Mental Health Association, Inc. *and* Service Employees International Union, Local 509, Petitioner. Case 1–RC–22449

April 29, 2011

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

The National Labor Relations Board, by a three-member panel,[1] has considered objections to an election held June 8, 2010, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 82 for and 131 against the Petitioner, with 8 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs,[2] has adopted the hearing officer's findings[3] and recommendations,[4] and finds that the election must be set aside and a new election held.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations.[5] Eligible to vote are

[1] Member Hayes is a member of the panel, but did not participate in this decision on the merits. In *New Process Steel v. NLRB,* 130 S.Ct. 2635 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum when one of the panel members is unable to participate. Under the Court's reading of the Act, "the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified." *New Process Steel*, 130 S.Ct. at 2644; see, e.g., *Correctional Medical Services*, 356 NLRB No. 48, slip op. at 1 fn. 1 (2010).

The Employer filed a motion seeking Member Becker's recusal, and that motion was granted. Member Becker recused himself on the grounds that an employee of his former employer, the Service Employees International Union, represents or represented a party in this case. See *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB No. 40 (2010) (Member Becker, ruling on motions); 5 C.F.R. sec. 2635.502(a) and (b)(1)(iv); Executive Order 13490 secs. 1 (2) and 2(i), (j), (k) (Jan. 21, 2009).

[2] On April 28, 2011, the Board granted the Service Employees International Union's motion to allow amicus brief.

The Petitioner moves to strike the Employer's exceptions and/or brief in support for violating Sec. 102.69(j) of the Board's Rules and Regulations. The Petitioner argues that the Employer's exceptions document contains argument, and that when that argument is combined with the Employer's brief in support, its submissions exceed the 50-page limit allowed by the Rules. The Petitioner appears to rely on the Board's Rules governing unfair labor practice proceedings, particularly Sec. 102.46(b)(1) prohibiting argument in an exceptions document if a supporting brief is also filed. See *Special Touch Home Care Services*, 349 NLRB 759, 759–760 (2007); *Hotel del Coronado*, 344 NLRB 360, 360 (2005). The Rules applicable to postelection representation proceedings, however, contain no similar prohibition. See Sec. 102.69(f) and (j)(l). Although there are good reasons for similarly limiting arguments in representation case exceptions, we will not do so here. The argument contained in the Employer's submissions exceeds the 50-page limit by approximately 5 pages, and the Petitioner has failed to demonstrate any resulting prejudice. We therefore deny this aspect of the Petitioner's motion.

The Petitioner also argues that the Employer's brief in support of exceptions should be stricken because it does not contain an index and table of authorities, which are required for briefs exceeding 20 pages. See Sec. 102.69(j)(1) of the Board's Rules. After the Petitioner filed its motion, however, the Employer moved to substitute an amended supporting brief containing the required index and table. The Employer's motion is granted, and this aspect of the Petitioner's motion is denied as moot.

[3] 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.

[4] The hearing officer found merit to the Petitioner's Objection 22, alleging that, at an employee meeting about 1 week prior to the election and in a letter to employees a few days later, the Employer made statements concerning employee bonuses that tended to interfere with employee free choice. Although we affirm the hearing officer's finding, we disagree with her analysis insofar as she deemed it irrelevant whether the Petitioner had previously made statements regarding employee bonuses, including purported statements to the effect that it would force the Employer to pay bonuses. Nevertheless, even assuming that the Petitioner made such statements, we agree with the hearing officer that, under the circumstances here, Objection 22 should be sustained.

We also agree with the hearing officer that the election should be set aside based on the totality of the Employer's election-day conduct. Indeed, we would set aside the election based on this conduct alone. As found by the hearing officer, on the day of the election, the Employer, without advance notice, changed the route and method by which employees would enter the facility by limiting access to the employee entrance and by giving control over that entrance to openly antiunion employees for a substantial portion of the voting period. The Employer also hired security, erected a fence around part of its parking lot, and posted private property signs, all apparently without security justification. We find that the totality of this conduct reasonably tended to interfere with employees' free and uncoerced choice in the election. We thus find it unnecessary to pass on the hearing officer's further finding that the Employer's stationing of openly antiunion employees at the employee entrance, by itself, warrants a new election.

Finally, given that the Employer's conduct affected all voters, we find that a second election is warranted notwithstanding the election margin. Cf. *Freund Baking Co*., 336 NLRB 847, 847 fn. 5 (2001); *Scientific-Atlanta, Inc*., 278 NLRB 467 (1986).

[5] In its exceptions, the Petitioner, joined by amicus curiae SEIU, asks the Board to rescind its presumption in favor of holding an election on the Employer's premises and to replace it with a presumption in favor of holding an election at an appropriate neutral site, unless otherwise agreed to by the parties. Alternatively, the Petitioner, again joined by SEIU, argues for a new rule requiring that any election overturned

those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Service Employees International Union, Local 509.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. April 29, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

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because of election-day misconduct, including this case, be re-run away from the employer's premises. Chairman Liebman and Member Pearce observe that this case illustrates some of the shortcomings of the Board's current practices regarding the siting of elections. They are not prepared at this time, however, to deviate from the Board's current practice of leaving the determination of the appropriate method and location for initial and rerun elections to the discretion of the Regional Director. See *Federated Logistics & Operations*, 340 NLRB 255, 258 fn. 12 (2003), enfd. 400 F.3d 920 (D.C. Cir. 2005). Accordingly, we deny the Motion filed on April 27, 2011 by the Chamber of Commerce of the United States of America and the Coalition for a Democratic Workplace for Special Permission to File Brief Amici Curiae in the event that the Board chose to address the issue of election sites.