded could have been determinative,” (2) other circumstances suggest that “the vote may have been affected by the Board agent’s late opening,”

¹ There was one contested ballot.

or (3) it is “impossible to determine whether [the] irregularity affected the outcome of the election.” *Id.*

None of the three factors described above were at play in this case. See *Arbors at New Castle*, 347 NLRB 544, 545 (2006) (although polls opened late, parties stipulated that the five eligible employees who did not vote had not appeared at the polls “at any time during the scheduled polling hours”); *Jobbers Meat Packing Co.*, 252 NLRB 41 (1980) (polls opened two hours late, but vote of only employee possibly excluded could not have been determinative); *Smith Co.*, 192 NLRB 1098, 1102 (1971) (polls opened 2–3 minutes late, all eligible voters voted except one on leave of absence and another home sick).

As the Regional Director correctly determined, “a fifteen-minute delay in one of six sessions in an election with over 25 hours of scheduled voting time is not a substantial departure from the scheduled voting hours.” (ROA. 353). There was no evidence that (1) any employee sought to vote during this time and was unable to vote at any of the other five times, (2) any employees were disgruntled or affected by the late opening, or (3) employee free choice was affected in any way. In these circumstances, the Board’s ruling that a brief delay in the opening of the polling place on just one of six of the voting times was not a sufficient basis to overturn an election in which only two employees out of seventy-eight employees did not vote. Accordingly, the Board’s denial of Randalls’ objection should not be disturbed.

D. The Board Properly Ruled That Election Observers May Wear Union or Company Insignia.

Stacey Bess, a Union observer, wore a generic Local 745 t-shirt, which was no different from the Employer observers wearing Albertson's shirts and hats. (ROA. 326). At no time did Bess wear any clothing which signified that employees should vote yes for union representation. Additionally, the Company observer never objected to Bess wearing the shirt even though such observer clearly saw it. (ROA. 326).

The Board has consistently held that wearing stickers, buttons, and similar campaign insignia by participants as well as observers at an election is, without more, not prejudicial. *R. H Osbrink Mfg. Co.*, 114 NLRB 940, 942 (1955); see also *Furniture City Upholstery Co.*, 115 NLRB 1433, 1434–1435 (1956). Thus, precedent is clear that the wearing at the polls by observers of buttons or other insignia merely bearing the name of their union is not prejudicial to the fair conduct of an election. *Electric Wheel Co.*, 120 NLRB 1644, 1646 (1958). And viewing the identity and special interests of employer observers as not reasonably presumed to be less well known than that of union observers, the Board holds that the impact on voters is not materially different “whether the observers wear pro-union or anti-union insignia of this kind.” *Larkwood Farms*, 178 NLRB 226 (1969) (observer wearing “Vote No” hat not objectionable).; see also *Fiber Industries*, 267 NLRB 840, 850 (1983) (appearance of words “yes” or “no” in polling area, without more,

not grounds to set aside election); *Delaware Mills, Inc.*, 123 NLRB 943, 946 (1959) (overruling objection based on employee—who, because her vote was challenged, was required to sit at polling place—wearing union T-shirt and “Vote Yes” button and allegedly waving and smiling at other voters).

Based on the above-cited cases, there is simply no basis to disturb the Board’s overruling of the Company’s objection to an election observer wearing a Union t-shirt during two of the voting sessions.

E. The Board Properly Found That Pro-Union Signs in Vehicles Not Visible From the Voting Location is Not Inappropriate and Insufficient to Overturn the Election Results.

A few employees had signs stating “Union Proud” or “Union Strong” in the windshields of their vehicles, but these vehicles were in the parking lot and nowhere near the polling place (approximately 300 to 400 feet), which was inside the Company’s building. (ROA. 328, 354). These signs were not visible from the actual polling place because eighteen-wheeler trucks were parked in between the employees’ vehicles and the polling place. *Id.* Furthermore, even if the pro-union signage was, in fact, visible, from the polling place, that is insufficient to overturn election results.

For Board law on this topic, please see pp. 5-7, *supra*. It should bear repeating however, that pro-union signage outside of the polling place is insufficient to sustain an objection. See *American Medical Response*, 339 NLRB 23, 23 fn. 1 (2003) (pro-

union poster affixed to tree 100 feet from polling area and distributing pro-union flyers 50 to 80 feet from polling area not objectionable conduct). Furthermore, there was never a contention from Randalls that the Union, as opposed to pro-union employees, was responsible for displaying the signs. (ROA. 327, 354.) *See Electro Cube, Inc.*, 199 NLRB 504, 504 (1972) (“Vote Teamsters” sign 40 feet from polling area, for which union was not shown to be responsible, was unobjectionable).

The Board acted well within its considerable discretion in denying Randalls’ objection to the vehicle signage that was not visible from the polling place. Thus, the court should deny Randalls’ attempt to overturn such ruling.

F. The Board Properly Denied the Company’s Objection Regarding Employees Raising Funds for a Fellow Employee in Need.

A Randalls employee (not the Union organizer) wearing a Union vest was attempting to raise money for another employee who has a son with stage 4 bone cancer who was short on rent money because of the medical expenses for the treatment of her son. (ROA. 333-37). At no time did any Union agent or employee engage in this fundraising. *Id.* Both before and after the time period of this campaign and election, employees have engaged in attempting to raise money for fellow employees who had been beset by hard times. *Id.* There was nothing different about this occasion. *Id.*

Assuming, *arguendo*, that the raising of money for the employee by other employees and not the Union is relevant to the issue of “laboratory conditions” for

the election, Board law is clear that such conduct is insufficient grounds to overturn an election. The Board, with court approval, has consistently rejected employers' attempts to use employees' charitable, non-union-sponsored activities to overturn election results. In *Dolgenercorp, LLC v. NLRB*, 950 F.3d 540, 552 (8th Cir. 2020), *reh'g denied* (Apr. 21, 2020), the Eighth Circuit upheld the Board's finding that a union supporter's offer of an unconditional \$100 loan to a co-worker in financial distress "did not substantially impair [the coworker's] exercise of free choice in the election." In *NLRB v. WFMT*, 997 F.2d 269, 277-78 (7th Cir. 1993), the Seventh Circuit upheld the Board's finding that employees' pre-election contributions of \$3,000 to \$4,000 into a fund to cover union initiation fees for employees who could not afford them (which the union did not authorize) did not invalidate the election.

In the present case, employees (not the Union) attempted to raise money for a fellow employee who was in need. The fact that the Union was not involved should take this issue completely out of being questioned. Additionally, this was an attempt to raise money for one single employee, as opposed to the granting of a benefit for multiple employees. Pursuant to well-established Board precedent, there was nothing inappropriate about such attempts, and certainly insufficient to overturn the valid election.

G. The Company’s Totality of Conduct Objection Was Never Raised and is Without Merit Nonetheless.

On pages 23-24 of its Brief, Randalls attempts to raise a “totality of circumstances” as a basis to overturning the election and asserting error in the Board’s ruling that its five objections were without merit. The short shrift it gave this argument in its Brief is a good indicator of the Company’s lack of belief in this avenue of appeal. The court should summarily dismiss Randalls’ contentions in this regard for several reasons.

First and foremost, Randalls did not timely raise that objection in the representation proceeding. At no time did the Company reference the alleged cumulative-impact theory in its written objections and the Regional Director’s Order setting the objections for a hearing therefore did not address it (ROA. 263-65; 267). The Board correctly concluded that the issue was not properly before it. (ROA. 357.) *See Brentwood at Hobart v. NLRB*, 675 F.3d 999, 1006 (6th Cir. 2012) (the Board acted within its discretion in applying its “rule prohibiting hearing officers from expanding hearings beyond matters that are reasonably encompassed by the written objections”).

Second, even if Randalls had properly raised the theory before the Board and preserved it for the Court’s consideration, it is nevertheless without merit. This court stated in a similar case that “the cumulative impact of a number of insubstantial objections does not amount to a serious challenge meriting a new election.” *Con-*

Way Freight, 838 F.3d at 540 (quoting *Lamar Co., LLC v. NLRB*, 127 F. App'x 144, 151 (5th Cir. 2005)). See also *NLRB v. White Knight Mfg. Co.*, 474 F.2d 1064, 1067-68 (5th Cir. 1973), in which this court ruled that evidence concerning a series of incidents, none of which had any demonstrated influence on the outcome of the election, did not cumulatively meet employer's burden.

In the instant case, the Board concluded that the various, discrete, and unobjectionable incidents of which the Company complains had no greater effect on the election when considered in their totality. (ROA. 357.).

IV. CONCLUSION

For all of the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition, grant the Board's cross-application, and enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ David K. Watsky
David K. Watsky

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/s/ David K. Watsky
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