Laidlaw Transit, Inc. and Self-Help, Arkansas, Local 2001, a/w Office *and* Professsional Employees International Union, AFL–CIO, Petitioner. Case 26–RC–7948

December 23, 1998

DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS FOX, HURTGEN, AND BRAME

The National Labor Relations Board, by a three-member panel, has considered a challenge and objections to an election held October 23, 1997, 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 97 votes for and 97 ballots against the Petitioner, with 1 challenged ballot, a number sufficient to affect the results.

The Board has reviewed the record in light of the exception and brief, has adopted the hearing officer's findings[1] and recommendations, and finds that the election must be set aside and a new election held.

The Board agent allowed employee Connie Lewis, who arrived after the polls had closed, to cast a ballot which was subsequently opened and counted along with the other ballots cast and which, because of the closeness of the election, could have affected the result.[2] The Petitioner objected to the election on the basis that it was improper for the Board agent to have allowed Lewis to vote.[3] The hearing officer recommended that the objection be sustained and directed that a new election be held.

In sustaining the objection, the hearing officer rejected the Employer's contentions, first, that Lewis was delayed by rain and by the conduct of the Employer in assigning her duties that encroached on polling hours and, second, that the parties agreed to allow Lewis to vote. The hearing officer found no evidence to support the Employer's speculation that Lewis was prevented from timely reaching the polls either by the weather or by the Employer's conduct. The hearing officer further determined, based on his credibility resolutions, that the Board agent did not seek the positions of the parties and did not obtain their agreement before allowing the vote. As the Board agent accepted the ballot outside polling hours and in the absence of an agreement by the parties or extraordinary circumstances, the hearing officer concluded that the election should be set aside.

We agree. In *Argus-Press Co.*, 311 NLRB 24 (1993), in which the Board agent had allowed three employees to vote after the scheduled time for closing of the polls, the Board declined to set aside the election because the three employees' votes could not have affected the outcome of the election. By contrast, here the vote cast by the late-arriving employee could be determinative. Where a procedural impropriety may have affected the results of an election, the Board will order a second election. See, e.g., *B & B Better Baked Foods,* 208 NLRB 493 (1974) (new election ordered where votes of those excluded from voting because of Board agent's late arrival could have been determinative); *Harry Lunstead Designs Inc.*, 270 NLRB 1163 (1984) (election overturned where Board agent's erroneous instruction caused observer not to challenge determinative ballot).

Our dissenting colleague would remand the case to secure the Board agent's testimony, arguing that the Board agent is a critical and knowledgeable witness, and implying that the record is not "full" within in the meaning of Section 102.64(a) of the Board's Rules and Regulations without his testimony. We disagree with these propositions.

Remanding the case would require disregarding a reasoned and well-grounded credibility resolution. It would further require reversing a hearing officer's ruling without a showing of prejudicial error. The hearing officer ruled that sufficient evidence had been presented to enable him to decide whether the Board agent secured the parties' consent for Lewis to vote. The hearing officer heard six witnesses, including every Employer and Petitioner representative who was present. He specifically discredited the witnesses who testified that the Board agent had sought the parties' positions and secured agreement. The dissent presents no basis for reversing the hearing officer's ruling that the record was "full" other than the view that it would be more prudent to hear the Board agent. Indeed, the Employer made no attempt to have the Board agent testify.[4]

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless a clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

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

[2] Since the Board has adopted the hearing officer's sustaining of the challenge to another ballot, the vote is tied.

[3] We note that the Petitioner did not register a challenge to Lewis' eligibility to vote at the time she cast her ballot and that as a general rule, the Board does not allow parties to use the objection procedure to make postelection challenges. See, e.g., *Laidlaw Transit, Inc.*, 322 NLRB 895 (1997). Here, however, because Lewis arrived after the poll closing time and there was no agreement by the parties to allow her to vote, it was the Board agent's obligation to challenge her ballot. See NLRB Casehandling Manual, Representation Proceedings (Part Two), Sec. 11324 (noting that a challenge by the Board agent "will then permit an orderly investigation of all the circumstances surrounding the matter in postelection proceedings and be of assistance to the Region and to the Board in determining whether the late ballots should be counted"). See also *Monte Vista Disposal Co.*, 307 NLRB 531, 533 fn. 5 (1992). It is undisputed that the Board agent failed to challenge Lewis' vote as required. Thus, we regard the Petitioner's objection not as a postelection challenge to Lewis' eligibility but as a timely objection to the Board agent's conduct of the election.

[4] As our colleague acknowledges, it was the Petitioner who attempted to call the Board agent as a witness and whose request for a

Further, to avoid the appearance of partiality, the Board has a strong and long-standing policy against Board employees appearing as witnesses in Board proceedings. Special application must be made to the General Counsel in order for a Board agent to take the stand. See Rules section 102.118(a)(1). Generally, unusual circumstances must be present to justify overriding the prohibition. Unusual circumstances are not present where other witnesses are available and the issues can be resolved through credibility resolutions. See generally *Sunol Valley Golf Co.*, 305 NLRB 493 (1991), supplemented by 310 NLRB 357 (1993), enfd. 48 F.3d 444 (9th Cir. 1995); *Palace Club*, 229 NLRB 1128 fn. 3 (1997), enfd. in part sub. nom. *NLRB v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980), cert. denied 451 U.S. 906 (1981).

MEMBER HURTGEN, dissenting.

I would remand this case to obtain Board agent testimony on the critical issue of whether the parties agreed to allow the employee to vote. The employee appeared at the polls a few minutes after closing. The Board agent permitted the employee to vote, and the result was a 97–97 tie.

There was conflicting testimony as to whether the Board agent secured the agreement of the parties to permit the vote. The hearing officer credited those who testified that no agreement was secured. He, therefore, recommended that the election be re-run.

It seems to me that the case cries out for the testimony of the Board agent. He would be the person through whom any agreement would be reached. Further, he would be a neutral, unbiased, and knowledgeable witness.

continuance in order to do so was denied by the hearing officer. The Employer never sought the Board agent's testimony, and thus cannot claim to have been prejudiced by the absence of the Board agent's testimony. The Employer relied on the testimony of its own three witnesses, all of whom were discredited on the point as to which the Board agent would testify.

I recognize that the Board can simply take the testimony of the agents of the two parties, and seek to resolve credibility between them. In essence, this is what has been done. But, it seems more prudent to receive the critical testimony of the neutral Board agent, and to then resolve credibility.

I also recognize that it was *the Petitioner* who sought the testimony of the Board agent and sought a continuance to permit such testimony. The hearing officer rejected the request. The Employer does not (and perhaps could not) except to this ruling against the Petitioner. However, my position is not based on any injury or prejudice to the Employer. Rather, it is based on the interests of the Board. Thus, for the reasons indicated above, I would have the Board, sua sponte, call the Board agent and have him testify. The case involves a Board election, Board agent conduct, and Board resources (if another election must be held). Accordingly, I believe that the Board has a vital interest in ascertaining the facts.[1] The testimony of the Board agent can help us to ascertain those facts.[2]

Finally, I note that this is not a case where one party accuses the other of misconduct. In such a case, the board may be reluctant to have a Board agent testify as to the merits of such an accusation. By contrast, in the instant case, neither party accuses the other of misconduct. Rather, the case involves what the Board agent said and did. I would take his testimony on that matter.

[Direction of Second Election omitted from publication.]

[1] A hearing officer has the affirmative duty "to inquire fully into all matters in issue necessary to obtain a full and complete record." See Rules 102.64(a) and 102.66(b).

[2] Since the Board agent is under the supervision of the General Counsel, the General Counsel's consent to seek testimony must be secured. See Sec. 102.118. In order to assist the Board to resolve this representation case. I would urge the General Counsel to grant it.