Tyson Fresh Meats, Inc. *and* Carlos A. Perez, Petitioner *and* General Teamsters Local 556, affiliated with the International Brotherhood of Teamsters, AFL–CIO. Case 19–RD–3576

December 16, 2004

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to a decertification election held April 8 and 9, 2004,[1] and the hearing officer's report recommending disposition of them [pertinent parts attached as an Appendix]. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 708 for and 657 against the Union, with 5 challenged ballots, an insufficient number to affect the results of the election.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[2] and recommendations only to the extent consistent with this Decision and Direction of Second Election, and finds that the election must be set aside and a new election held.[3]

Introduction

The Employer filed six timely objections to the election. Objection 1 alleged that the Union, through its agents and adherents, improperly communicated and campaigned to employees who were waiting in line to vote and to employees who were entering the polling place. Objection 5 similarly alleged that the Union, through its agents and adherents, engaged in electioneering in the voting area that was intended to intimidate employees into voting for the Union. Specifically, the Employer argued that union stewards, acting in their capacity as union agents, engaged in objectionable conduct when they spoke with voters waiting in line to cast their ballots in the election. *Milchem, Inc.*, 170 NLRB 362 (1968) (election will be set aside if party to the election engages in prolonged conversation with prospective voters waiting in line to cast their ballots, regardless of the content of the conversation).

In addressing Objection 1, the hearing officer first found that the union stewards were not union agents because they had neither actual nor apparent authority to act on behalf of the Union. Accordingly, the hearing officer found that the stewards did not violate the rule set forth in *Milchem,* supra, which applies only to party misconduct. Second, the hearing officer inadvertently applied the wrong standard for determining objectionable electioneering by a third-party, and concluded that the electioneering by the stewards was not so "aggravated" as to have "create[d] a general atmosphere of fear and reprisal rendering a fair election impossible." *Westwood Horizons Hotel*, 270 NLRB 802 (1984).[4] Therefore, he recommended that Objections 1 and 5 be overruled.

The Employer excepts to the hearing officer's recommendation to overrule Objections 1 and 5, and contends that the stewards are union agents who engaged in sustained conversations with voters in line, thus requiring that the election be set aside. For the reasons set forth below, we find merit in this exception. Accordingly, we sustain Objections 1 and 5 and set aside the election.[5]

I. FACTS

The election took place during three voting sessions over a period of 2 days (April 8 and 9). The polling area

[1] Hereinafter, all dates are in 2004 unless otherwise noted.

[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co*., 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[3] The Union renews its motion to dismiss the Employer's objections, based on the grounds that the petition and the entire election process were "improperly affected by the fact that the Petitioner, Carlos Perez, is now a supervisor and part of management." The hearing officer, in fn. 1 of his report, properly denied the Union's motion as lacking in merit because it is well-established that "where a petitioner becomes a supervisor after the filing of a petition the process is not abated, as the petitioner is only a representative of the employees who are interested in a vote on continuing representation." See *Weyerhaeuser Timber Co*., 93 NLRB 842 (1951). We agree with the hearing officer's ruling in this matter and deny the Union's motion.

In its opposition to the Employer's exceptions, the Union contends that the Employer's exceptions should be dismissed because the Employer failed to attach the hearing officer's report to its exceptions and brief. Contrary to the Union's argument, the Board's rules do not require that the hearing officer's report be attached to a party's exceptions and brief. See Sec. 102.67(d) of the Board's Rules and Regulations.

Furthermore, we reject the Union's contention, in its opposition to the Employer's exceptions, that the hearing officer erred in denying the Union access to certain subpoenaed statements that the Employer had in its possession regarding the Union's alleged misconduct. The hearing officer properly permitted the Union to review any statements provided to the Board in this matter or any prior matter under Sec. 102.118(b) and (c) of the Board's Rules and Regulations, in accord with the *Jencks* rule. See *Jencks v. U.S.*, 353 U.S. 657 (1957). Accordingly, we find that the Union was not prejudiced in its ability to cross-examine witnesses.

[4] In evaluating electioneering by nonparties, the standard is "whether the conduct at issue so substantially impaired the employees' exercise of free choice as to require that the election be set aside." *Hollingsworth Mgmt. Service*, 342 NLRB 556, 558 (2004); *Rheem Mfg. Co*., 309 NLRB 459, 463 (1992).

[5] In light of our finding that the sustained conversations of the stewards with voters waiting in line, warrant setting aside the election, we find it unnecessary to pass on the hearing officer's reasoning and conclusions with respect to the remaining objections.

was in the conference room in the far corner of the cafeteria opposite the processing floor. The processing lines shut down shortly before the opening of the polls in each voting session, resulting in a large number of voters attempting to vote at the same time. Employees sometimes had to wait an hour or more in line before voting.

During the morning voting session on April 8, two long lines of voters formed from the conference room through the cafeteria and into the hallway outside the cafeteria. During this same time period, the cafeteria was open for employees to eat lunch and take breaks. (The cafeteria can accommodate a few hundred people.) Unit employees Augustin Padillo and Jubinito Soto, along with Union Steward Pedro Hernandez, were sitting and/or standing around a cafeteria table adjacent to the entrance to the voting room. The voting line snaked by this table. As the voters passed by the table on their way to cast their ballots, Hernandez, Soto, and Padillo told voters in line to vote for the Union. The record shows that the three men were at this table talking to employees in line to vote for nearly 1 hour.

According to the credited testimony, steward Hernandez also spoke with voters, for a period of 5 to 30 minutes, near or at the entrance to the voting room. Employee Cristina Reyes testified that steward Hernandez approached her while she was waiting in line to cast her ballot and told her to vote for the Union.

During the evening voting session on April 8, employees waited in a line that extended through the cafeteria to the conference room to vote. Union Steward Raul Alvarado spoke to employees waiting in line. Alvarado spoke to two female employees in line for a period of 5 to 10 minutes each.

Alvarado is one of two stewards who wear a blue hardhat at the Employer's facility.[6] Employee Dinh Pham testified that a "blue hat" named "Raun" talked to him and other voters in line and told the prospective voters to vote Union. Employee Trang Ha testified that a "blue hat" was speaking in Spanish to voters in line for approximately 5 to 10 minutes during the "B shift" voting session. Employee Nghia Kieu, a "B shift" employee, also testified that a "blue hat" was talking to people in line for 30 minutes.

Steward Amir Mustafic testified that, during the evening voting session, he discussed the Union and the election with voters in line for approximately 10–15 minutes.

[6] The record demonstrates that stewards wore purple hardhats at the facility. However, Alvarado and steward Benigna Diaz wore blue hardhats because, in addition to being stewards, they were "supervisor helpers."

II. ANALYSIS

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 and (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. Our reasons follow.

A. The Union Stewards had Actual and Apparent Authority to Represent the Union

The burden of proving an agency relationship is on the party asserting its existence. *Millard Processing Services,* 304 NLRB 770, 771 (1991), enfd. 2 F.3d 258 (8th Cir. 1993), cert. denied 510 U.S. 1092 (1994). The determination of whether this burden has been met rests on an analysis of the facts under common law agency principles:

> [A]ctual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied. Apparent authority, on the other hand, results from a manifestation by a principal to a third party that another is his agent. Under this concept, an individual will be held responsible for actions of his agent when he knows or "should know" that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him. Restatement 2d, *Agency*, § 27.

Communications Workers Local 9431 (Pacific Bell), 304 NLRB 446 fn. 4 (1991).

Furthermore, with respect to a principal's liability for the actions of its agent, the Board in *Bio-Medical Appli-*

cations of Puerto Rico, 269 NLRB 827, 828 (1984), stated:

> A principal is responsible for its agents' conduct if such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent . . . it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted.

Applying these factors, we find that the Employer has established that the stewards had both actual and apparent authority to represent the Union in the circumstances of this case.[7]

1. The union stewards had actual authority

The Board has placed probative value on an alleged agent's position as steward, finding that a steward is "the first union representative the members look to, and the man from whom they take their cues insofar as union policy is concerned." *Battle Creek Health System,* 341 NLRB 882, 893 (2004), citing *Teamsters Local 886 (Lee Way Motor Freight),* 229 NLRB 832 fn. 5 (1977), enfd. 586 F.2d 835 (3d Cir. 1978), quoting *Carpenters Local 2067,* 166 NLRB 532, 540 (1967). Placing such value on the steward position is particularly warranted here, where the Union encouraged employees to perceive the stewards as representatives of the Union by giving them the responsibility of orienting new hires to the benefits of unionization. Furthermore, there is evidence that employees did in fact seek information from the stewards about the Union and the election. For example, steward Mustafic testified that many of the Bosnian employees asked him questions regarding the election and for his thoughts concerning the election.

The parties' collective-bargaining agreement is further evidence that the stewards have actual authority to represent the Union. Article XI of the agreement provides that stewards have the express authority to present grievances on behalf of employees. *Teamsters Local 886 (Lee Way Motor Freight),* supra at 833 (union steward was an agent of the union because he had, inter alia, express authority from the union to receive, process, investigate, and ensure employer compliance on employee grievances).

Finally, the record shows that stewards regularly participated in labor-management meetings throughout the year. In the 12-month period before the hearing, there were eight or nine such meetings, where safety issues were discussed.[8] Although not all stewards attended these meetings, the stewards involved in the conduct at issue in this case did so.

All of these factors establish that the Union gave a range of actual authority to the stewards to represent it in the workplace, including the authority to speak on behalf of the Union about the benefits of unionization. Speaking about union benefits to voters waiting to participate in the election falls within this range. That there is no affirmative evidence that the Union specifically authorized the stewards to participate in the election campaign does not warrant a contrary result. "It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted." *Teamsters Local 886*, 229 NLRB at 832–833 (quoting *Longshoremen ILWU Local 6 (Sunset Line & Twine Co.),* 79 NLRB 1487, 1509 (1948). Accordingly, we find that the stewards had actual authority to represent the Union when they spoke to voters in the voting line.

2. The union stewards had apparent authority

Under the principle of apparent authority, the Employer established that the Union created a perception among employees that the stewards represented it when they spoke to employees waiting in line to vote. As discussed above, the Union gave the stewards the responsibility to introduce new employees to the benefits of the Union. The stewards also wore purple hardhats to signify their status as union stewards. Employees knew the stewards by their hats if not by their names. Several employees testified that the "purple hat" wearers "worked for the Union." In the eyes of these employees, the stewards were essentially equated with the Union.

The visual designation of union stewards, coupled with the Union's holding the stewards' out as being responsible for orienting new employees to the Union, reasonably gave employees the impression that the stewards were acting on behalf of the Union in providing information concerning the Union and its benefits. Thus, when the "purple hat" stewards stood by the voting lines near the entrance to the polling place, the Union had "cloaked [them] with sufficient authority to create a perception among the rank-and-file that [they acted] on behalf of the union[.]" *Kitchen Fresh*, 601 F.2d at 355.

In light of these facts, we find that the Employer established that the Union either intended employees to believe that the stewards were acting for the Union when they spoke to employees in the voting line or that the Union should have realized that the employees waiting in line to vote would have perceived the stewards as Union

[7] Member Walsh relies solely on the finding that the stewards have apparent authority.

[8] There was no evidence concerning discussion of other matters at the labor/management meetings.

agents. Accordingly, we find that, under the principle of apparent authority, the Union had responsibility for the stewards' conduct in speaking to employees about the benefits of Union representation.

B. Union Stewards Engaged in Improper Conduct Under Milchem

Having determined that the stewards are union agents, as outlined above, we turn to the question whether the stewards engaged in objectionable conduct under *Milchem,* 170 NLRB 362 (1968). As discussed above, *Milchem* establishes a strict rule against "prolonged" conversations between representatives of a party to the election and employees waiting in line to vote, regardless of the content of the conversations. In *Milchem*, there was evidence that Union Secretary-Treasurer Stevens held conversations for "several minutes" with employees waiting to vote. There was also evidence that Stevens appeared to be talking to employees waiting to vote for "perhaps five minutes." The Board concluded that "Stevens' conduct [in speaking to voters in line] could not, in any view of the evidence, be dismissed as minimal." Thus, the Board found that Stevens' conversation breached the *Milchem* rule and set aside the election.

Here, the conversations between stewards and employees waiting to vote are similar in duration to the conversation at issue in *Milchem.* As described earlier, voters in the morning and evening sessions on April 8 stood in long lines stretching through the cafeteria while waiting to vote in the election. Many voters were in line for an hour or more. Stewards Mustafic, Alvarado, and Hernandez stood near or sat at a cafeteria table close to the voting line. Steward Mustafic, by his own admission, spent 10 to 15 minutes speaking with voters in line. It is undisputed that steward Alvarado spoke to two women in the voting line for a period of 5 to 10 minutes each. Steward Hernandez spent nearly an hour at a table near the entrance to the voting room and spoke with various employees as they waited in line to vote.

These conversations of at least 5 to 10 minutes between agents of the Union and employees waiting to vote, like the union official's conversation of "several minutes" in *Milchem,* constitute the type of "prolonged" conversations strictly prohibited by *Milchem.*[9] Accordingly, we shall set aside the election and direct that a new election be held.[10]

[Direction of second election omitted from publication.]

APPENDIX

HEARING OFFICER'S REPORT AND RECOMMENDATION ON OBJECTIONS

This report contains my findings and recommendations regarding six Employer Objections[2] to the April 8 and 9, 2004 election that the Union won by a vote of 708 to 657 (with 1495 eligible voters), with 5 nondeterminative challenges. The Employer objections and my recommendations are summarized as follows:

(1) The Union (through its agents and adherents) engaged in improper electioneering and campaigning in the customary area near or at the polls. My findings are that certain electioneering did occur but my recommendation is that it was not legally attributable to the Union and not sufficient under third-party standards to overturn the election.

. . . .

(5) The Union (through its agents and adherents) engaged in electioneering in the voting area.

. . . .

Upon the entire record in this proceeding,[3] and from my observations of the witnesses,[4] I make the following findings of facts, conclusions and recommendations:

[9] We are aware that the *Milchem* Board cautioned that its establishment of a strict rule did not mean that "any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election." *Milchem*, supra at 363. The duration of the conversations at issue here precludes any finding that they are the sort of chance, isolated, innocuous comment that falls outside the *Milchem* rule.

[10] Inasmuch as we have found that the stewards acted as agents of the Union, we need not pass on whether their conduct would have upset the election under the third party standard.

[2] In an argument not presented at hearing, the Union contends the objections were not served by the Employer on the Petitioner and only served on counsel for the Union. Sec. 102.69(a) of the Board's Rules and Regulations, as amended, provides that an objecting party timely serve the objections with the Regional Director who will then serve the objections on the parties. The record shows the objections were timely served on the Regional Director and the Regional Director did subsequently serve all parties with the objections. This contention is clearly without merit and is rejected.

[3] The hearing was conducted in accordance with the provisions of Sec. 102.69 of the Board's Rules and Regulations. All parties were afforded full opportunity to be heard, to present and examine witnesses, to introduce evidence and to submit position statements if they so desired. The Employer and the Union filed briefs, which were considered.

The Employer filed a motion to correct the transcript and that motion is granted. I also note there were other transcription errors not specified, but none of the additional errors were of a nature that would impact the substance of the transcript to a future reader.

Although not every bit of evidence or every argument is specifically addressed, I have nonetheless, considered all matters. Unless otherwise indicated, credibility resolutions have been based on my observations of the testimony and demeanor of the witnesses at the hearing. *3-E Co. v. NLRB,* 26 F.3d 1, 3 (1st Cir. 1994); *NLRB v. Brooks Camera, Inc.,* 691 F.2d 912, 915 (9th Cir. 1982). All witness testimony has been considered even though I may not detail all potential conflicts in testimony. *Walkers,* 159 NLRB 1159, 1161 (1966).

[4] The Union argues that I was in error in not permitting the Union to subpoena statements given to the Employer by witnesses in this proceeding. Counsel for the Union argues the lack of these statements

Objection 1. "The Union, acting through its agents and adherents, unlawfully communicated and campaigned to employees waiting in line to vote and actually entering the polling place. Specifically these union agents and adherents discussed how employees would be voting and directed employees entering the voting area to vote for the Union. Such conduct of the Union, acting through its adherents, interfered with, coerced, and restrained employees in the exercise of their Section 7 rights and destroyed the laboratory conditions under which the Board mandates that elections must beheld."

This objection has to be viewed in the context of three factual areas: (1) the stipulated voting arrangements. The polling took place over 2 days at three locations on the first day and one location on the second day. The primary alleged objectionable conduct arises prone location during the two shifts on the first day. The first shift (A shift) voted between 9 a.m. and 2:30 p.m. and the second shift (B shift) voted between 6 p.m. and 11:30 p.m. on April 8, 2004. There was an additional polling period from 11:30 a.m. to 2 p.m., in a separate polling area that same day. (2) The actual "electioneering" alleged to have taken place and (3) the agency status of those individuals who engaged in any conduct. In order to find the Union responsible for any objectionable conduct, the stewards must be found to be agents of the Union. If the stewards are agents of the Union then the *Milchem*[5] standards can be applied to the conduct in question. If the stewards are not agents then the third-party standards will apply in analyzing any objectionable conduct. See *Cal-West Periodicals, Inc.,* 330 NLRB 599, 600 (2000); *Westwood Horizons Hotel,* 270 NLRB 802, 803 (1984).

The bulk of the testimony concerned the events occurring at the processing cafeteria and processing conference room located adjacent to the cafeteria. These circumstances can be categorized into two areas: The first is the general electioneering taking place in the cafeteria and the second is the one-on-one electioneering with voters waiting on line.

The processing lines shut down shortly before the opening of the polls and this created a large number of voters attempting to vote at the same time. The polling area (conference room) was located in the far corner of the cafeteria opposite the processing floor. By virtue of the large number of voters appearing at the same time, lines formed across the cafeteria leading to the polling area. In addition, the cafeteria was open for employees to eat lunch and take breaks during this time. The voting lines wound through and adjacent to the seating areas in the cafeteria as well as the hallway areas next to the cafeteria. There was quite a bit of commotion when the lines first formed and some witnesses testified they waited up to an hour[6] from the time they arrived on line to actually voting. During the initial stages of the morning polling times there is clear evidence that some individuals came into the cafeteria shouting or yelling prounion campaign slogans such as "union, si" or "union, yes." The individuals engaging in this behavior were unit employees (at least one was a steward on the B shift–Raul Alvarado) and after a few minutes, variously defined as anywhere from 3 to 15, one of the Board agents came out of the polling room and told the people to keep it down or words to that affect. Thereafter the louder election slogans ceased. There was a power failure for 15 minutes later in the morning and that created an environment for a few minutes of generally raucous behavior. However, the voting line had greatly dissipated by that time and any inappropriate behavior was very limited and ceased when the power came back on.

The Employer also points to individual behavior in support of this objection. The evidence shows that a number of individuals spoke to employees waiting on line and as they approached the voting area. Alavarado spoke to employees waiting in line on the evening voting period (B shift), but the testimony does not show any content of what Alvarado said to employees other than "union, si" or words to that effect, on some occasions. There is some conflicting testimony as to exactly what Alvarado said but there is enough testimony from witnesses to show that Alvarado was telling at least a few employees to vote for the Union. There are some discrepancies between the testimonies of various witnesses[7] but I find that Alvarado did tell some employees to vote for the union as they were waiting on line in the cafeteria. Alvarado also told employees to use a pen rather than a pencil to mark the ballots and mentioned this to other stewards to pass on to the voters.

Steward Amir Mustafic also passed on this pen vs. pencil instruction to some Bosnian speaking employees while they were on line. Mustafic also discussed his views in favor of the Union when waiting voters asked him for his opinion.

During the morning shift (9 a.m.–2 p.m.), the objections focus on Steward Pedro Hernandez speaking to voters and the

([t]he testimony shows there were some statements in addition to those provided to the Regional Director) prejudiced its ability to properly cross-examine certain witnesses. I ruled that the teachings of *Anheuser-Busch,* 237 NLRB 982 (1970), applied to this situation and that the Union could not have access to statements prior to a witness's testimony, nor could the Union have access to statements not provided to the Regional Director, unless they were used to refresh a witness's memory under Rule 612 of the Fed. R.Evid. I did permit counsel for the Union to review any statements provided to the NLRB in this matter or any prior matters under the proscriptions of the *Jencks* rule. (353 U.S. 657, 672 (1957)). Contrary to the Union's assertions, the *Jencks* rule is applicable in postelection hearings. See Sec. 102.118(c) of the Board's Rules and Regulations. The Union's assertions as to their right to examine such statements provided to the Employer is unsubstantiated and I find there was no prejudice to the Union's ability to cross examine witnesses.

[5] 170 NLRB 362 (1968).

[6] There was varying testimony about the length of time the initial voters had to wait in line but it was clear that the voters had to wait a significant amount of time to vote if they arrived at the opening of the polls. Later arrivals did not have to wait nearly as long. I am not making any credibility determinations based on time recollections unless the timeframe is so far out of connection with reality to be clearly mistaken. Individuals have differing perceptions of how fast time passes and unless they were looking at a clock or watch, estimates of the passage of time can be very inaccurate. Time can pass quickly in an individual estimation if an event is pleasurable or very slowly if it is a chore or something deemed unpleasant.

[7] There appears to be at least four languages spoken by employees: English, Spanish, Vietnamese, and Bosnian. Only a small number of witnesses were multilingual. The bulk of the witnesses only had limited knowledge of any of the other three languages and this impacted exactly what they heard being said in most of the contexts of these objections.

presence of a group of employees/stewards near or at the entrance to the voting area. As noted above, the line to the actual voting area (conference room) snaked through the cafeteria from two beginnings on the opposite side of the room. The cafeteria is fairly large and can hold a few hundred people. There are numerous tables for employee's use and the lines went past these tables, which were used, by various groups of employees to eat or just talk about various subjects, including the election. One group of employees, Augustin Padillo (unit employee), Jubinito Soto (unit employee), and Hernandez (unit employee/steward) for some unknown period of time were sitting or standing at a table adjacent to the entrance to the voting conference room. Padillo and Soto were present at this table for an extended period of time (an hour or more) while Hernandez was there for a more limited period of time. The evidence shows that Padillo, Soto, and Hernandez were asking the voters to vote for the union as they passed by and at one point Padillo showed the voters a replica of a ballot marked yes. Padillo put the document away when asked to do so by a Board agent. The record shows that Padillo was the prime conversationalist in these encounters at the table. There was additional testimony pointing to Padillo's presence in a chair at the door to the voting conference room. I find that it is unlikely that Padillo was sitting in a chair at the entrance to the voting area ([t]here was a door leading into the hallway outside the conference room which had another door—both doors were open at all times during the polling). There is ample credible evidence that Board agents came out of the voting area to tell employees to keep down the noise. In addition, the evidence shows that during at least part of the polling time a board agent was at the first door to expedite the identification process. The presence of a voter sitting at the entrance to a voting area is not likely to have been tolerated by a Board agent. Other witnesses testified they did not see Padillo sitting at the door but at the nearby table. On balance I find the credible evidence to show that Padillo was at the nearby table and not sitting next to the door.

This factual scenario and objection raises the issue as to whether the stewards can be considered agents of the Union for the purposes of objectionable conduct. The record shows the stewards are appointed by the Union and not elected to those positions.[8] Their primary purpose is to enforce the contract, although they are only mentioned in the collective-bargaining agreement as a potential step-one grievance representative. An employee can present their own grievance if they so choose. The stewards were not given an official, formal role in the election campaign in this matter, although they did make their views known to employees. Stewards do run the new employee union orientation, although it is also run by union officials on occasion. Stewards do participate in monthly[9] labor/management meetings, but not all stewards participate in all meetings. There was no evidence as to exactly what occurs at these meetings other than to discuss safety issues. The stewards wear distinguishing purple hardhats in most cases and are exempt from paying union dues.

The burden of proving an agency relationship is on the party asserting its existence. *Millard Processing Services,* 304 NLRB 770, 771 (1991), enfd. F.3d 258 (8th Cir 1993), cert. denied 510 U.S. 1092 (1994). The Employer points to *Battle Creek Health System,* 341 NLRB 119 (2004), as supporting its position that the stewards were agents of the Union. This reliance is somewhat misplaced as the steward in *Battle Creek* was elected, a member of the bargaining committee and specifically authorized to represent the union in the decertification campaign. However, *Battle Creek,* supra at 11, supplies an excellent outline of the principles of agency applied under the Act. "Agency is established if the evidence shows that the union 'instigated, authorized, solicited, ratified, condoned or adopted' the statements at issue" citing *Kitchen Fresh, Inc. v. NLRB,* 716 F. 2d 351, 355 (6th Cir. 1983).

The evidence shows some of the stewards (as well as other bargaining unit employees) were active on the days of the election in speaking to other employees in the cafeteria while they were waiting to vote. While I personally find it hard to believe, there was no record evidence showing that the stewards had any role in the decertification campaign. The stewards only acted as bargaining unit employees in speaking their minds about voting for the Union. The stewards are not elected; only handle grievances at the first-step level, participate in new employee orientation and sporadically participate in labor-management meetings. There is no evidence that the collective-bargaining agreement gives them any special roles or duties other than mentioned above, there is no evidence that the by-laws or constitution of the Union imparts any special duties on stewards and there is an absence of evidence showing the stewards had any role in the decertification campaign. I note there were no witnesses describing any electioneering or pamphleting outside of what is described above. Weighing all of these factors I cannot conclude that the stewards were agents of the Union in any actions taking place during the campaigning and during the actual election itself.

The absence of agency status leads me to analyze the election conduct under the third-party standards. The Board will set aside an election on the basis of third-party conduct only if the conduct is so aggravated that it creates a general atmosphere of fear and reprisal rendering a fair election impossible. *Westwood Horizons,* supra. The Board and the courts recognize that conduct by third parties is less likely to effect the outcome of an election, and that because unions cannot control nonagents; the equities militate against setting aside elections on the basis of conduct by third parties. *Corner Furniture Discount Center,* 339 NLRB 146 (2003). The "electioneering" conduct by third-party individuals in this matter consisted of chanting prounion

[8] The Employer asked me to take judicial notice of an LM-2 Report for 2003 (filed in early 2004). This report shows one of the stewards, Raul Alvarado, serving in a trustee (elected) position sometime in 2003. While this should been have submitted at the hearing, it is a public document and I see no prejudice in reviewing the document. It does show that Alavarado was a trustee sometime in 2003 but it also shows he was a past trustee and no longer in that position at the end of 2003. Testimony also showed that Alvarado's trustee position ended in early 2003: Since the operative events covered by these objections are in 2004, Alvarado's position as trustee sometime in 2003 is not probative and has no impact on his agency status.

[9] The meetings do not routinely occur every month and in the past 12 months there were an estimated eight or nine such meetings.

slogans during the earlier stages of voting and individual conversations between third party individuals and voters while they were waiting on line to vote. In *Boston Insulated Wire & Cable Co.,* 259 NLRB 1118 (1982), enfd. 703 F.2d 876 (5th Cir. 1983), the Board set out a series of factors to be considered in electioneering cases. These factors include (1) the nature and extent of electioneering, (2) whether it was conducted by a party or by employees, (3) whether the conduct was in a designated no electioneering area, and (4) contrary to the instructions of a Board agent. While the cafeteria was not necessarily a no-electioneering zone, it is clear from *Milchem* and its progeny that the voting line is part of any no-electioneering zone. See, e.g., *Golden Years Rest Home,* 289 NLRB 1106 (1988); *Westwood Horizons Hotel,* supra; *Boston Insulated Wire,* supra. There was a significant amount of electioneering, but under the third part standards it does not rise to a level that is so aggravated it would cause a general atmosphere of fear and reprisal. It is campaign puffery without threats (I will discuss the threat possibility under Objections 2 and 4) and propaganda by individuals and under the above analysis is not objectionable conduct. I would overrule this objection.

. . . .

Objection 5. "The Union, acting through its agents and adherents engaged in electioneering in the voting area that was intended to intimidate employees into voting for the Union. Not only did the Union's agents and adherents engage in such electioneering, but Union representative Maria Martinez was also in the cafeteria during the poling period and yelled and screamed at employees waiting in line to vote. The electioneering could be heard in the polling place."

This objection has some of the same bases as Objection 1 with the addition of Martinez' presence during some of the pro-union yelling during the initial stages of the voting. Woolery, an A shift unit employee, testified that she saw Martinez in the cafeteria as the A shift voting commenced at 9 a.m. on April 8. Woolery testified that Martinez was present during some of the initial yelling for the union and did nothing to calm down the electioneering. The evidence, including the Employer's security logs[17] show that Martinez could not have been in the cafeteria during the polling times. Martinez arrived with other union representatives and even though there is no log in or log out for Martinez, the other accompanying individuals left at 9:03 a.m. Woolery was mistaken at best and I do not credit her recollection as to these events.[18] I find that Martinez was not present in the cafeteria after the morning opening of the polls and could not have been present during any chanting right after the polls opened on the A shift.

There was one additional instance of Martinez presence during a polling period. The evidence shows that Martinez (along with one other identifiable union individual—Peyreya) was signed in at 5:30 p.m. and signed out at 6:15 p.m. on April 8. The B-shift voting started at 6 p.m. B-shift employee Trinh Pham testified she saw Martinez talking to employees in the cafeteria for about 15 minutes after 6 p.m. that same evening. Pham seemed to be a little confused about the precise times she spent in the cafeteria. She did not vote until approximately 7 p.m. and sat in the cafeteria talking with friends from 6 to 7 p.m. Initially, she testified she saw Martinez at 7 p.m. and then changed to 6 p.m. She testified that she ate after she voted until about 8 p.m. but in her testimony all of these times became confused. Pham only spoke Vietnamese and may have been confused by the translation process. Martinez testified that she left the cafeteria shortly before 6 p.m. and spoke to an employee in the hallway before leaving the plant, thus accounting for the extra 10 or so minutes between the beginning of the polling and her leaving the plant. Pham did not overhear any of the putative conversations between Martinez and employees nor did she have any estimate of the number of employees involved. I find that the security logs are the best evidence of the times Martinez entered and left the plant in both situations, and that she left the security shack at 6:15 p.m. on April 8.

As I noted above, unless individuals are referencing time by a watch or a clock, estimates of time are relatively inaccurate. If I take Pham's estimates at face value then Martinez was in the cafeteria until about 6:15 p.m. Given my finding that the security logs are the most reliable evidence, this is physically impossible since it takes at least 5 minutes or more to transit from the cafeteria to the security shack. Martinez knew the consequences of being in the polling area after the polls opened but may have been delayed a minute or two as she left the area. There is no evidence as to what Martinez may have said to any voters in the cafeteria. My finding is that Martinez may have lingered a minute or two after 6 p.m. as she left the area and then talked to an employee in the hallway on her way out of the facility. Pham's estimate of Martinez spending 15 minutes talking to employees on line in the cafeteria does not comport with the physical facts. Employees were released to vote and lined up in the cafeteria. The lines were long and it took over an hour for voters to wait in line from 6 p.m. on. There has to be some time allowance for voters to line up at 6 p.m. and taking this with the other factors I mentioned above, I find that Martinez was not talking to voters in line after the polls opened.

However, assuming arguendo that Martinez was present in the cafeteria for 5 minutes or so after the polls opened, this is not sufficient under *Milchem* to overturn the election. The cafeteria was not initially designated as a no-electioneering area and this only developed as a matter of law as the lines of waiting voters grew and snaked across the cafeteria: As discussed above, the lines of voters are considered by the Board to be part of the polling area. However, in the instant case Martinez was located at the fringes of the line area and even if she spoke to waiting voters it was at the very end of any line, we do not know what was said to employees and it was possibly a circumstance where Martinez may have spoken briefly to some individuals for a few minutes at best. I do not know the subjects addressed in these conversations and cannot make any findings as to what was said. Brief social pleasantries or work-related discussions are generally not considered objectionable under the *Milchem* rule. See *Sawyer Lumber Co.,* 326 NLRB 1331

[17] These logs keep track of all nonemployee visitors to the plant and the security personnel enter the times. In the absence of other convincing, credible evidence I find the security log shows that Martinez was signed out of the plant at 9:03 a.m.

[18] This does not impact my factual findings as to the damage to Woolery's vehicle referred to above under Objection 2.

(1998); *Dubovsky & Sons,* 324 NLRB 1068 (1997), citing *NLRB v. Vista Hill Foundation,* 639 F.2d 479 (9th Cir. 1980), enfg. 239 NLRB 667 (1978) (six brief conversations, some discussing election, not objectionable).

Based on my findings and analysis above I recommend that this objection be overruled.