

Kent County Levy Court (hereinafter "County") filed an objection to the conduct of the election on March 16, 1995. The County objected for the following reasons:

1. The IUE and/or its representatives had contact with potential voters via personal visits, distribution of literature, and telephone calls within the immediate 24 hours prior to the election in violation of NLRB rules.
2. The IUE and/or its representatives violated Del.C. Sec. 1307(b), numbers 1, 5, and 6.

The IUE willfully interfered with, restrained, and coerced employee(s) prior to and during the election process. In spite of the fact that their unfair labor charges were dismissed and definitions of "Management Rights" explained to them, they persisted in making false promises about shift changes, staffing levels and items that would not fall within collective bargaining rights. They distributed union literature both during the normal course of work and the election process. When they posted libelous materials on the County's bulleting board and were told that it was a possible violation, some items were removed; however, new items appeared the day before the election. [Items was attached to the County's objection]

An employee reported that he had been the victim of verbal and physical abuse, and the threat of worse if he voted against the IUE. He was told they would know how he voted. He has asked for assistance in finding a new job.

3. The IUE violated Section 4.1(e) of the PERB rules and regulations. They stationed union representatives outside of the polling place handing out union paraphernalia and were electioneering right in front of the entrance to the polling place. The IUE representative was in the polling place while people were voting, and spoke with voter(s) in the restricted area directly outside of the polling area.

The County requests a hearing and a determination that the election results be overturned.

The IUE responded to the County's objections on Friday, March 17, 1995. The IUE denies that the distribution of literature, visiting of employees or telephoning of potential voters within the twenty-four (24) hour period prior to the election violates the statute or PERB regulations. It categorically denies the County's allegations that its representatives made false promises, distributed literature during working hours, posted libelous materials on County bulletin boards and/or verbally or physically

abused any employee. The IUE attached to its response a copy of all literature disseminated by the IUE to Kent County Wastewater employees. It asserts it was never inside the plant prior to the morning of the election and that its methods of distribution do not provide either grounds for setting aside the election nor finding of an unfair labor practice. The IUE argues that the Notice of Election clearly stated that any employee had the right to report any interference, coercion or restraint to the Public Employment Relations Board "immediately". Finally, it rejects the County's assertion that the IUE engaged in electioneering in the polling area, noting that the area was under the direct control of PERB officials during the entire balloting process. The IUE notes that no objections to employee contact were registered during the voting process and that County representatives signed the "Certificate of Conduct of Election" at the conclusion of the voting, verifying that the election was conducted fairly and in secret.

OPINION

The County asserts that the results of the March 8 election should be set aside because the IUE had contact with potential voters within the twenty four (24) hour period immediately preceeding the election through personal visits, distribution of literature, and telephone calls. The County alleges that the IUE's conduct "violates NLRB rules".

Section 1311(c) of the Public Employment Relations Act (19 DeL.C. Chapter 13 (1994)(hereinafter "PERA") requires that following the determination of an appropriate bargaining unit, "... the Board shall cause an election of all eligible employees to be held within a reasonable time after the unit determination has been made, in accordance with procedures adopted by the Board, to determine if and by whom the employees wish to be represented." (emphasis added). Election procedures are governed by Regulation 4 of the Rules and Regulations of the Public Employment

Relations Board. Under Regulation 4.1, campaigning shall be controlled under the unfair labor practice provisions of statute. ¹

While the statutes administered by the Public Employment Relations Board, including the PERA, parallel the National Labor Relations Act in some areas, the PERB established in its earliest decisions under the Public School Employment Relations Act that although decisions by the National Labor Relations Board ("NLRB") may provide guidance, they do not constitute binding precedent for the PERB. Seaford Education Association v. Bd. of Education, Del. PERB, Case 2-2-84S (3/19/84).

In regulating election and campaign conduct, the National Labor Relations Board has defined prohibitions and restrictions primarily through its case law, rather than through the promulgation of regulations or statutory edicts. The "24 hour rule" established by the NLRB in Peerless Plywood Co. (107 NLRB 106, 33 LRRM 1151 (1953)), prohibits employers and unions alike from making election speeches to massed assemblies of employees, on company time, within twenty four (24) hours of a scheduled representation election. The rule does not prohibit employers or unions from making campaign speeches on or off company premises during the 24 hour period if employee attendance is voluntary and the employee is on his or her own time. Neither does the rule prohibit the distribution of literature or personal contact of potential voters.

The "24 hour rule" has not been adopted by the Delaware PERB; however, even if it had been adopted prior to this election, the complained of conduct would still be permissible. For these reasons, the County's first objection is dismissed.

¹ The Rules and Regulations specifically references the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982, 1989) and the Police Officers and Firefighters Employment Relations Act, 19 Del. C. Chapter 16 (1986). The Public Employment Relations Act became effective in September 1994, and is identical to the other two statutes in all material respects. The regulations adopted by the PERB, therefore, have and continue to be applied to the PERA and have not been revised since its passage.

The County further alleges that the IUE "willfully interfered with, restrained or coerced employee(s) prior to and during the election process" in violation of 19 Del.C. §1307(b)(1), (5) and (6). It asserts that the IUE made "false promises" about the outcome of collective bargaining. Union promises are customarily considered part of the give and take of campaign propoganda. Employer promises of benefit or threat have been subjected to greater scrutiny because the employer generally has it within its power to implement its promises, whereas a union does not. As stated in Smith Co. (192 NLRB 162, 78 LRRM 1266 (1971)):

Employees are generally able to understand that a Union cannot obtain benefits automatically by winning an election; but must seek to win them through collective bargaining. Union promises ... are easily recognized by employees to be dependent upon contingencies beyond the Union's control and do not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises or benefits.

The PERB recognizes the wisdom in refraining from probing the truth or falsity of campaign statements of the parties, and intervening only where a party has engaged in fraud or forgery which renders voters unable to recognize propoganda for what it is. Review of the literature disseminated by the IUE reveals no evidence of such forgery or fraud. Exaggerations, inaccuracies, and half truths are best left for correction by the opposing party. In fact, the County acknowledges in the final paragraph of its objection letter that it "... continually attempted to educate our employees". The evaluation of the veracity of campaign statements is best left to the employees, who, as mature individuals, have the capacity to recognize campaign propoganda for what it is and to accord it appropriate weight in their decision making process.

Under these circumstances, the IUE's alleged "misrepresentation" do not constitute grounds for setting aside the election. Further, the County's allegation that some of the IUE's statements constituted libel is not proper subject matter for resolution in this forum.

The County alleges that the union "distributed union literature both during the normal course of work and the election process." §1307(a)(5) states that it is an unfair labor practice for an employee organization to:

Distribute organizational literature or otherwise solicit public employees during working hours in areas where the actual work of the public employees is being performed in such a way as to hinder or interfere with the operation of the public employer. This paragraph shall not be construed to prohibit the distribution of literature during the employee's meal period or duty free periods or in such areas not specifically devoted to the performance of the employee's official duties.

The statutory prohibition is narrower than simply prohibiting the distribution literature during the normal course of work. The objection alleges no hindrance or interference with the operation of the public employer. The IUE explicitly denies being in the physical plant prior to the morning of the election. This objection is therefore dismissed for failure to state a substantial basis for setting aside the election.

The County also alleges that "an employee" reported he had been verbally and physically abused and threatened. The objection does not state by whom the alleged abuse and threats were committed. The test established by the NLRB for setting aside an election because of violence and threats is set forth in Bauer Welding and Metal v. NLRB (8th Cir., 758 F.2d 308, 118 LRRM 3193 (1985)):

Whether the election was held with a general atmosphere among the employees of confusion, violence and threats of violence, such as might reasonably be expected to generate anxiety and fear of reprisal and to render impossible a rational uncoerced expression of choice as to bargaining representative.

In determining the seriousness of the threats and the impact of alleged threats on the election, the NLRB considers the nature of the threats and the surrounding circumstances, including whether a prior climate of violence and threats exists, whether the threats encompass the entire bargaining unit, whether they were widely disseminated, whether the persons making the threats had the ability to carry them out, and whether the threats had a material impact on the election. There is no

evidence, in this case, that a general atmosphere of threats, violence or coercion existed. Nor is there any allegation that the alleged threat was widely disseminated among bargaining unit employees. Finally, everyone in the bargaining unit voted.² The voting results indicate a 2 to 1 preference by the employees for representation. If one hypothetically assumes that the allegedly threatened employee voted for the IUE, had his vote been cast for No Representative instead, it would have had no impact on the election results. For these reasons, this objection is dismissed.

The County's final objection concerns electioneering in the polling area during the election. The polling area was designated by the PERB prior to the opening of the polls. Polling area signs read:

**OFFICIAL PERB
POLLING AREA**

Polls Open: 6:45 - 7:45 a.m.
3:00 - 4:00 p.m.

**NO ELECTIONEERING PERMITTED
IN THIS AREA**

The signs were posted on the door to the conference room and on the glass doors between the public administration area and the "back offices" which included the break room and appeared to primarily for staff use. The polling area did not extend into the back area of the building beyond the glass doors. During the election, both IUE and County representatives were in the back area on the other side of the glass doors from the polling area. Employees generally came to vote one at a time, but when more than one employee was waiting to vote, they were asked to remain in line at the door to the conference room, with the line extending into the public areas. This area was separated from the area where the IUE and County representatives were talking with each other and other employees by the glass doors. No objection

² The one eligible employee who did not vote was hospitalized just prior to the election under circumstances where an absentee ballot was not possible under the PERB procedures.

was raised during the course of the election that anyone was being prevented from entering the polling area by either individual employees or the County's representative. There was no complaint during the election that any electioneering was taking place in the polling area. The polling area was under the express and direct control of an official of the PERB at all times during the balloting process.³ For these reasons the County's final objection is dismissed.

For the reasons discussed above, the County's objections are rejected and the election results are affirmed. The County is ordered to enter into collective bargaining with the IUE, the certified exclusive bargaining representative of the employes.

/s/Deborah L. Murray-Sheppard
Hearing Officer/Principal Assistant
DE Public Employment Relations Bd.

/s/Charles D. Long, Jr.
Executive Director
DE Public Employment Relations Bd.

DATED: March 29, 1995

³ The IUE argues that because the County signed the Certificate of Conduct at the conclusion of the balloting, it was precluded from alleging that electioneering irregularities occurred. The Certificate of Conduct was signed by the PERB official and the County's and the IUE's observers immediately following the close of the polls. It states: "WE HEREBY CERTIFY that such balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote." The observers were specifically advised that by signing this form they were not waiving their rights to file objections to the election.