

Associated Air Freight, Inc. and Miscellaneous Warehousemen, Drivers & Helpers Local 986; International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Petitioner.
Case 31-RC-4390

February 8, 1980

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the objections to an election held on March 29, 1979,¹ and the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Regional Director's findings² and recommendations.³

[Direction of Second Election omitted from publication.]⁴

MEMBER PENELLO, dissenting:

I would not set aside the election in this case but would instead overrule Objection 1. As noted in my dissenting opinions in *Kilgore Corporation*⁵ and subsequent cases,⁶ it is the burden of the party filing the objection to establish that the conduct objected to affected the election. The Petitioner has not met that burden here. There is no evidence that the employees were unaware of or misunderstood their rights or the procedures involved in the election. Given the fact that the notices were posted in conspicuous places for all employees to see at least 1 full day prior to the election,⁷ it must be presumed, in the absence of contrary evidence, that the employees had the opportunity to read the notices and that they knew and understood their rights with respect to the election.

Nor is there evidence that any employees were foreclosed from voting because they did not see the official notices earlier and were unaware of the date, time, and place of the election. On the contrary, it appears that the employees were well aware of the election date, since 21 of the 23 eligible voters cast ballots. Further, there is no indication that the two employees who did not vote were unaware of the election.⁸ Accordingly, I would certify the results of the election.⁹

¹ The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 4 for, and 16 against, the Petitioner; there was 1 challenged ballot, an insufficient number to affect the results.

² In the absence of exceptions we adopt, *pro forma*, the Regional Director's recommendation that the Petitioner's Objection 2 be overruled and his

findings with respect to conduct not specifically raised by the Petitioner in its objections.

³ The Regional Director's discussion of Objection 1, which we adopt in its entirety, is attached as an appendix.

Our findings are consistent with Board precedent which was not changed by *Printhouse Company Inc. and Dennison Ticket, Printhouse Division*, 246 NLRB No. 112 (1979), where a Board majority (Chairman Fanning and Member Jenkins dissenting) refused to set aside an election despite an allegation of late posting. However, Member Truesdale indicated that he adhered to the principles established in *Kilgore Corporation*, 203 NLRB 118 (1973), but found the facts in *Printhouse* distinguishable. Contrary to Member Penello's views, we find that the facts presented here are significantly different from those in *Printhouse*. Here, the Regional Director found that, in view of the various different work schedules of the employees, the employees could not have been reasonably afforded an opportunity to review the notice prior to the day of the election. Therefore, notwithstanding our disagreement with *Printhouse*, we find it not controlling.

⁴ [*Excelsior* footnote omitted from publication.]

⁵ 203 NLRB 118 (1973), enforcement denied 510 F.2d 1165 (6th Cir. 1975).

⁶ See, e.g., *Congoleum Industries, Carpet Division*, 227 NLRB 108 (1976); *The Singer Company, U.S. Sewing Products Division, District One*, 238 NLRB 264 (1978); *Thermalloy Corp.*, 233 NLRB 428 (1977).

⁷ I see no essential difference between the facts presented here and those in *Printhouse Company, Inc.*, 246 NLRB No. 112 (1979), in which the Board refused to set aside an election even though it was alleged that the Board notice was posted 1 day before the election. My colleagues would distinguish this case on the ground that because of their different work schedules some of the employees here did not have a reasonable opportunity to review the notice. Yet no one claims that a single employee was unaware of the election or misunderstood his or her rights with respect thereto. In fact, of the two employees who did not vote, one had not reported to work for several weeks and could not have availed himself of the election information in any event. Absent a showing that the late posting in any way affected the results of the election, I see no valid reason why the employees' expression of choice should be frustrated.

⁸ In fact, one of these employees had not reported to work for several weeks prior to the election and could not have availed himself of the election information in any event.

⁹ The Regional Director recommended that, if the Board found that the election should not be set aside on the basis of Objection 1, a hearing should be held concerning certain alleged conduct by the Employer not specifically objected to by the Petitioner. In the absence of a specific written objection, I would not order a hearing with respect to this alleged conduct. See my dissenting opinion in *Dayton Tire & Rubber Co.*, 234 NLRB 504 (1978).

Finally, in agreement with my colleagues, I would, in the absence of exception, adopt *pro forma* the Regional Director's recommendation that Objection 2 be overruled.

APPENDIX

Objection No. 1

The Employer failed to properly post the "Notice of Election" in a timely manner.

The Petitioner's witness contends that the election notices were not posted as of 4 p.m. on March 27, 1979, and that she saw the notices for the first time when she reported for work at 7 a.m. on March 28, 1979. The Employer contends that two notices were posted at about 9:30 a.m. on March 27, 1979, one on the office bulletin board and the second on the dock bulletin board. The election was held on March 29, 1979, from 11:45 a.m. to 12:45 p.m. and from 6:45 p.m. to 7:30 p.m.

The evidence reveals that Region 31 mailed the Notices of Election to the parties on March 20, 1979. Max B. Keesling, the District Manager, contends that his secretary did not give him the notices until March 26, 1979. Yet, by Keesling's own admission, because, after reading Region 31's letter transmitting the notices, he sensed no particular urgency, he did not post the notices immediately upon

receipt, but instead, waited until the morning of March 27, 1979, a scant two days before the election. A copy of the cover letter, attached hereto as Exhibit A, required the Employer to post the notices immediately in conspicuous places.

The Employer asserts that 21 of the 23 eligible voters voted and that all employees were advised of the date of the election through campaign literature which the Employer had mailed to all employees prior to the election. The Employer asserts that neither of the two voters, who did not vote in the election, reported to work on March 29, 1979. One of the two employees was outside California on the day of the election while the second employee, who worked at irregular intervals, had not reported to work for several weeks prior to the election.

Although the Board has never established a rule specifying the time before an election when a Notice of Election must be posted, where no valid excuse is offered by an employer for a late posting of notices, the Board has found late posting to be the basis for ordering a new election, regardless of whether employees were otherwise notified of the election time and regardless of the fact that virtually all of the eligible voters cast ballots in the election. See *Congoleum Industries, Carpet Division*, 227 NLRB 108 (1976); *The Singer Company*, 238 NLRB No. 229 (1978). Furthermore, the mere fact that a large percentage of the eligible voters cast ballots in the election is not dispositive for a large voter participation may have occurred whether or not notices had been posted at all. See *Kilgore Corporation*, 203 NLRB 118 at 118-119.

The fact that the campaign literature which was sent by the Employer to all of its employees contained a reminder of the date of the election and the fact that a large percentage of the eligible employees voted does not obviate the necessity for prompt posting of notices. The Employer's campaign literature can in no way replace an official Board notice, which provides the employees with an official statement not only of the date, time and place of polling, but also informs them of the eligibility requirements, and the type of ballot to

be used. In addition, the official election notice includes important information regarding the rights of employees under the Act and such information serves to alert employees as to their rights and to caution both unions and employers against engaging in conduct tending to impede a free and fair election. See *Kilgore Corporation, supra* at 118-119. A late posting of the official notice may deprive employees who have received campaign literature of an opportunity to evaluate the content of the campaign literature.

Included on the voting eligibility list were full-time and part-time employees from both the day and evening shifts. The investigation reveals that some employees worked only Saturdays and others worked only at irregular intervals and consequently could not have been reasonably afforded an opportunity to review the notice prior to the day of election. In view of the various different work schedules of its employees, it was incumbent upon the Employer to post the notices promptly upon receipt in order to afford sufficient advance notice of the election to as many employees as possible.

The evidence is in conflict as to when the posting occurred on March 27, 1979. Assuming, *arguendo*, that the notices were posted in the morning of March 27, 1979, as the Employer contends, in my view, such a late posting in the circumstances here presented, failed to give employees sufficient advance notice of the election and constituted a substantial disregard of the posting instructions which accompanied the notices.

Further, the Board's notice posting requirement is not to be lightly regarded by employers. If this Employer, who offered no excuse for its last minute posting, is not to be held accountable, other employers would be encouraged to also ignore the posting requirement. See *Congoleum Industries, Carpet Division, supra* at 109. I conclude, therefore, that the election should be set aside due to the late posting of notices and, accordingly, I will recommend that Petitioner's Objection No. 1 be sustained.