

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32¹

RENAISSANCE SENIOR LIVING
MANAGEMENT, INCORPORATED
Employer

and

Case 32-RC-5262

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 415, AFL-CIO
Petitioner

**REPORT AND RECOMMENDATIONS ON OBJECTIONS
AND NOTICE OF HEARING**

Acting pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned has caused an investigation of the Employer's objections² to be conducted and hereby recommends that Objections Nos. 3, 6, 7, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, 21 and 22 be overruled, and orders that a hearing on Objections Nos. 1, 2, 4 and 5 be held.

The Election

The Petition in this matter was filed on May 28, 2004.³ Pursuant to a Stipulated Election Agreement approved on June 9, an election by secret ballot was conducted on July 9 in the following unit:

All full time and regular part-time service and maintenance employees employed by the Employer at its 80 Front Street, Santa Cruz, California facility; *excluding* all managerial and administrative employees, including but not limited to activities director, marketing manager, housekeeping supervisor and administrative assistant, all professional employees, Registered Nurses (RNs), Licensed Vocational Nurses (LVNs), confidential employees, receptionists, office

¹ Herein called the Board.

² A copy of the objections is attached to this Report.

³ All dates hereinafter refer to calendar year 2004.

clerical employees, all other employees, guards, and supervisors as defined in the Act.

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

Approximate number of eligible voters.....	51
Number of void ballots.....	0
Number of votes cast for participating labor organization.....	35
Number of votes against participating labor organization.....	8
Number of valid votes counted.....	43
Number of challenged ballots.....	5
Valid votes counted plus challenged ballots.....	48

Challenges were insufficient in number to affect the election results. Thereafter, the Employer filed timely objections to the election, a copy of which was served on the Petitioner by the Region. In its position statement in support of its objections to the election, the Employer, with my approval, withdrew Objections Nos. 11 and 14. The remaining objections having now been investigated, the results of that investigation are as follows:

The Objections

Objections Nos. 1, 2, 4, and 5⁴

In support of these objections, the Employer provided names of witnesses it asserts would testify that the Petitioner’s representatives remained outside the polling room in the line of march to the polls, during the time the polls were open, and engaged in conversations with voters. The Employer asserts that this conduct is objectionable under *Milchem, Inc.*, 170 NLRB 362 (1968). These objections raise material issues of fact and law that can best be resolved by a hearing.

⁴ Objection 1 is being set for hearing only to the extent that it applies to the Employer’s assertion that the Petitioner engaged in objectionable conduct by alleged improper electioneering, surveillance, coercion, intimidation and pressure during the polling periods.

Objection No. 15

The Employer proffered no evidence that the Board agent in charge of the election allowed, condoned, ratified or was even aware of Petitioner's conduct, as alleged in Objections Nos. 1, 2, 4 and 5. Accordingly, I recommend that Objection No. 15 be overruled.

Objections Nos. 3, 6, 7, 8, 9, 10, 17, 18 and 22

At issue in these objections is the Employer's contention that the Petitioner engaged in objectionable conduct by picketing at the Employer's facility without first having complied with the notice requirements set forth in Section 8(g) of the Act. As support for that contention, the Employer submitted evidence showing that, on June 30, 2004, a group of about 40 individuals, consisting of some off-duty employees⁵ and their supporters, conducted a rally in front of the Employer's facility, during which time some of those in attendance carried picket signs. Although the Employer describes the rally as loud, it makes no claim that it was non-peaceful. Nor does it claim that any employees were impeded from entering or exiting its facility. Rather, the Employer's objections focus on its contention that, prior to the rally, the Petitioner unlawfully failed to provide the notice required by Section 8(g). As to that contention, I have found merit, for the Employer, which provides nursing care for seniors, including dementia patients, qualifies as a health care institution, and the Petitioner failed to provide notice prior to

⁵ The Employer contends that one of the employee participants, Yolanda Moya, engaged in a work stoppage, but the investigation revealed, at worst, a misunderstanding as to whether Moya had made proper arrangements so as to be relieved from duty while she participated in the rally.

the June 30 rally in which picketing occurred.⁶ Nonetheless, I find that the Petitioner's violation of Section 8(g) is not a basis for setting aside the election.⁷

In making that finding, I rely on *Poplar Living Center*, 300 NLRB 888 (1990), wherein the Board overruled a similar objection involving a petitioning union's failure to serve Section 8(g) notices. Citing its earlier decision in *Holt Bros.*, 146 NLRB 383, (1964), the Board noted that "only those unfair labor practices that pose a threat of 'restraint or coercion of employees' can logically serve as a ground for setting aside an election." 300 NLRB at 888. A Section 8(g) violation is not such an unfair labor practice, for, as the Board further noted, "Section 8(g) * * * was enacted to assure arrangements could be made for the continuity of patient care in the face of strikes and picketing at health care institutions, and thus has no significant connection with the restraint and coercion of employees." 300 NLRB at 888.

Although the Employer attempts to distinguish *Poplar Living Center* by arguing that the picketing at issue here in fact restrained or coerced employees, I find its arguments in that regard are unconvincing. According to the Employer, the picketing was coercive "because it demonstrated the Union was willing to violate the law to attain its goals." It follows, according to the Employer, that employees would infer that they "better vote for the Union to avoid the Union's wrath." Even assuming, without finding, that employee awareness of the Petitioner's failure to give pre-picketing notice could lead to such an extreme inference, the Employer has not shown that any employee was aware that the Petitioner had failed to comply with its Section 8(g) notice obligation. Indeed, the Employer faults both the Petitioner and the Region for not

⁶ On July 6, the Employer filed charges in Cases 32-CG-51 and 32-CB-5814, alleging, respectively, that the Petitioner engaged in a strike, picket or other concerted refusal to work without filing the notices required under Section 8(g) of the Act and that it thereby coercively induced employees to violate the Act and forego their Section 7 rights. The Petitioner has since entered into an agreement to settle Case 32-CG-51 and, on July 26, the Region dismissed Case 32-CB-5814.

making employees aware of the Petitioner's failure prior to the election. Without employee awareness that the Petitioner violated the Act, the Employer's entire premise for contending that employees were coerced by that violation—namely, that employees would have been led to anticipate further unlawful conduct by the Petitioner—fails.

Similarly, there is no basis to the Employer's related contention that the Petitioner coercively induced the employees who participated in the rally to jeopardize their protected status. Thus, as noted above, there is no claim by the Employer that the participants were aware either that the Petitioner had violated the Act by failing to provide the required notice or that such failure on the part of the Petitioner had put the employees at risk. To the contrary, the Employer asserts that the Petitioner misled employees by keeping from them the fact that it had not complied with Section 8(g)'s notice requirements. Moreover, the Employer makes no claim that the employee participants in the rally in fact suffered any adverse consequences because of their participation. Thus, the consequences of the Petitioner's notice violation could not have been weighing on the minds of the employees when they cast their ballots.

In sum, the Petitioner's violation of Section 8(g) of the Act has not been shown to have adversely impacted the election, as would be necessary in order to warrant setting the election results aside. Accordingly, I recommend that Objections Nos. 3, 6, 7, 8, 9, 10, 17, 18 and 22 be overruled.⁸

Objections Nos. 12 and 20

⁷ Because I have found that this conduct did not constitute a basis to set aside the election, the Employer's claim that the election should have been blocked by Cases 32-CG-51 and 32-CB-5814 is without merit.

⁸ Although Objection No. 3 is broadly worded so as to encompass "other objectionable conduct, including, but not limited to, misrepresenting Board processes," the only evidence submitted in support of that objection concerned the Union's picketing activity. Accordingly, I construe Objection No. 3 as being limited to that activity, and the Employer will not be permitted at hearing to introduce evidence in support of that catch-all objection. Likewise, it will not be permitted at hearing to introduce evidence in support of the "other unlawful conduct" referred to in Objection No. 22.

The Board has held that, to meet its obligation to provide evidence in support of its objections, a party must, at a minimum, provide details of the alleged objectionable conduct and identify witnesses who allegedly could provide supporting evidence. *Heartland of Martinsburg*, 313 NLRB 655 (1994). Here, in its submission in support of these objections, the Employer, aside from a recitation of Board case law concerning grants of benefits and gifts, states only that “based on information and belief, the female union representative present at the election provided an employee with a water bottle which was to be given to the Petitioner’s election observer.” By timely failing to provide either details of the alleged objectionable conduct or the names of any witnesses who could provide supporting evidence, the Employer has failed to meet this minimum burden. Accordingly, I recommend that Objections Nos. 12 and 20 be overruled.⁹

Objections Nos. 13 and 21

According to the Employer in its position statement, Objection No. 13 relates both to the Petitioner’s picketing and to its alleged improper electioneering and surveillance during the polling periods; Objection No. 21 relates to the aforementioned improper electioneering, the Region’s refusal to block the election, and the Petitioner providing an item of value to an eligible voter. All the above conduct has already been addressed with respect to certain other Employer election objections in this Report. The Employer provided neither evidence, nor assertions, of any additional conduct beyond that alleged in those other objections. Accordingly, because there is no conduct here that has not otherwise been addressed in other election objections, I recommend that Objections Nos. 13 and 21 be overruled.

⁹ In doing so, I am also mindful that the allegedly objectionable item was merely a water bottle.

Objection No. 16

Initially, the Region provided the Employer with Spanish language Notices of Election that incorrectly listed the first polling session as 6:15 a.m. to 9:00 a.m. The correct time was 6:15 a.m. to 8:15 a.m. Although the Region sent corrected Spanish language Notices to the Employer, they were not received in time to be posted for three full working days prior to the election, as required by the Board's Rules.

Although an employer's failure to post notices for the correct length of time is strictly enforced, an error in voting times is not *per se* objectionable conduct. Instead, the effect of the error must be considered. In this case, 48 of 51 eligible voters cast ballots, with 35 voting for and 8 against representation. Thus, even assuming that three eligible voters were somehow misled by the erroneous election notice and did not vote as a result, there would be no effect on the results of the election.¹⁰ I also note that the corrected Spanish notices were received by the Employer on July 6 and, presumably, posted that same day. The election did not take place until July 9. For all of these reasons, I recommend that Objection No. 16 be overruled.

Objection No. 19

The Employer provided the name of a witness who it claims would testify that the Board agent in charge of the election posted a polling place sign in English on the door to the polling room but posted the same sign in Spanish inside the polling room. According to that same witness, at some point after the polls opened, the Board agent moved the Spanish language sign to the outside door to the polling room. The Employer posits that, although standing alone the above might not warrant setting aside the election, when combined with the other alleged objectionable conduct, the overall circumstances had a tendency to interfere with the election.

Further, the Employer argues that the initial failure to post the Spanish sign in conjunction with the issues involving the Spanish election notices raised in Objection No. 16, somehow discriminated against Spanish speaking employees.

With respect to this objection first I note that there is no strict Board requirement that polling place signs be posted, much less in multi-languages. Therefore, even assuming that the posting occurred as alleged by the Employer, I find that this conduct is not a basis to set aside the election,¹¹ in light of the fact that the Employer proffered no evidence of any confusion as to the location of the polling place, and only three eligible voters did not vote, Accordingly, I recommend that Objection No. 19 be overruled.

Notice of Hearing

IT IS HEREBY ORDERED that a hearing on Objections Nos. 1, 2, 4 and 5 be held before a duly designated Hearing Officer of the National Labor Relations Board.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting the hearing shall prepare and cause to be served upon the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said issues. Within fourteen (14) days from the issuance of said report, any party may file with the Board an original and one (1) copy of exceptions to such report, with supporting brief, if desired. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof, together with a copy of any brief filed, on the other party to the proceeding and with the undersigned. If no exceptions are filed to such report, the Board, upon

¹⁰ The Employer proffered no evidence that, in fact, any eligible voters did not vote because of the erroneous notices.

¹¹ As to alleged discrimination against Spanish-speaking employees, I find no basis on which to conclude that this conduct, even coupled with other conduct, would constitute unlawful discrimination.

