D.R. NO. 82-54

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

CITY OF ATLANTIC CITY,

Public Employer,

-and-

NATIONAL POLICE SECURITY OFFICERS LOCAL 9,

DOCKET NO. RO-81-31

Petitioner,

-and-

AMALGAMATED TRANSIT UNION DIVISION 880, AFL-CIO,

Intervenor.

SYNOPSIS

The Director of Representation dismisses objections to an election which were filed by the National Police Security Officers Local 9.

The NPSO filed objections concerning (a) conduct prior to the day of the election, by the incumbent representative, the Amalgamated Transit Union, Division 880, (b) ATU conduct during the election, and (c) the location of the voting site.

The Director noted that objections, when filed, must allege conduct which would warrant setting aside the election as a matter of law, and further that the objecting party has the burden to proffer evidence, sufficient to support a prima facie case, which precisely and specifically shows the occurrence of the alleged objectionable conduct.

The Director determines that the NPSO has failed to supply sufficient evidence to support a prima facie case indicating that conduct or circumstances occurred which would warrant setting aside the election. Further, the Director observes that even assuming the factual allegations as stated in the objections to be true, they fail to set forth a sufficient basis upon which to set aside the election.

The Director certifies the ATU as the majority representative.

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Appearances:

For the Public Employer
John Miraglia, Consultant

For the Petitioner
G. Chip Dunn, President

For the Intervenor
Weitzman, Brady & Weitzman, attorneys
(Richard D. Weitzman of counsel)

DECISION

Pursuant to a Decision and Direction of Election [1/] a representation election was conducted on March 12, 1982, among baggage agents, bag persons, janitors, matrons and security guards employed by the City of Atlantic City ("City") at the Atlantic

1/ In re City of Atlantic City, D.R. No. 82-34, 8 NJPER 83 (¶ 13034 1982), aff'd P.E.R.C. No. 82-81, 8 NJPER 137 (¶ 13059 1982).

City Bus Terminal. [2/] The Tally of Ballots indicated that of approximately 34 eligible voters, 24 valid votes were cast for the incumbent representative, Amalgamated Transit Union, Division 880 ("ATU") and 7 valid votes were cast for the Petitioner, National Police Security Officers, Local 9 ("NPSO"). There were no void ballots, no challenged ballots and no ballots were cast for the "neither" position on the ballot.

Post-election objections were timely filed by the NPSO on March 17, 1982. No affidavits or other sworn statements were filed in support of the objections. Rather, the objections were filed in the form of signed, undated statements. [3/] The objections filed by the NPSO fall into three broad categories: (a) ATU conduct on the day prior to the election; (b) ATU conduct during the election; and (c) the location of the voting site. [4/]

The NPSO objections indicate that on the day before the election, a unit employee was contacted by telephone by an ATU

2/ NPSO had originally petitioned solely for the security guards and had later amended its Petition to conform with the existing larger unit structure referred to above.

3/ These statements were submitted by the NPSO president and one unit member.

4/ Other aspects of the objections filed by the NPSO concerned the appropriateness of the negotiations unit in which the instant election was conducted. The undersigned notes that the election was conducted in the amended unit petitioned-for by the NPSO. NPSO argues now for reconsideration of the appropriateness of the unit it petitioned-for originally, and later withdrew. Having failed during the pre-election investigatory stages of this matter to argue the claim as to the appropriateness of the unit originally petitioned-for, NPSO may not assert this claim as a post-election objection. The issue of unit appropriateness must be raised to the Commission prior to a determination as to the appropriate unit, which in this matter, was embodied in the decision directing an election.

representative who solicited his vote. Further, it is stated that an ATU representative solicited votes at the bus terminal on the day prior to the election.

The objections further state that despite the parties' agreement to vacate the bus terminal property during the election, the ATU president was observed outside the baggage window at 8 a.m. on the day of the election and was observed leaving the property at 8:09 a.m. In addition, it is alleged that an ATU representative was observed soliciting on bus terminal property during election hours. 5/

Finally, the NPSO objects to the site where the balloting was held. The objections indicate that, prior to the day of the election, the NPSO had indicated to the election agent its preference concerning the voting site -- either the lobby of the Bus Terminal or the coffee shop. It is alleged in the objections that the election was held in the baggage room/employee lounge area of the terminal. The NPSO contends that it received fewer votes than it had anticipated due to the location of the voting site in what is alleged to be an anti-NPSO area. The NPSO objected to this voting location because (1) the ATU shop steward's desk (the normal work location assigned to her by the City) was in the baggage room; and (2) this area was a "hangout" for a "clique" of

5/ It is alleged that the solicitation was observed on bus terminal property at 9:20 a.m. on 2/12/82. The election took place on 3/12/82. The undersigned has assumed that the designation of 2/12/82 is a typographical error and that the objecting party meant to allege that a solicitation occurred on bus terminal property on 3/12/82.

baggage and maintenance personnel. Although guards were allowed in this area, the NPSO president states that he was "informed by some guards that they felt very uneasy voting in the baggage room;" and there were anti-NPSO baggage employees on duty in the baggage room during election hours. Because the voting site was in the baggage room/employee lounge, NPSO supporters felt "intimidated, scared and placed in an awkward and uncomfortable position."

N.J.A.C. 19:11-9.2 sets forth the procedures and standards utilized by the Commission in determining the disposition of objections to an election. N.J.A.C. 19:11-9.2 states, in pertinent part:

> (h) Within five days after the tally of ballots has been furnished, any party may file with the director of representation an original and four copies of objections to the conduct of the election or conduct affecting the results of the elections. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall be served simultaneously on the other parties by the party filing them, and a statement of service shall be made. A party filing objections must furnish evidence, such as affidavits or other documentation, that precisely and specifically shows that conduct has occurred which would warrant setting aside the election as a matter of law. The objecting party shall bear the burden of proof regarding all matters alleged in the objections to the conduct of the election or conduct affecting the results of the election and shall produce the specific evidence which that party relies upon in support of the claimed irregularity in the election process.
>
> (i) Where objections as defined in subsection (h) of this section are filed, the director of repre-

> sentation shall conduct an investigation into the objections if the party filing said objections has furnished sufficient evidence to support a prima facie case. Failure to submit such evidence may result in the immediate dismissal of the objections.
>
> (j) Where an administrative investigation has been conducted into the objections that have been filed as defined in subsection (h), a hearing may be conducted where the investigation reveals that substantial and material factual issues have been placed in dispute which, in the exercise of the reasonable discretion of the director of representation, may more appropriately be resolved after a hearing. After the administrative investigation has been completed, an administrative determination will be rendered with regard to the objections either setting aside the election and directing a new one, or dismissing the objections and issuing the appropriate certification.

Accordingly, objections, when filed, must describe conduct which would warrant the setting aside of the election as a matter of law and the objecting party has the burden to proffer evidence, sufficient to support a prima facie case, which precisely and specifically shows the occurrence of the alleged objectionable conduct.

The undersigned is guided by the following standard established by the Commission in In re Jersey City Dept. of Public Works, P.E.R.C. No. 43 (1970) (Slip Opin. at 10), aff'd sub. nom. AFSCME, Local 1959 v. P.E.R.C., 114 N.J. Super. 463 (App. Div. 1971):

> The Commission presumes that an election conducted under its supervision is a valid expression of employee choice unless there is evidence of conduct which interfered or

> reasonably tended to interfere with the employee's freedom of choice. Conduct seemingly objectionable, which does not establish interference, or the reasonable tendency thereto, is not a sufficient basis to invalidate an election. The foregoing rule requires there must be a direct relationship between improper activities and the interference with freedom of choice, established by a preponderance of the evidence. 7/

With regard to allegations concerning improper pre-election campaign statements the undersigned, in In re County of Salem, D.R. No. 81-30, 7 NJPER 182 (¶ 12080 1981), aff'd. P.E.R.C. No. 81-121, 7 NJPER 239 (¶ 12107 1981), stated that he would be guided by the policy established by the National Labor Relations Board in Hollywood Ceramics Co., 140 NLRB 221, 51 LRRM 1600 (1952) and reaffirmed in General Knit of California, 239 NLRB 101, 99 LRRM 1687 (1978). Under the standard established, a representation election will be set aside only where there has been a factual misrepresentation involving a substantial departure from the truth at a time which precludes an effective reply.

In the instant matter, two instances of campaigning are cited within the 24 hour period prior to the election. The first

7/ In NLRB v. Golden Age Beverage Co., 71 LRRM 2924, 2926 (5th Cir. 1969), a leading private sector case, the Court observed that the objecting party had the burden of proving that there had been prejudice to the fairness of the election. The Circuit Court stated:

> This is a heavy burden; it is not met by proof of mere misrepresentations or physical threats. Rather, specific evidence is required, showing not only that the unlawful acts occurred, but also, that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election.

The New Jersey Supreme Court, has stated in Lullo v. Intern'l. Assn. of Firefighters, 55 N.J. 409 (1970) that the Commission should utilize NLRB law and policy as a guide to its own decisions in representation proceedings.

instance does not implicate Hollywood Ceramics, since the NPSO has not alleged that the telephone campaigning on behalf of the ATU on the day before the election involved misrepresentations. Mere campaigning on the day prior to an election is not misconduct.

The second instance of alleged misconduct is that the ATU president, on the day prior to the election, was campaigning at the Bus Terminal and advised security employees that certain promised security equipment had been obtained. The undersigned notes that the NPSO president was informed of ATU's activity, came to the Bus Terminal and confronted the ATU president. Thus, the objecting party admits that it had an effective opportunity to reply to the alleged misrepresentation.

Accordingly, the NPSO has failed to present evidence establishing a prima facie case of election irregularity regarding ATU's pre-election campaign activity and these objections are dismissed.

NPSO further asserts that during the election, the ATU president was observed near the baggage window at 8 a.m. and was observed leaving the Bus Terminal property at 8:09 a.m. The NPSO further asserts that an ATU representative was seen "soliciting" on Bus Terminal property during the hours of the election.

In Milchem Inc., 170 NLRB 362, 67 LRRM 1395 (1968), the NLRB established a rule prohibiting extended conversation between the representatives of any party to the election and voters waiting in line to vote. The intent of Milchem is to insure that voters are free from any influence immediately prior

to casting their ballots, in order that they may make their ballot choice in an atmosphere of reason. Milchem applies only to conversations between voters and a party representative while the voters are in a polling area waiting to vote. 8/ Further, under the rule a "chance, isolated, innocuous comment or inquiry by an employer or union official to a voter" will not void the election. Milchem, supra, at 1003.

In the instant matter, the undersigned takes administrative notice of the fact that the Atlantic City Bus Terminal is a large public transportation facility. "Soliciting" or campaigning by a union representative in some part of such a sizable facility during an election is not an activity proscribed by Milchem. The Milchem protections extend only to the limited area of the voting site -- there is no indication in the objections that ATU Representative Eckard was soliciting in the voting place among voters waiting in line to vote.

Further, the allegation that the ATU president was seen standing outside the baggage window during election hours, without more, does not establish a Milchem violation. There is no indication that the ATU representative spoke to employees waiting to vote; nor is there any indication that he did anything to interact with voters. 9/

8/ See, Harold W. Moore, 173 NLRB 1258, 70 LRRM 1002 (1968).

9/ Further, based upon the descriptions of the voting area provided by the NPSO in its objections, it does not appear that a person standing outside the baggage window would be in a position to speak with voters who were waiting to vote --inasmuch as the voting place was inside the baggage room/employee lounge area and did not encompass surrounding areas.

Where allegations of election campaigning in the vicinity of the polling location have not been factually demonstrated or where a nexus between the electioneering and actual interference with employee free choice has not been established, the Commission has rejected post-election objections. 10/

Accordingly, the NPSO has failed to establish a prima facie case of election irregularity relating to ATU activities on the day of the election and these objections are dismissed.

In the objections concerning the voting site, it is asserted that the baggage room/employee lounge area was the work location of the ATU shop steward, was a hangout for baggage and maintenance employees and that during the election, there were anti-NPSO employees working in the baggage room. It is thus contended that NPSO voters were intimidated and uneasy because the polling location was in the baggage room/employee lounge area.

It is not disputed that the baggage room/employee lounge area was open and utilized by all employees of the Bus Terminal.

Further, based upon the material contained in the objections, there is an acknowledgment by the NPSO that during the election the Commission Election Agent ordered the ATU shop steward to leave her regular work location in the baggage room. There is no further allegation that the ATU shop steward was in

10/ See In re County of Atlantic, D.R. No. 79-17, 5 NJPER 18 (¶ 10010 1979); In re Jersey City Dept. of Public Works, supra; In re County of Hudson, E.D. No. 9 (1970); and In re County of Camden, E.D. No. 9 (1970).

the polling area during the election. Thus, the first of NPSO's reasons for objecting to the polling site is irrelevant.

Although the employees who were on duty in the baggage room during the election are alleged to have been anti-NPSO, the application of Milchem dictates that more is needed than their mere presence at the voting site to establish interference or the tendency to interfere with employee free choice. There are no allegations that employees or any other persons were loitering in the baggage room/employee lounge area during the election. The only persons in the baggage room/employee lounge were Commission Election Agents, official election observers, the voters and the employees who were assigned (by the public employer) to work in the baggage room during the hours which encompassed the instant election. There are no allegations that the employees who were working in the baggage room spoke to or otherwise interacted with employees who were in the baggage room/employee lounge area waiting to vote. No coercive behavior or other conduct of an intimidating nature is alleged to have occurred at or near the polling site during the election.

There are no affidavits submitted from any employee alleging that he/she did not vote because they were intimidated by persons at the voting location or other intrinsic characteristics of the voting location. Further, there is no indication in the objections that employees were prevented from voting. Indeed, the Tally of Ballots would belie such a claim -- of a total of 34 eligible employees, 31 employees, or 91.2% voted. Even if the 3

employees who did not vote had voted for the NPSO, their votes would not have been determinative of the results of the election.

There are also no affidavits submitted by employees which would indicate that when they came to vote, their vote was influenced by the persons at the voting site and/or the voting site itself.

Under normal election procedures, there may be employees present at a voting site who are known by voters to be sympathetic to a rival union as opposed to the union preferred by a given voter -- for example, other voters whose political preferences are known may be at the election site; certainly, the observer for the rival union may be there. Commission rules contemplate the presence of such persons at the voting site. A fortiari, the mere presence of employees, who voters know favor a rival union, at their work location adjacent to the area of the voting site, does not without more establish interference or the tendency to interfere with employee free choice.

In Milham Products Co., 114 NLRB No. 223, 37 LRRM 1200 (1955), an NLRB Regional Director had determined to conduct a representation election away from the employer's premises. In post-election objections, the employer contended that the off-premises voting site had improperly influenced voters. In rejecting the employer's objection, the Board stated that the Regional Director has broad discretion in making arrangements with respect to the conduct of representation elections. Further, the Board noted that the employer furnished no evidence to support its

contention that the polling site had improperly influenced voters. 11/

N.J.A.C. 19:11-5.1 states:

> ... In the absence of an agreement among the parties as to the dates, hours and places of the election, and the designations on the ballot, the director of representation shall determine the same. 12/

In the instant matter, there was no agreement as to the election site and the Director of Representation's designated Election Agent determined the precise location of the polling site after receiving input from the NPSO president and after having surveyed the layout of the Atlantic City Bus Terminal facility prior to the opening of the polls.

Based upon the above, the undersigned concludes that the NPSO has failed to proffer a prima facie case establishing its contention that the election site interfered with or tended to interfere with the free choice of the employees herein. Accordingly, the voting site objections are dismissed.

Based upon all of the foregoing, the undersigned concludes that the NPSO has failed to supply sufficient evidence to support a prima facie case indicating that conduct occurred, or that circumstances occurred, which would warrant setting aside the election. Further, even assuming the factual allegations as stated in the objections to be true, they fail to set forth a sufficient basis upon which to set aside the election herein.

11/ See also Cupples-Hesse Corp., 119 NLRB No. 152, 41 LRRM 1272 (1958).

12/ See, In re State of New Jersey, D.R. No. 81-35, 7 NJPER 220 (¶ 12096 1981). See also, Sabine Towing & Trans. Co., 224 NLRB 942, 92 LRRM 1562 (1976).

Based upon the foregoing, the undersigned hereby dismisses all of the election objections filed by the NPSO. In accordance with the rules of the Commission, the undersigned shall issue the appropriate Certification of Representative (attached hereto and made a part hereof) to the ATU in the unit of baggage, maintenance and security personnel.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Carl Kurtzman, Director

DATED: June 1, 1982
Trenton, New Jersey

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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-and-

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Petitioner,

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AMALGAMATED TRANSIT UNION, DIVISION 880, AFL-CIO,

Intervenor.

DOCKET NO. RO-82-31

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the undersigned in accordance with the New Jersey Employer-Employee Relations Act, as amended, and Chapter 11 of the Commission's Rules and Regulations; and it appearing from the Tally of Ballots that an exclusive representative for collective negotiations has been selected; and no valid objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefore;

Pursuant to authority vested in the undersigned, IT IS HEREBY CERTIFIED that

Amalgamated Transit Union, Div. 880, AFL-CIO

has been designated and selected by a majority of the employees of the above-named Public Employer, in the unit described below, as their representative for the purposes of collective negotiations, and that pursuant to the New Jersey Employer-Employee Relations Act, as amended, the said representative is the exclusive representative of all the employees in such unit for the purposes of collective negotiations with respect to terms and conditions of employment. Pursuant to the Act, the said representative shall be responsible for representing the interests of all unit employees without discrimination and without regard to employee organization membership; the said representative and the above-named Public Employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment; when an agreement is reached it shall be embodied in writing and signed by the parties; and written policies setting forth grievance procedures shall be negotiated and shall be included in any agreement.

UNIT: Included: All salary and hourly rated employees classified as baggage agents, bag persons, janitors, matrons and security guards employed by the City of Atlantic City at the Atlantic City Bus Terminal.

Excluded: Managerial executives, confidential employees, craft employees, professional employees, police employees, fire employees and supervisors within the meaning of the Act.

DATED: Trenton, New Jersey
June 1, 1982

Carl Kurtzman, Director
of Representation