

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

MICROPOWER USA CORP.

Employer

and

Case No. 02-RC-108839

NEW YORK STATE UNITED TEACHERS,
AMERICAN FEDERATION OF TEACHERS,
AFL-CIO

Petitioner

REPORT ON OBJECTIONS AND RECOMMENDATIONS

On July 10, 2013,¹ New York State United Teachers, American Federation of Teachers, AFL-CIO filed the petition in this matter seeking to represent certain employees employed by Micropower USA Corp. On July 26, the Petitioner and the Employer signed a Stipulated Election Agreement, which was approved on that date. On September 10 and 14, an election by secret ballot was conducted among the employees in the following unit:

all full-time, regular part-time, teachers employed by the Employer at its facility located at 137 West 25th Street, New York, NY, but excluding all other employeecs, including office clerical employees, and guards, and supervisors as defined in Section 2(11) of the Act.

¹ All dates hereinafter are in 2013, unless otherwise indicated.

At the conclusion of the election on September 14, a tally of ballots was made available to the parties and it showed the following results:

Approximate number of eligible voters.....	38
Number of void ballots.....	0
Number of ballots cast for the Petitioner.....	21
Number of votes cast against participating labor organization.....	12
Number of valid votes counted.....	33
Number of challenged ballots.....	3
Number of valid votes counted plus challenged ballots...	36

Challenges are not sufficient in number to affect the results of the election.

A majority of the valid votes counted plus challenged ballots has been cast for Petitioner.

On September 21, the Employer filed timely objections to the election. The objections verbatim, are as follows:

1. During the period after the filing of the petition and prior to the election, the New York State United Teachers/American Federation of Teachers/AFL-CIO (hereinafter the "Union"), by and through its agents, officers, supporters and representatives, distributed a flyer on the Employer's premises that stated, among other things, "we are voting yes." Pasted below the statements were photographs of several eligible voters, including the photographs of two eligible voters that neither authorized [n]or consented to the use of their photographs in the Union's flyer. In fact, one of the two employees explicitly advised the Union that they objected to the Union's use of their photographs. By utilizing the foregoing two employees' photographs in Union campaign propaganda without either individual's consent and over one employee's express objection to such use, the Union misrepresented both individual's (sic) support for the union, thereby interfering with the laboratory conditions necessary to the holding of a free and fair election.
2. During the period after the filing of the petition and prior to the election, the Union by and through its agents, officers, supporters and representatives, advised an eligible voter that her vote in the election would affect her immigration status in an attempt to unlawfully influence the vote in the election by interfering with the eligible voter's free and uncoerced choice in the election and creating a general atmosphere of fear and confusion.
3. During the period after the filing of the petition and prior to the election, the Union, by and through its agents, officers, supporters and representatives, advised at least two employees on multiple occasions that they were ineligible to vote in an attempt to unlawfully influence the vote in the election by interfering with their free and uncoerced choice in the election and creating a general atmosphere of fear and confusion.

4. By these and other acts, the Union, by its officers, agents and representatives, engaged in objectionable conduct which destroyed the laboratory conditions required for a fair election.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation of the objections was conducted, during which the parties were afforded full opportunity to submit evidence bearing on the issues.

Objection 1

In this objection the Employer alleges that during the critical period the Petitioner distributed a flyer on the Employer's premises which stated, inter alia, "We are voting yes." Below the statements there were photographs of a number of employees, including the photographs of two eligible voters who apparently neither authorized nor consented to the use of their photographs in the flyer. The Employer contends that one of the two employees explicitly objected to the use of a photograph. The Employer contends that the Petitioner's conduct of posting the photographs of these two employees, without consent and authorization and over the objection of one employee, constituted a misrepresentation regarding support for the Petitioner. The Petitioner maintains that the flyer contained photographs of employees who consented to having their pictures taken and who knew it would appear on a campaign flyer.

An employee has stated that on August 20, during a meeting with Petitioner's representatives Daniel Esakoff and Julie Berman, she consented to having her picture taken. According to this employee, Berman told the employees who attended the meeting, including the employee in question, that the Petitioner would contact them to get a quote prior to the publication of the flyer. This employee states that neither Esakoff nor Berman followed up to get a quote, and that the employee did not consent to the use of the photograph. However, there is no evidence that this employee, or any other employee, explicitly informed Petitioner representatives that they objected to the use of their photograph in a campaign flyer. The employee denies telling Berman or Esakoff how she would vote, and further asserts the Petitioner did not provide a copy of the flyer to her prior to or subsequent to its publication.

Petitioner denies the allegation, noting that it used photographs of voters who authorized having their pictures taken and who knew what the pictures would be used for. The Petitioner argues that, in the event of an objection by any of the voters, their pictures would not have appeared on the flyer.

In ruling on election objections alleging that a union has circulated campaign literature using the names or signatures of employees, or the attribution of quotes to them without first receiving their consent, the Board has applied the standard set forth in *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982). Based on that standard, the Board does not explore the veracity or falsity of alleged statements. Rather, the Board examines whether or not a party has used “forged documents which render the voters unable to recognize propaganda for what it is.” See *id.* (“where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected.”)

Applying *Midland National* to the facts of the instant case, the evidence adduced is insufficient to establish that the Petitioner utilized campaign material which rendered eligible voters unable to recognize the campaign flyer for what it was. Rather, no evidence of forgery was alleged or adduced in the investigation, voters could easily identify the flyer as the Petitioner’s campaign propaganda, and any alleged misrepresentation was not pervasive. In this regard, unauthorized use of an employee’s name/photo in a campaign flyer is not grounds for setting aside an election. Thus, in *N.L.R.B. v. Enterprise Leasing Co. Se., LLC*, 722 F.3d 609 (4th Cir. 2013), the court upheld the Board’s overruling of a similar objection, noting that the “union’s use of employee photograph on campaign flyer without employee’s prior authorization did not impermissibly taint union representation election, where union’s conduct involved no forgery, and there was nothing to indicate that eligible employees’ ability to recognize flyer as campaign propaganda was compromised.” See also *Somerset Valley Rehab. & Nursing Center*, 357 NLRB No. 71 (2011) (overruling objection where a union falsely quoted union supporters as actually stating that they would vote for the union); *BFI Waste Servs.*, 343 NLRB 254, 254 n. 2 (2004) (overruling objection where a union arguably misrepresented quotes from two employees); *Champaign Residential Servs., Inc.*, 325 NLRB 687, 687 (1998) (overruling objection where two employees did not know that their signatures in support of a union would be shared with others on a flyer); *Findlay Indus., Inc.*, 323 NLRB 766, 766 n. 2 (1997) (overruling objection where a union, at most, misrepresented that two employees would vote for it). See also *Sprain Brook Manor Nursing Home*, 348 NLRB 851 (2006), in which the employer’s objection that the union photographed employees without their consent, and used the photographs in its campaign materials, was overruled by the Board. The Board held that the use of an employee’s photograph without consent is not per se objectionable. In the instant case, the alleged conduct is

limited to one out of approximately 17 employees, insufficient to be characterized as “pervasive” and is not grounds for setting aside the election.

Based on all of the above, I find Objection 1 to be without merit, and recommend that it be overruled.

Objection 2

In this objection, the Employer alleges that during the critical period the Petitioner warned an eligible voter that her vote in the election would affect her immigration status in a manner that interfered with this employee’s right to a free and uncoerced choice in the election. The Petitioner maintains that no agent, supporter or representative of the Petitioner advised any voter that a vote in the election would affect her or his immigration status.

The Employer has not provided any probative evidence regarding this allegation. The Board has held that a party filing objections is obligated to supply specific evidence, tantamount to an offer of proof, which, prima facie, would warrant setting aside an election, before the Board will require a Regional Director to investigate the alleged objectionable conduct.² If the objecting party does not submit its supporting evidence within the time required, the objections will be dismissed³.

In this case, the Employer has failed to submit any evidence in support of this objection. I therefore find Objection 2 to be without merit, and recommend that it be overruled.

Objection 3

In this objection the Employer alleges that during the critical period the Petitioner advised at least two employees on several occasions that they were ineligible to vote, which interfered with the voters’ right to a free and uncoerced election. The Petitioner denies advising any voters that they were ineligible to vote. Rather, the Petitioner asserts that its conduct was limited to exercising its right to contest the eligibility of three individuals to vote, via the challenge procedure, based on its contention that one employee was not employed in the unit set forth in the election agreement executed by the parties, and that the other two employees were supervisors.

In support of this objection, an employee testified that Petitioner’s representative Berman called him on an unspecified date in approximately August. This employee stated that during the

² *European Parts Exchange, Inc.*, 264 NLRB 224 (1982), and cases cited therein.

³ *Kano Trucking Serv.*, 295 NLRB 514, 515 (1989).

phone call, Berman explained the benefits of joining the Petitioner. The employee asserts that he told Berman he was not interested. The employee states that Berman told him that he was not eligible to vote based on his date of hire. Consequently, the employee approached Lalit Chabria, the Employer's President, who informed him that he was eligible to vote. The employee advised Chabria that he would not vote, because he did not want to create a problem. This employee testified that on September 10, Petitioner's representative Esakoff approached the employee and asked how he voted. The employee states that he felt threatened and thought that the question was inappropriate.

The second employee witness testified that he took a leave of absence in mid August, and returned to work in early September. This employee states that on September 8, Berman called him on his cell phone. This employee asserts that Berman asked questions about his employment status, the leave of absence, and how he would vote. The employee testified that he replied that his vote was a personal private choice, and that he would not discuss it with her. In response to continued questioning by Berman as to how he would vote, the employee further testified that he concluded the conversation by telling Berman that the Employer was kind to him, so he would return that kindness. According to this witness, Esakoff called him on September 12, and asked if the employee worked full or part time, and how he intended to vote. It is uncertain how the employee responded or if he responded at all. This employee stated that Esakoff told him that he may not be eligible to vote, and that the Petitioner had the ability to challenge his vote if it did not believe that he was eligible to vote.

In this case, both employees stated that as early as mid July they became aware they were eligible voters. There is no contention, or evidence to establish, that the Employer did not post the election notices, which provides specific details to eligible voters, for three full working days in advance of the election. Even assuming that either Berman or Esakoff told these two employees they were not eligible voters, which has not been established, the investigation revealed that both of these employees voted in the election, and the Petitioner did not challenge the eligibility to vote of either employee. Therefore, even if the alleged conversations occurred, they had no bearing on the voters' ability to vote and both of them voted.

Although not specifically alleged in the objections, the employee witnesses who testified in support of this objection assert that Petitioner representatives Berman and Esakoff asked them how they would vote in the election. Even assuming, without concluding, that such conduct occurred, it would not be grounds for setting aside the election. Although employer polling is

generally assumed to be coercive and therefore unlawful, union polling is generally recognized as non-coercive lawful activity. See *Springfield Hospital*, 281 NLRB 643, 692-693 (1986) (finding that union's survey of employees' union sentiments did not constitute objectionable conduct), *enfd.* 899 F.2d 1305 (2d Cir. 1990); *Springfield Discount Inc., d/b/a J. C. Penney Food Department*, 195 NLRB 921 (1972) (overruling employer's objection that union interfered with the election by polling employees as to how they were going to vote in the election, in the absence of coercion), *enfd.* 82 LRRM 2173 (7th Cir. 1972).

I therefore find Objection 3 to be without merit, and recommend that it be overruled.

Objection 4

This objection is a conclusionary statement alleging that the Petitioner destroyed the laboratory conditions required for a fair election.

It is well established that objections "must contain a statement of the reasons therefor, couched in specific, as distinguished from conclusionary terms. The objections must provide 'meaningful notice' of the conduct alleged."⁴

This objection raises no substantive issues as it is a conclusionary statement. I therefore find Objection 4 to be without merit, and recommend that it be overruled.

SUMMARY AND RECOMMENDATION

In light of all of the foregoing, I recommend that all of the Employer's objections be overruled in their entirety and that a Certification of Representative be issued to the Petitioner.

Right to File Exceptions: Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8 as amended, you may file exceptions to this Report may be filed with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the

⁴ *Factor Sales, Inc.*, 347 NLRB 747 (2006).

submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

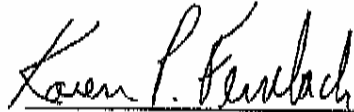
Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on **December 2, 2013, at 5 p.m. (ET)**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁵ A copy of the exceptions must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished

⁵ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Signed at New York, NY,
November 18, 2013.



Karen P. Fernbach
Regional Director, Region 2
National Labor Relations Board
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New York, New York 10278