

Comcast Cablevision of New Haven, Inc. and Timothy W. Costa, Petitioner and Connecticut Union of Telephone Workers, Incorporated, Local 502. Case 34-RD-225

May 22, 1998

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND BRAME

The National Labor Relations Board, by a three-member panel, has considered objections to an election held September 17, 1997, and the hearing officer's report recommending disposition of them.¹ The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 20 for and 18 against the Union, with no challenged ballots.

¹ The pertinent portion of the hearing officer's report is attached as an Appendix.

² The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

We agree with the hearing officer's finding that the Union's conduct in distributing mock ballots does not warrant setting aside the election. The mock ballot, distributed at a union demonstration, and containing numerous exhortations to vote for the Union for various reasons, was clearly union propaganda, and would not reasonably mislead employees into believing that the Board favored the Union. In addition, the posted official election notice plainly states: "This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an Agency of the United States Government, and does not endorse any choice in the election." (Emphasis added.) This provides further support for our conclusion that employees would not reasonably believe that the mock ballot emanated from the Board. See *Brookville Healthcare Center*, 312 NLRB 594 (1993).

In adopting the hearing officer's recommendation to overrule Objection 3, Chairman Gould agrees with the hearing officer that the Board's rule in *Peerless Plywood Co.*, 107 NLRB 427 (1954), is not applicable in this case. In his view, the *Peerless* rule applies only to election speeches given by an employer on company time to massed assemblies of employees since the interference with a free election that results from a captive audience speech is due primarily to employees' complete dependence upon their jobs as their means of livelihood and economic existence. Since a union does not wield such economic control, Chairman Gould would not apply *Peerless Plywood* to union campaign speech.

Member Liebman finds it unnecessary to reach the issue, discussed by the Chairman, of whether the Board should no longer apply the *Peerless Plywood* rule to unions, because she agrees with the hearing officer, for the reasons stated by him, that under current Board precedent the Union's "brief urging of voters to vote for the Union" was not prohibited by the rule. In addition, Member Liebman emphasizes that the employees who were the audience of the Union's appeal were not captive, but were free to come and go as they pleased. Accordingly, Member Liebman joins her colleagues in overruling Objection 3.

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The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings² and recommendations,³ and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Connecticut Union of Telephone Workers, Incorporated, Local 502, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time Installers, Installer Technicians, Service Technicians, Line Technicians, Dispatchers, Inventory Control Clerk(s), Construction Ground Person, Construction Line Person and Warehouse Person(s) at its New Haven, Connecticut facility; but excluding all office clerical employees, all other employees and guards, professional employees and supervisors as defined in the Act.

In adopting the hearing officer's recommendation to overrule Objection 6, concerning the distribution of mock ballots, Member Brame finds it unnecessary to rely on the disclaimer language contained in the official posted Board election notice and the cases cited by the hearing officer on this point. Additionally, in adopting the hearing officer's recommendation to overrule Objection 3, Member Brame finds it unnecessary to rely on *Bro-Tech Corp.*, 315 NLRB 1014 (1994), enf. denied and remanded 105 F.3d 890 (3d Cir. 1997).

³ We agree with the hearing officer that there is no merit in the Employer's objections relating to the Union-sponsored demonstration that took place on the morning of the election. However, we find it unnecessary to rely on the hearing officer's discussions of whether the Union's conduct constituted picketing and of whether this case involves a labor dispute. Rather, in adopting the hearing officer's recommendation to overrule these objections, we do so on the ground that the Union's conduct did not reasonably tend to interfere with the employees' free and uncoerced choice in the election.

APPENDIX

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

The objections all relate to a Union-sponsored demonstration taking place on the morning of the election held inside the Employer's facility located on Whalley Avenue in New Haven. More particularly, the conduct at issue for the most part took place at the employee entrance located in the back of the facility on Elm Street, which is a two lane-one way road. Orchard Street also borders the facility on one side, and runs between Elm Street and Whalley Avenue. There is a large parking area for employees in the back of Elm Street, as well as parking for customers off Orchard Street. On the other side of the facility are buildings and parking areas, which are bordered by Dwight Street, and which also runs between Whalley Avenue and Elm Street. At the time of the election, most unit employees drove Employer service vehicles and vans to and from work, and parked these vehicles in the back parking lot off Elm Street. There are three gates into the back parking lot. The middle one is the main gate

and is usually utilized by the employees. There is a storage building between the main gate and the gate located towards Orchard Street. While these gates were open on the day of the election, the third gate located towards Dwight Street was locked. The back parking lot has an area for employees to sit which has a picnic table. Inside the back of the Employer's building itself is a garage with an area for parking and a warehouse area. There is a garage door, which was open on the morning of the election, leading into the garage. The main gate to the back parking lot is clearly visible from the garage door. Immediately inside that garage door is the converter control area, which has a counter with windows and a sliding door to the left of the garage entrance. Unit employees routinely pick up equipment and work orders in that area, and then leave the facility through the back parking lot to perform their service calls.

Starting time for the great majority of unit employees is 8:00 a.m. while a handful of employees start at either 6:30 or 7:00 a.m. It is undisputed that beginning about 6:30 a.m. on the day of the election various union officers and Executive Board members congregated in a demonstration of support for the Union at the main entrance to the back parking lot. Demonstrators stayed until the polling period ended at 11:00 a.m. Some of the demonstrators parked on the employer's side at Elm Street, despite a no parking sign. The number of demonstrators grew as the morning wore on. There were conflicting estimates as to how many participated with union witnesses tending to give estimates as low as 12-15, while some Employer witnesses estimated that as many as 30 were at the demonstration. I find about 20-25 individuals participated in the demonstration. Two unit members, at least one of whom was a shop steward, were at the demonstration before they had to report to work at 8:00 a.m. Many of the demonstrators either wore or held placards which read "VOTE YES, CUTW." They distributed pins which read "VOTE YES CUTW UNION." They also distributed copies of a mock ballot marked yes, a copy of which is attached to this report. The demonstrators milled about in small groups at the sides of the main entrance, and on the sidewalk. At times some demonstrators would walk back and across the main entrance itself. When some trucks traveled through the other unlocked gate, a handful of demonstrators went to stand for some time at that entrance as well.

The record also shows that some vehicles stopped at the back entrances on their way to perform service calls or on their return to the facility after finishing such calls. The parties dispute whether any vehicles were forced to stop by the demonstrators. Once again, some union witnesses tended to downplay the conduct of demonstrators at the back entrances, while some employer witnesses tended to greatly exaggerate what occurred.

Employee David Roy Guthrie, Jr. testified that when he arrived at the back parking lot at about 7:30-7:45 a.m., there were 15-20 demonstrators in front of the main gate. Employee James Canty was driving behind him. Guthrie stopped and rolled up his window, while demonstrators came out to him and loudly said, "Vote yes," and "Please vote yes." They attempted to hand him a union button and a mock ballot, but he kept his window closed. The demonstrators moved out of his way and he passed through after about a minute and entered the facility. He did not see whether Canty stopped or not.

Employee Roberto Rivera testified that he also arrived at about 7:30-7:45 a.m. at the main back gate and he saw about 12-15 demonstrators. He testified that he had to stop because a few people were in front of the gate. He did not see any other unit employee there. He rolled down his window and one demonstrator walked up to him and said, "You're going to vote yes," and tried to hand him a union pin and a mock ballot, and dropped a pin into his lap. At that point Rivera drove through, having stopped for about a minute, and entered the facility.

On his way to work that morning, employee Dan Bowee heard over the radio someone say, "I thought we weren't going to be bothered." When he arrived at about 7:30-7:40 a.m., he saw unit employee Phil Craven stopped in the entrance to the main back gate talking to demonstrators. Bowee honked his horn, and Craven then moved forward. Bowee followed him into the parking lot without stopping. When some employees went inside the facility they spoke to each other about the demonstrators.

About 8:15-8:25 a.m., after picking up his orders, Guthrie drove back out the main entrance. As he went to leave, another employee leaving in a company truck had stopped at the gate, and was talking to the demonstrators at the main back gate. When that employee left, Guthrie followed him out without incident. Guthrie returned about 9:30 a.m. Demonstrators were walking in front of the main back gate and Guthrie stopped. One demonstrator with a pony-tail pointed at him and said, "vote yes." A few others said, "vote yes," and he then drove through after about 30 seconds. The pony-tailed demonstrator watched him drive up the driveway.

Rivera also left the facility at about 8:15-8:30 a.m., but drove through the other unlocked back gate. A man and a woman were there, and the man tried to stop and speak to him, but Rivera kept his window up, waved him off, and took off without incident. He returned about 10:30-10:45 a.m. through the same gate, and no demonstrator was there. He estimated that about 25-30 demonstrators were at the main gate, and he saw a pickup truck was across the street where a couple of demonstrators were handing out pamphlets.

Bowee also left the facility that morning, apparently without incident. When he returned at about 10:30 a.m., about 10-15 demonstrators were at the main back gate, and one stood in front of his truck. He stopped, and about four demonstrators spoke to him. Two demonstrators asked why he wasn't wearing a pin, and he responded that no one gave him one, and he did not want one. He was handed one anyway. He was told by a demonstrator that the only reason "Larry" was there at work was because of the Union, referring to a previously dismissed but reinstated employee. At that point he was let through.

Installation Supervisor John Simeone testified that he arrived at the facility at about 6:30 a.m., entering from Whalley Avenue. After picking up work orders in the dispatch area, he proceeded to the garage, and observed demonstrators at the back gate. He spent most of the morning in the garage area because he wanted to avoid the studio area where the election was being held. He claimed that he observed demonstrators block the back entrance and stop every truck that came through and then converge on the driver and passenger side of each truck, speak to the drivers and hand literature into the trucks. He claimed that each truck entering

the facility was stopped in the same fashion for about 1–2 minutes. He testified that he observed about 10–15 trucks stopped in this fashion between 6:30 a.m. and 9:30 a.m., and some others between 10:30 a.m. and 11:00 a.m. Although he did not testify about exiting trucks in his direct testimony, he later testified he saw about 10 service trucks stopped on the way out in a similar fashion. He admitted that he could not hear what was being said at the back entrances from the garage door.

Simeone testified that he personally interacted with the demonstrators twice. He left through the back gate at about 9:30 a.m. in an employer vehicle with another supervisor, and was asked, “What are you guys doing here?” He asked the demonstrators to move so he could leave, which they did, and someone told him that the Union was going to win as he left.

About 10:45 a.m., after he had returned through a different entrance, Simeone walked alone out of the main entrance in the back lot with a couple of the mock ballots in his hand. He said, “You guys still here?” and a demonstrator responded, “We’ll be here a month from now if we have to be here.” Someone told him to get out of there, and asked what he wanted. He said he was just curious. The demonstrators stood close to him and around him. He asked if they had any other literature, and was told no, that was all they had. Although he claimed the demonstrators were “very angry, very hostile” there is no evidence in the record of any threatening statement or conduct by the demonstrators to Simeone, nor any evidence that any employee witnessed him meeting with the demonstrators or heard what was said in their conversation.

Human Resource Director Pamela Alvino testified that she arrived at the facility shortly before 8:00 a.m. She claims that she drove up Elm Street, as she normally does to enter through the entrance to the back parking lot, and saw a large number of cars parked, and about 20–25 people around and in front of the main gate. She first claimed that she tried to veer off the road because of the congestion, which was backing up traffic. She then pulled into the main gate but could not get through because of the demonstrators, and stopped on the sidewalk. She testified that “hostile” demonstrators converged on her vehicle telling her to vote yes. She was there 30–45 seconds, and when they realized she was not a unit employee, she was then allowed through.

Although Alvino first claimed that traffic was backing up because of the demonstration when she arrived, her testimony changed on cross-examination. She then admitted that there were only two or three cars in front of her on Elm Street when she pulled up to the gate, and they proceeded unimpeded down to Orchard Street. No car was backed up in front of her entering the main entrance. There was, therefore, no basis for her to claim that traffic was backed up on Elm Street when she arrived. I found Alvino prone to greatly exaggerate things in her testimony, and she became argumentative when cross-examined about details.

Upon entering the parking lot she drove her vehicle into the garage, where she stood for 20 minutes and during that period she observed two trucks stop at the main entrance, and demonstrators handing literature to the drivers. She claimed that she went to her office after about 20 minutes. About 8:50 a.m., on her way to the preelection conference, she observed vehicles entering the back gate and she saw one

truck stopped by the demonstrators for about 30 seconds. Although she claimed to have observed the demonstrators for about 50–60 percent of the time she was present that morning up until the election ended at 11:00 a.m., she did not testify to seeing any other trucks stopped at the back gate.

The union witnesses uniformly testified that they did not witness anyone being forced to stop. Rather, they hoped that drivers would stop and speak with them, but if not, they would let the trucks through. Moreover, if the demonstrators realized the individual stopped was either a contractor or a management person, they would let them pass. Although I find that both Alvino and Simeone tended to exaggerate in their testimony, I also find that various union witnesses tended to downplay the significance of the demonstrators causing vehicles to stop by virtue of their presence in the entrances to the back parking lot. I credit the testimony that some individuals, including Alvino, stopped in the back entrances because they were afraid they might hit a demonstrator. While it appears that some employees engaged in conversation with the demonstrators, I find that the evidence in the record does not show that anyone was forced to stop for any time longer than it took to be given a pin and a leaflet and to be encouraged to vote yes. I do not credit Simeone’s testimony that he saw about 15 vehicles forcibly stopped as they entered the back lot, and about 10 forcibly stopped as they exited. I do find, however, that the conduct at the demonstration was clearly visible to virtually everyone in the bargaining unit, and was the subject of discussion inside the facility. Further, there is no evidence that the demonstrators attempted to prevent anyone from entering the facility, or to prevent them from leaving. There is no evidence of any threatening or coercive statements being made to employees when they stopped.

Alvino also testified that chanting from the demonstrators could be heard inside the building, but no one else testified to that effect and the one employee who was questioned about it, Bowee, who was an Employer-called witness, denied he could hear inside the building what was taking place at the demonstration line. When pressed for details as to what she heard, Alvino admitted she could not discern what was being said outside, and described it simply as a “swelling of sound” from the demonstration line. I do not credit Alvino in this regard.

About 8:15 a.m. on the day of the election, approximately 7–8 SNET (Southern New England Telephone) trucks drove by the demonstration. The Union represents SNET workers. The SNET drivers shouted words of support, and honked horns, and then drove down Elm Street. Later in the morning a couple more SNET trucks came by, and one dropped off coffee for the demonstrators. Also at some point in the morning a number of New Haven city trucks rolled by and honked their horns in support. While there was some speculative evidence from one witness that one of the SNET drivers might have been a union official of some kind, the record does not establish that. It is clear, however, that the Union had put out a notice of the demonstration on the union newswire for interested members. The record also makes clear that most, if not all, of the demonstrators at the entrances on Elm Street held some kind of union position, and that some worked for SNET as well.

While Simeone and Human Resources Director Pam Alvino claimed that they could hear the trucks circling sev-

eral times around the facility honking horns, and that the horns could be heard inside the building, no employee testified to that effect. Moreover, Bowee testified that he did not hear the horns honking inside.

Alvino also gave exaggerated numbers for the number of SNET trucks involved, and claimed that as many as 20 circled the building three times. No other witness supported her testimony. I do not credit her version of events with regard to the SNET trucks, except to the extent that she saw some trucks, whether SNET trucks or city trucks, on Whalley Avenue pass by the front entrance and honk.

There is no evidence in the record that anyone engaged in misconduct in the voting area, or that employees could hear or see anything related to the union demonstrators in the voting area or immediately outside it, during the election. Although Simeone and Alvino testified that they could see the demonstration from the garage entrance, there is no evidence that anyone in or near the studio could see or hear the demonstration. In this regard, a wall of approximately 15 feet runs past the converter control area, which is located just inside the garage door, until it reaches a hallway on the left, which is approximately 20–25 feet from the garage door. Several feet into that hallway there is a door on the right which leads into another hallway. Several feet past that door is another door which leads directly into a soundproof studio wherein the election was held. This entrance was used for the election. On the opposite side of that studio entrance is another entrance into the studio, which could be reached by entering the second hallway, but which entrance was not used for the election, apparently because there are offices on that side of the building. The record is devoid of any evidence that the Union in any way violated a designated no electioneering area. The record does not indicate that there was a specifically designated “no electioneering” area, but I infer from Simeone and Alvino’s testimony that they considered the area outside the studio entrance to be an area to stay away from during the election. Simeone testified that he specifically stayed away from the voting area because of the election. Neither one knew where employees would have lined up waiting to vote, if they did so. Thus, not only is there no testimony in the record showing that any employee could see or hear anything with regard to the demonstration from the voting area, but the testimony as to where the soundproof studio is located would appear to make it impossible that anything could be seen, and improbable that anything could be heard.

In cases involving alleged misconduct by union agents, the Board determines whether their conduct “reasonably tends to interfere with the employees’ free and uncoerced choice in the election” by evaluating the following factors:

- (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct;

- (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.

Phillips Chrysler Plymouth, Inc., 304 NLRB 16 (1991), citing *Baja’s Place*, 268 NLRB 868 (1984) and *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986).

The record makes clear, and I so find, that any conduct which may have taken place at the demonstration line on Elm Street is attributable to the Union. It is clear that most, if not all, of the unit employees passed through the entrances to the back lot either shortly before the election period, or during the election period, and that some of these employees stopped at the entrance because of the presence of the demonstrators. Accordingly, assuming arguendo that the demonstration itself constituted misconduct, then virtually the entire unit was aware of it the morning of the election.

The objections are, for the most part, interrelated. The Employer’s main argument is that the Union effectively put up a picket line, just before and during the election, and that a picket line is inherently coercive, and therefore the picketing destroyed the laboratory condition required for a free and fair election. However, the notion that holding an election while picketing is occurring at the election site is objectionable, without more, has no merit. *Noesting Pin Ticket Co., Inc.*, 214 NLRB 987, 991 fn. 23 (1974); *Korber Hats, Inc.*, 122 NLRB 1000, 1001 (1959).

It also argues that the Union engaged not just in picketing, but “mass picketing” which was coercive and restrained employees entering and leaving. With regard to the claim that the Union engaged in mass picketing or picket line misconduct, which would arguably violate Section 8(b)(1)(A), the Employer chose not to file an unfair labor practice charge. Despite the lack of a charge, however, it is appropriate to consider whether the Union’s conduct restrained or coerced employees to such a degree as to make a free election impossible. *ARA Living Centers Co.*, 300 NLRB 888 (1990); *Holt Bros.*, 146 NLRB 383, 384 (1964).

There is a question as to whether the Union’s conduct at the back gates, constituted picketing as ordinarily understood. In this regard, the evidence shows that approximately 20–25 demonstrators milled about the back entrances to the facility, wore and held placards, and stopped employee vehicles to distribute leaflets and pins. However, conduct is normally only considered picketing in the context of a labor dispute of some kind. In *Mine Workers, District 12 (Truax-Traer Coal)*, 177 NLRB 213 (1969), the administrative law judge grappled with the issue of what kind of conduct actually constitutes picketing within the meaning of the Act. After noting that the Act itself does not define picketing, the judge searched through historical definitions and determined that:

The purpose of picketing in labor disputes is to convey a message which is usually intended to influence the conduct of certain persons to stay away from work or to boycott a product or business, and is frequently accomplished, as was done herein, by posting individuals at the approaches to a place of work. *Id.* at 218.

The Board recently cited this definition with approval in *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 72 fn. 12 (1991).

Furthermore, the Board has noted that “mass picketing” is not defined by the number of picketers, but rather by the

conduct of the picketers. Instead of regulating the number of picketers, the Board's function is:

limited to determining whether picketing as conducted in a given situation, whether or not accompanied by violence, "restrained" or "coerced" employees in the exercise of their rights guaranteed under the Act, and, if so, to enjoin such conduct. In these circumstances, the number of pickets has relevance only as it tends to establish the potential or calculated restraining or coercive effect of massed pickets to bar nonstriking employees from entering or leaving the plant.

When a Union is engaged in picketing to impede or prevent access to a jobsite, even if the actual delay is of short duration, then it can violate Section 8(b)(1)(A). *Sheet Metal Workers, Local 19 (Delcard Associates)*, 316 NLRB 426, 431 (1995); *Carpenters (Reeves, Inc.)*, 281 NLRB 493, 498 (1986); *Shopmen's Local Union No. 455*, 243 NLRB 340, 346, 348 (1979); *Metal Polishers Buffers, Int'l. Local 67*, 200 NLRB 335, 336 (1972); *Lithographers, Local 223*, 193 NLRB 11, 15, 20 (1971). In all of these cases, however, there was an ongoing labor dispute, and there were various acts of coercion besides a delay of short duration in entering or leaving the jobsite, unlike this case where the Union did not engage in any other coercive acts or threats. Further, the purpose of the picketing in each case was to disrupt the employer's operations and encourage employees to respect the picket line. The conduct was unlawful because even if the delays were of short duration, employees were restrained and coerced in their right to refrain from joining the strike or assisting labor organizations. *Carpenters, (Reeves, Inc.)*, supra at 498; *Metal Polishers, Buffers Int'l. Local 67*, supra at 336; and *Lithographers, Local 223*, supra at 19, 20.

Recently, in *Electrical Workers IBEW Local 3 (Cablevision)*, 312 NLRB 487 (1993), the Board addressed mass picketing in the context of an organizational campaign. In that case, where no strike was occurring, the union staged a large demonstration at the employer's facility, with 100–150 demonstrators and at least one demonstrator carrying a union placard. Demonstrators yelled at employees as they tried to enter and leave various entrances, attempted to hand literature to drivers, and threw pamphlets into trucks. The union also caused a number of nonemployer owned trucks to drive "very slowly" around the facility "as if to impede the progress" of the 17 employer's returning trucks. Demonstrators blocked a van and did not move, and forced the driver to "inch up" slowly through a crowd. Demonstrators told some employees that those employees who did not sign a card "would be remembered." In one incident demonstrators threatened an employee, cursed at him, and banged on his truck as they blocked his entrance. The union also engaged in photographing drivers to instill fear of retaliation. *Id.* at 489–490. The administrative law judge found that the demonstration constituted picketing, and further that the conduct described above violated Section 8(b)(1)(A). *Id.* at 492.

The picketing in *Electrical Workers IBEW Local 3 (Cablevision)* was thus designed to intimidate and coerce employees into supporting the organizational campaign, thus violating their right to refrain from doing so, and the conduct was designed to intentionally disrupt the employer's ability to conduct business.

In contrast to those situations where picketers forcibly stop employees in an attempt to prevent ingress and egress to an employer's facility, the brief stopping of employees which is only incidental to noncoercive picketing activity does not violate Section 8(b)(1)(A). *Interstate Cigar Co.*, 256 NLRB 496, 497–498 fn. 3 (1981); *H.N. Thayer Co.*, 99 NLRB 1122, 1130–1131 (1952); *United Electrical Radio and Machine Workers, Local 813 (Ryan Construction Corp.)*, 85 NLRB 417 (1949).

The Union in this case did not attempt to actually block ingress or egress to the facility. There is no evidence that the demonstrators engaged in any threatening or coercive conduct when they spoke to the unit employees entering or leaving the premises. Instead, the demonstrators momentarily caused some unit employees to stop in order to encourage them to vote yes in the election. The Employer has cited no cases to support its contention that such conduct is by itself objectionable. The Board has held that momentarily stopping employees on the way to vote to encourage them to vote yes does not necessarily constitute objectionable conduct.

In *Firestone Steel Products Co.*, 241 NLRB 382 (1979), the Board overruled an objection where a large gathering of individuals, between 75–100, gathered at the entrance to the jobsite where a multishift election was being conducted, leafleted cars, and held signs. "While this activity might have caused cars to slow down or stop momentarily, there is no evidence that access or egress from the plant was otherwise interrupted during the course of the evening." *Id.* at 385–386. Although there were incidents of booing and throwing of beer cans, "the mood of the crowd was not cast in a singularly ominous tone, as it appears that at least some had come to celebrate what they considered to be a successful organizing campaign." *Id.* at 385–386².

In *Firestone Textiles Co.*, 244 NLRB 168 (1979), a fairly large number of employees, 15–35, gathered at the entrance to the employer's facility where an election was being conducted over 2 days, distributed handbills and campaigned for the union. Some cars stopped to take the union literature, thus forcing the cars in back to stop as well. Several demonstrators used foul language. One demonstrator stopped in front of a vehicle which had been forced to stop because the vehicle in front had stopped, and said, "Son of a bitch, you'd better stop next time." The administrative law judge did not think that the "relatively few derogatory remarks uttered at the plant were likely to or did have any impact on employees and their voting intentions." *Id.* at 717. He did not find the union's conduct objectionable:

I do not find that the presence of fairly large numbers of union adherents at the plant entrance, by itself, constituted a threat would deprive employees of their freedom of choice in a secret-ballot election. Union adherents are entitled to handbill and to urge employees to vote for the Union as long as it is done peacefully and without threats. While the derogatory comments are regrettable, I do not find them coercive in these circumstances. I find that the overall conduct of the handbillers was generally peaceful and within lawful bounds.

² However, one distinguishing factor in that case was there was no finding that the union was responsible for the demonstration.

He noted in his decision, however, “that none of the employees were blocked from entering or exiting, and that that all witnesses agreed that they had no difficulty in getting in or out of the plant.” *Id.* at 171–172.

Thus, it is clear from *Firestone Textiles Co.* that simply having a large number of demonstrators campaigning and distributing literature to employees at the entrance to the facility during the election, even where some vehicles are actually forced to stop momentarily because of such conduct, does not constitute objectionable conduct.

In *Hy’s of Chicago, Ltd.*, 276 NLRB 1079 (1985), an election was held “in the environs” of the employer’s restaurant. Union representatives stationed themselves outside the restaurant, but away from the entrances “where they could intercept employees on their way to work.” In at least one incident an employee was intercepted and engaged in conversation and given union literature. However, no effort to impede the employees’ access to the polling place or to unduly intimidate in the election process occurred. Moreover, even though the union representatives stationed themselves outside the restaurant during the election,

No evidence in this record establishes acts on the part of the union representatives comprising efforts to stop (except to discuss the election issues) any employee or commit any act which is deemed evidence of coercion or interference in the election process. *Id.* at 1024.

The Union’s conduct was not found objectionable.³ Thus, *Hy’s of Chicago Ltd.* also stands for the proposition that a union does not commit objectionable conduct by briefly stopping employees on their entrance to work before and during an election where there is no other evidence of coercion or restraint.

I find that the Union in this case did not engage in any other acts of coercion or threats in its conduct at the demonstration. Therefore, in the absence of any other acts of coercion or threats, I do not find that the Union’s conduct in stopping some vehicles entering and leaving the facility during the election coerced or restrained employees in the exercise of statutory rights. The Union made no attempt to prevent anyone from entering or leaving. In fact, all 38 of the eligible voters voted. There is no evidence of any threats made to those employees by the demonstrators which could arguably impact on their free choice. I, therefore, recommend that Objections 1, 2, and 4 which allege coercive and threatening conduct by the demonstrators be overruled.

The Employer objects to the Union’s conduct at the line in stopping and speaking to employees as objectionable based on *Peerless Plywood Co.*, 107 NLRB 427, 429 (1954). However, *Peerless* applies to election speeches on company time to massed assemblies of employees. *Bro-Tech Corp.*, 315 NLRB 1014 (1994). It does not apply to individual or minor conversations where employees are simply urged to vote for one party. *DeCasper Corp.*, 278 NLRB 143, 146 (1986); *Business Aviation, Inc.*, 202 NLRB 1025 (1973). There simply is no basis in the record to find that *Peerless* applies to the brief urging of voters to vote for the Union

as they entered and left the facility, which occurred in this case. Accordingly, I recommend that Objection 3 be overruled.

The record does not support the Employer’s claim that the Union’s conduct was objectionable because it constituted impermissible electioneering within sight and hearing of employees entering the voting area. On the contrary, there is no evidence that any electioneering was conducted in the voting area, and there is no evidence to show that any employee saw or heard any electioneering from the election area. While Alvino and Simeone testified that they could hear the trucks honking their horns inside the facility, there is no evidence that any employee heard, or could hear, honking in the election area. Accordingly, I recommend Objection No. 5 be overruled.

The Employer’s claim in Objection 6 that the Union’s conduct in distributing the mock ballots is objectionable is without merit. Given the circumstances of the distribution of the mock ballot by the Union demonstrators, and with its clearly pro-Union appeal to “VOTE UNION YES,” the ballots would not tend to mislead voters that the Board was encouraging a vote for the Union. See *Baptist Home for Senior Citizens*, 290 NLRB 1059 (1988). Moreover, it does not appear that marking a ballot in a partisan way constitutes objectionable conduct given the warnings now attached to Board Notices of Election. *Wells Aluminum Corp.*, 319 NLRB 798 (1995); *Hotel & Restaurant Employees Local 226 (Santa Fe Hotel)*, 318 NLRB 829, 839 (1995); *Irvington Nursing Care Services*, 312 NLRB 594 (1993).

I therefore recommend that Objection No. 6 be overruled.

³ The decision was not based on a finding that the conduct at issue was de minimus or isolated. The vote was a tie with several challenges, so there was no basis for saying coercion of one voter would not have affected the election.