

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION

Involving Certain Employees of

FOX VALLEY VOCATIONAL,
TECHNICAL AND ADULT EDUCATION
DISTRICT

Case 45
No. 39464 ME-2749
Decision No. 25357-A

Appearances: 1/

Previant, Goldberg, Uelmen, Gratz, Miller and Brueggeman, S.C., by Ms. Marianne Goldstein Robbins, 788 North Jefferson Street, P.O. Box 92099, Milwaukee, WI 53202, on behalf of Teamsters Local No. 563.
Mr. Stephen Pieroni, Staff Counsel and Mr. John Landre, Law Clerk, Wisconsin Education Association Council, 101 West Beltline Highway, P.O. Box 8003, Madison, WI 53708, on behalf of Educational Support Personnel Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER DIRECTING NEW ELECTION

The Wisconsin Employment Relations Commission, having on April 15, 1988 issued a Direction of Election in the above matter to determine whether certain employees of the Fox Valley Vocational, Technical and Adult Education District wish to be represented for the purposes of collective bargaining by the Education Support Personnel Association or by Teamsters Local No. 563 or by neither of said labor organizations for the purposes of collective bargaining; and said election having been conducted on May 24, 1988; and Teamsters Local No. 563 having on May 27, 1988 timely filed objections to the conduct of said election; and hearing having been held in Appleton, Wisconsin on June 28, 1988 before Examiner Peter G. Davis; and a transcript of the hearing having been received on August 10, 1988; and Teamsters Local No. 563 and Educational Support Personnel Association having filed written argument, the last of which was received on August 31, 1988; and the Commission having reviewed the record and the parties' argument and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Fox Valley Vocational, Technical and Adult Education District, herein the District, is a municipal employer having its principal offices at 1825 North Bluemound Road, Appleton, Wisconsin 54913.

2. That Educational Support Personnel Association, herein the Association, is a labor organization which seeks to represent certain employees of the District for the purposes of collective bargaining and has its principal offices at 550 East Shady Lane, Neenah, Wisconsin 54956.

3. That Teamsters Local No. 563, herein Teamsters, is a labor organization which seeks to represent certain employees of the District for the purposes of collective bargaining and has its principal offices at Appleton, Wisconsin.

1/ Although the Fox Valley Vocational, Technical and Adult Education District was represented at the hearing by Mr. Jerry Rickman, Administrator, Human Resource Services, the District did not wish to have any formal appearance noted for the record and did not participate as a party in the proceedings. The District does not wish to and has not taken any position as to the objections filed by Local 563.

4. That on April 15, 1988, the Commission issued a Direction of Election which stated in pertinent part:

That an election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this Directive in the collective bargaining unit consisting of all full-time and regular part-time supportive employees working an average of 12 hours or more per week, excluding casual and seasonal employees, teachers, supervisory, managerial, confidential, craft employees, work study students and other students in work experience programs (student interns), who were employed on March 29, 1988, except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether such employees desire to be represented by the Educational Support Personnel Association, or by Teamsters Local No. 563, or by neither of said labor organizations, for the purposes of collective bargaining with the Fox Valley Vocational, Technical and Adult Education District.

that on May 24, 1988, an election was conducted by Commission agent Larry Fitchett pursuant to said Direction; that said election was conducted at the following times and locations: 9:00 a.m.-11:30 a.m.--Appleton campus; 1:00 p.m.-2:30 p.m.--Oshkosh Campus; 3:30 p.m.-4:15 p.m.--Appleton campus; that when the polls were closed, the ballots were counted and a tally sheet was prepared and signed by Fitchett and representatives of the District, the Association and Teamsters which reflected the following results:

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|---|------------|
| 1. ELIGIBLE TO VOTE | <u>214</u> |
| 2. BALLOTS CAST (Includes <u>all</u> ballots) | <u>184</u> |
| 3. BALLOTS CHALLENGED | <u>3</u> |
| 4. BALLOTS VOID | <u>0</u> |
| 5. BALLOTS BLANK | <u>0</u> |
| 6. VALID BALLOTS COUNTED (Total ballots cast minus challenged ballots, void ballots, and blank ballots) | <u>181</u> |
| 7. BALLOTS CAST FOR EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION | <u>115</u> |
| 8. BALLOTS CAST FOR TEAMSTERS LOCAL NO. 563 | <u>65</u> |
| 9. BALLOTS CAST FOR NO REPRESENTATION | <u>1</u> |

5. That on May 27, 1988, the Commission received objections to the conduct of the May 24 election which stated in pertinent part:

The election was a three-way contest between the Local Union, No Representation, and the Educational Support Personnel Association (ESPA). It has come to this writer's attention via the Union's representative, observers and from eligible voters that ESPA/WEAC, by its agents and representatives, engaged in conduct which materially affected the outcome of the election. Specifically, ESPA/WEAC supporters and representatives:

1. Maintained a voter roster even after being instructed by the Official conducting the election that they were not allowed to do so.
2. ESPA/WEAC supporters and representatives congregated immediately outside of the polling area and engaged in electioneering and other conduct which affected

the neutrality of the polling area. This had undue influence on eligible voters approaching the polling area.

3. ESPA/WEAC supporters and representatives used their unauthorized voter list as their basis to canvas the entire technical college grounds during the polling periods in an attempt to search out people who had not voted and attempted to persuade them to vote for ESPA/WEAC.

6. That during the 9:00 a.m. to 11:30 a.m. voting period at the District's Appleton campus, employees wishing to vote would approach a table at which the election observers designated by the Association and Teamsters 2/ were located and state their name; that if the employee was an eligible voter, both observers would place a check mark in front of the employee's name on the official voter eligibility list provided by the Commission and advise Commission agent Fitchett to give the voter a ballot; that on or about May 23, 1988, Henry Krokosky, an Association representative, had telephoned Commission Election Supervisor Kramer and asked about the propriety of the Association observer maintaining a separate list of employees who voted during the election; that Krokosky was advised by Kramer that each observer would be provided a copy of the official eligibility list and that the observer could do what he or she wished with the list; that during a brief meeting prior to the opening of the polls at 9:00 a.m. at the District's Appleton campus, Commission election agent Fitchett advised Association observer Rae, in the presence of Teamster Representative Reardon, that he would not allow Rae to keep a separate list of those employees who had voted; that Rae followed Fitchett's instructions; that the majority of the employees who voted in the election cast their ballots during the 9:00 a.m. to 11:30 a.m. voting period; that during this voting period, Henry Krokosky, a representative of the Association, possessed a list of eligible voters which he had prepared; that with the permission of the Commission agent Fitchett, Krokosky was periodically seated at a table 10-12 feet behind the table at which the observers were located; that when a voter would identify himself to the observers, Krokosky would check that name off on his list; that Krokosky would periodically leave the room in which the voting was taking place to take a break or to talk with other Association representatives or supporters in the hallway outside of the room in which the election was being conducted; that if he took his personal voter list with him on such occasions and was talking with Association supporters or representatives when he observed an employee he did not know enter the room in which the vote was being conducted, Krokosky would ask the Association supporters or representatives the name of the employee and note same on his list; that on such occasions, if Krokosky knew a prospective voter who was passing him in the hall outside the voting room, Krokosky would, on occasion, greet the prospective voter if he knew him or her or return a greeting from such an individual; that on 5-6 occasions when no voters were present at the observers' table, Krokosky, pursuant to the invitation of Fitchett, would leave his table and approach the observers' table and look at the observers' voter eligibility list to determine whether anyone had voted while he was out of the room; that Krokosky both maintained his list and identified voters in a manner which made it unlikely that any voter observed either his list or his physically checking names off on said list; that Krokosky was never clearly instructed by any agent or representative of the Commission that it was inappropriate for him to keep the second list, and Krokosky reasonably believed his conduct to be appropriate based upon his conversations with Kramer and Fitchett's willingness to allow him to observe the list; and that Teamster Representative Reardon reasonably believed it was not appropriate to maintain a list of voters and use same for campaign purposes based upon Fitchett's pre-election conference remarks to Rae.

7. That between 10:30 and 10:45 a.m., Krokosky left the room in which the voting was being conducted with his voting list; that Krokosky made a copy of the list and gave same to Association supporter and District employee Yvonne Matz; that after 11:30 a.m., Matz used the list to ask 5-6 individuals who had not yet voted to vote during the afternoon voting period at the District's Appleton campus; that

2/ The District chose not to have an observer present during this or any other voting period.

shortly after the conclusion of the 9:00 a.m. to 11:30 a.m. voting period, Krokosky reviewed his voting list and then wrote on a separate sheet of paper names of 20-25 employees who had not voted and who Krokosky believed were likely Association supporters; and that this list of 20-25 voters was then used by 2 Association supporters who were District employees to contact prospective voters who were urged to vote; and that the Association's supporters remarks to prospective voters during these contacts were limited to asking that the employees participate in the election.

Based upon the foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

That where, as here, the information provided by, and the conduct of, Commission agents and representatives caused, in some substantial manner, the parties to have differing but reasonable expectations and understandings as to the campaign conduct which was appropriate and where, as here, it is conceivable that the campaign conduct which did and did not occur as a result of those different understandings could have impacted upon the election result, the requirement implicit in Sec. 111.70(4)(d)2.a., Stats. that we conduct fair elections mandates that a new election be directed.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER

1. That the election conducted among employees of Fox Valley Vocational, Technical and Adult Education District on May 24, 1988 is set aside.

2. That a new secret ballot election shall be conducted within 45 days among the employees of Fox Valley Vocational, Technical and Adult Education District in the bargaining unit described in Finding of Fact 4, above, who were employed on November 15, 1988, except such employees as may quit their employment or be discharged for cause prior to the election to determine whether a majority of the employees voting desire to be represented by the Educational Support Personnel Association, or by Teamsters Local No. 563, or by neither of said labor organizations, for the purposes of collective bargaining with Fox Valley Vocational, Technical and Adult Education District.

Given under our hands and seal at the City of
Madison, Wisconsin this 15th day of November, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

A. Henry Hempe
A. Henry Hempe, Commissioner

FOX VALLEY TECHNICAL INSTITUTE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER DIRECTING NEW ELECTION

POSITIONS OF THE PARTIES:

Teamsters:

Teamsters assert that the Association engaged in objectionable conduct requiring that the results of the May 24, 1988, election be set aside and that another election be directed. Teamsters note that where the conduct of one of the parties to an election has interfered with the "laboratory conditions" necessary for a free, fair and secret ballot election, the Commission has set aside the election results and directed that a new election be conducted. Although the Teamsters contend that the propriety of the specific Association conduct at issue in the present case has never been previously addressed by the Commission, Teamsters argue that application of existing NLRB precedent to the Association's conduct would warrant setting aside the election results.

More specifically, Teamsters assert that where, as here, voters are aware that a party to an election is maintaining a list of persons who have or have not voted, the NLRB has repeatedly set aside elections, citing International Stamping Company, 97 NLRB 921 (1951); Sound Refining, 267 NLRB 204 (1983); Masonic Homes, 240 NLRB 776 (1981). The Teamsters further allege that the Association's conduct as to the maintenance of a second list is especially reprehensible since the Commission had advised the Association that such conduct was improper. The Teamsters contend that the Association's persistence in maintaining the list after receiving instructions to the contrary underscores the impropriety of the conduct and the significant impact it had upon election results. Teamsters argue that it is apparent that the Association felt the use of its targeted get-out-the-vote strategy was essential to an Association success in the election. Even if the Commission erroneously concludes that it will adopt a standard of conduct for elections which is lower than that adopted by the NLRB, it argues that Teamsters should not be penalized for complying with the Commission's directive not to maintain a second list. Teamsters assert that had they made a targeted effort similar to the Association's, there would have been a strong probability that a different election result would have been obtained. Therefore, for the foregoing reasons, Teamsters assert that the maintenance and use of the second list by the Association mandates the setting aside of the May 24, 1988, election.

Teamsters also assert that the Association engaged in objectionable electioneering near the polling place. Teamsters assert that in Milchem, Inc., 170 NLRB No. 46 (1968) the NLRB concluded that "the sustained conversation with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election." Thus, Teamsters contend that the Association's argument herein that the conversations in question did not involve the election misses the mark. The Teamsters further assert that if the Association's defense were found valid, electioneering in the polling area could not be policed since those not engaging in the conversation are in almost all cases unaware of the conversation's substance. As the conversations between the Association representatives and voters immediately outside the polling place were repeated and prolonged, Teamsters urge the Commission to apply the Milchem rule and set aside the election results.

Should the Commission conclude that the two specific types of Association misconduct do not separately warrant setting aside the election, the Teamsters argue that the combination of misconduct compels direction of a new election. For the foregoing reasons, Teamsters request the Commission sustain its objections, set aside the election held on May 24, 1988, and schedule a new election.

The Association:

The Association asserts that its conduct does not warrant setting aside the election results in question herein. Initially the Association argues that the evidence is inconclusive as to whether the Commission election agent ever clearly directed the Association not to maintain a second election list. However, even in the unlikely event that the Commission concludes that the Association intentionally disobeyed the directives of the Commission election agent, the

Association asserts that the list keeping conduct is not a basis for setting aside the election. Citing Whitefish Bay Cleaners and Tailors, Dec. No. 5335 (WERC, 2/60), the Association asserts that Commission decisions make it clear that only conduct of an egregious nature that impedes employee free choice will warrant the setting aside of an election. Inasmuch as the instant case does not involve direct interference or irregularities in the voting process itself, the Commission should apply the strong Whitefish Bay presumption in favor of upholding the results of the secret ballot election. The Association asserts that the Association representative was discreet in his maintenance and use of the second list and that no evidence was presented indicating that voters knew of his activities. Therefore, the Association asserts that the "freedom of choice" was not impaired in any manner by the Association's conduct as to said list. The Association also urges the Commission to conclude that the probability of interference with the rights of voters resulting from list-keeping is far less when the party involved is a labor organization than when the party involved is the Employer who wields much more authority over the working lives of the employees.

If the Commission should determine that it will adopt the NLRB International Stamping rule, the Association contends that the election should not be overturned because there is no evidence that employee voters knew that their names were being recorded, citing Masonic Homes, *supra* and Medical Center of Beaver County, Inc., NLRB, 716 F.2d 995 (1983). Moreover, the Association asserts that the Commission need not follow NLRB case law. It argues that even if voters were aware of a voter roster, it is difficult to comprehend how the mere knowledge that a union maintained a voter roster could impair an elector's free choice. The Association asserts that this is especially true in this case because there was no testimony from eligible voters that they were intimidated by knowledge of a roster. The Association also contends that even the NLRB appears to apply an "outcome determinative" test in list-keeping cases and will not set aside election results where only a small number of voters were aware of the list, citing Roberts Tours 244 NLRB No. 133 (1979); South Mississippi Electric Power Association, 616 F. 2d 837 (5th Cir. 1980); Tom Brown Drilling, 172 NLRB No. 133 (1968) and A.D. Juilliard and Company 110 NLRB 2197 (1954).

As to the Teamster's claims of improper electioneering, the Association asserts that it is questionable initially as to whether the conduct of the Association in any way constituted electioneering. In this regard, the Association asserts that the Association activity was limited to reminders to a small number of employees that an election was being conducted and the occasional greetings and social amenities exchanged between an Association representative and prospective voters in the hallway outside the polling place. The Association asserts that it is not reasonable to conclude that such conduct in any way intruded upon voter free choice. As to the Teamster's claim that the conversations outside the polling place implicate the Milchem rule established by the NLRB, the Association asserts that Milchem would not apply because the conversations in question were brief and did not occur while employees were waiting in line to vote. The Association asserts that the NLRB in Hy's of Chicago, Limited 276 NLRB No. 113 (1985) concluded that even purposeful electioneering by union agents who intercepted employees on their way to the polls did not warrant setting aside an election because there was no "effort to impede the employees' access to the polling place nor to unduly intimidate him in the election process."

As no evidence was presented suggesting that voters were hindered in their efforts to reach the polls or that voters were coerced or intimidated by any Association conduct, the Association urges the Commission to dismiss the Teamster's objections and to certify the election results.

DISCUSSION:

One of the rights accorded municipal employees by Sec. 111.70(2) Stats., is the right to be represented for the purposes of collective bargaining by a "labor organization of their own choosing". Thus, when employees seek to exercise that choice through an election conducted by the Commission pursuant to Sec. 111.70(4)(d), 2.a., Stats., they are entitled to an election climate which is free of conduct or conditions which improperly influence them and which is fair to all parties on the ballot. WERC v. Evansville 69 Wis. 2d 140 (1975); Washington County, Dec. No. 7694-C (WERC, 9/67); St. Croix County, Dec. No. 8932-E (WERC, 9/87). Where the secrecy of the voting process itself is

maintained, there is a strong presumption that the ballots actually cast reflect the true wishes of the employees participating. Whitefish Bay Cleaners, supra. 3/ Therefore, where, as here, objections are filed which allege that conduct or conditions existed which prevented the employees from freely expressing their preference as to union representation and that the election results should be set aside, the question before us is whether the conduct or conditions in question render it improbable that the voters were able to freely cast their ballot. Fond du Lac County Dec. No. 16096-B (WERC, 9/78); Town of Weston, Dec. No. 16449-B (WERC, 2/79); St. Croix County, supra., (WERC, 9/87).

The objections asserted by Teamsters involve: (1) Association maintenance and use of a list of those employees who had voted; and (2) alleged electioneering by an Association representative during the voting period near the polling place.

However, as a preliminary matter, Teamsters argue that a new election must be directed even if the Association conduct herein was appropriate because the election did not occur on a "level playing field". Teamsters assert they understood our election agent, Fitchett, to have prohibited campaign activity related to the keeping of the "second list" and that they relied to their detriment upon that understanding. As indicated earlier herein in our Findings of Fact, Fitchett's instructions as to the keeping of a "second list" were less than definitive when viewed in the context of the information WEAC had earlier received from the Commission's Election Supervisor and of Fitchett's subsequent invitation to Krokosky to approach the observers' table whenever he wished to see the list of who had voted. However, the Teamsters heard Fitchett's instructions in a context which did not include contradictory messages. In such a context, Fitchett's instructions regarding a second list acquire greater clarity and we are satisfied the Teamsters reasonably concluded that targeted "get out the vote" activity was prohibited. Where, as here, the parties had differing expectations and understandings as to the campaign conduct which was appropriate; where, as here, we are satisfied those differing understandings were based in some substantial part upon the information provided and/or by the conduct of Commission agents; and where, as here, it is conceivable that the campaign conduct which one party engaged in and one party did not could have impacted upon the election result, we are persuaded that a new election must be directed. We do not reach such a result easily because, as indicated earlier herein, there is strong presumption that ballots cast in the context of a secret ballot election reflect the true wishes of the voters. However, under the combination of circumstances cited above, we are compelled to direct a new election to insure that the actions of our agents never affect the outcome of an election. Such "fairness" is an implicit and essential component of our obligation to conduct representation elections under Sec. 111.70(4)(d) Stats.

Given the foregoing, we need not resolve the objections raised by Teamsters as the propriety of the Association's conduct herein. However, we do think it appropriate and necessary in the context of the new election we have directed herein to provide some general guidance to the parties as to appropriate activity.

We initially note, as indicated in Election Supervisor Kramer's letter to the parties, 4/ we have historically provided copies of the official eligibility list

3/ While the Commission comment in Whitefish Bay occurred in the context of an election conducted under the Wisconsin Employment Peace Act, the presumption is a valid one in any election process conducted by the Commission.

4/ Pursuant to Mr. Davis' request, below is my statement concerning the allegations in the objections filed by Teamsters Local No. 563 in the above-entitled matter.

On or about May 23, 1988, I received a telephone call from Mr. Krokosky inquiring as to whether the observer for WEAC could keep a list of employees who voted during the election. I informed him that we provide each observer with a copy of the eligibility list and that the observer can do what he/she wishes with that list. Later that day I had a telephone call from Joan Haag, also a WEAC representative, asking the same question in reference to the election and confirmed with her my conversation with Mr. Krokosky.

to the observers designated by the various parties in on-site elections and have never prohibited the observers from using their copy of the list to record the names of those who have voted. The propriety of this historical practice has never previously been challenged and thus we are unaware of any on-site election, other than this case, in which it has even been alleged that the presence of a "second list" and its potential use for campaign purposes has interfered with a voter's right to freely exercise their choice when marking a ballot.

Although the NLRB announced in International Stamping Company, supra, that it would henceforth prohibit such lists, the rationale for doing so has not been clearly expressed in the Board decisions we have reviewed. However, it would appear that the rule exists, at least in part, to meet a concern that if employees know that the employer and/or union(s) are recording whether they have voted, the employee may perceive a veiled threat of reprisal which will coercively intrude upon the free exercise of their choice as to how to mark the ballot. How significant a protection the Board prohibition against possible reprisals turns out to be when it is remembered that all parties are entitled to have observers present at the polling place for the express purpose of identifying voters may be open to question. Nonetheless, it is clear that the ability of a voter to freely express his or her choice is the preeminent value to be protected in the free electoral process and that the Board prohibition against parties' independently recording who votes is rationally related to the protection of this preeminent value. It does not appear that the Board's position is based upon a desire to inhibit a party's ability to "get out the vote" during the balloting period away from the polling place. Thus, the Board has never overturned its holding in Craddock Terry Shoe Corp. 80 NLRB 1239 (1948) that it was acceptable of an official union observer to report to union headquarters the names of employees who had not yet voted so that they could be brought in to vote. The Board held:

It is normal in a Board election, for both employer and union observers to have access to the eligibility list. And "getting out the vote" is a traditional part of election procedure. The conduct complained of was not coercive in its effect nor could it tend to exercise undue influence upon any voter.

Having considered the matter in light of our historical experience and NLRB precedent, we are persuaded that a prohibition against the maintenance of said lists by a party is appropriate only insofar as it is reasonably necessary to avoid the potential fear of reprisal on the voter's part. In our view such a fear can be generated if a voter observes the recording of their names outside the polling place and thus outside the aura of legitimacy and fair play conveyed by the presence of our election agent in the polling place. Thus, outside the polling place, it is improper for a party to record in any manner the identity of those who have voted or are about to vote. However, it is not inappropriate for the parties respective representatives (observers) in the polling place to use a copy of our official eligibility list to record the names of the employees who have voted. The information obtained from the copy of our list can be used for "get out the vote" activity so long as such activity occurs outside the polling place or the immediate vicinity thereof.

We are hopeful that the foregoing will insure both parties have a fair and equal opportunity to persuade the voters in the upcoming election.

Dated at Madison, Wisconsin this 15th day of November, 1988.