

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD¹
REGION 32

VALLEY POWER SYSTEMS NORTH, INC.

Employer

and

TERRANCE J. MECHAM, an INDIVIDUAL

Case 32-RD-1533

Petitioner

and

OPERATING ENGINEERS LOCAL UNION
NO. 3, INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO

Union

SUPPLEMENTAL DECISION 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 challenged ballots and Petitioner's objections in this matter, and I am sustaining the challenges to the ballots of Mike Croll, Roger Towle, Gerardo Alcerreca, Kurt Pless, Moises Alcerreca, William Otterstrom, Russ Mendenhall, Ezra Boone, Stephen Villa, Adan Molina, Brian Rocha, Doug Mendenhall, Chuck Drake, and John Griffin, overruling the challenges to the ballots of Juan Avila, Aaron DeGracia, Danavan Li, Glenn Martinez, Terrance Mecham, and Kimberly Petrosky, and overruling the Objections Nos. 1 through 12 and 14 through 18. Objection No. 13 is being set for hearing.

The Election

The Petition in this matter was filed on April 20, 2007. Pursuant to a Decision and Direction of Election issued on November 7, 2008,² an election by secret ballot was conducted on December 5,³ in the following appropriate collective bargaining unit:

¹ Herein called the Board.

All persons regularly employed by Valley Power Systems North, Inc. at its facility located at 1775 Adams Ave., San Leandro, California, including only those classifications set out in Section 07.00.00 of the November 1, 2004 through October 31, 2007, collective bargaining agreement between the Union and Sierra Detroit Diesel Allison, d/b/a Stewart and Stevenson (leadmen/foremen, power generation technicians, parts leadmen/foremen, partsmen, warehousemen, utilitymen [yardmen, steam cleaners, stock clerks, packers, deliverymen, and toolroom employees], mechanic trainees, and partsmen and warehousemen trainees); excluding all other employees, office and clerical employees, guards, salesmen, professional employees, technical and engineering employees, shop maintenance and janitorial employees, plant sweeper and sweeper operations, grounds keepers, and supervisors as defined in the LMRA of 1947 (as amended).

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

Approximate number of eligible voters.	30
Number of void ballots	0
Number of votes cast for participating labor organization .0	
Number of votes against participating labor organization ..8	
Number of valid votes counted	8
Number of challenged ballots	22
Valid votes counted plus challenged ballots	30

The challenged ballots are sufficient in number to affect the results of the election. Thereafter, the Union filed timely objections to the election, copies of which were served on the other parties by the Board.

The Challenged Ballots⁴

The Board agent⁵ conducting the election challenged the ballots of Mike Cross, Roger Towle, Gerardo Alcerreca, Kurt Pless, Moises Alcerreca, William Otterstrom, Russ Mendenhall, Ezra Boone, Stephen Villa, Adan Molina, Brian Rocha, Doug Mendenhall, Chuck Drake, and John Griffin because their names were not on the voter eligibility list supplied by the Employer. As regards Gerardo Alcerreca, Moises Alcerreca, Ezra Boone, Charles Drake, John Griffin, Douglas Mendenhall, Russ

² All dates hereinafter refer to calendar year 2008.
³ Processing of the petition was suspended during the pendency of a series of unfair labor practice charges filed by both the Employer and the Union.
⁴ Although given the opportunity, the Petitioner provided no evidence regarding any of the challenged ballots.
⁵ The Petitioner and the Employer also challenged these voters on the same ground.

Mendenhall, William Otterstrom, Roger Towle, and Stephen Villa, the investigation disclosed that they were discharged when the Employer permanently closed its Truck and Fire Truck shop on January 4, 2008. The Employer's conduct with respect to that closing and the resulting terminations of the above employees was the subject of an unfair labor practice charge filed by the Union in Case 32-CA-23703. As a result of the Region's investigation of that charge, it was determined that the Employer's decisions to close the shop and to discharge the shop employees were lawful. These determinations were sustained on appeal to the General Counsel. Subsequently, the Region determined that the Employer unlawfully failed to engage in effects bargaining regarding the closing of the shop, and thereafter, the parties entered into an informal Settlement Agreement resolving, among other things, payments due Gerardo and Moises Alcerreca, Ezra Boone, Charles (Chuck) Drake, John Griffin, Douglas (Doug) and Russ Mendenhall, William Otterstrom, Roger Towle, and Stephen Villa. Copies of that Settlement Agreement and the related Effects Bargaining Agreement are attached as Exhibits "A" and "B." Given the foregoing, it is clear that none of these employees were employed at the appropriate times, and thus, they were not eligible to vote. As regards Brian Rocha and Mike Croll, the Employer provided employee records which disclosed that that they voluntarily terminated their employment on July 25, 2007, and October 6, 2007, respectively. Thus, neither of these employees was employed during the payroll period immediately preceding the issuance of the aforementioned Decision and Direction of Election and on the date of the election. Accordingly, they were not eligible to vote in the election

Although the Union does not appear to dispute the foregoing with respect to these employees, or that any of these individuals had a right or reasonable expectation of returning to work in the bargaining unit, the Union nonetheless argues that because the Notice of Election did not specify the ending date of the payroll period for eligibility, any employee who ever worked for the Employer should be found to be eligible to vote. With regard to this contention, while it is true that the payroll period ending date for eligibility in the election was inadvertently omitted from the Notice, my Decision and Direction of Election clearly set out the payroll period for eligibility. Moreover, there is no claim that any eligible employee was disenfranchised by this mere oversight. Accordingly, I find no merit attaches to the Union's contention.

As regards, Adan Molina and Kurt Pless, the investigation disclosed that they engaged in an economic strike that commenced on July 10, 2007, they were permanently replaced on October 23, 2007, and that they had not been reinstated as of the time of the election. Permanently replaced strikers are not eligible to vote in an election held more than 12 months after the commencement of an economic strike. *Thoreson-McCosh, Inc.*, 329 NLRB 630 (1999); *Wahl Clipper Corp.*, 195 NLRB 634 (1972). Accordingly, because the election in this matter was held more than 12 months after the commencement of the strike, the challenges to the ballots of Molina and Pless are hereby sustained.

Given 14 of the 22 challenges have been sustained, and there are currently 8 valid votes against the Union, I find the remaining 8 challenged ballots are no longer determinative of the election results. However, in the interest of completeness, the remaining challenged ballots are discussed below.

The Union challenged the ballots of Juan Avila, Aaron DeGracia, Danavan Li, Glenn Martinez, Terrance Mecham and Kimberly Petrosky, based on its contention that they are not employed in the bargaining unit. In support of that contention, the Union provided a witness who testified that he had observed DeGracia and Li sweeping and cleaning the Employer's San Leandro facility parking lot, which the Union claims are not duties of a bargaining unit member. The witness also testified that he had observed Martinez working on multiple occasions at the Employer's facility in West Sacramento, and that he "is informed and believes that Mr. Mecham has operated as a distributor for a Valley Power-related company called Northern Lights." The witness further testified that when he worked at the San Leandro facility (the witness terminated his employment more than a year prior to the election), he observed Petrosky performing clerical, not bargaining unit work. On the other hand, the Employer provided records showing that Avila, DeGracia, Li, Martinez, Mecham, and Petrosky were employed in the bargaining unit during the payroll period immediately preceding the issuance of the Decision and Direction of Election, and on the day of the election. Those Employer records show the following: Avila is classified as a front counter person, which corresponds to the bargaining unit position of partsman; DeGarcia is listed as a parts counter trainee, which corresponds to the bargaining unit position of partsman trainee; Li is classified as a

front parts counter person, which corresponds to the bargaining unit position of partsman; Martinez is classified as a field service shop technician, which corresponds to the bargaining unit position of field serviceman; Mecham is classified as field service technician, which corresponds to the bargaining unit position of field serviceman; and Petrosky is classified as a parts counter employee, which corresponds to the bargaining unit position of partsman. Therefore, assuming, as the Union contends, that some of the employees in question were sometimes assigned to sweep or clean the parking lot, there has been no showing or, indeed, any claim that the performance of such duties was to the exclusion of performing unit work, as opposed to being merely occasional. Similarly, even assuming that Martinez has been occasionally assigned to work at another Employer facility, that, without more, does not establish that he was not also performing sufficient unit work to qualify for inclusion in the bargaining unit. As to Mecham, even assuming that he also performs services for another company related to the Employer, the Union provided no evidence that he performs insufficient bargaining unit work on a regular basis to warrant his exclusion. The investigation also disclosed that Petrosky transferred from the position of customer service representative, a position not included in the bargaining unit, to the bargaining unit position of parts counter employee effective September 27, 2007, approximately a week before the Union's witness ceased working for the Employer. Finally, the Employer provided a copy of a Union letter dated March 10, 2008, requesting personnel records for a number of "bargaining unit employees," which included not only Petrosky but also Juan Avila. Based on all of the above, I hereby overrule the challenges to the ballots of Juan Avila, Aaron DeGracia, Danavan Li, Glenn Martinez, Terrance Mecham, and Kimberly Petrosky, which in any event, as noted above, would be insufficient in number to be determinative of the election's outcome.⁶

Because my above determinations regarding the other challenged ballots in all likelihood will result in the ballots of Henry Holmes and Patrick McCarthy not being determinative, I neither make a finding as to their eligibility at this time, nor set their challenged ballots for hearing.

⁶ These rulings would only come into play if the Board does not agree with my earlier findings. Thus, although I have overruled the challenges to their ballots, should those findings stand, the ballots need not be opened and counted

The Objections

Objection Nos. 1 and 9

1. The National Labor Relations Board, by its agents and representatives, conducted the election in a manner inconsistent with its required rules and policies and such conduct interfered with the laboratory conditions necessary for the conduct of a fair election.

9. The Employer, by its agents and managers, engaged in surveillance of employees as they were voting thereby interfering with the laboratory conditions necessary for the conduct of a fair election.

In support of these objections, the Union asserts (1) that the Notice of Election was misleading because it failed to establish an eligibility cut-off date, (2) that the Board agent conducting the election exhibited bias and partisanship by permitting non-striking employees to vote ahead of striking employees and by failing to investigate the Union observer's claim that the Employer was recording and surveilling the elections, and (3) that the Board agent distributed "sample" rather than official ballots to certain voters.

With respect to the Notice of Election, the Union provided no examples of any employees who were disenfranchised⁷ by the inadvertent omission of the payroll period cut-off date. Moreover, as noted above, the Decision and Direction of Election clearly stated that employees working during the payroll period preceding issuance of the Decision would be eligible to vote, which was the payroll period ending October 26, 2008. Finally, examination of the eligibility list used in the election reveals that all employees on that list cast ballots. Accordingly, I find that this oversight did not affect the election in any way warranting setting it aside.

As regards the Union's contention that the Board agent improperly permitted non-striking employees to vote ahead of striking employees, the investigation disclosed that the conduct at issue involved the Board agent's decision to first process voters identified on the voting eligibility list before engaging in the time-consuming requirements of processing challenged ballots on behalf of the numerous individuals now identified as ineligible to vote. Even assuming that the Board agent conducted the election in this manner, I find this was not, as the Union contends, a decision based on bias or

⁷ If anything, the omission would have resulted in additional, ineligible voters casting ballots.

partisanship, but, instead, was a pragmatic decision based on the Board agent's reasonable determination that this was the most efficient method for handling the crowd of voters who simultaneously showed up to vote. This was so because those voters whose names were not on the list would have to be challenged, a process that is more time consuming than allowing an uncontested voter to vote. As a further consideration in this matter, I note that none of the individuals who were challenged because they were not on the eligibility list and had to wait were, in fact, eligible to vote. Therefore, even if they were moved to the end of the line, this could not have affected the election. Accordingly, I find no merit to the Union's contention that the Board agent engaged in objectionable conduct by first processing the voters identified on the voting eligibility list.

As regards the Union's contention that the Board agent engaged in objectionable conduct by giving voters sample ballots instead of official ballots, the investigation disclosed that the Board agent ran out of official ballots because almost twice as many persons as were on the eligibility list showed up to cast ballots. In responding to that situation, the Board agent copied the sample ballot contained in the file, and gave the last two voters those ballots to mark. Although the Union asserts that this action confused or disoriented voters, it proffered no evidence in support of this contention, and there was nothing inherently confusing or disorienting about the sample ballots, which had the same content as the official ballot. In considering the Union's reliance on this procedure in objecting to the election, I also note that the Union challenged both of those voters on other grounds, one as not being in the bargaining unit, the other, as being a supervisor. Indeed, the reason the Board agent conducting the election had to use these types of ballots is that many ineligible persons came to vote, including the Union's business representative, and although the Region prepared almost twice as many ballots as the number of eligible voters, this was still not enough. Finally, I find that as I have determined that the ballots of the last two voters are not determinative of the results of the election, this situation does not warrant setting aside the election.

Regarding Objection No. 9, the Union asserts that the Board agent ignored the Union's protest regarding the Employer's alleged recording and surveilling of the election. In support of this objection, the Union provided a declaration from Business

Representative Michael Croll, who served as its election observer,⁸ who states that, after noticing “a large device that appeared to be audio-visual equipment,” he objected to the Board agent that the device might be recording the election and those who had voted.

The investigation revealed that the election was conducted in a training room, which included an overhead projector, specifically, a Proxima Ultralight LX Projector. A review of the specifications of that model reveals that it only had projection capabilities and cannot be used for recording.⁹ In the face of such evidence, the Union has shown no basis as to why the employees would believe this would be used as an observation or recording device.¹⁰ Accordingly, I find no merit to this objection.

In sum, based on all of the above, I hereby overrule Objections Nos. 1 and 9.

Objections Nos. 2, 3, 4, and 5

2. The Employer, by its agents and managers, placed the names of persons not eligible to vote on the Excelsior list.
3. The Employer, by its agents and managers, included ineligible voters on the Excelsior list in order to undermine employees’ support for the Union.
4. The Employer, by its agents and managers, omitted the names of eligible voters from the Excelsior list furnished to the Union prior to the election.
5. The Employer, by its agents and managers, omitted the addresses of employees eligible to vote from the Excelsior list furnished to the Union prior to the election.

These objections concern the same issues discussed above regarding the challenged ballots. With respect to Objections Nos. 2, and 3, there can be no finding that the Employer’s inclusion of those persons who were challenged by the Union was intended to undermine employee’s support for the Union, or was otherwise done in bad

⁸ Although Croll was no longer a bargaining unit employee at the time of the election, no party objected to his serving as the Union’s election observer.

⁹ A copy of the specification sheet provided by the manufacturer is attached as Exhibit “C.”

¹⁰ In fact, there was no evidence, or even the contention, that any employee eligible to vote in the election noticed the projector.

faith.¹¹ As to Objections Nos. 4 and 5, the Union again argues that, because the Notice of Election did not include a payroll period cut-date, all employees who had worked for the Employer at any time were eligible to vote, and thus should have been included on the eligibility list. However, as noted above, the Decision and Direction of Election in this matter specifically states that “eligible to vote in the election are those in the unit who were employed during the payroll period immediately before the date of this Decision,¹² including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.” That is clearly the appropriate eligibility period, and there has been no showing that the open-ended eligibility set forth in the Notice of Election has caused any prejudice. In that regard, there was no evidence that any employees who met the appropriate eligibility criteria were left off the eligibility list. Moreover, as noted above, all eligible voters appear to have voted. Accordingly, based on all of the above, I hereby overrule Objections Nos. 2, 3, 4, and 5.

Objections Nos. 6, 8, 12, 15, and 17

6. The Employer, by its agents and managers, interfered with, restrained, and/or coerced employees in the exercise of their rights guaranteed by Section 7 of the Act.

8. The Employer, by its agents and managers, created an atmosphere of fear and coercion thereby interfering with the laboratory conditions necessary for the conduct of a fair election.

12. Petitioner interfered with, restrained, and/or coerced employees in the exercise of their rights guaranteed by Section 7 of the Act.

15. Third parties, on their own and the Employer’s behalf, interfered with, restrained, and/or coerced employees in the exercise of their rights guaranteed by Section 7 of the Act.

17. Third parties, on their own and the Employer’s behalf, created an atmosphere of fear and coercion thereby interfering with the laboratory conditions necessary for the conduct of a fair election.

¹¹ It is noted that I have determined that at least 6 of the 7 employees challenged by the Union were, in fact, eligible to vote.

¹² As stated previously, the payroll period ending October 26, 2008.

The Union provided no evidence of any additional objectionable conduct in support of these “catch-all” objections. Accordingly, Objections Nos. 6, 8, 12, 15, and 17 are hereby overruled.

Objections Nos. 7 and 16

7. The Employer, by its agents and managers, interfered with the rights of employees by singling out known Union adherents and publicly insulting them.

16. Third parties, on their own and the Employer’s behalf, interfered with the rights of employees by singling out known Union adherents and publicly insulting them.

The Union provided no evidence regarding the Employer’s agents or managers singling out known Union adherents and publicly insulting them. Although the Union did provide a witness who testified that he observed a non-striking employee laughing and waving his paycheck at striking employees as he entered the training room to vote, such conduct falls far short of the type of “third-party” conduct that the Board considers sufficiently egregious to constitute objectionable conduct. Cf. *Westwood Horizons Hotel*, 270 NLRB 802 (1984), where the nature of the conduct was so egregious that it interfered with the right of employees to a free and uninhibited choice in the selection of a bargaining representative to such an extent that it rendered “a free election impossible.” Accordingly, I hereby overrule Objections Nos. 7 and 16.

Objection No. 10

10. The Employer, by its agents and managers kept lists of which employees voted in the NLRB election destroying the laboratory conditions necessary for the conduct of a fair election.

The Union provided no evidence that the Employer’s agents and managers kept lists of which employees voted in the election. Accordingly, Objection No. 10 is hereby overruled.

Objection No. 11

11. The Employer, by its agents and managers, discriminated against employees in violation of Sections 8(a)(1) and 8(a)(3) of the Act by terminating them because of their union and or protected, concerted activities.

In the absence of complaint alleging such violations, the Board will not consider objections which involve allegations of conduct in violation of Section 8(a)(3) of the Act. *Texas Meat Packers*, 130 NLRB 279 (1961). As stated above, the allegations that employees were unlawfully terminated were investigated and dismissed in Case 32-CA-23703. Accordingly, I hereby overrule Objection No. 11.

Objections Nos. 13 and 14

13. The Petitioner kept lists of which employees voted in the NLRB election destroying the laboratory conditions necessary for the conduct of a fair election.

14. Petitioner engaged in surveillance of employees as they were voting thereby interfering with the laboratory conditions necessary for the conduct of a fair election.

The role of election observers is to assist the Board agent in the conduct of the election by checking off the names of voters on the eligibility list as they appear to cast their ballots, challenging those voters whom they believe to be ineligible on behalf of the party they represent, and otherwise generally monitoring the election process. The Petitioner, an eligible voter, served as his own observer. Obviously, such duties require election observers to pay attention to the progress of voters as they enter the polling area, receive their ballots, enter and exit the polling booth, and place their ballots in the official ballot box. Such attention, without more, does not constitute unlawful surveillance or objectionable conduct. Accordingly, Objection No. 14 is overruled. On the other hand, although observers may bring to the election lists of employees they intend to challenge, they may not maintain a list of those who do or do not vote. In support of Objection No. 13, the Union provided a declaration of its election observer, wherein he claims that he observed the Petitioner entering information into his “personal computer/cell phone”

while employees were casting their ballots. Thus, this objection raises material issues of fact or law that can best be resolved by a hearing.

Objection No. 18

18. Third parties, on their own and the Employer's behalf, engaged in surveillance of employees as they were voting thereby interfering with the laboratory conditions necessary for the conduct of a fair election.

In support of this objection, the Union provided a witness who testified that he observed a non-striking employee using her cell phone to "text" while waiting in the hall outside the polling place. The witness was unable to describe the text message. Rather, he merely speculated that the cell phone user "could [emphasis supplied] have been entering information concerning who was voting or other information related to the conduct of the election and the identities of the voters." As the objection concedes, the alleged surveillance at issue here was not conducted by a party to the election. I have determined that this conduct, which occurred outside the polling area, by an employee, was not conduct warranting setting aside the election. Accordingly, I hereby overrule Objection No. 18.

Notice of Hearing

IT IS HEREBY ORDERED that a hearing on Objection No. 13 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 the expiration of

the period for filing exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

PLEASE TAKE NOTICE that on February 19, 2009, at 9:00 a.m. PST, at the Oakland Regional Office, and continuing on consecutive days thereafter until completed, a hearing pursuant to Section 102.69 of the Board's Rules and Regulations will be conducted before a hearing officer of the National Labor Relations Board upon the aforesaid objections, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony and to examine and cross-examine witnesses with respect to said matters.

DATED February 11, 2009, at Oakland, California.¹³

/s/ Alan B. Reichard
Alan B. Reichard
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

¹³ Under the provisions of Section 102.69 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. Pursuant to Section 102.69(g), affidavits and other documents which a party has submitted timely to the Regional Director in support of objections or challenged ballots are not part of the record unless included in the Supplemental Decision or appended to the request for review or opposition thereto which a party submits to the Board. The request for review must be received by the Board in Washington, DC by February 25, 2009. In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the www.nlr.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.