

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES

BERKSHIRE NURSING HOME LLC
Employer

and

Case No. 29-RC-10113

NEW YORK'S HEALTH & HUMAN SERVICES UNION, 1199,
SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO
Petitioner

Aaron Schlesinger, Esq., Peckar & Abramson, P.C., Counsel for the Employer.
Daniel Ratner, Esq., Levy Ratner, P.C., Counsel for the Petitioner.

RECOMMENDED DECISION ON OBJECTIONS

Joel P. Biblowitz, Administrative Law Judge: This matter was heard by me on February 9, 2004 in New York, New York. Based upon a petition that was filed on October 9, 2003¹ by New York's Health & Human Services Union, 1199, Service Employees International Union, AFL-CIO, herein called the Petitioner or the Union, and pursuant to a Stipulated Election Agreement entered into by the Petitioner and Berkshire Nursing Home LLC, herein called the Employer, an election by secret ballot was conducted on November 5 among the employees in the following unit:

All full-time and regular part-time non professional employees including the classifications of Licensed Practical Nurses, Certified Nursing Assistants, Maintenance Workers, Recreational Aides, CNA/Therapy Aides, Cooks, Dietary Workers and Housekeeping Workers employed by the Employer at its 10 Berkshire Road, West Babylon, New York facility, but excluding all Registered Nurses and other professional employees, Receptionists, Medical Records personnel, Nursing Secretary and other business office clerical employees, confidential employees, guards, LPN Nursing Care Coordinators, Shift LPN Charge Nurses, Administrators, Physical Therapy Assistants, Managers and supervisors as defined in Section 2(11) of the Act.

The Tally of Ballots showed the following:

Number of ballots cast for the Petitioner	110
Number of ballots cast against the Petitioner	20
Number of challenged ballots	9

Challenges are not sufficient in number to affect the results of the election.

On November 12, the Employer filed timely objections to conduct affecting the results of the election. On December 3, the Regional Director for Region 29 issued a Report on Objections, in which he recommended that the Employer's objections be overruled in their entirety and that a Certification of Representatives be issued certifying the Petitioner as the

¹ All dates referred to herein relate to the year 2003 unless otherwise stated.

collective bargaining representative of the employees in the unit described above. On December 16 the Employer filed exceptions to the Regional Director’s Report on Objection, and on December 22 the Petitioner filed an answering brief in opposition to the Employer’s exceptions. On January 14, 2004, the Board issued a Decision and Order Directing Hearing
 5 wherein it adopted the Regional Director’s findings and recommendations, except that it found that the Employer’s Objection #2(c) raised substantial and material factual issues warranting a hearing, ordered that a hearing be held to receive evidence to resolve the issues raised by the Employer’s Objection #2(c), and that the hearing officer designated to conduct the hearing
 10 prepare and cause to be served upon the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendation to the Board as to the disposition of the remaining objection.

Objection #2(c) states: “Outside the facility, large groups of Union members and officials stopped employees as they drove or walked by on their way to vote for the purpose of coercing
 15 them to vote for the Union.”

At the hearing, the Employer presented two witnesses in support of Objection #2(c): William Cowen, the administrator of the facility, and Kathleen Pan, the assistant director of nursing at the facility. The election was conducted from 7:00 to 9:00 a.m. and from 2:00 p.m. to
 20 5:00 p.m. in the staff dining room at the Employer’s facility. Cowen testified the entrance the Employer’s facility leads to a circular driveway, which leads to the sidewalk and the street, Berkshire Road, and that the distance from the entrance to the facility to the street is about fifty feet. The staff dining room, which is to the left of the lobby and building exit, is a little further
 25 from the street, but has a window facing in that direction. In the semi-circular area on the inside of the circular driveway are shrubbery and trees that block, at least, part of the view from the staff dining room to the street. When Cowen arrived for work on November 5, he saw approximately twenty individuals standing on the street in front of the facility; he believes that about two of these were Union representatives. He testified: “Anybody that drove by or anybody
 30 that walked up that was an employee of the facility would be approached by various other employees, as well as representatives of the union and they would engage in conversation.” He could not hear any of these conversations and he does not recall whether anything was handed to the employees.

Pan testified that when she arrived for work at about 7:50 a.m. on November 5, she saw
 35 some staff and Union members, a total of about ten individuals in the street adjoining the facility. At other times that day she observed up to twenty people in the street. As employees were coming to work, either they walked over to the people in the street to speak to them, or the people called to the employees, who walked over to them. She did not hear any of the resulting conversations and she could not recall whether she saw any Union representative approach
 40 employees as they were walking to the facility.

Analysis and Discussion

Cowen and Pan were each totally credible and believable witnesses. They appeared to
 45 be testifying truthfully as to what they observed on the day of the election, without exaggeration. What they saw was between ten to twenty individuals or Union officials in the street in front of the facility, approaching, or calling to, employees arriving for work at the facility. The area where they were standing was fifty to sixty feet from the entrance to the building and the staff dining room, where the election was conducted. There was no evidence that these individuals were
 50 any place near a designated no-electioneering area established by the Board agent conducting the hearing, nor is there any evidence that the Union supporters made any threats or coercive statements to the employees.

5 The law is clear that the party seeking to overturn the results of a Board conducted
election bears the burden of establishing that the election was not fairly conducted. *Family*
Service Agency S.F. v. NLRB, 163 F.3d 1369, 1377 (D.C. Cir. 1999). In *Safeway, Inc.*, 338
NLRB No. 63 (2002), the Board, citing *NLRB v. Hood Furniture Mfg Co.*, 941 F.2d 325, 328 (5th
Cir. 1991), stated: “Representation elections are not lightly set aside...There is a strong
presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires
of the employees.” In addition, in order for a party’s conduct to constitute grounds for setting
10 aside an election, it must reasonably tend to interfere with the employees’ free and uncoerced
choice in the election. In making this determination, the Board “considers not only whether the
conduct occurred within or near the polling place, but also the extent and the nature of the
alleged electioneering...The Board has also relied on whether the electioneering is conducted
within a designated ‘no electioneering’ area or contrary to the instructions of the Board agent.”
Boston Insulated Wire & Cable Co., 259 NLRB 1118, 1119 (1982). The Employer has not
15 sustained this burden herein.

The Board has long held that a union can speak to employees outside an employer’s
facility, even on the day of the election, in the absence of threats or coercion, without engaging
in objectionable conduct. In *Firestone Textiles Company*, 244 NLRB 168, 171 (1979), the
20 administrative law judge dismissed the employer’s objection, stating: “I do not find that the
presence of fairly large numbers of union adherents at the plant entrance, by itself, constituted a
threat that would deprive employees of their freedom of choice in a secret-ballot election. Union
adherents are entitled to handbill and to urge employees to vote for the Union as long as it is
done peacefully and without threats.” See also *Hy’s of Chicago, Ltd.*, 276 NLRB 1079, 1084
25 (1985). In *Comcast Cablevision of New Haven, Inc.* 325 NLRB 833, 838 (1998), with facts and
objections similar to those in *Firestone, supra*, the hearing officer, as affirmed by the Board,
recommended that the objection be overruled because there was no evidence of any threats by
the demonstrators that could arguably impact on the employees’ free choice, and there was no
attempt to prevent anyone from entering or leaving the employer’s facility. Counsel for the
30 Employer, in his brief, cites *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001) in
support of its position. However, the facts therein are distinguishable from the instant matter. In
Katz, the employer filed an objection to the election alleging that two union agents were in a car
within twenty feet of where the employees entered to vote and that they motioned and honked
at the employees. The objection further alleged that the Board agent had established a twenty
35 five foot no-electioneering zone in the area, and that the union agents were within that zone.
The Regional Director overruled the objections finding that, even if they were true, there was
insufficient evidence to find that the union had interfered with the employees’ free choice. The
Court, in vacating the Board’s decision and remanding for further proceedings, found that
because the Regional Director assumed that the allegations in the employer’s objections were
40 *true*, it would make its findings based upon those assumptions. Therefore, the Court found that
the union agents’ conduct occurred within the no-electioneering zone, contrary to the Board
agent’s instructions. In the instant matter, however, the individuals (most of whom were
employees) were on the street approximately fifty feet from the Employer’s building, clearly
outside of any no-electioneering area, and there was no evidence of any threats or coercive
45 activities by these individuals. They simply stopped employees on their way to work or called to
them requesting that they stop to talk to them. To find this to constitute objectionable conduct
would prevent a union from engaging in noncoercive electioneering in the vicinity of an
employer’s premises, outside of the no-electioneering area, on the day of a Board conducted
election. I know of no such rule. Further, the Union won the election by a vote of 110 to 20. A
50 wide margin such as this would not have been affected by the conduct alleged to be
objectionable herein. *Quest International*, 338 NLRB No. 123 (2003). I therefore recommend
that the Employer’s remaining Objection, # 2(c), be overruled.

Recommendation

5 Based upon the above, I recommend that the Employer’s Objection 2(c) be overruled
and that the Union be certified as the exclusive collective bargaining representative of the
employees in the following appropriate unit:

10 All full-time and regular part-time non professional employees including the
classifications of Licensed Practical Nurses, Certified Nursing Assistants, Maintenance
Workers, Recreational Aides, CNA/Therapy Aides, Cooks, Dietary Workers and
Housekeeping Workers employed by the Employer at its 10 Berkshire Road, West
15 Babylon, New York facility, but excluding all Registered Nurses and other professional
employees, Receptionists, Medical Records personnel, Nursing Secretary and other
business office clerical employees, confidential employees, guards, LPN Nursing Care
Coordinators, Shift LPN Charge Nurses, Administrators, Physical Therapy Assistants,
Managers and supervisors as defined in Section 2(11) of the Act.

Dated, Washington, D.C.

20

Joel P. Biblowitz
Administrative Law Judge

25

30

35

40

45

50