

Wald Sound, Inc. and Miscellaneous Warehousemen, Drivers & Helpers Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Petitioner. Case 31-RC-2210

April 30, 1973

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS FANNING, KENNEDY, AND PENELLO

Pursuant to a Stipulation for Certification Upon Consent Election, a secret ballot election was conducted November 17, 1972, under the direction and supervision of the Regional Director for Region 31 among the employees in the stipulated unit described below. At the conclusion of the election, the Regional Director served on the parties a revised tally of ballots which showed that, of approximately 165 eligible voters, 178 cast ballots, of which 94 were for, and 57 against, the Petitioner, 1 ballot was void, there were 5 challenged ballots remaining undetermined, and 21 challenges were sustained. The remaining challenged ballots were insufficient in number to affect the results of the election. The Employer filed timely objections.

In accordance with the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, the Regional Director conducted an investigation and on January 5, 1973, the Regional Director issued and duly served on the parties his Report on Objections (pertinent portions attached as Appendix) recommending that the objections be overruled and that Petitioner be certified as the exclusive collective-bargaining representative in the stipulated unit. Thereafter, the Employer filed timely exceptions to the Regional Director's report and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this case the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
2. The labor organization involved claims to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
4. The parties stipulated and we find that the following employees constitute an appropriate unit for

the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees, shipping and receiving employees, warehousemen, truck drivers, leadmen and leadladies employed at the Employer's plant at 11131 Dora Street, Sun Valley, California. Excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

The Board has considered the Regional Director's report and the Employer's exceptions and brief and the entire record in this case and hereby adopts the Regional Director's findings, conclusions, and recommendations.¹

As the Petitioner has received a majority of the valid ballots cast, we shall certify it as the exclusive bargaining representative of the employees in the unit found appropriate.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that as a majority of the valid ballots has been cast for Miscellaneous Warehousemen, Drivers & Helpers Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, pursuant to Section 9(a) of the Act, the said labor organization is the exclusive representative of all the employees in the unit found appropriate herein for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.

MEMBER KENNEDY, dissenting:

I do not share my colleagues' opinion that the exceptions herein "raise no material and substantial issues." I do not think this case can be distinguished in principle from *D & N Delivery Corporation*, 201

¹ In our opinion the exceptions raise no material and substantial issues of fact or law which would warrant reversal of the findings and recommendations of the Regional Director

While we view the Board agent's choice of language as unfortunate, and to be avoided, we agree with the Regional Director's finding that the language, viewed in context, simply indicates that in the Board agent's view the new Board agents who accompanied her were participating in an election presenting unusual complications. Moreover, there is no way in which her remark, made after the ballots had been cast, could have affected the election results *D & N Delivery Corporation*, 201 NLRB No. 37, is distinguishable. In that case the Board was concerned that the Regional Director's action in counting the ballots prior to the filing of the request for review in breach of the Rules and Regulations may have created the appearance that the Board had prejudged the issues as to the eligibility of the trainees. Here the Employer does not contend that the Board agent's remark indicated that the Board may have prejudged any of the issues. To the contrary, the Employer states that while the only remaining issue, the challenges, remained technically determinative this issue could not have affected the outcome of the balloting. The Employer notes that the names of more than half of the 39 challenged voters were not on the *Excelsior* list and that these employees were conceded by the Employer to be ineligible to vote (and that it agreed with 22 of the challenges). As the margin was 38, the remaining challenges were insufficient to affect the outcome of the election.

NLRB No. 37, in which I joined my two colleagues on this panel in ordering a new election because the Regional Director's breach of the Board's Rules and Regulations may have created the appearance that the Board had prejudged the issues with respect to certain challenged ballots.² It seems to me that we cannot escape the conclusion that the Board agent appeared to have prejudged the election results by her announcement in the presence of the parties, "You've got yourself a winner."³ This statement was made at a time when the results were inconclusive by reason of the fact that the unresolved challenges were determinative of the election. I cannot accept the conclusion of the Regional Director that the reasonable interpretation of the "winner" remark is that the new Board agents "had partaken in an election presenting unusual complications." Is the Employer compelled to accept the Board agent's explanation to the Regional Director as to what she intended by her "unfortunate" language without even a hearing? I think not.

The Board agent's comment does not inspire confidence in the impartiality of the Board's election processes. Plainly, her conduct was a departure from the standards which the Board seeks to maintain. See *Athbro Precision Engineering Corp.*, 166 NLRB (1967), where the Board stated:

The Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures. The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election.

Chief Judge Bailey Aldridge expressed the view of the First Circuit in *N.L.R.B. v. Athbro Precision Engineering Corp.*, 423 F.2d 573, 575 (1970), as follows:

We cannot think that the Board, any less than a court, is uninterested in maintaining, as well as fairness, the appearance of fairness. The Board's public image provides the basis for its existence. The re-running of an occasional election is a small price to pay for the preservation of public respect.

When unions and employers invest substantial time, effort, and money in an organizational campaign, it is incumbent upon the Board to conduct an election in a manner which inspires confidence in the impartiality and competence of the Board and its

agents. There is no function or mission of this agency of greater importance than running fair elections.

I am unwilling to ignore the conduct of the Board agent in this case. Nor am I willing to accept the explanation of the new employees as to their subjective understanding of the "winner" remark. Either the election should be voided and a new one conducted, or a hearing held.

APPENDIX

The objections in their entirety are set forth in the indented paragraphs below.

(1) Immediately following the physical counting of the ballots on November 17, 1972, and in the presence of Peter Wald, president of the Employer, Howard Hay of Paul, Hastings, Janofsky & Walker, one or both of the employees of the Employer who acted as observers selected by the Employer, Rudy Heredia, a representative of Petitioner, and two other individuals identified as attorneys newly employed by the 31st Region, Field Examiner Jerilou H. Cossack, said apparently directing her statement to the two new Board lawyers, that they were very "fortunate" or "lucky" in that this was their first experience with an election and that they had gotten themselves a "winner."

When Field Examiner Cossack made the above remark, the count showed 88 votes for Petitioner, 50 votes against Petitioner, and 39 challenged ballots, one of which was cast by Tobias L. Guerrero, a former employee of the Employer who is alleged in Case No. 31-CA-3291 to have been discriminatorily discharged. The election thus was an apparent winner for the Petitioner. It was in no sense a winner for the Employer.

Thus, the reference to the election by Field Examiner Cossack as a "winner" constituted a partisan characterization which clearly violates the principles expressed in *Athbro Precision Engineering Corp.*, 166 NLRB 966 (1967) as follows:

The Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures. The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election.

² This case arises in the same region as *D & N Delivery Corp.*, *supra* It is also the same region in which *Alladin Plastics, Inc.*, 182 NLRB 64, arose.

³ See the attached Appendix for a full statement of the circumstances surrounding the "winner" remark

The investigation discloses that two recently employed field attorneys accompanied Field Examiner Cossack to the election so that each might observe his first Board-conducted election and assist in its conduct. Although the polling itself was uneventful, except for the large number of challenged ballots, the preelection conference was marked by the late arrival of the Petitioner representative, his demand that the election be delayed to afford him time to recruit a second observer, and his demand for changes in the physical voting arrangements at a time when it was too late to effectuate such changes. The postelection meeting was marked by protests from both parties concerning the temporary absence of the observers and the refusal of the Petitioner's representative to agree to the resolution of any challenges. It was in this context that Mrs. Cossack, after the votes had been counted, remarked to her associates that they were fortunate because this was their first case and they had gotten "a winner." Mrs. Cossack's associates understood her remark to mean that they had partaken in an election presenting unusual complications. It is difficult to see what other implication could reasonably have been attached to her remarks, particularly inasmuch as the results of the election at that time were indecisive. Moreover, there is no way in which her remarks, made after all the ballots had been cast, could in any way have affected the election or its results. The [Regional Director] concludes, therefore, that the objection is without merit.

(2) Immediately following the closing of the polls at 4:00 p.m. on November 17, 1972, and before the ballot box was opened to count the ballots, Field Examiner Cossack dismissed the observers for both the Employer and the Union. A representative of the Employer became aware of the fact that the two observers selected by the Employer were leaving the premises and they were instructed by a representative of the Employer to return for the counting of the ballots. The individuals referred to under objection (1) above convened, following the closing of the polls, in the office of Peter Wald, the president of the Employer. Mr. Heredia, the representative of Petitioner, objected to the counting of the ballots when the observer appointed by the Union was not present and had been dismissed. Mr. Hay, representing the Employer, agreed that the observers should not have been dismissed. Over Mr. Heredia's objection, Field Examiner Cossack proceeded to count the ballots. The foregoing clearly violated the procedures required by the Board in the conduct of elections, and specifically those set forth in Section 11340.2 of the Board's Field Manual.

The investigation discloses that at 4 p.m., the scheduled closing time, Mrs. Cossack announced that the polls were closed and the observers then signed the Certification on Conduct of Election. One of the Employer's observers, who speaks Spanish but little or no English, asked the bilingual Employer observer if he could leave. His request was relayed to Mrs. Cossack and she replied that all of the observers could leave. The Petitioner's observer left the Employer's premises immediately. He states that he did not ask for or receive permission to leave but left because the Petitioner representative had not asked him to stay after the polls closed. The two Employer observers walked to the company parking lot where the Employer's president, whose office window overlooks the parking lot, noticed them about to drive away and directed them to come to his office instead. The Employer's attorney went to the polling area, arriving there a few minutes after 4 p.m. while the Board agents were still folding the collapsible voting booths and packing away the remaining election materials. The Board agents, accompanied by the Employer's attorney, then carried the ballot box to the office of the Employer's president. The Petitioner representative and the two Employer observers were present in the office when they arrived. The Petitioner representative expressed concern because of the absence of his observer but when efforts to locate the Petitioner's observer proved unsuccessful, the ballot box was opened and the ballots counted. One Employer observer was released after the count at the request of the Employer's president, the other Employer observer remained until after the Board agents left.

Upon careful consideration of the facts disclosed by the investigation, none of which is in dispute, the [Regional Director] finds that the procedures followed did not in any way violate procedures required in the conduct of elections or, specifically, the procedures set forth in Section 11340.2 of the Board's Internal Instructions and Guidelines.

It will be noted that the Board agent did not prohibit the observers from staying after the close of the polls, she merely told them they could leave when the Employer's bilingual observer made it clear that they were anxious to do so. The Employer was in no way prejudiced because, in fact, its observers were present for the counting of the ballots. There is no rule or requirement that the persons who act as authorized observers in the counting and tabulating of ballots be the same individuals as those who are the authorized observers in the conduct of the balloting. It is noted in the present case that, although both of the Employer's election observers were present at the count, the tally of ballots was signed by the Employer's attorney as authorized observer in the

counting and tabulating of ballots. There is no allegation or evidence that the security of the ballot box was in any way compromised, and the [Regional Director] finds that its security was protected at all times. The [Regional Director] concludes that the second of the Employer's objections is without merit.

(3) The Employer also objects to conduct by rep-

resentatives of Petitioner which affected the results of the election, including unlawful promises and threats and misrepresentation of facts.

The Employer has failed to offer any evidence in support of its third objection and no such evidence has been uncovered in the course of the investigation. The objection, therefore, is without merit.