

**Dunham's Athleisure Corporation and Local 51,
International Brotherhood of Teamsters, AFL-
CIO, Petitioner.** Case 7-RC-20191

November 30, 1994

DECISION AND CERTIFICATION OF
REPRESENTATIVE

BY MEMBERS STEPHENS, DEVANEY, AND
BROWNING

The National Labor Relations Board, by a three-member panel, has considered objections to an election held January 7, 1994, and the hearing officer's report (pertinent sections of which are attached) recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 61 for and 28 against the Petitioner, with 28 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings¹ and recommendations, as modified below, and finds that a certification of representative should be issued.

1. In its exceptions, the Employer contends, inter alia, that the hearing officer erred in finding that no objection was filed concerning the security of the ballot box. The Employer asserts that this matter is encompassed within Objection 18, which addresses events occurring in the voting room. On the merits of this objection, the Employer alleges that the security of the ballot box was compromised during the voting period because its observer was unable to see the ballot box at all times. The Employer claims the ballot box was left virtually unattended for more than two-thirds of the voting period.

The record indicates that the line of employees waiting to vote was situated between the observers' table and the ballot box. When the line was at its longest and deepest, it interfered with the observers' ability to

¹The Employer alleges that the hearing officer failed to consider the cumulative impact of the Petitioner's conduct on unit employees. In adopting the hearing officer's recommendations, we have considered the record evidence as a whole and find no objectionable conduct sufficient to warrant setting aside the election.

We disavow any comments made by the hearing officer suggesting that certain conduct of the Petitioner and its supporters would be likely to create negative feelings toward the Petitioner.

We agree with the hearing officer that this case is distinguishable from *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991). Member Devaney notes that he dissented in that case. Members Stephens and Browning did not participate in that case and express no view on whether it was correctly decided.

The Employer asserts that line leaders are supervisors. In this regard we note that the Board, on March 25, 1994, denied the Employer's motion for reconsideration of the Board's denial of its request for review of the Regional Director's finding that line leaders are not supervisors. The employee status of the Employer's line leaders is, thus, not open to relitigation.

see the ballot box. When there were only a few employees in line, the observers had no trouble seeing the ballot box.

We agree with the Employer that Objection 18 fully encompasses this allegation. With regard to the merits of the objection, when the integrity of the election process is challenged, the Board must decide whether the facts raise a "reasonable doubt as to the fairness and validity of the election." *Allied Acoustics*, 300 NLRB 1181 (1990). There is no evidence that the ballot box was hidden totally from view at all times. The record shows that any obstruction occurred intermittently during the polling period, especially as groups of employees were released from work to vote. There is no evidence of "tampering, fabrication, misplacement, or loss of the [blank] ballot[s], or any factual issue concerning the accuracy or integrity of the [ballot count]." *Allied Acoustics*, supra at 1181. In other words, there is no evidence that the ballot box was "stuffed" at any time when the observers could not see it, because there is no discrepancy between the approximate number of employees eligible to vote (137) and the number of valid votes counted plus challenged ballots (117). Finally, there is no evidence or even an allegation of misconduct or interference with the voting process by employees waiting in line to vote. For all these reasons, we overrule Objection 18. See *Polymers v. NLRB*, 414 F.2d 999, 1004 (2d Cir. 1969). ("A *per se* rule of [setting an election aside if there is a] possibility [of irregularity] would impose an overwhelming burden in a representation case. If speculation on conceivable irregularities were unfettered, few election results would be certified, since ideal standards cannot always be attained.")²

2. In excepting to the hearing officer's recommendation that Objections 5 and 7 be overruled, the Employer contends, inter alia, that even if the statements in question were not made by agents of the Petitioner, the hearing officer should have analyzed them under the third-party standard. We agree with the hearing officer that there is no record evidence that any person who made the statements in issue is a general agent of the Petitioner. Applying the third-party standard, we find that the comments in question, pertaining to the possible ramifications of the challenged-ballot procedure, were not so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. See *Orleans Mfg. Co.*, 120 NLRB 630, 633-634 (1958).

²The facts of the instant case are distinguishable from the situation in *Austin Waxed Paper Co.*, 169 NLRB 1109 (1968), cited by the Employer, where it appeared that the ballot box and balloting area were left wholly unattended.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local 51, International Brotherhood of Teamsters, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time warehouse employees, line leaders, and truck drivers employed by the Employer at its facilities located at 38170 Amrhein and 12754 Richfield Court, Livonia, Michigan; but excluding all temporary employees, co-op students, plant clerical employees, office clerical employees, managers, coordinators, supervisors-in-training and guards and supervisors as defined in the Act.

APPENDIX

Hearing Officer's Report

Objections 5 and 7

The Employer asserts that several Management Information System (MIS) employees were told by agents of Petitioner that if they were going to vote no they were not eligible to vote and should not vote and, if they did vote, their votes would be challenged by Petitioner. This then would, these employees were allegedly told, lead to their being subpoenaed by Petitioner to testify at a trial, where they would lose at least 3 days of pay and incur expenses. By this, Petitioner and its agents are alleged to have destroyed the essential free choice of employees clearly eligible to vote in the election. Petitioner denies that this occurred, and argues that not a single employee failed to vote as a result of this allegedly objectionable conduct. The Employer presented three employee witnesses, Sheri Singletary, Lori Froh, and Stacey Harden, and employee Kim Tarovella also testified to some extent regarding this objection.

Singletary testified that Tim Potter, then a fellow employee in the warehouse, told her she might be challenged if she voted in the election. According to Singletary, Potter spoke in a nonthreatening manner as part of a noncoercive conversation they were having about the upcoming election. Singletary also testified that she asked fellow warehouse employees Dave Fox and Al Boone, who had been challenged in a previous election, what happens when a voter is challenged. Fox and Boone then proceeded to inform Singletary about what had happened to them.

The established tests for evaluating preelection conduct are: (1) "the third-party standard of whether the conduct created a general atmosphere of fear and confusion[.]" *Baja's Place*, 268 NLRB 868 (1984); and (2) the standard for parties to the election of "whether the conduct reasonably tends to interfere with the employees' free and uncoerced choice in the election." *Id.*

Since there is no record evidence that Fox and Boone are agents of Petitioner, the third-party standard must be utilized to evaluate their communication with Singletary. Simply informing her of what happened to them regarding the challenges to their votes in a previous election would not create

a general atmosphere of fear and confusion. There thus is nothing objectionable about the conduct of Fox and Boone.

As for Potter, although he was Petitioner's election observer during the polling conducted at the distribution facility, there is no evidence in the record that he was a general agent for Petitioner. *Advance Products Corp.*, 304 NLRB 436 (1991). Notwithstanding this, even if the preelection conduct standard for parties were applied, Potter's remark that Singletary might be challenged if she voted in the election does not rise to the level of reasonably tending to interfere with Singletary's free and uncoerced choice in the election. It therefore also follows that the lesser third-party standard has also not been met.

Lori Froh testified that a "different variety of people" who were employees of the Employer, but none of whom she could name, told her "That if I voted, my vote would be challenged, I'd have to go to court, I would get subpoenaed and that I wouldn't get paid for it." Froh's lack of memory of who allegedly made these remarks to her makes it impossible to determine whether or not any of the employees involved were agents of Petitioner. Since the burden of supporting an objection with record evidence is on the objector, the lack of this key evidence must be resolved against the Employer. Without knowing the identities of the employees who made the alleged coercive statements to Froh, I am unable to conclude that they had any connection whatsoever to Petitioner, as, indeed, it is just as likely that the statements were made by supporters of the Employer.

Even assuming, *arguendo*, that some of these employees were supporters of Petitioner, that does not in and of itself establish an agency relationship. To do so, there must be record evidence that Petitioner placed the employees in positions where they appear to act as Petitioner's representative. *Kux Mfg. Co. v. NLRB*, 890 F.2d 804 (6th Cir. 1989), *enfg.* 291 NLRB No. 60 (Oct. 20, 1988) (not reported in Board volumes). There is no such evidence of this in the instant case. As a result, I find that, even if some of the employees who made the alleged threats to Froh supported Petitioner, they were not also agents of Petitioner.

Stacey Harden testified that she and some fellow MIS employees, including Singletary and Froh, had no more than two discussions as to whether or not some of the people who worked in the MIS department would be allowed to vote in the election. According to Harden, none of the employees involved were supporters of the Union. In fact, the only person who spoke on this subject to her who could be identified as an agent of either of the parties was Douglas Billingsley, general manager of the distribution facility. Not only is there no record evidence that any of the statements made were coercive, there again is no evidence that any agents of Petitioner were involved in any possible wrongdoing.

At first, Kim Tarovella testified that she did not vote "[b]ecause one of the union employees [Steve Laycok] told me that my vote wasn't going to be counted anyway." At the same time, though, Tarovella said that she was also told by this supporter of Petitioner that "the Union would fight for the right for me to vote." In the end, Tarovella chose not to vote because, according to her, she considered herself to be a supervisor and did not want to get involved in the voting process.

There is no evidence in the record that Laycok is an agent of Petitioner. Consequently, his actions must be examined

with reference to the third-party standard enunciated by the Board in *Baja's Place*, supra. Not only did Laycok's remarks to Tarovella fail to create a "general atmosphere of fear and confusion," but they also do not rise to the level of violating the *Baja's Place* standard for parties to an election, as they did not reasonably tend "to interfere with the employees' free and uncoerced choice in the election." Id.

Tarovella's testimony establishes that she was not in any way coerced or intimidated regarding her right to vote and that she freely chose not to vote for her own reasons.

Accordingly, based on the above, I recommend that Objections 5 and 7 be overruled.