

VERMONT LABOR RELATIONS BOARD

INTERNATIONAL UNION OF)	
OPERATING ENGINEERS,)	
LOCAL 98, AFL-CIO)	
)	
and)	DOCKET NO. 93-66
)	
WINDHAM SOLID WASTE)	
MANAGEMENT DISTRICT)	

MEMORANDUM AND ORDER

At issue are objections to the conduct of a representation election filed by the Windham Solid Waste Management District ("Employer") on February 4, 1994.

On November 9, 1993, the International Union of Operating Engineers, Local 98, AFL-CIO ("Union"), filed a Petition for Election of Collective Bargaining Representative. Therein, the Union sought an election among all part-time and full-time employees, excluding supervisory employees, clerical employees and guards employed by the Employer.

The Employer responded to the petition and raised questions of unit determination. Timothy J. Noonan, Executive Director for the Board, met with the parties on December 28, 1993, and the parties resolved unit determination issues in dispute. Based upon this agreement, the Employer consented to the conducting of an election among the Equipment Operators, Special Material Processor, Working Foreman Recycling and Gatehouse Clerk, excluding the Working Foreman Landfill and all other employees of the Employer.

Linda McIntire, Labor Relations Specialist for the Board, conducted an election on January 25, 1994, from 3:00 p.m. to 4:00

p.m., in the MRF trailer on Windham Solid Waste Management District property adjacent to the landfill on Old Ferry Road in Brattleboro, Vermont. Union Business Representative Christopher Clark observed for the Union. Acting Executive Director for the Employer, David Hannum, observed the last fifteen minutes of the election for the Employer. The employees were asked whether they wished to be represented for exclusive bargaining purposes by the International Union of Operating Engineers, Local 98, AFL-CIO. The results of the election were:

Yes	3
No	2

On February 4, 1994, the Employer filed objections to the conduct of the election. These objections were considered by the Board pursuant to Section 33.27 of the Board Rules of Practice. The Employer made various factual allegations in support of the objections to the conduct of the election. Attached to the objections was an affidavit of David Hannum. The Employer requested that the Board investigate the objections and set aside the election.

The Board sent a copy of the objections by certified mail to each person named in the objections. The Board requested that Union Business Representative Christopher Clark file a response and accompanying affidavit to the Employer's objections to the conduct of the election. Subsequent to the receipt of that response, and subsequent to an election report submitted by Board election agent Linda McIntire, Board Chairman Charles McHugh conducted further investigation into the conduct of the election. Mr. McHugh visited the site of the election. He met at the site

with David Hannum, Christopher Clark and Employer Attorney Frederick Sullivan. Chairman McHugh also spoke with employee Tony Falzo on the day he visited the election site. Chairman McHugh reported back to the Board concerning the results of his investigation.

The Employer has made two objections to the conduct of the election. The Employer states the first objection as follows:

The words "Vote Yes" were written across a Vermont Labor Relations Act poster situated in the immediate vicinity of the ballot box while the election was conducted. These words, written in large black lettering across the top of the poster, were readily observable by employees who entered the polling area to vote in the election . . . The words at the very least improperly implied the State of Vermont's endorsement of the Union in the election. Accordingly, this defacement of the Board's official poster constituted improper pre-election or election conduct which warrants setting aside election results.

Board investigation has revealed that, at the time of the election, there was a Board Notice of Election posted on a wall on the inside of the trailer with the words "VOTE YES" written in large letters across the top portion of the notice. The notice was posted on the same wall with several other items. The notice was behind employees as they received the ballot from the Board agent and went to a table to mark their ballot. Employees could not see the marked notice prior to voting unless they turned around. No employees turned around prior to voting. Neither the Board agent nor the Union observer noticed the marked notice during the election. The Employer observer noticed the marked

notice when he arrived as observer 45 minutes after the commencement of the election, but he did not mention it to the Board agent because he did not consider it significant until after the election was concluded. By the time the Employer observer arrived at the election, 5 of 6 eligible voters had voted. The remaining eligible employee did not vote after the Employer observer arrived at the election site.

A few weeks prior to the election when he was in the trailer, the Union observer had noticed a Board notice of election in the trailer marked with the words "Vote Yes on Question 1", and with an "x" in the "Yes" box on the sample ballot contained on the election notice. Employees eligible to vote, and supervisory employees of the Employer, were in the trailer on a regular basis as it served as the place they would go at the landfill to work inside, get out of the cold and use for lunches and breaks. No report was made to the Board at any time of the election notice being marked in either of the ways described above until the Employer filed the objections to the conduct of the election. It is unclear which individual or individuals marked the notice of election.

In ruling on objections to the conduct of an election, the Board will not set aside an election unless improper conduct may have had an effect on the results of the election. Chauffeurs, Teamsters, Warehousemen and Helpers, Local 597 and Chittenden County Transportation Authority, 13 VLRB 112, 117-118 (1990). In applying that standard to the facts of this case, we conclude

that the marking of the election notice did not affect the results of the election.

The Employer contends that the marked election notice improperly implied the State of Vermont's endorsement of the Union in the election. We disagree. First, with respect to the marked notice observed a few weeks prior to the election, no reasonable person, after seeing the marked notice, would draw any conclusion other than that the ballot had been marked by someone after it had been posted on the wall. A reasonable person would not conclude that it had been marked by a Board official to express endorsement of the Union. Moreover, the Employer had the opportunity to bring the marked notice to the attention of the Board prior to the election, but failed to do so. We will not overturn an election under such circumstances when the objecting party had ample time to notify the Board of a problem.

Second, with respect to the marked notice at the election site on the date of the election, it is evident that no employee saw such notice after entering the polling area and before voting. Thus, the marked notice could not have affected their vote.

This is not to indicate that the Board condones anyone marking the election notice issued by the Board and posted at the workplace. The Board values and guards carefully the integrity of our election processes. However, since we are not persuaded that the results of the election were affected, we conclude that it would be unwarranted to set aside the election.

Also, we note that the Employer had a right to have an observer at the election. Management and union observers aid in the conducting of a fair election. The Employer elected not to have an observer present until the election was well underway. All employees who were to vote had voted by that time. The Employer's failure to exercise its right in this regard, and then later contest an election based upon something that an employer observer could have assisted in preventing, is disingenuous. It is more appropriate to seek to prevent potential problems than to later object to something which the objector possibly could have prevented.

The Employer states its second objection to the election as follows:

An employee, Tony Falzo, who was eligible to vote in the election, was unable to vote on the day of the election because of an injury he sustained while at work. He was hospitalized while the balloting took place. He would have cast a vote had he not been hospitalized. As his vote was determinative of the outcome, the present election results should be set aside due to the employee's inability to cast a ballot on the scheduled date of the election.

The Board investigation reveals that these allegations of the Employer are factually incorrect. Falzo did not go to the hospital on the day of the election. Falzo was in charge of a group of individuals, under the custody of the State Corrections Department, who were performing community service work at the landfill that day. Falzo hurt his hand in the morning, and left work at approximately 2:15 p.m. after having completed that duty, rather than waiting until 3:00 p.m. to vote in the election. Falzo went home to take care of his hand, and did not go to the hospital. There is no basis to set aside an election when an

employee makes a voluntary decision not to vote under such circumstances.

Now therefore, based on the foregoing reasons, it is hereby


ORDERED:

1. The objections by the Windham Solid Waste Management District to the conduct of the representation election in this matter, with the accompanying request to set aside the election, is DENIED; and

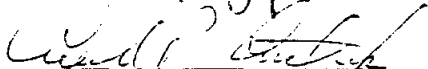
2. As a result of the representation election conducted in this matter, the International Union of Operating Engineers, Local 98, AFL-CIO, is CERTIFIED as the exclusive bargaining representative of the Equipment Operators, Special Material Processor, Working Foreman Recycling and Gatehouse Clerk, excluding the Working Foreman Landfill and all other employees, employed by the Windham Solid Waste Management District.

Dated this 24-day of May, 1994, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Catherine L. Frank


Louis A. Toepfer


Carroll P. Comstock