

*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

**Europa Auto Imports, Inc. d/b/a Mercedes-Benz of San Diego and International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 190, Petitioner.** Case 21-RC-21210

August 25, 2011

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

The National Labor Relations Board, by a three-member panel, has considered an objection and determinative challenges to ballots cast in an election held on August 31, 2010, and the administrative law judge's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 24 votes cast for and 19 against the Petitioner, with 5 challenged ballots, which are sufficient in number to affect the results of the election.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the judge's findings<sup>1</sup> and recommendations,<sup>2</sup> and finds that a certification of representative should be issued for the reasons explained below.

The election was held in a unit of the Employer's auto technicians. The Employer's objection alleges that the Board agent engaged in misconduct by refusing to allow employees Mauricio Zaragoza and Lee Maher to vote. The judge recommended overruling the objection, finding that Zaragoza and Maher were not eligible to vote because the Employer had improperly transferred them to

---

<sup>1</sup> The judge was sitting as a hearing officer in this representation proceeding. The Employer has implicitly excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> In the absence of exceptions, we adopt, pro forma, the judge's recommendation to overrule the challenges to the ballots of Peter Faber, Brian Palmiter, Jose Casanova, and Chris Switzer.

In adopting the judge's recommendation to sustain the challenge to the ballot of Remo Bersinger, we agree with the judge that Bersinger is a supervisor within the meaning of Sec. 2(11) of the Act as a result of his authority to promote bargaining unit employees using independent judgment. We do not rely on the judge's finding that Bersinger assigns work to employees.

the technician classification only days before the end of the eligibility period in order to affect their voting eligibility. Although we affirm the judge's recommendation to overrule the Employer's objection, we do not rely on his rationale. As explained below, the Employer's assertion that Zaragoza and Maher were eligible to vote is untimely, as eligibility is not properly litigated through the postelection objections process. The only question before the Board at this stage of the proceeding is whether the Board agent acted improperly, based on the information available to him, in refusing to allow Zaragoza and Maher to vote. We find that he did not.

In his Decision and Direction of Election, the Acting Regional Director found that Zaragoza and Maher were not eligible to vote, based on evidence presented by the Employer at the preelection hearing. After the preelection hearing, but before the end of the eligibility period, the Employer made operational changes that could have affected Zaragoza's and Maher's eligibility. Most important, the Employer placed them into a technician classification that was included in the unit. In seeking review of the Decision and Direction of Election, however, the Employer failed to bring these changes to the attention of the Board. The Board denied the request for review in relevant part and adopted the Acting Regional Director's decision finding that Zaragoza and Maher were not eligible to vote.

At the preelection conference, the Board agent, in accordance with the Board's order denying review, struck the names of Zaragoza and Maher from the eligibility list. The Employer did not raise the issue of changed circumstances at that time. Similarly, no one apprised the Board agent of any changed circumstances when he denied Zaragoza's and Maher's attempts to vote during the election, or at any other time before the polls closed. Instead, after the election, the Employer filed an objection alleging that the Board agent's failure to allow Zaragoza and Maher to vote "chilled the laboratory conditions of the election atmosphere and created a condition where voters were disenfranchised from the election process."

Following the election, the Acting Regional Director issued a supplemental decision ordering a hearing on the challenged ballots of several employees. In that supplemental decision, the Acting Regional Director also addressed the Employer's objection, finding that the Board agent acted properly in refusing to allow Zaragoza and Maher to vote. Nevertheless, the supplemental decision expressly permitted the parties to present evidence at the hearing concerning "possible changed circumstances in terms and conditions of employment for Maher and Zaragoza" and "the election-day events related to their

franchise.” At the postelection hearing, the Employer presented, for the first time, evidence that Zaragoza and Maher had been transferred into the technician classification.

We depart from the judge’s analysis insofar as he examined the Employer’s objection in terms of Zaragoza’s and Maher’s eligibility. It is well established that the Board will not permit a party to raise eligibility issues under the guise of a postelection objection. As the Board has long held, and as the Supreme Court has recognized, “challenges to the eligibility of voters [must] be made prior to the actual casting of ballots, so that all uncontested votes are given absolute finality.” *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 331 (1946); accord: *Solvent Services*, 313 NLRB 645, 646 (1994) (“[I]n the interest of promoting election finality, postelection challenges will not be permitted”). The same holds true for challenges to preelection rulings that employees are not eligible to vote. Here, the Employer had multiple preelection opportunities to present evidence of Zaragoza’s and Maher’s reclassification, including to the Board in its request for review and to the Board agent at the preelection conference or, at the very latest, at any time before the polls closed. Having failed to do so, the Employer cannot now use a postelection objection to argue that Zaragoza and Maher were eligible voters. Accordingly, we find that the Employer’s argument that changes to Zaragoza’s and Maher’s job duties made them eligible was not timely made.<sup>3</sup>

The only question properly before the Board, therefore, is whether, as alleged in the Employer’s objection, the Board agent’s actions require setting aside the election. To prevail on that question, the Employer, as the objecting party, must establish facts raising a “reasonable doubt as to the fairness and validity of the election” *Rheem Mfg. Co.*, 309 NLRB 459, 460 (1992), quoting *Polymers, Inc.*, 174 NLRB 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970). The Employer contends that the fairness of the election was compromised because the Board agent struck the names of Zaragoza and Maher from the eligibility list and did not allow them to vote. We disagree.

The Board agent clearly adhered to established election procedures. Section 11338.7 of the Board’s Casehandling Manual (Part Two), Representation Procedures provides, in relevant part:

<sup>3</sup> The fact that the Acting Regional Director permitted the Employer to introduce evidence of “changed circumstances” does not require the Board to find that such circumstances existed or to engage in a belated re-examination of eligibility.

Persons in job classifications specifically excluded by the Decision and Direction of Election should be refused a ballot, even under challenge, unless there have been changed circumstances. The Board agent must exercise discretion in deciding whether to allow a vote under challenge when the person presents plausible reasons for being permitted to vote despite the exclusion or when there is some question as to whether the person is actually within the excluded group.

...  
In all situations where reasonable doubt exists concerning whether the prospective voter falls within an included or excluded category or whether changed circumstances have altered the voter’s eligibility status, the challenged ballot procedure should be used.<sup>4</sup>

Here, the Board agent acted in accordance with the Board’s denial of review of the Decision and Direction of Election, which specifically excluded Zaragoza and Maher from the unit. As described, moreover, neither the Employer nor Zaragoza or Maher provided the Board agent any reasons, much less “plausible reasons,” why they should have been permitted to vote or why, because of changed circumstances, there was at least a “reasonable doubt” concerning their eligibility. Thus, given the evidence available to the Board agent at the time, his decision not to allow Zaragoza and Maher to vote was fully consistent with the Board’s standard procedures. In those circumstances, we find that his actions do not raise a “reasonable doubt as to the fairness and validity of the election.” We therefore overrule the Employer’s objection.

In view of the foregoing, and inasmuch as the four challenged ballots the judge concluded should be counted are insufficient to affect the results of the election, we shall certify the Petitioner.

#### CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 190, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit:

All flat-rate technicians, PDI Technicians, Roadside Assistance Technicians, and hourly Smart technicians employed by the Employer at its facility located at

<sup>4</sup> Although the Casehandling Manual is not binding on the Board, it provides “operational guidance” that is “intended to safeguard a free and fair election.” *Queen Kapiolani Hotel*, 316 NLRB 655, 655 fn. 5 (1995); *Kirsch Drapery Hardware*, 299 NLRB 363, 364 (1990).

4750 Kearny Mesa Road, San Diego, CA; excluding all other employees, Service Advisors, all other hourly technicians, Parts Department employees, Loaner Department employees, Rental Car Department employees, Warranty Administration employees, Cashiers, Greeters, Car Washers, office clerical employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C. August 25, 2011

---

Wilma B. Liebman, Chairman

---

Craig Becker, Member

---

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD