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Goffstown Truck Center, Inc. and Chauffeurs, Teamsters, and Helpers Local 633, a/w International Brotherhood of Teamsters. Case 1–RC–22272

November 18, 2010

DECISION AND DIRECTION OF THIRD ELECTION

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

The National Labor Relations Board, by a three-member panel, has considered an objection to a rerun election held on October 23, 2009, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Decision and Direction of Second Election.¹ The tally of ballots shows 23 for and 20 against the Petitioner, with 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings and recommendations² only to the extent consistent with this Decision and Direction of Third Election.

The hearing officer recommended overruling the Employer's objection alleging that the Petitioner's organizer, Robin Loder, visited employees at their homes and represented that she was acting with the authorization of the NLRB to ascertain how they would vote. Contrary to the hearing officer, and for the reasons set forth below, we find merit in the Employer's objection and shall direct a third election.

Facts

A second election was directed in a unit of school bus drivers at the Employer's Londonderry, New Hampshire facility. In the weeks leading up to the second election, Union Organizer Loder visited the Employer's school

¹ On July 21, 2009, the two sitting members of the Board issued a Decision and Direction of Second Election, which is reported at 354 NLRB No. 49. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Sec. 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. In light of *New Process Steel*, the Board has, sua sponte, decided to reconsider the postelection representation issues that were addressed in the prior decision. The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings and recommendations to the extent and for the reasons stated in the July 21, 2009 Decision and Direction of Second Election, which is incorporated herein by reference.

² In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Employer's Objection 2, alleging that the Union created the impression of surveillance.

bus drivers at their homes, as she had prior to the first election.

In one such visit, on October 2, 2009,³ Loder met employee Rebecca Binder. Binder recognized Loder from a campaign visit before the first election. Loder told Binder that she was there "on behalf of the NLRB" to determine how employees were voting, because "they" were trying to determine whether to go forward with the election, and whether there was enough interest in union representation. Loder then asked Binder how she was going to vote. Binder told Loder that she planned to vote against union representation and briefly explained her reasons. The conversation ended shortly thereafter.

During the week of October 12, Loder visited employee Crystal Ashman at Ashman's residence. When Loder introduced herself, Ashman responded that she knew who Loder was, as she recognized Loder from the Union's previous campaign. Loder stated that she was there "on behalf of the National Labor Relations Board and Teamsters 633" regarding the upcoming election, and asked if Ashman would tell her how she was going to vote. When Ashman stated that it was none of Loder's business, Loder responded that the NLRB and the Teamsters wanted to know. Ashman restated that it was none of Loder's business, told Loder to leave her property, and shut the front door.

The Hearing Officer's Report

The hearing officer recommended overruling the election objection. The hearing officer reasoned that Loder's misstatements were, at most, "a misrepresentation of Board processes or actions" and, as such, should be considered in a manner similar to other campaign misstatements that have been found not objectionable. In support, the hearing officer relied on *Riveredge Hospital*, 264 NLRB 1094 (1982) (union's leaflet erroneously stating that the government issued a complaint against employer not objectionable), and *TEG/LVI Environmental Services*, 326 NLRB 1469 (1998) (union's flyers stating that the Board wants the workers to have a union not objectionable). The hearing officer considered Loder's statements to be "even more innocuous" than the messages found not objectionable in *TEG/LVI* and *Riveredge Hospital*, because those messages implied that the NLRB favored one election outcome over another. The hearing officer therefore concluded that Loder's statements were not a basis for setting aside the election.

Contrary to the hearing officer, we find that Loder's statements compromised the integrity of the election process and therefore constitute objectionable conduct warranting setting aside the election.

³ All dates are in 2009, unless otherwise indicated.

Analysis

At the outset, we find that *Riveredge Hospital and TEG/LVI*, relied on by the hearing officer, are not applicable to Loder's conduct, as those cases do not concern statements purporting to come from the Board. Rather, the prior decisions hold that a "party's misrepresentation of the Board's action" should be treated similarly to other campaign misrepresentations which, under the Board's *Midland* doctrine,⁴ are not objectionable. The Board reasoned in those cases that when a misstatement about the Board's processes or neutrality comes from a party to the election, employees will understand it to be election propaganda, and the "Board's actions speak for themselves, and will show up any misrepresentation for what it is." *Riveredge*, supra at 1095; *TEG/LVI*, supra at 1469.

Unlike the communications in *Riveredge* and *TEG/LVI*, Loder's conduct involved more than a misstatement of the Board's processes. It also included a misstatement about her authority, as she purported to speak "on behalf of the NLRB" in eliciting information about how the employees intended to vote. In other words, she expressly stated that her question to the voter was from and on behalf of the National Labor Relations Board. By purporting to act on behalf of the Board, Loder made it difficult for the "Board's actions [to] speak for themselves."

Further, the message Loder conveyed, at least in the conversation with Ashman, was that the Board was not entirely neutral, but was working with the Union in the election process.⁵ Clearly, a misstatement about the Board's processes and/or its neutrality carries far more weight if the statement purports to be from the Board itself rather than from a party to the election.

By misrepresenting that she was acting on behalf of the Board, Loder's conduct implicated concerns similar to those presented when a party to an election distributes an altered sample ballot with the Board's official disclaimer language deleted. Like Loder's statements here, an altered ballot falsely purports to convey a message from the Board itself, suggesting a lack of neutrality.

We thus find *Ryder Memorial Hospital*, 351 NLRB 214 (2007), instructive. There, the Board addressed the message conveyed by the distribution of altered sample ballots. The Board revised the disclaimer language it requires on such ballots to (a) more clearly explain the

Board's neutrality in the election process and (b) disclaim any involvement on the part of the Board in the alteration of any sample ballot. In addition, the Board held that the distribution of an altered sample ballot with the disclaimer language deleted would thereafter be treated as per se objectionable rather than examined on a case-by-case basis to determine whether the particular alteration would have a tendency to mislead voters about the Board's neutrality. *Ryder*, supra at 216 fn. 13.

Here, Loder's statements effectively conveyed the same kind of message the Board was so concerned about in *Ryder*—i.e., that *the Board* was informing employees that it was not entirely neutral in the election process. Loder donned a false cloak of Board authority when asking employees to reveal how they intended to vote. By purporting to speak for the Board in this manner, Loder's communication went beyond the realm of typical campaign propaganda which employees are "capable of recognizing . . . for what it is." *Midland*, supra at 132. Indeed, her comments violated the fundamental policy underlying *Ryder*: that any communication purporting to come from the Board "effectively preclude any reasonable inference that the Board favors or endorses any choice in the election." *Ryder*, supra at 216.⁶ Loder's comments, at a minimum, did not preclude such an inference.⁷

We find that Loder's comments were made to a sufficient number of employees (two) to require setting aside the election here given the three-vote margin of the Union's victory.

For all of those reasons, we sustain the Employer's objection to the election, and shall direct that a new election be held.

DIRECTION OF THIRD ELECTION

A third 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 Third Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic

⁴ *Midland National Life Insurance Co.*, 263 NLRB 127 (1982) (holding that the Board would no longer set aside an election on the basis of a party's misleading statements during the election campaign).

⁵ We thus disagree with the hearing officer's conclusion that Loder's statements were "innocuous" with regard to the message about the Board's neutrality.

⁶ The Board takes a similar approach to communications actually coming from its agents. See, e.g., *Glacier Packing Co.*, 210 NLRB 571, 573 (1974) (setting aside an election because a Board agent's conduct reasonably suggested that the Board opposed the employer).

⁷ We note that Loder's questions alone, had she not misrepresented on whose behalf she was asking them, would not have been objectionable. See *Plant City Welding & Tank Co.*, 119 NLRB 131, 133-134 (1957).

strike that began less than 12 months before date of the election directed herein and who retained their employee status during the eligibility period and their replacements. 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 date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Chauffers, Teamsters and Helpers Local 633, a/w International Brotherhood of Teamsters.

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 Third 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 ground for setting the election whenever proper objections are filed.

Dated, Washington, D.C. November 18, 2010

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD