**Columbine Cable Company, Inc. *and* International Brotherhood of Electrical Workers, Local 68, Petitioner.** Case 27–RC–8467

November 30, 2007

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held November 15, 2006, 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 7 for and 6 against the Petitioner, with 1 void ballot.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations,[1] and finds that the election must be set aside and a new election held.[2]

The hearing officer determined that two late-arriving voters, Eric Gerwig and Ryan Winter, voted without either the privacy of a voting booth or in a completely private room, and that the Board agent and election observers watched them while they marked their ballots. She accordingly recommended sustaining the Employer's objection and setting aside the election. We agree with the hearing officer's recommendations.[3]

The election was held in a multipurpose room at the Employer's facility. After the polls closed as scheduled, the Board agent disassembled the voting booth, and the parties assembled in the entrance area of the Employer's facility. Thereafter, but before the ballot box was opened, employees Gerwig and Winter arrived to vote and the parties agreed by written stipulation to allow this.[4] The Board agent and the observers returned to the multipurpose room but the voting booth was not reassembled. Instead, the Board agent directed first Gerwig, and then Winter, to separately enter the room and to mark his ballot at a counter in the room. During this late voting, the Board agent and the observers were stationed in the multipurpose room, positioned about 15 feet away from Gerwig and Winter, and could see each voter's back and left shoulder from their vantage point. Moreover, the voters' arm movements were fully exposed as they voted. Although the hearing officer did not note it, Gerwig also testified that his ballot was "80 percent exposed," while Winter testified that it was "very possible" that the observers had access to his ballot "if they wanted to."

The Board has long held that "[i]t is of vital importance to the Board's effectuation of the policies of the Act that the regularity of its elections be above reproach. And if the integrity of the Board's election process is to be maintained it is manifestly essential that employees be balloted in a secret election, for the secret ballot is a requisite for a free election." *Royal Lumber Co.*, 118 NLRB 1015, 1017 (1957) (internal footnote omitted). Accord: *Northwest Packing Co.,* 65 NLRB 890, 891 (1946) ("The secrecy of the ballot is essential in a Board-conducted election, and it may not be jeopardized.").[5]

As the 10th Circuit has recognized, the Board has consistently set aside elections where "voting arrangements could have led employees to believe they were being observed as they voted." *Crown Cork & Seal Co. v. NLRB*, 659 F.2d 127, 131 (10th Cir. 1981), cert. denied 454 U.S. 1150 (1982). In *Imperial Reed & Rattan Furniture Co.*, 118 NLRB 911 (1957), for example, voters were required to mark their ballots on a table within sight of the observers who were located about 7 feet away. Although cushions were placed on one side of the voting table and the Board agent stood behind the voters "to afford some privacy," the Board nevertheless found that "the improvised voting arrangements were entirely too open and too subject to observation to insure secrecy of the ballot and freedom of choice by the employees in the

[1] The Petitioner 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 the 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.

[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation that the following allegations encompassed by the Employer's objections be overruled: that there were gaps in the voting booth and the voting booth location did not allow complete voter privacy; that the Petitioner's observer potentially kept a list of how voters voted; that the Petitioner's observer stared at voters in an intimidating manner and engaged in electioneering in the polling area; that employee Cyrus Ramirez, agent of the Union, greeted several voters near the polling area; and that employee Uriah Desoto, acting as an agent of the Union, gave misinformation to employees about the polling time of the election.

[3] We also agree with the hearing officer that this issue is sufficiently related to the allegation, set for hearing, that the Petitioner's observer attempted to watch voters. See *Hollingsworth Management Services*, 342 NLRB 556, 557 fn. 3 (2004).

[4] The written agreement stated, "Both the Employer and the Union mutually agreed to allow voters to vote after [the] official voting period ended but before [the] ballot box was opened and votes were counted." (Original emphasis omitted.)

[5] Consistent with these principles, the Board's Casehandling Manual (while not binding authority) states: "What is required [for a voting booth] is a compartment or cubicle that not only provides privacy but that also demonstrates the appearance of providing privacy, while maintaining a level of dignity appropriate to the election process." Casehandling Manual, Part Two—Representation Proceedings Sec. 11304.3.

selection of a bargaining representative." Id. at 912–913. Although there was no evidence that any observer could see how any ballot had been marked, the Board set aside the election "[i]n the interest of preserving the integrity of our election processes" because "a secret ballot is essential to a free election." Id. at 913.

Likewise, in *Royal Lumber Co.*, supra, the Board set aside an election where employees voted in a small lean-to shed on a board placed on top of two oil drums. A nonvoter stood in the open doorway for part of the election, and the Board found that the nonvoter could have seen how some employees voted and that the employees could have believed that their votes had been observed. On these facts, the Board concluded that "the employees voted under circumstances which at least raise doubts concerning the integrity and secrecy of the election" and therefore set it aside. Id. at 1017.

As in *Imperial Reed & Rattan* and *Royal Lumber Co.,* the voting arrangements for Gerwig and Winter were "entirely too open and too subject to observation to insure secrecy of the ballot and freedom of choice by the employees in the selection of a bargaining representative." *Imperial Reed & Rattan,* supra at 913. Like the employees in those cases, Gerwig and Winter voted without the privacy and secrecy afforded by a voting booth or a completely private room. Instead, the Board agent and the observers for the parties were in the same room as the late voters, positioned only 15 feet away, and observed their backs and left shoulders while they were marking their ballots. As the hearing officer found, "at a minimum, the voters' arms were fully exposed as they voted." These circumstances "raise doubts concerning the integrity and secrecy of the election." *The Royal Lumber Co.,* supra at 1017. This is so even though there is no affirmative proof that any person actually saw how the ballots were marked. Id.; see also *Imperial Reed & Rattan,* supra at 913.

Our dissenting colleague acknowledges that the circumstances in which Gerwig and Winter cast their ballots "were not ideal." Nevertheless, he would overrule the hearing officer and certify the Petitioner. He appears to view the failure to insure that the voters marked their ballots in privacy as a mere irregularity, insufficient to warrant setting aside the election because there is no evidence that Gerwig or Winter "were deterred from exercising their free choice." The dissent's position is inconsistent with the precedent cited above, which makes clear that election irregularities that "raise doubts concerning the integrity and secrecy of the election" are grounds for setting aside an election. *Royal Lumber Co.,* supra at 1017.[6] Unlike the dissent, we adhere to this precedent and to the principles on which it is based. Accordingly, we set aside this election.

[Direction of Second Election omitted from publication.]

MEMBER WALSH, dissenting.

The goal of the Board's election procedures is to effectuate, not frustrate, employees' desires regarding union representation. Yet frustration is all the employees in this case are left with as a result of my colleagues' decision to set aside the election, which the Petitioner won 7–6, solely because two late-arriving voters individually cast their ballots at a table in the voting room instead of in a voting booth. I dissent.[1]

Election results should not lightly be set aside. The burden is on the objecting party, the Employer here, to show by specific evidence that there has been prejudice to the election. See *NLRB v. Mattison Machine Works*, 365 U.S. 123, 123–124 (1961). Accordingly, the question is not whether optimum practices were followed, but whether, on all the facts, "the manner in which the election was conducted raises 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). Mere irregularities in the conduct of an election do not warrant upsetting the employees' expressed wishes. See, e.g., *St. Vincent Hospital,* 344 NLRB 586 (2005) (presence of two individuals in the voting booth at the same time did not justify setting aside the election); see also *Kirsch Drapery Hardware*, 299 NLRB 363 (1990) (irregularities in the Board agent's handling of an early, challenged voter were insufficient to set aside the election).[2]

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[6] *St. Vincent Hospital,* 344 NLRB 586, 587 (2005), cited by the dissent, is not apposite. There the Board declined to set aside an election there where two employees might have been present in the voting booth at the same time, but where there was no evidence that either employee marked their ballot while they were in the booth together. Here, the employees were observed while marking their ballots, in a manner that raises doubts concerning the secrecy of the election.

*Kirsch Drapery Hardware,* 299 NLRB 363 (1990), also cited by the dissent, is even less apposite. As pertinent, that case dealt with the manner in which a Board agent handled a challenged ballot (taking it from the voter and putting it in a challenge envelope instead of allowing the voter to put it in the envelope) and did not involve the observation of the voter as he cast his ballot.

[1] I agree with my colleagues that the hearing officer properly considered the circumstances under which the late-arriving voters cast their ballots, as this issue was sufficiently related to the Employer's objections as interpreted by the Acting Regional Director.

[2] In setting aside the election, my colleagues effectively endorse the hearing officer's reading of *Royal Lumber Co.,* 118 NLRB 1015 (1957), and *Imperial Reed & Rattan Furniture Co.,* 118 NLRB 911 (1957), as establishing essentially a per se rule that an election must be set aside whenever there is even a possibility that voter privacy has

The Employer has not established any reasonable doubt about the fairness and validity of the election in this case. All the evidence shows is that two eligible voters, employees Eric Gerwig and Ryan Winter, arrived at the polling place minutes after the Board agent timely closed the polls and disassembled the voting booth. The parties agreed to permit Gerwig and Winter to vote, but there was no agreement to reassemble the voting booth. The Board agent instructed Gerwig, and then Winter, to enter the voting room and mark his ballot at the same table where the voting booth had been located. As each marked his ballot, he was more or less facing away from the observers, who were approximately 15 feet away. There is no evidence that anyone saw, or attempted to see, how Gerwig or Winter voted. Both employees testified that they felt they should have been afforded more privacy, but there is no objective evidence that they were unable to (or did not) freely vote their choice. In my view, these facts simply do not establish any reason to question the validity of the election result.

Certainly, I agree that the circumstances in which Winter and Gerwig cast their ballots were not ideal. But, as described, the standard is not perfection, and for good reasons. Perfect laboratory conditions are frequently not attainable. Moreover, few election results would be certified if losing parties could seize on any perceived defect to garner a second chance. In light of these realities, and in the absence of any evidence that Winter and Gerwig were deterred from exercising their free choice, the Board should overrule the Employer's objection and certify the Petitioner.

been compromised. That is clearly not the law. See *St. Vincent Hospital,* supra at 587 ("there is not a 'per se rule that representation elections must be aside following any procedural irregularity'") (citation omitted). Rather, the Board must make a "practical judgment of the facts" in each case. *Polymers,* supra at 282 fn. 6.