JD(NY)–31-12
Ft. Washington, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

NORTHERN HEALTH FACILITIES, INC., d/b/a
DRESHER HILL HEALTH & REHABILITATION CENTER

Employer

and **Case No. 4-RC-80166**

NATIONAL UNION OF HOSPITAL AND HEALTH
CARE EMPLOYEES, DISTRICT 1199C

Petitioner

Cynthia Springer, Esq., Faegre, Baker, Daniels, LLP, Counsel for the Employer.
Gail Lopez-Henriquez, Esq., Freedman and Lorry P.C., Counsel for the Petitioner.
Deena Kobell, Esq., Representative of the Regional Office.

DECISION ON OBJECTIONS

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on August 29, 2012 in Philadelphia, Pennsylvania. Pursuant to a Stipulated Election Agreement approved by the Regional Director for Region 4 on May 25, 2012, an election by secret ballot was conducted on July 3 in the following unit:

> Included: All full-time and regular part-time licensed practical nurses employed by the Employer at its 1390 Camp Hill Road, Dresher, Pennsylvania facility.
>
> Excluded: All other employees, registered nurses, office and clerical employees, managerial employees, guards and supervisors as defined in the Act.

The Tally of Ballots showed that nine employees cast ballots in favor of the Petitioner, seven employees cast ballots against the Petitioner, and there was one challenged ballot, which was not sufficient to affect the results of the election.

On July 10, 2012, the Employer filed timely Objections to conduct affecting the results of the election, which allege as follows:

> 1. The Board Agent permitted the Union observer/Petitioner's union steward for the service and maintenance employees, Susan Outlaw, to receive a cell phone call and carry on a telephone conversation while the polls were open.
>
> 2. The Board Agent permitted Ms. Outlaw to send text messages while the polls were open.

3. The Board Agent permitted another member of the Petitioner's service and maintenance bargaining unit, Mary Warner, to be present in the polling area for an extended period and to talk with Petitioner's union steward, Ms. Outlaw, while the polls were open.

4. The Board Agent permitted another member of the Petitioner's service and maintenance bargaining unit who is a housekeeper to be present in the polling area and to talk to Ms. Warner and other members of the Petitioner's service and maintenance bargaining unit inside the polling area while voting was actually taking place over a 20-30 minute period.

5. The Board Agent permitted an LPN, Shahedah Floyd, who had voted in the morning session, to remain in the polling area after the afternoon session opened and while voting was taking place and to carry on a conversation in the polling area with others, including LPN Lucy Simprevil, who was in the polling area to vote.

6. The Board Agent permitted another member of Petitioner's service and maintenance bargaining unit who is a maintenance assistant to enter and leave the polling area while the polls were open.

I. The Facts

Testifying herein regarding the alleged objectionable conduct were Gregory Byrne, the Employer's Area Director for Human Resources and the Employer representative at the pre-election conferences, Patricia Westerman, the Employer's observer for the afternoon session of the election, and Susan Outlaw, the Petitioner's observer for both sessions of the election. The election was conducted on July 3 from 6:30 a.m. to 8:00 a.m., and from 2:30 p.m. to 3:30 p.m. in the Employer's break room, which appears to be about twenty by twenty five feet in size. The observers sat at a table containing two chairs with the ballot box at the right side of the table (looking out from the back wall) and the Board agent sat in a chair to the right of the table nearer to the corner of the room. On the next wall were two windows, with a television (that was off during the election) between them, and just past the next corner of the room was the voting booth. Continuing in the same direction, there was a table against the far wall, directly across from the observers' table, approximately two to three feet long, containing three chairs. Between that table and the left hand wall were three vending machines for sodas and snacks. That left hand wall contained two doors, with a refrigerator between them, and a table and chairs in front of them. On the other wall is a door (the entrance to the break room) with the microwave oven just to its left, a paper towel dispenser, and the observer's table. The gravamen of the objections are that the Board agent allowed Ms. Outlaw to use her cell phone to make and receive telephone calls and to send text messages during the election, that she allowed non-unit employees to be present and to socialize in the voting area during the voting period, and that she allowed one of these non-unit employees to talk to a voter after she had voted.

Byrne, Westerman and Outlaw testified that at the pre-election conference the Board explained the rules to the observers and told them what to do if they wished to challenge a voter. She also gave them a copy of the Board's Instructions to Election Observers[1] and told them that they can greet the voters, but that there should not be any discussion related to the

[1] The final instruction on this list says that observers are not to use any electronic devices, including cell phones, which should be turned off being entering the voting area.

election. Prior to the start of the afternoon session, the Board agent gave Westerman a copy of the observer's instructions and, prior to leaving the area, Byrne observed three employees (a housekeeping employee, a nursing department employee and a nursing assistant[2]) at the microwave machine and sitting at the table near the voting booth and he asked the Board agent if she had an issue with employees being in the break room while the voting was taking place. She said that she didn't see it as an issue and that if it was, she would address it. Outlaw's testimony differs from Byrnes' in that she testified that he asked the Board agent if he should shut down the break room during the period of the election and she responded that it wouldn't be a problem because the voting was not taking place where they were located. She testified that Westerman responded that she is familiar with everybody, and "if things get too out of hand" she would tell the employees to keep it down. Westerman testified that, although she did say that she was familiar with everyone coming to vote, she did not say that she would tell them to keep it down if it got too noisy: "I wasn't there to tell people what to do. I was there to be an observer."

Westerman testified that during the afternoon voting session she observed Outlaw making two calls on her cell phone. She was on the first call for about a minute or two and on the second call for less than a minute; no voter was in the area at the time of either call. In addition, she observed Outlaw texting on her cell phone during the voting period. While she was doing that, an eligible voter, Melissa Black approached the table and Outlaw put her phone down and Black spoke to both Outlaw and Westerman about her baby, how the baby was doing, showed them pictures of the baby, and then she voted. No other voter was present during that time. Westerman testified that this was the only time that voters spoke to anybody in the room before they voted. Westerman testified that Outlaw never asked the Board agent for permission to use her cell phone, and the Board agent never told her that she could not talk on the phone during the voting, and never told Outlaw to turn her phone off. She testified that she never received a telephone call during the voting session. Outlaw testified that prior to the election, the Board agent told her that she could use her cell phone as long as nobody was in the room to vote; Westerman testified that the Board agent never said that to them. Outlaw also testified that Angela Gordon, the observer for the Employer on the morning shift, who did not testify herein, made a call to a nurse on her shift to give report to her and, she also told her to come to vote. Outlaw further testified that Westerman was on the phone during the afternoon shift talking about her dogs (Boxers) that were either sick or had surgery. On rebuttal, Westerman testified that she does not have Boxers, and that it was the Board agent who was on the phone talking to somebody about one of her Boxers, while Outlaw testified that she does not recall the Board agent talking on her phone about her sick dog. Outlaw testified that during the afternoon session she received a telephone call from an ex-boyfriend while a voter was present and she was on the phone for less than a minute and told him that she would call him back, and she did so when no voters were present. She believes that she may have gotten other calls, but she did not answer them. In addition, when there were no voters present, she used her cell phone to access Facebook and another social network, but did not post anything about the election.

The Employer also objects to the fact that there were other employees present in the break room during the afternoon voting period, and that was clearly true. Westerman testified that a number of non-unit employees were in the break room during the voting period in the afternoon. "Jocelyn," a housekeeping aide, was in the area for twenty to thirty minutes, sitting in a chair at the table across the room from the observers and the Board agent, about a foot or two

[2] The Petitioner represents the service and maintenance employees of the Employer, as well as the employees of the housekeeping and laundry contractor at the facility.

from the voting booth, and with her back toward the booth. She spoke to a number of employees while she was there, principally Mary Warner, a nursing assistant who spent most of her time at the microwave, which was between the entrance door and the observers' table. Their conversation lasted for between five and ten minutes, and during this time an employee came in to vote, but the Board agent did not ask Warner to leave the area. She also testified that Jocelyn and Warner had other, shorter, conversations as well, but she cannot recall if Jocelyn spoke to any voters during this period. In addition to speaking to Warner, Jocelyn also had about a five minute conversation with a CNA employee and she responded with a hello to a maintenance employee who said hello to her. Westerman also testified that, in addition to speaking with Jocelyn, Warner also spoke to Outlaw while she was at the microwave and Outlaw was at the observer's table. This conversation lasted for about a minute or two and ended when a voter walked in to the area, and during this period while they were speaking, a voter was in the voting booth marking her ballot. Outlaw testified that she has no recollection of speaking to Warner during the election. Warner left the room and returned to the microwave and had another conversation with Jocelyn, who was still sitting in the chair with her back toward the voting booth; this conversation lasted for about a minute or two. No voter was present during this conversation. Warner left the area and returned, again, this time while a voter, Lucy Simprevil was present and, again, Warner and Jocelyn began speaking while Warner was at the microwave and Jocelyn was in the same chair as before. After Simprevil voted, she remained in the area speaking to another employee for about five to ten minutes, and during this period another voter, Dorothy Minnick came to vote. Westerman testified that the Board agent never told Simprevil, Warner or Jocelyn that they should not remain in the voting area or that they should not be talking in the voting area.

Outlaw testified that during the voting period Warner was in the break room, sitting across the table from, and speaking to, Jocelyn, but she does not recall her speaking to Jocelyn while standing at the microwave and she could not hear what they were saying. Warner did not speak to her about the election.

It is also alleged that during the election period people in the break room were talking to voters. As previously stated, Westerman testified that other than the conversation that Black had with the observers about her baby, she did not see anyone in the break room speaking to voters before they voted.

II. Analysis

The evidence supporting the Employer's objections is supplied principally by Westerman, whose testimony, at times, is contradicted by Outlaw's testimony. Where there is a conflict, I credit the testimony of Westerman. Unlike Outlaw she, at times, admitted that she was incorrect in something that she may have previously said, whereas Outlaw refused to admit that she might have been mistaken in her testimony, and, at times, appeared to be tailoring her testimony to make it appear more believable. For example, she testified that that the table where Jocelyn was sitting and the vending machines had been moved, while it appears that the vending machines were already against the left hand wall, and had no place to go.

In *Cambridge Tool & Manufacturing Co., Inc.*, 316 NLRB 716, the Board stated:

> The test, an objective one, is whether the conduct of a party to an election has the tendency to interfere with the employees' freedom of choice. In making its determination as to whether the conduct has the tendency to interfere with employees' freedom of choice, the Board will consider, *inter alia*, the closeness of the election.

This election was close: nine votes for, and seven against, the Union. Even so, I find a total lack of evidence supporting the Employer's objections herein. True, Jocelyn had a number of conversations with Warner while Warner was at the microwave and she was sitting at the table across from the observers' table; however, there was no evidence that either was acting as agents of the Petitioner, nor is there any evidence that any of their discussions related to the election. *Yukon Manufacturing* Company, 310 NLRB 324, fn. 3 (1993). Rather, as neither one were in the unit involved in the election, it is highly unlikely that they discussed the election. In *NLRB v. Hood Furniture Manufacturing Co.*, 941 F.2d 325, 330 (5th Cir. 1991), the Court stated: "In the absence of Union agency, it is possible to set aside an election only if the conduct of third parties 'produced such a climate of tension and coercion that the employees were effectively precluded from making a free choice.'" See also *NLRB v. IDAB, Inc. 770 F.2d 999, 1000 (11th Cir., 1985) and Dubovsky and Sons, Inc.*, 324 NLRB 1068 (1997). That "climate of tension and coercion" was certainly not present here.

The Board's *Milchem* rule, at 170 NLRB 362 (1968) prohibits "prolonged conversations between representatives of any party to the election and voters waiting to cast ballots." Both elements of this are missing here: neither Jocelyn nor Warner were representatives of the Petition (they weren't even in the voting unit) and the testimony establishes that nobody spoke to any of the voters prior to their marking their ballots. Rather, the discussions between them, as in *Sawyer Lumber Company, LLC,* 326 NLRB 1331, 1333 (1998), appears to be nothing more than "innocuous social pleasantry that would not have influenced any voter." Finally, the Court, in *Polymers, Inc. v. NLRB*, 414 F.2d 999, 1004 (2d Cir. 1969), stated: "A *per se* rule [setting aside an election if there is a] possibility [of irregularity] would impose an overwhelming burden in a representation case. If speculation on conceivable irregularities were unfettered, few election results would be certified, since ideal standards cannot always be attained." It would clearly have been preferable if the Board agent had told Jocelyn, Warner and all other non-voters to leave the break room until the election was completed. Because of her failure to do so, the standards for this election were clearly not ideal; however, there is absolutely no evidence that any voters' intention was affected by their presence in the area, or by what appears to be their innocuous conversations.

The Employer also objects to Outlaw's telephone calls. In this situation, I credit Outlaw's testimony (not very different from Westerman's testimony, except that I credit Westerman that it was the Board agent, not Westerman, who made a phone call about her sick Boxer) that she received a telephone call from an ex-boyfriend while a voter was present in the afternoon session. She told him that she would call him back, and this call lasted less than a minute. She later returned his call while no voter was present. In addition, while no voter was present, she accessed Facebook and another social network. That was the extent of her cell phone use during the afternoon session. It is not enough that there may have been procedural irregularities in the conduct of the election or that an observer did not follow the rules set out by the Board. The issue is whether these actions had any effect on the integrity of the election. *St. Vincent Hospital, LLC*, 344 NLRB 586, 600 (2005). Here, Outlaw's two brief telephone calls and her accessing the social network clearly did not.

I therefore recommend that the Employer's Objections 1 through 6 be overruled.

Conclusions of Law

The Union has not engaged in any objectionable conduct warranting setting aside the election.

Case No. 4-RC-80166 should be remanded to the Regional Director for Region 4 for the purpose of issuing the appropriate certification.[3]

Dated, Washington, D.C. September 25, 2012

Joel P. Biblowitz
Administrative Law Judge

[3] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Decision may be filed with the Board in Washington, D.C. within 14 days from the date of this Decision and Recommendation. Exceptions must be received by the Board in Washington by October 9, 2012.