

**Baker Victory Services, Inc. and Communications  
Workers of America, AFL-CIO, Petitioner.**  
Case 3-RC-10760

August 23, 2000

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX  
AND BRAME

The issue in this case is whether the election should be set aside in either of the separate voting groups of professional and nonprofessional employees because severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote. As explained below, we reaffirm the standard articulated by the Board in *V.I.P. Limousine, Inc.*, 274 NLRB 641 (1985). Applying that standard to the facts of this case, we find that the election conducted among the Employer's professional employees must be set aside.

Background

On December 17, 1998, the Regional Director for Region 3 issued a Decision and Direction of Election, pursuant to which an election was conducted among the Employer's professional and nonprofessional employees on January 14, 1999. The Employer subsequently filed objections to the election, contending primarily that severe winter weather conditions during the week preceding and on the day of the election denied the eligible voters an adequate opportunity to vote, such that a new election should be held.

The Regional Director thereafter issued a supplemental decision, overruling the Employer's objections. Applying the standard set forth in the plurality opinion of Members Stephens and Cohen in *Glass Depot, Inc.*, 318 NLRB 766 (1995), she concluded that a "representative complement" of eligible voters was able to vote despite the weather conditions. The Regional Director also found that the record, including the testimony of five employees about why they did not vote, did not establish that the weather conditions on the day of the elections constituted an extraordinary circumstance under Board law. Thus, she upheld the election and certified the Petitioner as the bargaining representative of the employees in both units. The Employer filed a timely request for review of the Regional Director's decision. The Board granted the request for review on August 5, 1999. The parties thereafter filed timely briefs on review.<sup>1</sup>

We have carefully considered the parties' briefs on review, as well as Board precedent, particularly *V.I.P. Limousine*, supra, and the three separate opinions in *Glass Depot*, supra. We conclude that the proper standard to be applied to the issue here is contained in *V.I.P.*

<sup>1</sup> The Petitioner has requested oral argument. The request is denied as the record and briefs adequately present the issues and the positions of the parties.

*Limousine*, i.e., an election should be set aside where severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote. Accordingly, we reaffirm that standard today, and we reject the "representative complement" standard set forth in the plurality opinion in *Glass Depot*. Applying the *V.I.P. Limousine* standard to the facts here, we find that the election should be set aside in the professional group (group A) because severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote.

Facts

The Employer operates early childhood programs (ECPs) in Buffalo, New York. As part of the ECPs, the Employer provides services for children (for example, early childhood services for infants, and special education services for children ages 3 to 5 years old) at its two school-based facilities,<sup>2</sup> as well as at children's homes and other locations. The Petitioner filed a petition seeking to represent various classifications of the Employer's ECP employees. The Regional Director directed an election, finding appropriate two separate units of employees: one consisting of all professional employees and the second consisting of all nonprofessional employees, voting groups A and B, respectively.<sup>3</sup> The professional employees include, inter alia, teachers, on-going service coordinators, caseworkers, developmental specialists, various salaried therapists, and therapists employed on a flat-fee-for-service basis (FFFS).

The full-time teachers and salaried therapists work on a 10-month school year schedule, and are *not* required to report to work when the school at which the ECP facility is located is closed due to inclement weather. In contrast, the service coordinators, caseworkers, and developmental specialists work a 12-month schedule, and are required to report to work even when the school facility is closed. Additionally, the FFFS employees, who comprise approximately half of the professional employee group, have widely varying work schedules and are not required to regularly report to the ECP facilities. Many of the FFFS employees maintain contact with the ECP facility solely by telephone, fax, or mail.

The nonprofessional employees include teacher assistants, personal care aides, and secretaries. Some of the nonprofessional employees work a 10-month schedule and others work a 12-month schedule. As with the professional employees, those nonprofessional employees who work a 10-month schedule are not required to report

<sup>2</sup> The larger of the two programs is conducted from a school facility in south Buffalo, the location at which the election was conducted.

<sup>3</sup> Consistent with the principles set forth in *Sonotone Corp.*, 90 NLRB 1236 (1950), the professional employees additionally were provided the opportunity to vote for inclusion in a unit with the nonprofessional employees or for separate representation.

to work when the school is closed,<sup>4</sup> but those who work a 12-month schedule are expected to report even when the school is closed.

During the week in which the election was held, the Buffalo area received a significant amount of snowfall: 7.5 inches on Monday, January 11, 1999;<sup>5</sup> 4 inches on January 12; 5 inches on January 13; and 3.2 inches on January 14, the day of the election. Additionally, data from the Buffalo weather service indicated that the city had received a total of 55.8 inches of snow during the first 2 weeks of January. As a result of the significant accumulation of snow, the mayor of Buffalo and President Clinton declared a state of emergency in the city for the period from January 11 to 19 (which entitled the city to Federal disaster assistance), and the school at which the election was to be conducted was closed on the day of the election.<sup>6</sup> The Employer's ECP facility at the school, however, remained open.

The election was conducted as scheduled on January 14. The results of the election revealed that the Petitioner received a majority of the votes cast in both the professional and nonprofessional voting groups. Among the professional employees, 32 of 51 eligible employees voted, with 17 voting for the Petitioner, 15 voting against the Petitioner, and 1 challenged ballot;<sup>7</sup> among the nonprofessional group, 19 of 21 eligible employees voted, with 17 voting in favor of the Petitioner and 2 voting against the Petitioner.

The Employer subsequently filed objections to the election, alleging that the severe weather conditions surrounding the election denied the employees an adequate opportunity to vote, thereby requiring that a new election be held in both the professional and nonprofessional units. The Regional Director, applying the "representative complement" test set forth by Members Stephens and Cohen in *Glass Depot, Inc.*, supra—pursuant to which an election would be set aside if an extraordinary circumstance resulted in the turnout of less than a "representative complement" of voters—concluded that a new election was not warranted.

The Regional Director found that although the weather conditions on the day of the election were poor, they did not constitute an "extraordinary circumstance." In this regard, the Regional Director found that there was no driving ban in effect on the day of the election, the parking lot at the Employer's facility had been plowed, and the Board agent as well as the employer and petitioner representatives and observers were able to travel to the

election site. The Regional Director also found that, among the five employees who testified concerning their failure to vote in the election, one attributed her failure to vote to illness, and the others chose not to drive to the polling place based on their perceptions of the severity of the weather/driving conditions or the mistaken assumption—which they did not attempt to verify—that the election had been postponed as a result of the school's closure. More significantly, despite the weather conditions, an examination of the number of voters who cast ballots revealed a 70.8-percent overall voter turnout rate (a 62.7-percent turnout rate among employees in voting group A, and a 90.5-percent turnout rate among employees in voting group B). Based on these rates of voter participation, in conjunction with her other findings, the Regional Director concluded that a "representative complement" of employees had voted in the election and the election results should therefore be certified.

#### Analysis

The issue in this case is whether the election should be set aside in either of the separate voting groups of professional and nonprofessional employees because severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote. The starting point for our analysis is the Board's decision in *V.I.P. Limousine, Inc.*, supra at 641. In that case, a severe snowstorm on the day of a deauthorization election resulted in 20 inches of snow, rendering navigation of area roads extremely difficult.<sup>8</sup> Only 67 of the approximately 89 eligible voters voted, and the tally was 37–30. Therefore, the number of nonvoters (approximately 22) was determinative of the outcome. Both the employer and the petitioner filed objections to the election, alleging that the severe snowstorm that developed during the polling period prevented a substantial number of eligible voters from reaching the polls and that the election should therefore be set aside. Based on the evidence concerning the weather and road conditions, the Board concluded that the election should be set aside because the snowstorm "affected the electorate as a whole" and "[a] substantial number of employees did not vote in the election." *Id.* The Board reasoned as follows:

The Board is responsible for establishing the proper procedure for the conduct of its elections. In carrying out this responsibility, a primary concern of the Board is whether employees are given a sufficient opportunity to vote. While the Board is not required to guarantee that every voter is able to get to the polls, when it is alleged that numerous employees were prevented from voting, the Board must assess whether the particular circumstances so affected

<sup>4</sup> According to one witness, however, several teacher assistants work a 10-month school year schedule, but nevertheless are expected to report to work on snow days.

<sup>5</sup> Unless otherwise noted, all dates are in 1999.

<sup>6</sup> The school was also closed the day preceding and the day following the election.

<sup>7</sup> The professional employees, by the same margin (17 to 15), voted against inclusion in the unit with nonprofessional employees.

<sup>8</sup> Statements from 11 of the 22 nonvoting employees indicated that the blizzard conditions caused many of them to be caught in traffic and unable to reach the polls.

a sufficient number of ballots as to destroy the requisite laboratory conditions under which elections must be conducted. If there is a reasonable possibility that this occurred and a determinative number of votes are called into question, to maintain the Board's high standards, the election must be set aside.

Id. (citation omitted).

The Board subsequently revisited this issue in *Glass Depot, Inc.*, supra. There, a heavy snowstorm on the day of the election prevented four employees, whose votes would have been determinative,<sup>9</sup> from reaching the polling site. The Board majority concluded that the election results should not be set aside, but was split over the rationale for this result. Members Stephens and Cohen indicated that they would set aside an election if an extraordinary circumstance resulted in the turnout of less than a "representative complement" of voters. Applying this "representative complement" test to the facts in the case, they concluded that, although the snowstorm might have constituted an extraordinary circumstance, a "representative complement" of voters (79 percent) had participated in the election and, thus, a new election was not warranted. Chairman Gould, concurring, agreed with their conclusion that the circumstances of the case did not warrant setting aside the election, but based his concurrence on the premise that, as in political elections, acts of nature, such as a snowstorm, simply cannot constitute an extraordinary circumstance for purposes of determining whether an election is valid. Significantly, Chairman Gould criticized the "representative complement" test. He rejected the use of a numerical analysis to determine the validity of the election, and indicated that he would instead set aside an election if an extraordinary circumstance—"such as where the winning party is responsible for the tardiness of the late-arriving voters"—denied a determinative number of voters the opportunity to cast ballots, regardless of the number of employees who had actually cast ballots.

In a dissenting opinion, Members Browning and Truesdale expressed the view that the "representative complement" test advocated by Members Stephens and Cohen is "unworkable and will invite unnecessary litigation." The dissenters indicated that, consistent with the Board's decision in *V.I.P. Limousine*, they would instead analyze all the circumstances "to determine if the storm or other *force majeure* was so severe that the eligible voters, as a group, did not have an adequate opportunity to vote." 318 NLRB at 768. Applying that standard, the dissenters concluded that the election should be set aside.

Having carefully considered the various standards set forth in *Glass Depot* and the contentions of the parties in the instant case, we conclude that the appropriate stan-

dard for determining whether to set aside an election because of the effects of severe weather conditions is the one set forth in *V.I.P. Limousine*: An election should be set aside where severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote. In our view, this standard best effectuates the Board's goal of ensuring maximum voter participation<sup>10</sup> and properly places the focus on the right of all eligible employees to cast ballots in the election. See, e.g., *Yerges Van Liners, Inc.*, 162 NLRB 1259, 1260 (1967) ("[i]t is the Board's responsibility to establish the proper procedure for the conduct of its elections, which procedure requires that all eligible employees be given an opportunity to vote"). By contrast, the "representative complement" test, which was rejected by three Board Members in *Glass Depot*, is concerned only with the proportion of eligible employees who actually voted, without consideration of any potential interference with the nonvoting employees' right to participate in the election. Moreover, the decision of the Regional Director in the instant case demonstrates the problems with the application of the "representative complement" test. Although Members Stephens and Cohen indicated that the test was not intended to be a single-factor analysis dependent solely on the numerical percentage of participating voters, the percentage of participating voters nevertheless is likely to serve as the focus of the analysis in any given case because it is easily quantifiable and appears to be the only concrete measure for determining a "representative complement." An additional problem concerns the largely subjective determination as to whether a particular percentage is sufficient to constitute a "representative complement." In this regard, we agree with the *Glass Depot* dissenters that the "representative complement" test is somewhat elusive and likely to invite litigation.

Although the Regional Director in the instant case applied the "representative complement" test, she also indicated that even if the *V.I.P. Limousine* standard—the standard we reaffirm today—were to be applied, the result would be the same (i.e., the election results would be upheld). We disagree. We believe that the circumstances of this case compel the conclusion that, as a result of the weather conditions, all voters were not afforded an adequate opportunity to vote. As previously indicated, more than 4 feet of snow had fallen in the area during the 2-week period preceding the election, and a state of emergency had been declared for the city during the week of the election. Moreover, the school at which the Employer's ECP is based was closed on the day of the election, thereby relieving a significant number of

<sup>9</sup> Fifteen of nineteen eligible employees voted in the election; the tally was six for, and nine against, the union.

<sup>10</sup> See *Community Care Systems*, 284 NLRB 1147 (1987).

employees of the obligation to report to work.<sup>11</sup> For these reasons, we conclude that eligible employees were not afforded an adequate opportunity to vote. As the

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<sup>11</sup> The Employer contends that among the professional employees, only approximately five of the employees work a 12-month schedule (and are therefore required to report to work when the school is closed for inclement weather), but that among the nonprofessional employees, *all but* five employees are required to report to work when the school is closed. The Employer therefore asserts that this distinction in employee reporting obligations is in part responsible for the disparity in voter turnout rates between voting groups A and B; as such, the Employer implies that this disparity serves as evidence of the indirect effect of the weather conditions on voter participation.

Although we could not ascertain from the record the precise number of employees in each voting group who had an obligation to report to work on the day of the election, it is evident that the vast majority of employees in the professional group did not have an obligation to report to the Employer's facility on the day of the election, while the vast majority of employees in the nonprofessional group did have such an obligation. Since we cannot discern with any degree of certainty the extent to which the difference in reporting obligations may have affected voter turnout, however, we do not accord controlling weight to this particular piece of evidence in assessing the impact of the weather on the election. Nevertheless, we do believe that the employees' obligation to report to work merits consideration as one among several factors in the analysis of the overall effect of the weather conditions on voter participation.

votes of the nonparticipating eligible employees in group A would have been determinative of the election results, we conclude that the election among the professional employees in group A must be set aside. In addition, because, under the Board's *Sonotone* procedure, if the professional employees vote to be included in the same unit with the nonprofessional voters, the votes of the professional employees will be counted with the votes of the nonprofessional employees to determine whether the combined unit has voted for union representation, we further conclude that the results of the election among the nonprofessional employees in group B must be set aside as well so that a new election can be conducted utilizing the same eligibility date for both groups of voters.

#### ORDER

The Regional Director's Supplemental Decision is reversed, the Certification of Representative is vacated, and the case is remanded to the Regional Director for the holding of a new election and for further action consistent with this opinion.