

Allen Tyler & Son, Inc. and James Henry McCready, Petitioner, and International Union of Bricklayers and Allied Craftsmen, Local No. 8 of Maryland, AFL-CIO. Case 5-RD-569

January 11, 1978

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBERS JENKINS, PENELLO, AND MURPHY

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 objections in an election held on June 15, 1977,¹ and the Regional Director's report recommending disposition of same. The Board has reviewed the exceptions and brief and hereby adopts the Regional Director's findings² and recommendations.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for International Union of Bricklayers and Allied Craftsmen, Local No. 8 of Maryland, AFL-CIO, and that said labor organization is not the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

MEMBER MURPHY, dissenting:

I cannot agree with my colleagues in adopting the Regional Director's recommendation to overrule Objection 2. Here, employee Gary Brohawn was selected as a union observer but withdrew under "highly suspicious circumstances" and thereafter failed even to vote. Yet, the Regional Director

¹ The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 15 for, and 28 against, the Union; there were 13 challenged ballots, a number insufficient to affect the results.

² We do not agree with the intimation of our dissenting colleague that the Regional Director abused his discretion by overruling Objection 2. The action by the Regional Director is consistent with the National Labor Relations Board Casehandling Manual, Part Two, Representation Proceedings, sec. 11392.5, which states in pertinent part:

It is [the duty of] the party filing objections . . . to furnish evidence sufficient to provide a *prima facie* case in support thereof *before the Region is required to investigate the objections*. [Emphasis supplied.]

Clearly, the Union has failed to present probative evidence sufficient to provide a *prima facie* case in support of its allegations. In the absence of any

apparently did not attempt to interview him. I would remand the case to the Regional Director with directions that he arrange for such an interview and further investigation, including the holding of a hearing if that thereafter seems appropriate.

A witness states that Brohawn telephoned to say he would not act as the Union's observer. Brohawn allegedly went on to say that Respondent's plant superintendent, Harry Grunden, had approached him at the jobsite and mentioned that he had heard that Brohawn was to be the Union's observer. When Brohawn confirmed this, Grunden allegedly said he had nothing "against Brohawn personally, but" The conversation apparently trailed off at this point and Grunden left the area. Subsequently, the Union lost the election by a vote of 20 to 43, not counting challenged ballots. According to the Union, Brohawn not only did not act as an observer but did not even vote.

The Regional Director, relying largely on the Union's failure to submit a statement from Brohawn, recommends the objection be overruled. The sudden withdrawal of an employee from acting as union observer and his failure to cast a ballot — together with some indication that the employee was threatened — creates such a suspicious set of circumstances that the exercise of sound discretion requires that the Regional Director interview the employee involved — even in the absence of a supporting statement from the Union.³ In such circumstances, the Union's failure to obtain a statement from Brohawn is understandable, for, if the hearsay account of the incident is borne out of an investigation, Brohawn probably wanted nothing further to do with the Union for fear of employer reprisal.

I would remand this proceeding to the Regional Director for that purpose and for such additional investigation as thereafter is appropriate.

probative evidence, we shall not require or insist that the Regional Director conduct a further investigation simply on the basis of a "suspicious set of circumstances."

³ My colleagues seem to feel that the only action the Board should take is to compel a Regional Director to do what is minimally necessary, to comply with the Casehandling Manual. It seems to me that they, and we, should be held to a higher standard. Thus, where, as here, the procedures in the Casehandling Manual arguably have been complied with, but nevertheless the circumstances cry out for further investigation, the Regional Director should make that investigation. If he fails to do so on his own volition, the Board should compel him to do so. It is only in this way that we can maintain the Board's reputation as an agency which is concerned with substance rather than form. In other words, effectuate the policy of the Act by assuring that our elections are conducted in an atmosphere in which the employees are able to exercise a free and untrammled choice.