

**Public Storage, Inc. and United Food and Commercial Workers Union, Local No. 428, United Food and Commercial Workers International Union, AFL-CIO, Petitioner. Case 32-RC-2777**

July 24, 1989

### DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT, HIGGINS, AND DEVANEY

Pursuant to a Decision and Direction of Election issued on September 14, 1988, an election by secret mail ballot was conducted in the above-entitled proceeding on November 9, 1988. Upon the conclusion of the election, the tally of ballots furnished the parties showed that of approximately 163 eligible voters, 46 cast votes for and 83 cast votes against the Petitioner. There were three challenged ballots that were not sufficient in number to affect the results of the election.

On November 15, 1988, the Petitioner filed timely objections to the election. By letter dated November 16, 1988, sent by certified mail, the Regional Director requested that the Petitioner submit evidence in support of its objections by November 23, 1978, and advised that the failure to provide such evidence would result in the objections being overruled. The Petitioner failed to respond to the Regional Director's November 16, 1988 letter. On December 1, 1988, the Regional Director issued a Supplemental Report and Decision on Objections in which he noted the Petitioner's failure to comply with the request to provide evidence within the time period allowed, overruled the objections, and issued a Certification of Results.

On December 19, 1988, the Regional Director issued a Second Supplemental Decision in which he rescinded the Certification of Results and issued a notice of hearing in connection with the objections. In his Second Supplemental Decision, the Regional Director noted that subsequent to issuance of the decision overruling the objections, the Petitioner submitted its supporting evidence, advising the Regional Director that it had never received the Region's November 16, 1988 letter or any other notice that its evidence was due. The Regional Director further noted that although the November 16, 1988 letter was sent by certified mail, "the Region has not received the return receipt confirming delivery, and the U.S. Postal Service has thus far been unable to explain its failure to effectuate delivery of the letter." Based on these facts, and on the basis that the "Petitioner was not notified of its deadline to provide its supporting evidence prior to the Regional Director

overruling the objections and issuing a Certification of Results," the Regional Director reinstated the Petitioner's election objections and rescinded the previously issued Certification of Results.<sup>1</sup> On December 28, 1988, the Employer filed a request for special permission to appeal the Regional Director's rescission of certification of results and notice of hearing.

For the reasons that follow, the Board grants the Employer's appeal and, having granted the appeal, finds that the Regional Director erred in rescinding the Certification of Results.

Section 102.69(a) of the Board's Rules and Regulations provides that a party filing election objections must supply evidence in support of its objections "[w]ithin 7 days after the filing of objections, or such additional time as the Regional Director may allow . . . ." Although it appears that Regional Offices routinely notify the party filing objections of its obligations under Section 102.69(a), such notifications or "reminder" is not required by the Rules, but rather is undertaken as a matter of courtesy. In these circumstances, the Petitioner's failure to receive the Regional Director's November 16, 1988 letter does not relieve the Petitioner of its obligation to comply with Section 102.69(a) of the Board's Rules and Regulations which requires that evidence in support of objections must be submitted within 7 days. In *Star Video Entertainment*, 290 NLRB 1010 (1988), the Board held that this specific regulation will be "strictly applied."

The Regional Director's action of accepting the evidence after the deadline for submission had passed without the Petitioner's having requested an extension, and after the results had been certified, is not an exercise of discretion of the kind contemplated by the rule, especially as construed in light of *Star Video*. Were the Regional Director's action to be upheld, the refusal of other Regional Directors to grant retroactive extensions to parties relying on nonreceipt of courtesy reminders could be attacked as arbitrary and the rule would soon be de facto amended to require late receipt of evidence from parties who had not requested an extension within the time allowed by the Rules. Cf. *NLRB v. Washington Star Co.*, 732 F.2d 974, 977 (D.C. Cir. 1984).

In accordance with Section 102.69(a) and *Star Video*, we find that the Regional Director erred by relying on the Petitioner's failure to receive the Regional Director's November 16, 1988 letter, and by rescinding the Certification of Results that he had

<sup>1</sup> The Regional Director's Second Supplemental Decision also contained a notice of hearing that was quashed by the Board's unpublished order that issued on January 3, 1989. That order noted that a fully articulated decision would follow.

previously issued as a result of the Petitioner's failure timely to supply evidence in support of its objections. Accordingly, as the Petitioner's supporting evidence was not submitted within the time provided by the Board's Rules, we conclude that its objections should be overruled and a Certification of Results issued.

#### ORDER

The Regional Director's Second Supplemental Decision and Rescission of Certification of Results is vacated and the December 1, 1988 Supplemental Decision overruling the Petitioner's objections and certifying the results of the election is reinstated.

MEMBER DEVANEY, dissenting.

Unlike my colleagues, I would not reverse the Regional Director's decision to consider the Petitioner's objections. Section 102.69(a) of the Board's Rules and Regulations provides in pertinent part that "[w]ithin 7 days after the filing of objections, or such additional time as the Regional Director may allow [emphasis supplied], the party filing objections shall furnish to the Regional Director the evidence available to it to support the objections." The uncontroverted evidence here indicates that the Regional Director for Region 32 routinely sends to the party who has filed election objections a certified letter informing the party of its objections under Section 102.69(a). There is no evidence to controvert the Petitioner's contention that it never received that notification. However, on receiving the Regional Director's Supplemental Report on Objections, the Petitioner promptly submitted its supporting evidence and the Regional Director decided in his discretion to accept that evidence.

In now reversing the Regional Director, my colleagues have substituted their judgment for that of the Regional Director in an area that the rule itself leaves to the Regional Director's discretion. Thus, as noted above, Section 102.69(a) expressly leaves to the Regional Director the discretion to allow a party additional time to submit its evidence in support of its objections.<sup>1</sup> *Star Video Entertainment*, supra, relied on by the majority, is distinguishable. In *Star Video*, the Regional Director there, unlike here, sent a letter reminding the objecting party of its obligation to submit evidence in support of its objections and a Board agent then granted the objecting party an additional 48 hours to submit its evidence, but it failed to submit that evidence until after the additional 48 hours had expired. Here, of course, unlike *Star Video*, the Petitioner was never notified of the filing requirements and then did promptly submit its evidence on receiving the Regional Director's Supplemental Report on Objections. In my view, the Regional Directors' actions in these two cases fell within the discretion allowed them in Section 102.69(a) and such actions should not be disturbed absent an abuse of discretion.

For the reasons set forth above, and because I do not believe that a party should be denied access to the Board's processes by an overly strict application of a procedural rule, I would affirm the Regional Director's decision to consider the Petitioner's objections on their merits.

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<sup>1</sup> My colleagues state that the Petitioner asked for no such extension of time, but I note that the Regional Director in his discretion decided to grant such an extension and I would not countermand the Regional Director's exercise of his discretion.