

**Smith's Management Corporation, d/b/a Smith's Food and Drug, Inc. and United Food and Commercial Workers International Union, Local 99R, AFL-CIO, Petitioner. Case 28-RC-4664**

July 11, 1989

**DECISION AND DIRECTION OF  
SECOND ELECTION**

**BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND HIGGINS**

The National Labor Relations Board, by a three-member panel, has considered objections to an election held March 17, 1989, and the Regional Director's report (attached hereto in pertinent part) recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 37 for and 66 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the Regional Director's findings<sup>1</sup> and recommendations, and finds that the election must be set aside and a new election held.

[Direction of Second Election omitted from publication.]

<sup>1</sup> We agree with the Regional Director that because the Board's official notices of election were not posted 3 full days before the election as required by Sec 103.20 of the Board's Rules and Regulations and Statements of Procedure, the election should be set aside. As noted in the explanatory statement for Rule 103.20, the official Board Notice of Election contains important information with respect to employee rights under the Act. Such information should be conveyed to the employees far enough in advance of the election so that employees will be adequately apprised of their rights. Establishing a specific length of time for posting is meant to clarify to the parties their responsibilities and obligations with respect to notice posting and to discourage unnecessary and time consuming litigation on this issue. Accordingly, the Employer's arguments concerning its good faith and the number of employees who actually voted—whatever their merit under case law prior to the Board's adoption of this rule—do not constitute grounds for excusing compliance with the rule and certifying the election results.

**APPENDIX**

**OBJECTION 1**

This objection alleges that the Employer did not post for an adequate time period the Notice of Election, Form NLRB-707, at one of the voting locations. The facts are not in dispute. The Employer operates four stores in Tucson, Arizona. The election was conducted at locations in each of the stores. On March 7, the undersigned mailed six copies of the election notices to each of the voting locations for posting, including Store No. 195. The addresses used for mailing were provided by the Employer and are listed on the Stipulated Election Agreement.

On March 15, the election notices mailed to Store No. 195 were returned to the Regional Office by the United States Postal Service because of an incorrect address. Subsequently, it was discovered that the Employer had inadvertently provided an incorrect address for Store No. 195. Upon being notified by the Regional Office of the error, and since the election notices for all four locations were identical, the Employer took extra copies of the notices received at the other locations and posted them at Store No. 195 during the afternoon of March 15, less than two days before the election. The election in Store No. 195 was from 10 a.m. to 11:30 a.m. on March 17. Election notices at the other three stores were timely posted.

The voter eligibility list submitted by the Employer sets forth the store number where each employee works. A review of the voter eligibility list used during the election shows that 30 of the 31 eligible voters employed at Store No. 195 voted.

On August 5, 1987, the Board adopted a rule which provides that notices of election must be posted in conspicuous places on the employer's premises at least three full working days prior to 12:01 a.m. on the day of the election. The rule further provides that it is the employer's responsibility to notify the Regional Office at least five working days prior to the commencement of the election that it has not received copies of the election notices, and that failure to post the election notices as required shall be grounds for setting aside the election whenever proper objections are filed. The Employer was notified by letter of this rule on three different occasions: (1) at the time the petition was served on February 9, (2) at the time the election agreement was approved on February 22 (a copy of the rule was transmitted with this document), and (3) when the Notice of Election was served on March 7.

The Employer argues that it substantially complied with the Board's rule because election notices were posted at three of the four stores for the required period, and that the only reason notices were not timely posted at Store No. 195 was that they were not received due to the incorrect mailing address it had inadvertently provided for that store. The Employer further contends that it was unaware that election notices had been mailed directly to each store, and that the store manager at Store No. 195 believed that he had posted the required notice when he posted Form NLRB-666, which was provided when the Petition was initially served. Finally, the Employer argues that the times and places of the election were widely publicized by both the Petitioner and the Employer, and that its failure to timely post the notices at Store No. 195 had no impact on the results of the election because virtually all of the eligible voters at that store voted.

There is no evidence that the Employer has at anytime acted in bad faith. In this regard, I note that the Employer substantially complied with the Board's rule by timely posting election notices at three of the four stores. With regard to the contention of the Employer's counsel that he was unaware that notices were mailed directly to the individual stores, a copy of my March 7 letter to the par-

ties, which accompanied the election notices, was mailed to the Employer's counsel at the Employer's corporate office, as well as to each store. As noted above, in that letter, as well as by letters dated February 9 (transmitting the petition) and February 22 (transmitting the approved election agreement), I reminded the parties of the Board's three day notice posting rule and that failure to post the notices, as required, would be grounds for setting aside the election should proper objections be filed.

Moreover, contrary to the Board's rule, the Employer did not notify the Regional Office within five days of the election that the election notices were not received at Store No. 195.

Based upon the foregoing, I conclude that the Employer failed to fully comply with the Board's three day notice posting rule. Accordingly, I shall recommend that Objection 1 be sustained.