JD(SF)-75-05
Seattle, WA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

MESSENGER SIGN CO.
Employer

and Case 19-RC-14749

PAINT MAKERS, SIGN, DISPLAY,
TRUCK PAINTERS and ALLIED TRADES
LOCAL UNION 1094, affiliated with
PAINTERS DISTRICT COUNCIL #5, AFL-CIO
Petitioner

Matthew W. Lynch, Esq., (Washington Employers, Inc.)
Seattle, WA, for the Employer.

Terry C. Jensen (Rhinehart & Robblee)
Seattle WA, for the Petitioner.

ADMINISTRATIVE LAW JUDGE'S REPORT ON OBJECTIONS

Jay R. Pollack, Administrative Law Judge: Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the Regional Director for Region 19 entered a report and recommendations on objections, and ordered a hearing before an Administrative Law Judge. Prior to the scheduled hearing, the parties entered into a stipulation constituting the entire record in this case. Further, the parties waived a hearing and agreed that the case could be decided based on the stipulated record. I accepted the stipulation on September 26, 2005.

Pursuant to a Stipulated to Set Aside Prior Election and Conduct Second Election approved by the Regional Director on august 4, 2005, a second election by secret ballot was conducted on August 23, 2005, in the following unit of employees:[1]

> All full-time and regular part-time journeymen sign painters, journeymen sign hangers and construction men, production assistants, apprentices, journeymen screen printers, production screen printers, journeymen computer operators, shop persons/truck drivers "A", shop persons/truck drivers "B" and foremen employed by the Employer at its Seattle, Washington facility; excluding all clerical employees, sales personnel, casual employees, all other employees, guards and supervisors as defined in the Act.

The Tally of Ballots served on all the parties at the conclusion of the balloting showed the following results:

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[1] The original election was held on July 19, 2005, pursuant to a Stipulated Election Agreement approved by the Regional Director on June 22, 2005.

Approximate number of eligible voters……20
Number of void ballots……0
Number of votes cast for Petitioner……10
Number of votes case against participating labor organization…...9
Number of valid votes counted……..19
Number of challenged ballots…… 0
Number of valid votes counted plus challenged ballots……...19

Thereafter, Messenger Sign Co. (the Employer) filed timely objections to the election. The Regional Director set for hearing the follwing objection filed by the Employer:

> During the voting period the union observer and the Petioner, with the acquiescence of the supervising Board Agent, failed to preserve the secrecy of the balloting process and engaged in improper electioneering and conversation. Also during the voting period, the supervising Board Agent permitted loitering in the polling area.

As stated earlier the representation election was held on august 23, 2005. Voting occurred between 11:00 a.m. and 11:30 a.m. in an area of the production floor set aside for voting purposes. There were two Board Agents overseeing the voting. Sabrina Nelson was the sole Employer observer and John Noser was the sole Union observer. All four of these individuals were seated at the voting table for the entire voting period.

The parties stipulated that at approximately 11:25 a.m., employee Kimberly Waid approached the voting table and asked those presenr if employee Paul Ross had voted.[2] After a few seconds, Union observer Noser replied "no." Waid then immediately left the voting area. Waid went to Ross' work area, approached him, and stated "Paul, you gotta go vote."

Waid then returned to the voting area and asked if any other employee had yet to vote. This time, one of the Board Agents, responded that they could not answer that question, and that it was an employee's right to decide whether to vote or not. The Board Agent also stated that employees should not be "pushed" into voting. Waid then left the voting area.

After Waid left the voting area, and shortly before the voting period ended, Ross came to the voting area and cast a ballot.

The Employer objects to the conduct of the election on two grounds. First the Employer contends that Noser informed Waid that employee Ross had not voted and thereby caused Waid to seek out Ross and urge Ross to vote. The Employer contends that such conduct amounted to improper electioneering. Secondly, the Employer contends that the Board Agents engaged in misconduct by condoning and tolerating the conversation between Waid and Noser.

[2] Both Ross and Waid were eligible voters.

Conclusions and Recommendations

1. The conduct of the Union observer

As the Board put it in *New York Telephone Co*., 109 NLRB 788 790-791 (1954) :

> The Board is responsible for assuring properly conducted elections and its role in the conduct of elections must not be open to question. Where . . . the irregularity concerns an essential condition of an election, and such irregularity exposes to question a sufficient number of ballots to affect the outcome of the election, in the interest of maintaining our standards there appears no alternative but to set this election aside and to direct a new election.
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> This principle has been stated and restated in a countless number of cases and, in keeping with it, the Board tests the many types of procedural objections to an election which come before it. Elections may be set aside on procedural grounds or because of the conduct, deliberate or inadvertent, of the parties themselves or, as we have seen in the preceding chapter, even of third parties, of election observers or of others at the polls, or of Board agents if they fail to live up to the Agency's high standards of impartiality and fairness. Accord, *Sawyer Lumber Co*., 326 NLRB 1331 (1998) .

Recently in Tyson Fresh Meats, 343 NLRB No. 124 (2004) the Board restated its rule against electioneering at the polling area:

> The Board has long maintained that an election must be set aside when one party engages in "prolonged" conversations with voters waiting in line to cast their ballots. Thus, in Milchem, Inc., 170 NLRB 362, 362 (1968), the Board reasoned that "the potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of such conversations." The Board concluded that the final minutes before a voter casts his ballot should be his own, "as free from interference as possible." Id. The requirements of Milchem are as follows: (1) conduct by a party (2) that involves prolonged conversations with employees waiting in line to vote. Therefore, two questions must be answered in

determining whether this election should be set aside under the rationale of Milchem. The first question is whether the stewards who were talking to the voters in the voting line are agents of the Union. If so, the second question is whether they engaged in prolonged conversations with voters waiting in line to vote. We answer both questions affirmatively and find that the election must be set aside.

In the instant case Noser was the Union observer. Ther is no other evidence to establish that he was an agent of the Union. However, in *Modern Hard Chrome Service,* 187 NLRB 82 (1970) the Board applied its Milchem rule to the improper conversations of a union observer. The election was set aside where, despite being admonished not to converse with voters, a union observer spoke at length with employees as they approached the voting table, offering one of the voters a loan to buy a beer. The Board stated, "The Board jealously guards its election process as the keystone of the Act. Observers are supposed to watch the ballot box, identify and check off voters on the eligibility list, and perform other services as requested by the Board agent. Their functions do not include offering small loans to prospective voters as they stand in line."

In the instant case, Noser engaged in no prolonged conversation with Waid. He simply replied "No" to her question as to whether Ross had voted. I find that Noser's conduct here was innocuous, isolated and not in disregard of any Board Agent warnings. Further, It did not involve voters waiting in line to vote. I do not find Waid's conduct sufficient to set aside the election. Waid was not an agent of the Union. In fact there is no evidence that Waid even supported the Union. She engaged in no prolonged conversation at the polling place. Waid's essentially neutral directive to Ross to vote could not be characterized as a prolonged conversation. Further, the conversation did not take place in the polling area.

When Waid returned to the voting area, one of the Board agents responded that they could not answer that question and that it was an employee's right to decide whether to vote or not. The Board Agent also stated that employees should not be "pushed" into voting. There was no further conversation between Waid and the observers. Waid then left the voting area. Clearly, there was no violation of the Milchem rule at this time.

2. The conduct of the Board Agent

The conduct of Board agents must be beyond reproach and "must not tend to destroy confidence in the election process." *Athbro Precision Engineering Corp.*, 166 NLRB 966 (1967). There is well-established precedent that the Board in conducting elections must maintain and protect the integrity and neutrality of its procedures. See, e.g., Glacier Packing Co., 210 NLRB 571 (1974); Kerona Plastics, 196 NLRB 1120 (1972). Election conditions must approach, as nearly as possible, ideal "laboratory" conditions so as to facilitate expression of the uninhibited desires of the employees. General Shoe Corp., 77 NLRB 124, 127 (1948). Thus, the commission of an act by a Board agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election. Glacier Packing, supra. 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." Dunham's Athleisure Corp., 315 NLRB 689 (1994), quoting Allied Acoustics, 300 NLRB 1181 (1990). In Polymers, Inc. v. NLRB, 414 F.2d 999, 1004 (2d Cir. 1969), enfg. 174 NLRB 282 (1969), the court held as follows:

> A per se rule [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.

Where a Board agent permitted the union's observer, without objection from the employer's observer, to give the only Spanish-speaking employee direction on how to vote, in Spanish, but there was no evidence of electioneering, the election was upheld. *Regency Hyatt House*, 180 NLRB 489 (1969) . However, in *Alco Iron & Metal Co.*, 269 NLRB 590 (1984) the Board agent conducting the election could not speak or write Spanish and delegated to a Spanish-speaking observer the responsibility for explaining voting procedures to Spanish-speaking voters. The Board overturned the election finding that the delegation of an important part of the election process to the Petitioner's observer conveyed the impression that the Petitioner, and not the Board, was responsible for running the election. The Board held that such conduct is incompatible with its responsibility for assuring properly conducted elections.

The central issue in alleged Board Agent misconduct cases is whether the agent's conduct undermined the integrity of the election process and/or the indispensible perception of Board neutrality. It is self-evident that the perception of Board neutrality and the integrity of the election process must be preserved. *Hudson Aviation Services*, 288 NLRB 870 (1988). In *Sonoma Health Care Center*, 342 NLRB No. 93 (2004) the Board that an election must be set aside when the

conduct of the Board election agent tends to destroy confidence in the Board's election process or could reasonably be interpreted as impairing the election standards the Board seeks to maintain. Confidence in the Board election process and standards can be undermined when Board agents fail to maintain strict neutrality in what they say while conducting Board elections. Their conduct may threaten the "indispensable perception of Board neutrality." Citing Hudson Aviation Services, 288 NLRB 870 (1988). However, in Sonoma Health Center. the Board found that while a Board agent's remarks were intemperate and inappropriate, the remarks did not mandate setting aside the election. In the instant case, there is no evidence that the Board agents' conduct impugned the integrity of the election.

In the instat case, there was no electioneering by Waid or Noser in the polling area. While it is regrettable that the Board agents did not respond to Waid before Noser uttered the word "No", there is no basis to challenge the validity or fairness of the election. There is no evidence that the Borad agents delegated authority to the Union's observer or favored the Union's observer. I find there has been no showing that the Board agents undermined the integrity of the election process or gave any indication of partiality. Thus, I find no evidence of Board Agent misconduct which would warrant setting aside the election .

In conclusion, I recommend, that the Employer's objections to conduct affecting the results of the election be overruled and that the Union be certified as the duly elected representative of all employees in the stipulated appropriate bargaining unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:

ORDER[3]

The Employer's objections to conduct affecting the results of the election in the above matter are overruled. The Regional Director for Region 19 shall certify the Petitioner as the collective-bargaining representative of employees in the appropriate unit.

Dated, Washington, D.C., November 2, 2005.

Jay R. Pollack
Administrative Law Judge

[3] Any party may, under the provisions of Section 102.67 and 102.69 of the Board's Rules and Regulations, file exceptions to this report with the Board in Washington, D.C., within fourteen (14) days from the issuance of this report. Immediately upon filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. Exceptions must be received by the Board in Washington, D.C. by October , 2005.