First Student, Inc. *and* Service Employees International Union, Local 284, and Amalgamated Transit Union, Local 1005, Joint Petitioner. Case 18–RC–17565

August 9, 2010

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND PEARCE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held February 29, 2008, and the hearing officer's report recommending disposition of them. The election was held pursuant to a Stipulated Election Agreement. The tally of ballots shows 67 votes cast for and 83 votes against the Joint Petitioner, with 8 challenged ballots, an insufficient number to affect the results.

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

We agree with the hearing officer that the Employer has placed its election observer, trainer, and substitute bus driver Patty Baldwin, in a position in which she could reasonably be viewed by employees as closely identified with management. *Sunward Materials*, 304 NLRB 780 (1991). Baldwin interviews applicants for the Employer's commercial driver's license (CDL) training program, notifies applicants of their acceptance into the program, conducts the training in the classroom and on buses, administers CDL testing on behalf of the State, completes State- and Employer-required assessments of employees' driving performance and records, and informs employees when they are required to undergo physical examinations and other testing. She is also the only employee who sits in an enclosed office that she shares with a supervisor. We note particularly that Baldwin is in some instances the only representative of the Employer with whom applicants deal during the application and training process, and therefore they could reasonably believe that she plays a role in deciding whether they are ultimately hired as drivers after they complete the CDL program.

Contrary to the Employer's contention, the Board did not employ a different test or set a higher threshold for showing close identification with management in *Mid-Continent Spring Co. of Kentucky*, 273 NLRB 884, 884 fn. 2 (1984). No party in that case excepted to the hearing officer's finding that the observer was closely identified with management. Rather, the question was whether the mere presence of the observer, whom employees perceived as the personnel officer, warranted setting aside the election, even without a showing of any specific interference in the election. The Board held that it did. Id. at 884.

Our dissenting colleague asserts that our decision imposes new eligibility restrictions for selection as an employer observer. We disagree. We create no new law here. We simply apply the standard the Board set forth in *Sunward Materials* almost 20 years ago, which was based on precedent dating 30 years earlier.[3] Under that precedent, selection of an employer observer whom employees could reasonably perceive as closely aligned with management interferes with laboratory conditions and constitutes objectionable conduct. We do not share our colleague's view that the rule should be narrowly interpreted by limiting its application to the precise facts of prior cases. The Employer's choice of Baldwin meets the Board's established standard and is therefore objectionable.

Our dissenting colleague also argues that the Board does not impose equivalent limitations on employers and unions in the selection of their election observers. We disagree. The Board's principal goal in conducting representation elections is to guarantee employees' freedom in exercising their choice with respect to union representation. See *Family Service Agency, San Francisco*, 331 NLRB 850 (2000); *General Shoe Corp.,* 77 NLRB 124, 127 (1948). In pursuing that goal, the Board considers, among other things, the employees' awareness that the employer wields substantial and direct control over their livelihoods and day-to-day working conditions, power that a petitioning union does not possess in any degree. Thus, as here, the Board prohibits individuals closely identified with management from serving as observers, without imposing a parallel prohibition on individuals identified with a petitioning union.[4] By contrast, an incumbent union may be perceived by employees as possessing the ability to affect their employment, if not as

[1] On August 1, 2008, the Board denied the Joint Petitioner's motion that the Board accept its late-filed exceptions and brief.

[2] No exceptions were filed concerning the hearing officer's recommendation to overrule the portion of the Joint Petitioner's objection contending that Baldwin is also a statutory supervisor.

[3] *Peabody Engineering Co.*, 95 NLRB 952 (1951).

[4] The Board has, however, adopted a per se rule that supervisors may not serve as observers for either party. *Family Service Agency, San Francisco*, supra.

directly or to the same degree as the employer. Therefore, in order to assure employee free choice in decertification elections, officials of the incumbent union are not permitted to serve as observers in such elections.[5] The Board's election observer rules, then, are carefully designed not to achieve a formalistic equivalency, but rather to address the economic realities of the workplace.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Service Employees International Union, Local 284, and Amalgamated Transit Union, Local 1005.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. August 9, 2010

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

First Student employees exercised their freedom of choice in a secret ballot election by voting against the Joint Petitioner 83 to 67. My colleagues set the election aside, finding that the Employer's nonsupervisory election observer, Patty Baldwin, was "closely aligned with management." Contrary to my colleagues, I find nothing in Baldwin's duties as a trainer and substitute bus driver that disqualifies her from serving as an election observer for the Employer.

It is well settled that an election is not to be lightly set aside and that the burden is on the objecting party to show that the conduct about which it complains had a reasonable tendency to interfere with employee free choice. In the area of election observers, however, the Board will set aside an election if a party's election observer is perceived as "closely aligned with management." Board policies concerning the parties' selection of observers derive from the Board's goal of providing as nearly as possible laboratory conditions for employees as they cast their ballots. They are a recognition, in part, of how highly contentious the question of union representation can be in the workplace. It is one thing, however, to set aside elections because an observer was a supervisor who actively participated in the employer's antiunion campaign; it is another to set aside an election because an observer was an employee with routine administrative or technical responsibilities.

In early decisions, the Board held that an employer may not choose a supervisor as its observer.[1] Thereafter, the Board expanded the policy to disqualify a personnel manager who, though not a supervisor, owed a "substan-

[5] *Butera Finer Foods*, 334 NLRB 43 (2001).

[1] See, e.g., *Paragon Rubber Co.*, 7 NLRB 965 (1938) (factory manager who was a "high supervisory official"); see also *Hoague-Sprague Corp.*, 80 NLRB 1699 (1948) (foremen/supervisors); *Ann Arbor Press*, 88 NLRB 391 (1950)(office manager who was a supervisor); *Worth Food Markets*, 103 NLRB 259 (1953)(head bookkeeper). In *Family Service Agency*, 331 NLRB 850 (2000), the Board established a bright-line rule that supervisors may not serve as observers for either party.

tial responsibility" to management.[2] Under the next extension of the policy, the Board ruled that employers' attorneys[3] and family members of high management officials were also ineligible.[4] Soon the Board began to characterize its policy as providing broadly that "persons closely identified with the employer may not act as observers."[5]

Under this expansive approach, the Board has more recently applied its prohibition not only to employer officials and close relatives, but also to employees whom other employees would reasonably believe to be closely aligned with management. In *B-P Custom Building Products*, 251 NLRB 1337 (1980), the Board found objectionable the employer's designation of an individual who attended management meetings, scheduled shifts, vacations, and overtime, authorized sick leave, and spoke at two employee meetings, one of which he conducted without management officials present. Because he relayed information from management, the Board found that he "had been placed . . . in a strategic position where employees could reasonably believe he spoke on its behalf." Id. at 1338.

Similarly, in *Sunward Materials*, 304 NLRB 780 (1991), cited by the hearing officer, the Board found compliance/training specialist Ken Vivian ineligible as an observer. Vivian was visible in the hiring process, answering applicants' questions, reviewing their applications for completeness, and scheduling interviews; informed successful applicants of their pay rate and when and where to report for work; provided on-site safety and equipment training to employees; monitored drivers' traffic records; and administered written drivers' tests.

While Baldwin's position resembles Vivian's to some degree, the Board in *Sunward Materials* relied on key additional facts in determining that Vivian's service as an observer was objectionable. Notably, at a series of employer campaign meetings, he sat at the front of the room facing the employees, in line with management officials, while those officials made antiunion speeches. The Board found that, by its assent to Vivian's presence with its managers, the employer placed him in a position in which employees could reasonably view him as closely identified with management.

Whatever the merits of *B-P Custom Building Products* and *Sunward Materials*, both cases are distinguishable on their facts. Unlike the employee in *B-P*, Baldwin does not attend management meetings or conduct employee meetings, other than on safety matters, her area of technical expertise. Nor has she participated in campaign meetings at the side of the Employer's managers, as in *Sunward Materials*. No comparable facts have been presented to warrant the same result in this proceeding.[6]

The Board's original policy of excluding only supervisors and those persons most inextricably linked to the employer was not unreasonable, although I would not find it essential to the conduct of fair secret-ballot elections. Since that initial policy, however, the Board has proceeded down a slippery slope, setting aside elections while incrementally restricting the employer's selection of its observers and the Section 7 rights of employees who would serve in that capacity.

Moreover, the Board does not correspondingly prohibit employees who are closely associated with the union from serving as union observers. Rather, the Board routinely permits employee union officials to serve as observers,[7] and has also found unobjectionable the service of non-employee officials, including union officers[8] who could have actively participated in the union's organizational campaign. Although my colleagues assert that employers are unique in that they exercise direct control over employees' incomes and working conditions, they disregard the power of the employees' collective-bargaining representative and the very real and immediate effects that a petitioning union, if successful, will have over the employees day-to-day work lives, a situation not lost on employees as they cast their ballots in the presence of union officials. Parties to Board elections

[2] *Harry Manaster & Bro.*, 61 NLRB 1373 (1948).

[3] *Union Switch & Signal Co.*, 76 NLRB 205 (1948) (nonemployee attorney); *Peabody Engineering*, 95 NLRB 952 (1951) (same).

[4] *Wiley Mfg., Inc.*, 93 NLRB 1600 (1951) (owner's wife, who was employee); *International Stamping Co.*, 97 NLRB 921 (1951)(son- and sister-in-law of employer's president).

[5] *Herbert Men's Shop*, 100 NLRB 670 (1952) (executive or managerial employee who attended negotiations and took part in final step of grievance process ineligible).

\]\6 Although, contrary to the assertion of my colleagues, I would not limit BP and Sunward to "the[ir] precise facts," those facts are essential to an accurate understanding of the Board's policy. Until today, the Board has found ineligible only persons whom employees would reasonably believe to be closely identified with management in a labor-management framework. In my view, Baldwin's technical and ministerial duties are too circumscribed to reasonably create such an impression. Therefore, the "closely identified with management" standard, understood in the context of the cases in which the Board has applied it, does not warrant the majority's conclusion.

[7] See, e.g., *Bordo Products Co.*, 119 NLRB 79, 80 (1957)(in the absence of electioneering, interference, or coercion, "an official position with the [u]nion does not disqualify an employee from acting as a union observer").

[8] See, e.g., *New England Lumber Division*, 252 NLRB 95 (1980), enfd. 646 F.2d 1 (1st Cir. 1981) (union president); see also *Black Bull Carting*, 310 NLRB No. 188 (1993)(not reported in Board volumes), enfd. 29 F.3d 44 (2d Cir. 1994); but see *Butera Finer Foods*, 334 NLRB 43 (2001) (agent of incumbent union may not serve as observer in decertification election).

are entitled to equitable policies concerning the selection of their observers.

In sum, I would decline to broaden by yet another increment the group of employees who are prohibited from serving as employer observers.

Accordingly, I would overrule the Joint Petitioner's objection.

NATIONAL LABOR RELATIONS BOARD

Dated, Washington, D.C. August 9, 2010

Peter C. Schaumber, Member