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Austal USA, LLC and Sheet Metal Workers International Association Union, Local 441, AFL-CIO Petitioner. Case 15-RC-8394

August 2, 2011

ORDER REMANDING

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

Petitioner Sheet Metal Workers International Association, Local 441, AFL-CIO has filed a request for review of the Regional Director's Direction of Election. The Employer has filed a statement in opposition. The central issue in contention is whether the Regional Director erred by directing that a second rerun election be held on the Employer's premises over the objection of the Petitioner, which requested that the election either be held at a neutral location not owned or controlled by any party or by mail ballot. For the reasons stated below, we grant special permission to appeal and remand the case to the Regional Director with instructions that she exercise her discretion over the location of the voting and whether it should be onsite or by mail and explain her ultimate decision in writing.

Petitioner has styled its filing with the Board a "Request for Review of the Regional Director's Direction of Election of Board Ordered Second Rerun Election," while expressly acknowledging that a request for review under Board Rule 102.67(b) does not precisely lie here given the procedural posture of this case. We therefore treat the request for review as a request for special permission to appeal.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We grant the request for special permission to appeal and reverse and remand the case to the Regional Director with the instructions contained in this decision.

Facts

At issue is the third election to be supervised by the Board pursuant to the original petition filed on April 12, 2002—over 9 years ago. The Board set aside the results of both of the first two elections due to unlawful and objectionable conduct by the Employer. Both of the two prior elections were conducted on the Employer's premises.

¹ See, e.g., *GPS Terminal Services, Inc.*, 326 NLRB 839, 839 fn. 1 (1998).

The First Two Elections

The first election was held on May 24, 2002. An administrative law judge recommended that the results of the election be set aside based on his findings that the Employer committed multiple unfair labor practices and engaged in various forms of objectionable conduct, and the Board sustained the recommendations. See *Austal USA*, 349 NLRB 561 (2007), *enfd.* 343 Fed. Appx. 448 (11th Cir. 2009). The unfair labor practices included unlawfully terminating 10 employees in retaliation for their protected, union activities; suspending and warning employees based on their union activity; coercively questioning employees about their union sentiments; threatening plant closure, job loss, stricter discipline, and other unspecified reprisals if the employees voted for the Union; promising or impliedly promising benefits if the employees rejected the Union; and instructing employees not to read or discuss union material during working time.

A second election was held on April 9, 2008. Again, an administrative law judge recommended that the results of the election be set aside based on his findings that the Employer committed multiple unfair labor practices and engaged in various forms of objectionable conduct and the Board sustained the recommendations. *Austal USA*, 356 NLRB No. 65 (2010). The unfair labor practices included unlawfully terminating one employee; threatening employees that they would not be promoted because of their support for the Union; telling employees they could not discuss the Union during working hours; threatening employees with termination because of their activities in support of the Union; interrogating employees about their union activities and the union activities of other employees; selectively and disparately enforcing a distribution and solicitation rule by prohibiting prounion solicitations and distributions while permitting antiunion and nonunion solicitations and distributions; impliedly threatening its employees that it would not hire union supporters; interrogating its employees about their support for or against the Union by soliciting employees to accept antiunion shirts; telling employees not to talk about the Union; and granting benefits to employees prior to the election. The judge concluded, "*Austal* blatantly violated its employee Section 7 rights, and interfered with the fairness of the election." *Id.* slip op. at 39.

The Employer's highest officials were directly involved in the unlawful conduct, including its chief executive officer, who endorsed the suggestion that the Employer needed to "kick them [prounion employees] out the gate"; its vice president for support services; and its human resources director, who stated that the Employer "did not want to fire everybody at Austal; we are

really only trying to get the people who's pushing for the Union." 349 NLRB at 564, 568, 569; 356 NLRB No. 65 at slip op. 1, 41.

The unlawful conduct all occurred on the Employer's premises. Moreover, much of the Employer's unlawful conduct involved the Employer's exercise of its authority over the premises, including on the day of the first election. For example, the Employer promulgated a no-solicitation/no-distribution rule, but enforced it only against union supporters. The Employer banned discussion of the Union while employees were working while permitting discussion of all other subjects. As the judge found, Austal "wanted to limit, as much as possible, any discussion among employees about the Union while they were working." 356 NLRB No. 65 slip op. at 39. At the same time, the Employer conducted an active campaign against the Union in the workplace. Supervisors met with employees both individually and in small groups. Two vice presidents and the production coordinator also met with employees with the chief executive officer present at some of the meetings. The vice president of support services "'talked to everybody in the shipyard' individually." 349 NLRB at 564. On the day of the first election, the Employer, for the first time, placed uniformed guards at the entrance to the facility who required that employees present identification in order to enter. Id. at 576.

The Dispute over the Location of the Third Election

After the Board overturned the results of the second election and directed that a third election be conducted, the Petitioner objected to the election being again conducted on the Employer's premises and requested either that it be conducted off the premises at an adjacent facility owned by the State of Alabama or that it be conducted via mail ballot. The Petitioner made these requests orally. The Employer opposed the requests. The Regional Director orally denied the requests and informed the parties in writing that the election would take place on the Employer's premises.

Analysis

The Act is silent on the location of elections. The choice of sites is therefore committed to the discretion of the Board. In *Halliburton Services*, 265 NLRB 1154, 1154 (1982), the Board observed that "it is clear under the broad remedial powers contained in Section 10(c) of the Act and our administrative powers to conduct elections under Section 9(c)(1)(A) of the Act, that the Board may designate the site of an election." (Footnote omitted).

Section 11302.2 of the Board's Casehandling Manual, Part Two, Representation Proceedings drafted by the

Board's General Counsel and not binding on the Board,² provides:

The best place to hold an election, from the standpoint of accessibility to voters, is somewhere on the employer's premises. In the absence of good cause to the contrary, the election should be held there.

....

It may also be necessary to conduct an election off the employer's premises where there are egregious or pervasive employer unfair labor practices. Thus, where a request to proceed has been filed, the Regional Director may direct that the election be conducted away from the employer's premises in situations where an election held on the employer's premises would compromise the prospect that employees will be able to exercise free choice. Examples of such conduct might include discharges or other discrimination directed at a significant portion of the voting unit, threats of plant closure, or other serious consequences if the union were to prevail and threats of violence to union adherents. In exercising discretion, the Regional Director should consider factors such as size of the unit, whether the conduct is ongoing, the extent to which the unfair labor practices are known to the voters, and the potential impact upon voter participation of having the election off premises.

If an election is held away from the employer's premises, it should be held as close by as is appropriate and necessary in a public building, social hall (other than one used as headquarters by a union), or a hotel, motel, school, church, or garage. A place normally used as a municipal voting place is particularly desirable. A van or truck may also be used if other accommodations are not found.

The availability of places away from the employer's premises should be taken into consideration when one of the parties urges that the election be held off company property. The initial burden of suggesting such available places should be placed on the party seeking that the election be held off company property, but final arrangements should be made by the Board agent.

The Board has stated that the choice of the election site should ordinarily be left to the sound discretion of the

² See *Hempstead Lincoln*, 349 NLRB 552, 552 fn. 4 (2007); *Pacific Grain Products*, 309 NLRB 690, 691 fn. 5 (1992).

regional director because the regional director, through his agents, can investigate potential sites and evaluate their suitability. See *Mental Health Association, Inc.*, 356 NLRB No. 151, slip op. at 1–2 fn. 5 (2011) (declining “to deviate from the Board’s current practice of leaving the determination of the appropriate method and location for initial and rerun elections to the discretion of the Regional Director”); *Smithfield Packing Co.*, 344 NLRB 1, 14 (2004) (despite recommendation of judge that new election be conducted at a neutral site or by mail, Board left “the determination of the appropriate method and location for the election to the discretion of the Regional Director”); *Federated Logistics and Operations*, 340 NLRB 255, 258 fn. 12 (2003) (refusing to rule directly on union’s request for a rerun election off the employer’s site, instead deferring to Regional Director’s “judgment on the issue of election site”); *Halliburton Services*, 265 NLRB at 1154 (same); *J.P. Stevens & Co.*, 167 NLRB 266, 270 (1967) (same). But see *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 474 (1995), *enfd.* in relevant part, 97 F.3d 65, 74 (4th Cir. 1996) (ordering rerun election be conducted off the employer’s premises in light of “egregious and pervasive” unfair labor practices, including threats of discipline and discharge, coercive interrogation, threats of plant closing, threats of deportation, and discriminatory reassignments, suspensions and discharges). In *Manchester Knitted Fashions*, 108 NLRB 1366, 1366 (1954), the Board explained, “Those factors which determine where an election may best be held are peculiarly within the Regional Director’s knowledge. His close view of the election scene, including the many imponderables which are seldom reflected in a record, is essential to a fair determination of this issue. We are convinced that it would be administratively unfeasible for the Board to make such determinations in every case.”

In this case, however, we are unable to determine whether the Regional Director abused her discretion or, indeed, whether she exercised any discretion at all. We are unable to determine if the Regional Director considered (1) the extent and nature of the Employer’s prior unlawful conduct, (2) the appropriateness of the alternative, neutral site proposed by the Petitioner, or (3) the factors the Board has indicated are best evaluated by the Director. Here, the Petitioner proposed a neutral site that appears to be equally or almost equally accessible to employees, yet we have before us no account of the Regional Director’s “close view of the election scene” with which to evaluate her rejection of the alternative site. We are thus unable at this time to determine whether the Regional Director simply followed the directions in the nonbinding Casehandling Manual without considering

whether the exception described therein should apply or otherwise exercising the discretion the Board has delegated to her. We have therefore decided to grant the request for special permission to appeal and to remand to the Regional Director so that she can exercise her discretion concerning the location of the election consistent with this opinion.

On remand, then, the Regional Director will retain discretion to select the election site based on her “close view of the election scene.” In doing so, however, she must consider the following factors.

First, the Petitioner’s objection to holding the third election on the Employer’s premises, the Employer’s request that it be held there, and the grounds therefor.

Second, the extent and nature of the Employer’s prior unlawful and objectionable conduct and the fact that the Petitioner has made a request to proceed despite the fact that the compliance period relating to the prior unlawful conduct has not yet closed. See Casehandling Manual Section 11302.2.

Third, the advantages available to the Employer over other parties to this proceeding if the election is conducted on premises it owns or otherwise controls.

Finally, the Regional Director must evaluate the alternative site proposed by the Petitioner, as well as other readily available sites. In evaluating these sites, the Regional Director shall consider their accessibility to employee-voters, the ability of the Board to conduct and properly supervise the election on the site, whether the parties to this proceeding have equal access to and control over the site, and the cost of conducting the election on the site.³

ORDER

IT IS ORDERED that this proceeding is remanded to the Regional Director for Region 15 for further action consistent with this Order Remanding.

Dated, Washington, D.C. August 2, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

³ The Regional Director shall also evaluate the propriety of conducting the election by mail ballot under the standards previously articulated by the Board and considering the Employer’s prior unlawful and objectionable conduct.

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD