

**Allied Acoustics, Inc. and Arizona State District Council of Carpenters and its affiliated Locals, AFL-CIO, Petitioner.** Case 28-RC-4838

December 31, 1990

DECISION AND ORDER REMANDING FOR HEARING

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held July 12, 1990, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The corrected tally of ballots shows 13 for and 10 against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief and adopts the Regional Director's findings and recommendations only to the extent consistent with this decision.

The Employer's Objection 2 alleged that "The Board revised the Tally of Ballots to show one more vote for the Union than was counted during the post Election conference, leaving the impression of tampering with the ballots and raising a question as to whether the ballot—if any—was cast for the Union or the Employer." The Regional Director's investigation revealed that commingled ballots from separate election locations were opened and counted by a Board agent in the presence of the parties' representatives at the Board's Regional Office on July 13, 1990. The tally of ballots served on and signed by the parties at that time showed 12 votes for and 10 against the Petitioner, with 1 nondeterminative challenge, making a total of 23 valid ballots.<sup>1</sup>

Approximately 1 hour after this tally was served and the parties' had left the Board's Regional Office, counsel for the Employer telephoned the Board agent and expressed the belief that 24 employees had voted in the election. The Board agent immediately recounted the ballots in private. The recount disclosed that one additional ballot had been cast for the Petitioner. Following a second recount confirming that 24 valid ballots had been cast, the Board agent prepared and mailed to the parties on July 16 a corrected tally of ballots reflecting the additional vote for the Petitioner.

In his report, the Regional Director recommended sustaining the Employer's Objection 2 and setting aside the election on that basis. Noting that the Board seeks to maintain high standards of integrity and neutrality in its conduct of representation elections, the Regional Director summarily stated:

Although the investigation of Employer Objection 2 failed to disclose either an allegation or evidence that the Board agent marked or altered any ballots, I am constrained to conclude that the . . . circumstances surrounding the counting of the ballots in this case tend to destroy confidence in the Board's election process, impugn the standards of integrity and neutrality, and raise doubts as to the fairness and validity of the election results.

In its exceptions, the Petitioner contends that Board precedent requires objective evidence of the potential impact of a Board agent's conduct on the election in order to establish the reasonable possibility that the election process has been tainted. The Petitioner argues that evidence of conduct occurring after the conclusion of voting and resulting from a simple error in failing originally to count a nondeterminative ballot for the Petitioner is insufficient to establish a reasonable belief that the integrity and neutrality of the Board's processes has been compromised. We find merit in the Petitioner's exceptions.

In order to set aside an election on the basis of Board agent conduct, the Board must be presented with facts raising a "reasonable doubt as to the fairness and validity of the election." *Polymers, Inc.*, 174 NLRB 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970). The evidence in support of the Employer's objection does not present such facts. Each party observed the initial counting of ballots and signed the tally of ballots without questioning its accuracy. The Employer itself subsequently raised the possibility that another ballot existed. The Board agent then conducted a recount of the ballots, revealing an additional vote for the Petitioner. There is no evidence that all the ballots cast were not in the Board's custody at all times subsequent to the election. There is no evidence raising doubt about the accuracy of the recount. There is no allegation or evidence that the discrepancy between the original and corrected tally of ballots resulted from anything other than an error in counting. By either tally, a majority of the valid ballots were cast for the Petitioner.

In sum, the Board agent apparently made a simple postelection mistake in counting ballots and corrected that mistake in response to the Employer's inquiry. This is not objectionable misconduct. In the absence of any affirmative indication of tampering, fabrication, misplacement, or loss of the uncounted ballot, or any factual issue concerning the accuracy or integrity of the Board agent's recount, it is not reasonable to infer that the Board's neutrality was impugned or that the parties' confidence in the election process was undermined. *Polymers, Inc.*, *supra* at 283 (1969); *N. A. Woodworth Co.*, 115 NLRB 1263, 1264 (1956).

<sup>1</sup> There was also one void ballot, which is not at issue here.

Based on the foregoing, we overrule the Employer's Objection 2. With respect to the Employer's three remaining objections concerning alleged initiation fee waivers, electioneering, and misrepresentation by the Petitioner, we adopt the Regional Director's finding that they raise substantial issues of fact which can best be resolved by a hearing.

#### ORDER

It is ordered that a hearing be held before a duly designated hearing officer for the purpose of receiving evidence to resolve the issues raised by the Employer's Objections 1, 3, and 4.

IT IS FURTHER ORDERED that the designated hearing officer shall prepare and serve on the parties a report containing credibility resolutions, findings of fact, and recommendations to the Board as to the disposition of these objections. Within 14 days from the date the report issues, either party may file with the Board in Washington, D.C., eight copies of exceptions. Immediately on the filing of exceptions, the party filing them shall serve a copy on the other parties and shall file a copy with the Regional Director. If no exceptions are filed, the Board will adopt the recommendation of the hearing officer.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 28 to arrange the hearing.

MEMBER OVIATT, dissenting.

I agree with the Regional Director that the private recount of ballots by the Board agent following this

election could raise questions in the minds of employees about the integrity of the election process. As I have stated in my recent dissenting opinion in *Show Industries*, 299 NLRB No. 101 (Sept. 7, 1990), the Board must be assiduous in avoiding even the appearance of condoning irregularities in its election procedures to ensure that the process is not compromised and that confidence in that process is not undermined.<sup>1</sup>

It is undisputed that, at the original ballot count, the Board agent, in the presence of representatives of both parties, announced that 23 valid votes had been cast in the election and that 12 votes had been cast for the Petitioner. Only after the tally of ballots had been prepared and served on the parties—and then only upon prompting by one of the parties—did the Board agent conduct a recount and determine that, in fact, 24 employees had voted and that the Petitioner had obtained 13 votes instead of 12. The recount was conducted in private, ostensibly for no other reason than that the parties had left the Regional Office. Thus, the defective count might easily have been cured by the Board agent's simply reconvening the parties for the recount, since it appears that all ballots were in the Board's custody at all times.

I do not share my colleagues' confidence that voters would not question this irregularity, and with it the Board's commitment to election fairness. Because, in my view, the undisputed facts require that the election be set aside, I would not order a hearing in this case.

<sup>1</sup> See also *Brink's Armored Car*, 278 NLRB 141 (1986).