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Garda World Security Corporation d/b/a Garda CI Atlantic, Inc. and International Union, Security, Police and Fire Professionals of America (SPFPA), Petitioner. Case 10–RC–15788

February 1, 2011

DECISION AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on July 21, 2010, 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 30 for and 29 against Petitioner, with no challenged ballots.

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

The hearing officer recommended overruling the Employer's objections in their entirety. Contrary to the hearing officer, and for the reasons set forth below, we find merit in the Employer's objections alleging that the Board agent's conduct in closing the polls early possibly disenfranchised a determinative number of voters.

On the day of the election, voting was conducted over two sessions, morning and afternoon. The morning session was scheduled to be held from 5:30 to 8:30 a.m. During the morning voting session, there was a 5-minute discrepancy between the (later) time shown on the Board agent's watch and the Employer's timeclock. This had been brought to the Board agent's attention at the preelection conference, when the Employer requested that its timeclock time be used. The Board agent declared her watch the official timepiece.¹

According to credited testimony,² the Board agent began taking down the election equipment, including the voting booth, at 8:27 a.m. At 8:29 a.m. (or 8:24 a.m. according to the Employer's timeclock), three eligible voters appeared to cast their votes. The Board agent told these voters that they could either cast their ballots under

challenge or return during the second session, and the voters left without voting. The Employer contends that other eligible voters might have been in the hallway outside the polls and might have overheard what the Board agent said to the three voters, or that one or more of the three might have told others arriving to vote that the polls were closed.³

The hearing officer found that the Board agent closed the first session polls early, but did not recommend setting aside the election. Saying that "whether a voter was possibly disenfranchised . . . requires some assessment of the possible effect" of the early closure, the hearing officer rejected the Employer's argument as resting "entirely on speculation." Absent evidence that at least one employee *was* in the hallway at the relevant time or that the three would-be voters *did* converse with at least one employee when they exited the polls, the hearing officer concluded that the Employer failed to show that at least one voter was possibly disenfranchised by the early closure.

The Board applies an objective standard to potential disenfranchisement cases in order to maintain the integrity of its own election proceedings. See *Wolverine Dispatch, Inc.*, 321 NLRB 796, 797 (1996). Under that standard, an election will be set aside if the objecting party shows that the number of voters possibly disenfranchised by an election irregularity is sufficient to affect the election outcome. See *id.* at 796; *Dayton Malleable Iron Co.*, 123 NLRB 1707, 1709 (1959). As clearly demonstrated in prior Board cases, such election irregularities include the polls being closed at a time when they should be open. See *Wolverine Dispatch*, *supra*, 321 NLRB at 796–797; *Whatcom Security Agency, Inc.*, 258 NLRB 985, 985 (1981); *Repcal Brass Mfg. Co.*, 109 NLRB 4, 5 (1954).

As an example, in *Wolverine Dispatch* the Board agent took the ballot box and left the polls for a few minutes in the middle of the session. Setting aside the election, the Board reasoned that during those few minutes it was "possible" that a number of voters sufficient to affect the outcome arrived at the polls, found no one present, and departed unnoticed. 321 NLRB at 796–797. Similarly, here, it was possible, as the Employer contends, that a unit employee—just one would have been enough—about to enter the polls might have overheard the Board agent telling the three to come back in the afternoon, or that the three, immediately upon leaving the polling place, might have told that voter that the polls were closed. That possible scenario, like the possible scenario

¹ Uncontradicted testimony reflects that the Board agent changed her watch to coincide with the Employer's timeclock before the afternoon voting session.

² There were no exceptions to the hearing officer's credibility findings.

³ The three employees voted during the afternoon session.

in *Wolverine Dispatch*, suffices to show a possibility of disenfranchisement.⁴

It remains only to assess whether a determinative number of voters were potentially disenfranchised. The approximate number of eligible voters was 79, 59 ballots were cast, and the electoral margin was 1 vote. Approximately 20 eligible voters did not cast ballots. Accordingly, we shall sustain the Employer's objections, set aside the election, and direct that a new election be held.

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 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

⁴ Chairman Liebman observes that setting aside an election based on a hypothetical possibility of disenfranchisement risks upsetting employees' validly expressed desires. In her view, a better approach might be to ask whether, based on a "practical judgment" of 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, 282 & fn. 6 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). No party, however, has asked the Board to adopt such a standard.

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 International Union, Security, Police and Fire Professionals of America (SPFPA).

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 (1996); *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 whenever proper objections are filed.

Dated, Washington, D.C. February 1, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD