

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 8

MARIETTA HEALTHCARE, LLC, D/B/A  
MARIETTA NURSING AND REHABILITATION CENTER

Employer

And

Case No. 8-RC-16595

SEIU DISTRICT 1199, THE HEALTHCARE AND SOCIAL SERVICE  
WORKERS UNION, AFL-CIO

Petitioner

**HEARING OFFICER'S REPORT ON OBJECTIONS**

Pursuant to a Stipulated Election Agreement approved by the Regional Director on February 13, 2004, an election was conducted on March 11, 2004 among the employees in the following-described unit:

*All full-time and regular part-time employees, including state tested nursing assistants, dietary aides, dietary cooks, housekeepers, laundry employees, restorative aides, central supply employees, activities' aides, and maintenance employees employed by the Employer at its 117 Bartlett Street, Marietta, Ohio facility, excluding registered nurses (RN's), licensed practical nurses (LPN's), confidential employees, business and office clerical employees, guards and supervisors as defined in the Act.*

The tally of ballots issued after the election shows that of approximately 80 eligible voters, 80 cast ballots, 58 of which were cast for and 21 against the Petitioner. There was one challenged ballot, a number insufficient to affect the outcome of the election.

Thereafter, the Employer filed timely Objections to Conduct Affecting the Results of the Election, a copy of which was duly served upon the Petitioner.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation of Employer's Objections Nos. 1 through 3, was conducted. On April 26, 2004, the Regional Director issued a Report on Objections recommending that Objections Nos. 2 and 3 were without merit and should be overruled. On June 9, 2004, the Board issued a Decision and Order adopting the recommendations of the Regional Director.

With regard to the remaining Objection No. 1, the Regional Director concluded that the evidence raised issues of fact and credibility that could not be resolved by an *ex parte*

proceeding. On April 26, 2004, the Regional Director issued an Order Directing Hearing on Objection and Notice of Hearing.

Pursuant to the Regional Director's Order, a hearing was held before me on May 17, 2004 in Cleveland, Ohio. All parties were afforded the opportunity to appear and participate at the hearing and were given full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues. Both parties filed post-hearing briefs which I have considered.

## **THE OBJECTION**

The Employer's Objection No. 1 is a two-part objection. The Employer alleged that while the polls were open, a non-employee Union supporter stationed himself immediately outside the polling place, observing, monitoring and taking pictures of eligible voters as they entered and exited the polling place. The Employer also alleged that the Petitioner's observer interfered with the laboratory conditions of the election by recording a tally of voters. As set forth below, I shall recommend that the Objection lacks merit and should be overruled.

### **Monitoring/Photographing Eligible Voters**

The Employer asserts that the photographing of employees during the election by David Van Wey constitutes objectionable conduct and should result in a re-run election.

The record establishes that David Van Wey has never been employed by the Employer. His wife, who is now deceased, was once a resident of the Employer's facility. Van Wey has subsequently been dating employee Patricia Cronin. Cronin was a known union supporter and eligible to vote in the March 11, 2004 election.

The testimony establishes that during the campaign Van Wey accompanied Cronin to union meetings and union sponsored events. On one of these occasions, the Union took photographs which included a photograph of Cronin and Van Wey. This photograph appeared in Union campaign literature. Van Wey was also in attendance at a post-election celebration.

No evidence was adduced at the hearing that Van Wey was actively engaged in the Union campaign. The testimony reflects that, unlike employee union supporters, Van Wey received no campaign assignments. Likewise, he wore no union insignia. He was not responsible for contacting employees to garner support for the Union, nor did he conduct any meetings. The evidence establishes that Van Wey has never been employed by nor received and compensation from the Union.

The election was scheduled for March 11, 2004. A pre-election conference was conducted at 5:00 a.m. The polling hours were from 5:30 a.m. to 7:30 a.m. and from 1:30 p.m. to 3:30 p.m. The polling was conducted in the "Therapy Room" at the Employer's facility.

The testimony reflects that on the morning of March 11, 2004, Van Wey drove Cronin to work. They proceeded to the Employer's parking lot where Union supporters were gathered to

have coffee and donuts. Van Wey took two pictures of the employees in the parking lot. Sometime prior to the start of the election, Van Wey approached Union Representative Pam Gogulski and asked her whether he could take pictures of the voting. She responded that he could not take pictures of employees voting as it was against government laws.

After the polls had opened, at approximately 5:45 a.m. Van Wey proceeded to enter the Employer's facility with approximately twenty eligible voters who had been in the parking lot.<sup>1</sup> The group proceeded to the "Therapy Room" to vote. The polling area was located off a main hallway at the Employer's facility. The door to the room was closed. Blinds covered the windows of the room. An official NLRB Notice identifying the room as the polling place was posted on the window to the polling area. The polls were already open. Witnesses including Myoka McGee testified that the door to the polling area was only opened to allow employees to enter or leave the immediate polling area and that two to four employees were allowed to enter the room at one time.

Van Wey testified that notwithstanding Gogulski's advisement, he took a photograph of employees in the hallway, standing outside the door to the polling area while they waited in line to enter the polling area to vote.<sup>2</sup> He was down the hall approximately twenty feet away from the employees. Van Wey denied taking any other photographs inside the facility.

The record reflects that Jodi Lockhart, Employer's Business Office Manager, and Victoria Garten, an employee in Payroll and Accounts Payable, attended the pre-election conference. Shortly thereafter, the two women along with Flanagan decided to go to breakfast. Before leaving the two women proceeded to use the restroom which is located off the same hallway as the polling area. Both witnesses observed Van Wey taking a picture of the employees in the hallway. Lockhart testified that she recalled seeing two or three camera flashes at this time.

The women immediately reported the incident to Employer Administrator Brian McBee and Employer Attorney Richard Hughes. Hughes asked Lockhart and Garten to escort him to Van Wey's location. Garten escorted Hughes around the outside perimeter of the facility to another entrance and down a hallway perpendicular to that where employees were in line to vote. Garten observed Van Wey standing in the same location as he was when she first observed him.

Hughes observed Van Wey in the hallway with a camera up to his face. He was unable to pinpoint Van Wey's location vis-à-vis the entrance to the polling area. However, Hughes approached Van Wey and after learning that he was neither an employee nor a relative of a resident, advised Van Wey that he could not be in the area taking pictures. Hughes escorted Van Wey out of the facility. Cronin joined the two men shortly thereafter.

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<sup>1</sup> Maintenance Director Sean Flanagan testified that he encountered Van Wey attempting to enter the building with other employees during the morning session and advised him that since he was neither an employee nor a relative of a resident, he could not enter. Van Wey denied this occurred. Based on Flanagan's demeanor, I do not credit his testimony. Regardless, the testimony is of no significance since there is no dispute Van Wey entered the building.

<sup>2</sup> Van Wey stated that he understood Gogulski to mean that he was not permitted to take pictures of the actual voting and he followed that instruction. Van Wey testified that he took pictures for history's sake, noting that the Union had attempted unsuccessfully to organize employees at other area facilities.

Hughes testified that as they exited the building, Van Wey volunteered that the Union had invited him to which Hughes responded that that was not the Union's place. Van Wey noted that he had been a member of a union for over 20 years. Hughes asked Van Wey if the Union asked him to take pictures and Van Wey did not respond. According to Hughes, employee Patricia Cronin responded in the affirmative.<sup>3</sup>

At the close of the first session, Hughes advised Union Representative C. J. Grimes regarding the incident. Hughes concedes that Grimes appeared not to know what Hughes was talking about. Grimes responded that Van Wey was a friend of an employee. Grimes testified that she believed it to be Van Wey as he had been taking pictures prior to the start of the election.

The Employer asserts that Van Wey took more than a single photograph while in the facility including photographs he took while he was stationed directly across from and facing the door to the polling area. No witnesses testified that they saw Van Wey take more than one picture, other than Lockhart, who believes she saw two to three flashes. No credible witness testimony was presented that Van Wey took pictures inside the polling area.<sup>4</sup>

The Employer subpoenaed for the hearing the pictures taken on the date of the election, including the picture of employees in the hallway. With regard to the roll of film which included photographs from the date of the election, the following evidence was introduced. The back of the pictures as well as the negatives are numbered. The picture of the employees waiting in line to vote on the morning of the election was marked 13A (Employer Exhibit 2). Another picture, labeled 11A (Employer Exhibit 8) was a picture of the Union organizers standing outside the facility. The picture was allegedly taken later in the day. No picture or negative was produced which was labeled 12A. The Employer argues that this picture, based on the numbering of the negatives, would have been taken after Van Wey took the picture of employees waiting to vote (13A) and before he took the picture of the Union representatives outside the Employer's facility (11A). Van Wey testified that he gave all the pictures and negatives to the Union. The Employer asserts that an inference should be drawn that the missing picture was taken by Van Wey during the polling hours, from directly across from the entrance to the polling area and depicting the inside of the polling area.

I find that even were I to assume that the missing picture was that of people waiting to vote, it would show little more than the picture taken of employees waiting in line to vote which is in evidence. At most, if the door were open only briefly while employees were exiting or entering the polling area, as employees have testified, it would show people standing in line directly inside the door waiting to vote. There is no evidence that it would show employees voting or, more importantly, how they voted.

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<sup>3</sup> Cronin was not called by either party to testify regarding the matter.

<sup>4</sup> Employee Richard Baker, the Employer's observer at the election, testified that at one point during the morning polling session he saw Van Wey stationed outside the polling area entrance with a camera up to his face. However, Baker conceded that he never raised Van Wey's conduct on the day of the election or when he provided a statement to the Employer in support of its Objections. His recollection about the events involving Van Wey "came to him" at a later time and Attorney Hughes was unaware of Baker's recollections until the week before the hearing. I find his testimony in this regard to be highly questionable and do not credit that he saw Van Wey take a picture while he was serving as the Employer's observer.

The Objection raises two issues. The first issue is whether David Van Wey is an Agent of the Union thereby making the Union liable for his conduct. The Employer argues that Van Wey was closely associated with the Union and it should be held liable for its conduct. The Board has held that the party asserting an agency relationship has the burden of proof. See **Millard Processing Services, Inc., 304 NLRB 770 (1991)**.

The record contains no evidence that the Union authorized or later ratified Van Wey's conduct.<sup>5</sup> I credit the testimony that the Union explicitly advised Van Wey that the taking of photographs of the voting was not permitted.

Likewise, the record is devoid of any evidence that apparent authority was created. In **Service Employees Local 87 (West Bay Maintenance), 291 NLRB 82 (1988)**, the Board held that:

Apparent authority is created through a manifestation by the principal to third parties that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. **NLRB v. Donkin's Inn, Inc., 532 F.2d 138, 141 (9<sup>th</sup> Cir. 1976)**; **Alliance Rubber Co., 286 NLRB 645, 646 fn. 4 (1987)**. Thus, either the principal must intend to cause the third person to believe that an agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief. Restatement 2d, Agency 27 (1958 Comment). Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity **Id. at 8**.

In this case, there is no record evidence that the Union took action to cause, or intended to cause Van Wey to believe that he was an agent authorized to act for the Union or that said authority encompassed Van Wey's activities. There is no evidence to support a finding that the Union should have realized that Van Wey's conduct would create such a belief. I find that Van Wey was not an agent of the Union.

The record evidence reveals that Van Wey is merely the boyfriend of pro-union supporter Cronin. He was known to employees and supervisors, including witnesses who appeared at this hearing, as Cronin's boyfriend and nothing more. The fact that he accompanied Cronin to Union meetings, is pictured in union literature or supported the Union effort does not alter my findings regarding agency status. See, **The Lamar Company, LLC d/b/a Lamar Advertising of Janesville, 340 NLRB No. 114 (2003)** and cases cited therein.

Having found that Van Wey was not an agent of the Union, his conduct must be considered under the third party standard. In this connection, the Board accords less weight to

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<sup>5</sup> The fact that Union officers posed for a picture for Van Wey later in the day and outside the facility is not persuasive.

third party conduct because “neither unions nor employers can prevent misdeeds. . . by persons over whom they have no control.” **NLRB v. Griffith Oldsmobile**, 455 F.2d 867, 870 (8<sup>th</sup> Cir. 1972). The Board considers whether the third party conduct is so aggravated that it creates a general atmosphere of fear and reprisal which renders a free election impossible **Westwood Horizons Hotel**, 270 NLRB 802 (1984), and “whether the conduct at issue so substantially impaired the employees’ exercise of free choice as to require that the election be set aside.” **Southeastern Mills**, 227 NLRB 57, 58 (1976).<sup>6</sup>

Here, the credited evidence establishes that Van Wey was in the hallway leading to the polling area for no more than ten minutes. During that time, he took one or possibly two photographs of employees in the hallway waiting to enter the voting area. The incident occurred approximately 15 minutes after the opening of the polls. He was immediately escorted off the property by Employer representatives. Van Wey’s activity was not accompanied by any threats or coercive statements nor was his conduct known, authorized or condoned by the Union. The tally of ballots reveals that of 80 eligible voters, 80 cast ballots. Clearly, the incident did not cause employees to refrain from voting and exercising a free choice and I recommend that this portion of the Employer’s Objection be overruled.

### **Recording Tally of Voters**

With regard to the second part of the Objection, the record reflects that Mary A. Shephard was employed as a nursing assistant. She was eligible to vote in the representation election and served as the Union’s observer at both sessions of the election. As previously stated Richard Baker served as the Employer’s Observer at this session.

The first session was conducted from 5:30 a.m. to 7:30 a.m. At approximately 7:25 a.m., Shephard wondered aloud how many people were left to vote for the second session. She went through each of the two page **Excelsior** list and counted the number of persons who had not yet voted. Thirteen had not voted off the first page and sixteen had not voted off the second page for a total of 29 employees off the list who had not voted. Shephard wrote these numbers on her index finger. No names were recorded. There were no employees in the room at the time the numbers were recorded. No employees entered the room between the time Shepard wrote the numbers and the closing of the first session. There was no evidence that Shepard’s conduct was disseminated to other employees.

At the close of the polls, the Employer Attorney Richard Hughes asked Shephard to identify what was written on her hand. Shephard advised Hughes that she had written down the number of employees who had not yet voted. Union Representative C. J. Grimes asked what the

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<sup>6</sup> The Employer asserts that Van Wey’s conduct constitutes record keeping of voters on the day of the election and cites case law for the proposition that such conduct is objectionable. Those cases deal with a party keeping record of persons who voted, however, I find that Van Wey’s conduct would not be tantamount to record keeping. While he photographed a small percentage of employees in line waiting to enter the polling area to vote, he was present for a very short duration and took at best, two pictures. I note that 80 employees voted in the election. No evidence was presented that Van Wey photographed voters in the polling area that would have shown how the employees intended to vote or that the photographs were intended as a record to be utilized by the Union as to who voted in the election. See **Overnite Transportation v. NLRB**, 294 F.3D 615, 170 LRRM 2362 (4<sup>TH</sup> Cir. 2002)

numbers were and Shepard provided the information. There is no evidence that the other employees were aware of Ms. Shephard's activity.

I find the conduct de minimus and insufficient grounds to warrant setting aside the election. I am cognizant of the Board's long-standing policy prohibiting observers from keeping lists and those cases where the Board has found list keeping to constitute objectionable conduct.<sup>7</sup> The facts of those cases are distinguishable. I find applicable, the Board's Decision in **Cerock Wire & Cable Group, 273 NLRB 1041 (1984)**. In that case, as employees voted, the Union's observer made hash marks on a piece of paper. She made the marks in two unidentified columns. She attempted to conceal her activity and there was no evidence to support nor inference to be drawn that a tally of employees' votes was being kept. The Board concluded that the conduct did not constitute grounds for setting aside the election.

Turning to the facts of this case, no evidence was presented at hearing that the voters either could or did infer that a tally of their votes was being kept. Clearly, the testimony in this case was that the Union's observer kept no tally during the voting. Rather, at the end of the first session, she counted the check marks on the **Excelsior** list to determine the total number of employees who had not yet voted. No employees were in the room when the conduct occurred. No employees entered the room between the time the conduct occurred and the closing of the first session. There is no evidence that any voters were ever aware that this was done. I shall, therefore, recommend that this portion of the Employer's Objection be overruled.

### **CONCLUSIONS AND RECOMMENDATIONS**

For the reasons set forth above, I recommend that the Employer's Objection No. 1 be overruled in its entirety. Accordingly, I recommend that the Board issue a Certification of Representative.

In accordance with Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, any party may file with the Board an original and seven copies of exceptions to this report within fourteen (14) days of the date of issuance of the report. Immediately upon the receipt of such exceptions, the party filing shall serve a copy upon the other party and upon the Regional Director. If no exceptions are filed, the Board may, upon expiration of the period for filing exceptions, adopt the recommendations of the hearing officer or make other disposition of this case.

Dated at Cleveland, Ohio this 6<sup>th</sup> day of August 2004.

/s/ Mary A. Bednar

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Mary A. Bednar  
Hearing Officer  
National Labor Relations Board  
Region 8

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<sup>7</sup> **Cross Pointe Paper Corporation, 330 NLRB 658**, and cases cited therein.