UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

TCGPLAYER, INC.

Employer

and **Case 03-RC-310876**

COMMUNICATIONS WORKERS OF AMERICA

Petitioner

DECISION OVERRULING OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Decision and Direction of Election, an election was conducted on March 10, 2023 in a unit of the Employer's Fulfillment Center and Inventory Specialist employees. The tally of ballots showed that of the approximately 246 eligible voters, 136 cast ballots for the Petitioner, 87 cast ballots against representation, and there was one void ballot. There were 26 challenged ballots, which were not sufficient to affect the results of the election. Therefore, the Petitioner received a majority of the valid votes cast.

On March 17, the Employer timely filed six objections accompanied by an offer of proof. As discussed in further detail below, I have concluded that the Employer's objections are without merit and should be overruled in their entirety and I am issuing a Certification of Representative.

I. THE OBJECTIONS

Objection 1: Region 3's failure to determine the Section 2(11) supervisory status of the Operations Leads before the March 10, 2023 election was inherently coercive of eligible voters' Section 7 rights because such voters were led to believe Operations Leads, to whom they directly report, may be included in the bargaining unit with them.

Objection 2: Region 3's failure to determine the Section 2(11) supervisor status of the Operations Leads before the March 10, 2023 election prevented eligible voters from exercising their Section 7 rights knowing the scope of the potential bargaining unit.

Objection 3: Region 3's failure to determine the Section 2(11) supervisory status of the Operations Leads before the March 10, 2023 election denied TCGplayer of its statutory and constitutional free speech rights in violation of Section 8(c) of the National Labor Relations Act and the First and Fifth Amendments to the U.S. Constitution without Due Process.

Objection 4: Region 3's personnel engaged in election misconduct by permitting Operations Leads, who are Section 2(11) supervisors, to be in the no-electioneering area and voting area in the presence of eligible voters during the polling periods on March 10, 2023.

Objection 5: Operations Leads, who are Section 2(11) supervisors, engaged in pro-union conduct that reasonably tended to coerce or interfere with employee free choice in the March 10, 2023 election.

Objection 6: Region 3 abused its discretion in not conducting a pre-election hearing that would have determined the Section 2(11) supervisor status of the Operations Leads.

II. THE APPROPRIATE STANDARD

It is well-settled that the Board will not lightly set aside a representation election. The burden of proof on a party seeking to have a Board-supervised, secret-ballot election set aside is a heavy one. *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000); *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 806 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania, Inc.*, 360 NLRB 637, 637 (2014), quoting *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970).

Per Section 102.69(c)(1) of the Board's Rules and Regulations, a party does not have an automatic right to a hearing on its objections. An evidentiary hearing is appropriate only "[w]hen an objecting party raises substantial and material issues of fact sufficient to support a prima facie showing of objectionable conduct." *Swing Staging v. NLRB*, 994 F.2d 859, 862 (D.C. Cir. 1993); see also *Durham School Services, LP v. NLRB*, 821 F.3d 52, 58 (D.C. Cir. 2016). The objecting party cannot rely on bare assertions or conclusory statements to raise an issue requiring a hearing and has the duty of furnishing evidence or description of evidence that, if credited at a hearing, would warrant setting aside the election. See, e.g., *Transcare New York, Inc.*, 355 NLRB 326, 326 (2010); *Affiliated Computing Services, Inc.*, 355 NLRB 899, 903 (2010); and *The Daily Grind*, 337 NLRB 655 (2002) (unsupported allegations are insufficient to trigger administrative investigations). Rather, the objecting party must point to "specific evidence of specific events from or about specific people." *Amalgamated Clothing Workers of America v. NLRB*, 424 F.2d 818, 828 (D.C. Cir. 1970) (quoting *United States Rubber Co. v. NLRB*, 373 F.2d 602, 606 (5th Cir. 1967)).

III. ANALYSIS OF OBJECTIONS 1-3 AND 6

The petition filed by the Petitioner sought an election among "all full-time and regular part-time employees of the Employer working at its Syracuse, NY authentication center." The Employer's Statement of Position contended that 13 individuals in the classifications of Operations Lead, Operations Lead – Advanced, and Operations Lead – Legend should be excluded from the bargaining unit because those individuals were supervisors within the meaning of Section 2(11) of the Act.[1] The Employer contended that an additional 12 individuals in other classifications did not share a community of interest with the remainder of the petitioned-for unit and should be excluded on that basis.

[1] I shall collectively refer to these three classifications as "Operations Leads" throughout this Decision.

In its Responsive Statement of Position, the Petitioner asserted that the Employer was incorrect and that all of the individuals whose eligibility had been contested by the Employer were properly included in the bargaining unit.

At the pre-election hearing held on February 14, the Hearing Officer rejected the Employer's offer of proof insofar as the Employer contended it was entitled to litigate the supervisory status of the Operations Leads and the community of interest arguments it raised regarding the other disputed classifications. The Decision and Direction of Election issued by the Acting Regional Director on February 23 noted that the 25 individuals in dispute were only 8.9 percent of the overall unit. Thus, the Operations Leads and other disputed classifications were permitted to vote subject to challenge in the election.

Objections 1 and 2 resurrect the Employer's contentions raised in the pre-election hearing regarding the impermissibility of deferring litigation of the supervisory issue first raised in its Statement of Position.[2] The Employer contends that the Region's failure to permit the parties to litigate whether Operations Leads are statutory supervisors prohibited employees from knowing the contours of the bargaining unit and therefore infringed on employees' Section 7 rights. The Employer also contends that the Acting Regional Director's deferral of this issue to a post-election proceeding violated its rights under the Act and under two of the amendments to the United States Constitution.

Section 102.64(a) of the Rules and Regulations states as follows regarding the conduct of a pre-election hearing:

> The purpose of a hearing conducted under Section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purposes of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. *Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.* If, upon the record of the hearing, the Regional Director finds that a question of representation exists, the director shall direct an election to resolve the question.

Emphasis added. This iteration of Section 102.64(a) was implemented in 2015 among other changes named collectively, "the Final Rule." 79 Fed.Reg. 74308 (Dec. 15, 2014). In this Final Rule, the Board declined to set a hard cap as to the percentage of the unit for which deferral of litigation was appropriate. However, the Board noted that permitting deferral of unit issues involving as much as 25 percent of a proposed unit was appropriate in certain circumstances and that "the Board has uniformly held that a change affecting no more than 20 percent of the unit does not require a new election." 79 Fed.Reg at 74388 fn. 373. Thus, given that all of the disputed

[2] The Employer's objections make no reference to the deferral of the unresolved community of interest issue it raised with respect to the remaining disputed classifications.

classifications at issue constituted less than 9 percent of the unit, the Acting Regional Director's decision to defer litigation was wholly appropriate and Objection 6 is therefore without merit.[3]

In its rationale for adopting the Final Rule, the Board squarely rejected the Employer's contention in Objections 1 and 2 that failure to litigate supervisory issues would deprive employees from knowing the contours of their bargaining unit at the time of the vote. In addressing this argument, the Board stated as follows, in pertinent part:

> Nor does the Board agree that the [Final Rule] improperly deprive[s] employees of the ability to make an informed choice in the election…[U]nder the amendments, as under the current rules, the regional director must determine the unit's scope and appropriateness prior to the direction of election. Accordingly, at the time they cast their ballots, the voting employees will be fully informed (via the Notice of Election) as to the description of the unit, and will be able to assess the extent to which their interest may align with, or diverge from, other unit employees.

Id. at 74389. As such, Objections 1 and 2 are without merit and are hereby overruled.

The Employer's argument in Objection 3, that the Region's deferral of litigation was objectionable insofar as it violated the Employer's constitutional rights, is unavailing. The Board, with federal court approval, has repeatedly held that its 2015 amendments to its Rules and Regulations did not violate parties' due process rights and were in accordance with the Administrative Procedures Act. In *University of Southern California*, 365 NLRB No. 11 (2016), the Board noted the following in rejecting a similar argument:

> Finally, in agreeing with the Regional Director's rejection of the [e]mployer's challenge to the facial validity of the Final Rule, citing *Pulau Corp.*, 363 NLRB 96 (2015), we note that in *Chamber of Commerce v. NLRB*, 118 F.Supp.3d 171 (D.D.C. 2015), the district court, granting summary judgment for the Board, found that the Rule did not violate the Act, the First Amendment, or due process under the Fifth Amendment. We further note that in *Associated Builders & Contractors of Texas v. NLRB*, NO. 1-15-CV-026 RP, 2015 U.S. Dist. LEXI 278890, 2015 WL 3609116 (W.D. Tex. June 1, 2015), the district court found that the Rule did not violate the Act and was not arbitrary and capricious under the Administrative Procedures Act. That decision was affirmed by the U.S. Court of Appeals for the Fifth Circuit, 826 F.3d 215 (5th Cir. 2016).

[3] On December 18, 2019, the Board published a final rule in the Federal Register codifying additional changes to its representation case procedures. 84 Fed.Reg. 69524 (Dec. 18, 2019) (hereinafter referred to as "the 2019 Final Rule"). Among the changes made by the Board in the 2019 Final Rule was an alteration to Sec. 102.64(a) specifying that issues regarding "unit scope, voter eligibility and supervisory status will normally be litigated and resolved" before an election was directed. However, the Board's implementation of that portion of its rule was enjoined and subsequently vacated in *AFL-CIO v. NLRB*, Civ. No. 20-cv-0675, 466 F.Supp. 3d 68 (D.D.C. 2020). On January 17, 2023, the United States Court of Appeals for the District of Columbia Circuit remanded to the District Court the 2019 change to Sec. 102.64(a) for further litigation. On March 10, 2023, the Board published in the Federal Register a rule staying implementation of this provision of the 2019 Final Rule until at least September 10, 2023. 79 Fed.Reg. 14913 (Mar. 10, 2023). The Board noted that "[d]ue to the District Court's injunction, these two provisions have never taken effect." *Id.* at 14914.

Thus, the constitutional validity of the Board's rules and its application are settled law.

In its offer of proof with respect to Objection 3, the Employer further contends that the Region's deferral of the supervisory issue with respect to Operational Leads deprived it of the ability to ask those individuals to communicate with voters on behalf of the Employer regarding the election. The Board rejected similar concerns in its adoption of the Final Rule as it noted "it is not the purpose of the pre-election hearing to determine employers' spokespersons in the ongoing representation campaign." 79 Fed.Reg. at 74389 fn. 382. Thus, as this precise argument was considered and explicitly rejected by the Board in adopting the Final Rule, the Employer's objection is fully without merit.

For the above reasons, Objection 3 is overruled.

IV. ANALYSIS OF OBJECTION 4

In Objection 4, the Employer contends that the presence of Operations Leads in the polling area on the date of the election was objectionable. Though the Employer contends in its offer of proof that "it is undisputed that Operations Leads spent time in the no-electioneering area…in the presence of eligible voters and operations Leads entered the voting area," the Employer proffers no evidence as to the length of time Operations Leads spent in the no-electioneering area or as to the conduct engaged in by these Operations Leads when in the polling area.

It is well established that an objection party is required "to supply the Board with specific evidence, tantamount to an offer of proof, which prima facie would warrant setting aside the election before the Board would direct a hearing or require the Regional Director to…[investigate] further." *Howard Johnson Co.*, 242 NLRB 1284, 1284 (1979), citing *Regency Electronics, Inc.*, 198 NLRB 627 (1972); and *Bufkor-Pelzner Division, Inc.*, 169 NLRB 998 (1968). The Employer's offer of proof is wholly insufficient to establish that any Operational Leads who were present in the polling area engaged in objectionable conduct.

Indeed, all that can be discerned from the Employer's offer of proof is that Operational Leads appeared in the polling place during the election. Given that the Decision and Direction of Election directed that these individuals would vote subject to challenge, these individuals were entitled to access the voting area to cast challenged ballots. Absent the submission of any evidence that their conduct while in the voting area was otherwise objectionable, I cannot conclude that the mere presence of individuals whose supervisory status remains undetermined constitutes objectionable conduct. I therefore conclude that Objection 4 is without merit and is overruled.

V. ANALYSIS OF OBJECTION 5

In Objection 5, the Employer contends that supervisors engaged in pro-union activities that impermissibly tainted the election, relying on *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004). In its offer of proof, the Employer contends that multiple Operations Leads signed the Petitioner's demand for recognition, that an Operations Lead posted pro-union messages on internal company chats, and that another Operations Lead solicited authorization cards from employees. As detailed below, the Employer's offer of proof again fails to state with sufficient specificity the evidence that it would adduce at a hearing to substantiate its objection.

In *Harborside Health*, the Board set forth the following test to determine "whether supervisory prounion conduct upsets the requisite laboratory conditions for a fair election…":

> (1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election.
>
> This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.
>
> (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in an election; (b) whether the conduct was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

343 NLRB at 909.

In the instant case, though the Employer contends that Operations Leads are supervisors within the meaning of Section 2(11) of the Act, it failed to proffer any evidence regarding the supervisory status of the Operations Leads who allegedly engaged in objectionable conduct. In other words, the Employer's offer of proof fails to identify which of the 12 listed indicia in Section 2(11) of the Act[4] that these Operations Leads possess, nor does the Employer proffer any specific evidence regarding whether these individuals' use of any supervisory indicia involves the use of independent judgment or is performed in the Employer's interest. As such, the Employer has failed to proffer sufficient evidence to demonstrate that the individuals in question were supervisors within the meaning of the Act. The Employer also does not contend that the alleged conduct would be objectionable if the individuals in question are not supervisors within the meaning of Section 2(11) of the Act.

Moreover, even assuming that the Operations Leads are supervisors, the Employer's offer of proof does not describe with sufficient particularity any conduct that would necessitate a hearing. Though the Employer contends in its offer of proof that one Operations Lead "was involved in soliciting cards," it does not delineate the nature of the individual's involvement, including failing to demonstrate that the Operations Lead in question actually solicited authorization cards from bargaining unit employees, how many cards were allegedly solicited, or when any such solicitation took place.

With respect to the Employer's contention that another Operations Lead posted pro-union statements on the Employer's internal chat software, the Employer's offer of proof does not describe the alleged statements made by the Operations Lead beyond stating that these comments were pro-union and does not otherwise provide written copies of any statements. The fact that an alleged supervisor may have made pro-union statements to employees during the critical period

[4] Section 2(11) of the Act defines supervisors as "having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

does not, without more, constitute objectionable conduct. In *Laguna College of Art & Design*, 362 NLRB 965 (2015), the Board overruled an objection based on pro-union conduct committed by a supervisor. In so doing, the Board relied upon the fact that the individual "was a low-level supervisor who engaged in noncoercive election behavior, including signing an authorization card in the presence of two employees, inquiring whether three employees were interested in signing authorization cards, emailing the bargaining unit about unionization, and being quoted in a prounion flyer." 362 NLRB at 965 fn. 3.[5] Here, the Employer's offer of proof provides insufficient detail to demonstrate that any statements made by this Operations Lead were objectionable.

Finally, the Employer's contention that the inclusion of Operations Leads as signatories to a letter requesting voluntary recognition was objectionable fails for the same grounds. The Employer's offer of proof contains a copy of this letter, which sets forth the undersigned individuals' rationale for seeking representation. However, the Employer has not demonstrated in its offer of proof how the appearance of the Operations Leads' signatures on this document was impermissible.

For the above reasons, Objection 5 is overruled.

VI. CONCLUSION

In sum, I find that the Employer's objections are wholly without merit and overrule them in their entirety.

VII. CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for Communications Workers of America, AFL-CIO, and that it is the exclusive representative of all the employees in the following bargaining unit:

> All full-time and regular part-time employees in the classifications of Fulfillment Center Generalist, Fulfillment Center Generalist – Advanced, Fulfillment Center Generalist – Legend, Inventory Specialist, Inventory Specialist – Advanced, and Inventory Specialist – Legend employed by the Employer at its Syracuse, New York facility, excluding office clerical employees, Customer Service employees, managers, guards, professional employees and supervisors as defined in the Act, and all other employees.

VIII. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision which may be combined with a request for review of the regional director's decision to direct an election as provided in

[5] Though the Board noted that the conversation with three employees regarding their interest in signing authorization cards was "potentially most troubling," the Board noted that the three individuals were not supervised directly by the supervisor and that he did not provide those employees with authorization cards. *Id.* As discussed above, the Employer's failure to provide any detail in its offer of proof regarding the alleged involvement of an Operations Lead in distribution of union authorization cards dooms its attempt to set aside the results of this election.

Sections 102.67(c) and 102.69(c)(2), if not previously filed. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by within 10 business days of the issuance of this Certification of Representative**.** If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: March 22, 2023

/s/Linda M. Leslie

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