Pruner Health Services, Inc. and Hospital & Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, Petitioner. Case 31-RC-6760

May 15, 1992

DECISION AND ORDER DIRECTING HEARING

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

The National Labor Relations Board has considered determinative challenges in an election held January 18, 1991, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of the ballots shows 28 for and 29 against the Petitioner, with 3 challenged ballots, a sufficient number to affect the results of the election.

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 and Order. The Regional Director recommended that challenges to two ballots be overruled and the challenge to a third ballot be sustained. Contrary to the Regional Director, we find, for the reasons that follow, that the challenge to Agee's ballot raises substantial and material issues warranting a hearing.

Region 31 conducted an election simultaneously at three separate facilities between the hours of 6:30 a.m. and 10:30 a.m. Agee, who did not work on election day, was scheduled to vote at the Calabasas, California facility, on the second floor of the Employer's crew quarters in space leased from the Las Virgenes Unified School District.

Agee averred that he arrived at the Calabasas facility about 10:28 a.m., parked his motorcycle in the outside parking lot, and attempted to open the ground floor door which provided access by means of stairs to the second-floor polling area. He found the door locked,² and, after banging on the door several times and getting no response, he went to another door where he was unable to gain access to the building. Agee then returned to the first door, again knocked loudly, and again was unable to enter. He decided to wait. Two or three minutes later, an employee (elsewhere identified as the Employer's observer, Jonas Escalera) opened the downstairs door and informed Agee that he was late.

Agee then encountered the Board agent and the Employer's director of field services, Barry Fisher. The Board agent permitted Agee to cast a challenged ballot.

In his affidavit, Fisher averred that he waited outside the facility until about 10:32 or 10:33 a.m., after the polls had closed. He then opened the unlocked groundfloor door³ and proceeded to the polling room. There he observed the Board agent seal the ballot box and Escalera sign the taped box. The Board agent then dismantled the voting booth and obtained Escalera's assistance in taking it downstairs. Fisher, who was then standing at the window of the polling room overlooking the parking lot, saw Agee drive up on a motorcycle and park it next to Fisher's car. After the Board agent left the polling room, Fisher locked the polling room door. As Fisher and the Board agent descended the stairs, they met Agee walking up the stairs. Agee asked whether he could still vote. The Board agent asked Fisher what time it was, and Fisher replied that it was 10:37. The Board agent told Agee that he could vote a challenged ballot, which Agee proceeded to do.

The Board agent stated that when Agee first met Fisher and the agent on the stairs, Agee told her that he had been at the premises for approximately 15 minutes, but could not get in because the downstairs entrance was locked. The Board agent stated that neither she nor Escalera heard any knocking at the door. According to the Board agent, Agee voted at approximately 10:42 a.m.

The Regional Director, relying principally on *New England Oyster House*, 225 NLRB 682 (1976), recommended overruling the challenge to Agee's ballot because Agee was only a few minutes late and the ballot box had not been opened yet. In *Monte Vista Disposal Co.*, 307 NLRB 531, issued today, we overruled *New England Oyster House*, holding instead that the ballots of late-arriving voters shall not be counted, in the absence of extraordinary circumstances, unless the parties agree to allow the votes.

We find that there are disputed factual issues that must be resolved in order to determine whether extraordinary circumstances warrant counting the ballot of the late-arriving employee. Here, the late voter alleged that he arrived at the facility in a timely manner

¹The Employer excepted only to the Regional Director's overruling the challenge to employee John Agee's ballot. In the absence of exceptions, we adopt, pro forma, the Regional Director's recommendations to overrule the challenge to Richard Kimbell's ballot and to sustain the challenge to Tim Crawford's ballot.

² Agee claimed that, based on his experience at this facility, the door locks automatically unless an object has been inserted to keep it open.

³ Fisher observed a sign on the door stating: "Must be open during business hours." Fisher also stated that, during the few months that the Employer had been leasing the school property, he had visited the facility at least 10 to 12 times and had never known this door to be locked.

The Employer also submitted a letter from the assistant superintendent for the Las Virgenes Unified School District stating, inter alia, that: (1) the building was open for normal operation on the day of the election; (2) the exterior doors were kept unlocked during the business day; (3) school records show no difficulties with respect to public access to the building; and (4) major conferences were held in the building on that day, with numerous people "coming and going . . . beginning at 9:00 a.m."

and would have presented himself at the polling room on time if the outside doors had been unlocked. If Agee's allegations are true, we would find that the challenge to Agee's ballot should be overruled under the extraordinary circumstance exception to the *Monte Vista* rule. The Employer, however, has submitted an affidavit and other evidence indicating that Agee arrived late at the facility and that the outside door was not locked. Thus, there are credibility issues to be resolved on the key factual issue regarding Agee's tardy ballot, i.e., whether he arrived at the building before 10:30, and, if so, whether the doors to the facility were locked. Accordingly, we shall order that a hearing be held to resolve these issues.

ORDER

It is ordered that a hearing be held before a designated hearing officer for the purpose of receiving evidence to resolve the issues raised by the challenge to the ballot of John Agee.

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

the challenge. Within 14 days from the date the report issues, any 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 recommendations of the hearing officer.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 31 to arrange this hearing.

MEMBER DEVANEY, dissenting.

It is contended that employee Agee arrived at the polls a few minutes after they were scheduled to close. Nonetheless, he cast his ballot before the ballot box had been opened. In my view, the Regional Director properly found under established Board precedent that Agee's ballot should be counted. Accordingly, and for the reasons set forth in my dissenting opinion in *Monte Vista Disposal Co.*, 307 NLRB 531, issued today, I would adopt the Regional Director's recommendation to overrule the challenge to Agee's ballot. I therefore dissent from my colleagues' reversal of the Regional Director's decision.