

Club Demonstration Services and Local 908, Service and Industrial Employees of North America, Petitioner. Case 22-RC-10614

May 9, 1995

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, COHEN, AND TRUESDALE

The National Labor Relations Board has considered objections to an election held by mail ballot from May 27 to June 9, 1992, 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 9 for and 4 against the Petitioner, with 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions¹ and briefs, and has decided to adopt the hearing officer's rulings, findings, and recommendations only to the extent consistent with this Decision and Direction of Second Election. Contrary to the hearing officer, we find merit to the Employer's Objection 1, and set the election aside because the election notices were not posted for 3 full working days before the election as required by Section 103.20 of the Board's Rules and Regulations.

I. THE FACTS

The facts are not in dispute. In Objection 1, the Employer contends that the election should be set aside because the Board's notices of election were not delivered to the Employer in a timely manner and, therefore, were not posted for 3 full working days prior to 12:01 a.m. on the day of the election as defined in and required by Section 103.20 of the Board's Rules.

Section 103.20 provides as follows:

(a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively

¹ In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendations overruling Objections 2, 3, and 4.

deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

(d) Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under provisions of section 102.69(a).

The parties' Stipulated Election Agreement provided that the ballots in the instant mail ballot election were to be mailed from the Regional Office on Wednesday, May 27, 1992, thereby commencing the election on that date.² As of Tuesday, May 19, the Employer had not received the notices of election. On that day, the Employer's attorney called the Regional Office and informed the Board agent in charge of the election that no notices had been received. The Employer's attorney visited the Regional Office on Thursday, May 21, and received five notices of election.³ Thus, sometime after the start of the business day on Thursday, May 21, was the earliest date notices could possibly have been posted.

II. THE HEARING OFFICER'S REPORT

The hearing officer found that the notices were required to be posted no later than 12:01 a.m. on Thursday, May 21. Monday, May 25, was the Federal Memorial Day holiday. The election commenced at 5:15 p.m. on Wednesday, May 27, when the ballots were deposited in the mail by the Regional Office. Thus, the hearing officer reasoned that the 3 working days before the election included Thursday, May 21; Friday, May 22; and Tuesday, May 26. Accordingly, the election notices were not posted for 3 full working days prior to the election.

The hearing officer determined that under Section 103.20(c) an employer must notify the Regional Office of its failure to receive notices at least 5 working days prior to 12:01 a.m. of the day of the election. Accordingly, he found that the Employer was required to notify the Regional Office that no notices had been received by the close of business on Monday, May 18, in order to be permitted to raise this objection. The hearing officer concluded that, by failing to notify the

² All dates hereafter are in 1992 unless specified otherwise.

³ When the Employer's attorney advised the Regional Office on May 19 that the notices had not been received, Regional Office personnel told the attorney that the notices were not ready and that they would be mailed on Wednesday, May 20. The notices were, in fact, mailed by the Regional Office on May 20 and were received by the Employer on May 22. The Regional Office, however, mailed the notices to the Employer's headquarters in Sterling, Virginia, and to the Employer's attorney's office in New York City, rather than to the Edison, New Jersey location where the unit employees are employed.

Regional Office “at least five working days prior to the commencement of the election that it had not received copies of the election notice,” the Employer was estopped from raising the fact that notices were not posted 3 days prior to the election as objectionable conduct which would warrant setting aside the election.⁴ Therefore, the hearing officer recommended overruling the objection and certifying the Petitioner as the collective-bargaining representative of the unit employees.

III. THE EMPLOYER’S EXCEPTIONS

In its exceptions, the Employer states that it is undisputed that the notices of elections were not posted “at least 3 full working days prior to 12:01 a.m. of the day of the election,” as required by Section 103.20(a) of the Board’s Rules. Therefore, the Employer argues, the election must be set aside under Section 103.20(d), unless the Employer is estopped under Section 103.20(c) from objecting to the late posting.

The Employer further argues that the hearing officer’s estoppel finding is based on a misreading of Section 103.20(c). The Employer points out that, unlike Section 103.20(a), which requires notice posting at least 3 working days “prior to 12:01 a.m. of the day of the election,” Section 103.20(c) merely requires notification to the Regional Office of nonreceipt of the election notices at least 5 working days “prior to the commencement of the election.” Therefore, the Employer reasons, it complied with Section 103.20(c) by notifying the Regional Office of the nonreceipt of the election notices on May 19, within “5 working days prior to the commencement of the election” on May 27. Accordingly, the Employer contends that its objection should be sustained and the election set aside.

IV. DISCUSSION AND FINDINGS

We find that the Employer is not estopped from raising Objection 1 because Section 103.20(c) of the Board’s Rules is ambiguous and the Employer has offered a reasonable interpretation of the rule.

The Employer has at least a tenable argument that if the Board had intended the rule to be interpreted as the hearing officer construed it, the Board would have included the “prior to 12:01 a.m.” language in Section 103.20(c), as it had in Section 103.20(a). Because the rule is ambiguous, and because the Employer’s reading of the rule is reasonable, we believe it would be in-

⁴The hearing officer’s report also contained the following additional rationale:

Furthermore, the instant record reveals that the employees involved herein work schedules that include weekend hours on a regular basis. Accordingly, it cannot be concluded that the employees were not [sic] exposed to the Notices of Election for less than three actual working days prior to the election.

equitable to hold that the Employer is estopped from objecting to the late posting of the election notices.

The rule, however, must be clarified to prevent this problem from arising in future cases. We find that the hearing officer’s reading is the preferable construction. It is consistent with the Board’s determination, as set forth in Section 103.20(b), that a “working day” for purposes of the notice-posting requirement means an entire 24-hour period, and not merely a portion of a calendar day. Most significantly, the hearing officer’s interpretation provides the Regional Office with a greater amount of time in which to correct the situation and avoid eventually having to set the election aside. Thus, unlike the Employer’s position, the hearing officer’s construction of Section 103.20(c) provides the Regional Office 2 full “working days” to transmit the notices to the Employer before the beginning of the 3-day period during which they must be posted. Given the vagaries of the United States mail and other delivery services, it seems impracticable to expect the election notices to be sent from the Regional Office and be received by an employer in less than 2 days. We hold that the hearing officer’s interpretation best effectuates the purpose of the rule and that it will be the interpretation that will be applied in future cases.

Accordingly, in all cases in which the petition is filed after the date of today’s decision, we will interpret Section 103.20(c) as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. The Regional Offices will refer to this clarification of Section 103.20(c) when providing employers written notification of their notice-posting obligations.

Turning to the merits of Objection 1, it is well settled that the provisions of Section 103.20 of the Board’s Rules are mandatory in nature, and that “[f]ailure to post the election notices . . . shall be grounds for setting aside the election.”⁵ In addition, the rule does not provide for any method of compliance other than posting. “[W]hile notices may be directly mailed to eligible voters in a mail ballot election, as they were here, that practice does not eliminate a Regional Office’s responsibility to timely furnish employers with election notices or the employer’s obligation to timely post such notices.” *Id.* at 572. A “substantial compliance” inquiry is impermissible because “the Rule’s provisions do not allow for any analysis as to the actual impact of noncompliance on a particular election.” *Id.*⁶ The Rule itself does not

⁵*Terrace Gardens Plaza*, 313 NLRB 571 (1993).

⁶ See also *Smith’s Food & Drug*, 295 NLRB 983 (1989). (Notwithstanding a Regional Director’s finding that an employer had “substantially complied with the Board’s rule,” the Board held that the union’s objection must be sustained and the election set aside because the election notices were not posted 3 full days before the election as required by Sec. 103.20.)

provide for any exceptions or any inquiry into “substantial compliance,” or into the extent of the effect on the election results. Instead, it states, at Section 103.20(d), that failure to post the notice for the required period of time “shall be grounds for setting aside the election” upon the filing of proper objections.⁷

In sum, because the Employer is not estopped from objecting to the late posting of the election notices and because it is undisputed that the notices were not posted 3 full days before the election, we sustain the Employer’s objection and direct a second election.

[Direction of Second Election omitted from publication.]

CHAIRMAN GOULD, dissenting in part.

I agree with my colleagues’ finding that the Employer was not estopped from raising its Objection 1 and their clarification of Section 103.20(c) of the Board’s Rules and Regulations for future cases. I dissent, however, from their sustaining Objection 1.

In light of *Smith’s Food*, the hearing officer in the instant case erred in considering the work schedules of the employees and whether they were “exposed” to the election notices. *Smith’s Food* makes clear that such considerations are not relevant.

Although we do not adopt the “substantial compliance” standard of our dissenting colleague, we note that, contrary to his recitation of the facts, the Employer, through counsel, received notices on May 21, and there is no evidence concerning the date when the election notices were actually posted.

⁷The rule thus modified a previously proposed version that simply implied that a failure to post would constitute objectionable conduct. See Explanatory Statements in Sec. 103.20 of the Board’s Rules and Regulations.

If he were writing on a clean slate, Member Cohen would be disinclined to adopt a per se rule that operates irrespective of impact. He agrees with his colleagues that the extant rule adopts this approach, however, and he will enforce the rule as written and intended.

On the facts of this case, I would not set the election aside because the election notices were not posted by the Employer for 3 full working days prior to the election. It is undisputed that although the notices should have been posted on May 21, the Employer did not receive them from the Regional Office until May 22, at which point the notices were promptly posted.¹ Further, each employee received a notice with his mail ballot.

Under these circumstances, I find that there was substantial compliance with the 3-day posting requirement of Section 103.20(a) of the Board’s Rules and Regulations. The primary purpose of the posting requirement is to ensure that the employees are fully informed of their rights and the Board’s procedures with respect to the election. In light of the election notice having been posted for 2 working days prior to the mailing of the ballots and having been received by each employee with his ballot, this purpose has been satisfied. Further, the Employer, as the objecting party, has failed to meet its burden of establishing that the election was affected in any way as a result of the late posting of the election notices. Finally, my colleagues’ decision to set aside the election in this case has the effect of penalizing the Petitioner for the failure of the Regional Office to prepare and mail the election notices in a timely manner. In sum, I subscribe to the dissenting opinion of former Member Devaney in *Terrace Gardens Plaza*, 313 NLRB 571 (1993), and I accordingly would certify the Petitioner as the collective-bargaining representative of the unit employees.

¹This delay was in no way attributable to the Employer. Rather, the Regional Office did not mail the notices to the Employer until May 20 and then failed to mail them directly to the facility where the unit employees are employed.