

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 12-50

April 24, 2012

TO: All Regional Directors, Officers-in Charge,
and Resident Officers

FROM: Anne Purcell, Associate General Counsel

SUBJECT: Guideline Memorandum for Evaluating Location of Rerun Elections

I. INTRODUCTION

The majority of Board elections are conducted on the employer's premises (onsite). This practice is consistent with Section 11302.2 of the Casehandling Manual, which states that the best place to hold an election, from the standpoint of accessibility to voters, is on the employer's premises. In the absence of good cause to the contrary, the election should be held onsite. But, as suggested by that provision, there are instances when it is appropriate to conduct an election away from the employer's premises (offsite). Until quite recently the Board's guidance about the factors that should be considered when evaluating the propriety of conducting an offsite election was limited to cases involving "egregious and pervasive" unfair labor practices. In its recent decision in *2 Sisters Food Group, Inc.*,¹ the Board included a discussion of factors that must be considered when an issue is presented concerning the election location in a rerun election.

2 Sisters involved Union objections to Employer conduct alleged to have affected the election outcome. The Board affirmed the Administrative Law Judge's finding that the Employer engaged in objectionable conduct that warranted setting aside the election. The Board then proceeded to consider the Union's request for an order directing an offsite election. While the Board ultimately remanded the case to the Regional Director to make the determination about the election site, its decision discussed at length the factors that the Regional Director must consider in evaluating whether to conduct the rerun election offsite. This memorandum discusses the Board's decision and provides guidance about the factors that must be considered and the procedure that should be followed when a Regional Director has to resolve a dispute about where to hold a rerun election.

II. DESIGNATION OF ELECTION SITE AND STANDARD OF REVIEW

The Board has consistently stated that Regional Directors are in the best position to make election-site determinations and has vested them with the authority to do so, subject to limited Board review. See, *Manchester Knitted Fashions*, 108 NLRB 1366, 1366 (1954) (Board explained the Regional Director's close proximity to the election scene, including the ability to

¹ 357 NLRB No. 168 (December 29, 2011).

assess the many imponderables that are seldom reflected in a record, is essential to a fair determination of the issue). In *Mental Health Association, Inc.*, 356 NLRB No 151, slip op. at 1-2 fn. 5 (April 29, 2011), the Board declined to deviate from its established practice of delegating to the Regional Director the authority to make the initial determination regarding the appropriate method and location for initial and rerun elections.

When a party disagrees with a Regional Director's determination regarding the location of an election, the Board reviews the determination using an abuse of discretion standard. Accordingly, when the Regional Director designates the election site, the parties should always be informed in writing of the Region's determination, including an explanation of the rationale supporting the decision. The issuance of a written explanation by the Regional Director is necessary to allow the Board to exercise its oversight responsibility with respect to location issues in rerun elections.

In *Austal USA, LLC*², the Petitioner asked the Regional Director to conduct a second rerun election offsite or, alternatively, by mail ballot. The Regional Director orally denied the requests and subsequently informed the parties in writing that the election would take place on the Employer's premises. This letter did not discuss the reasons for the Director's determination that the election should be conducted onsite. Treating the Petitioner's request for review as a request for special appeal, the Board noted that it was unable to determine, because of the lack of a written explanation presenting the Regional Director's rationale for rejecting the request to conduct an offsite election, whether the Regional Director's decision constituted an abuse of discretion. The Board granted Petitioner's request for special permission to appeal and remanded the case to the Regional Director with instructions to exercise her discretion concerning the manner and location of the election. Thereafter in *2 Sisters* the Board elaborated on the factors Regional Directors must consider in exercising their discretion to make rerun election site determinations.

III. CRITERIA FOR EVALUATING OFFSITE ELECTION REQUESTS

The Board in *2 Sisters* discussed the four factors that Regional Directors must consider when ruling on a request to conduct a rerun election offsite.

1. *The Petitioner's objection to holding the rerun election on the Employer's premises, the Employer's request that it be held there, and the grounds therefore.*

In the absence of an agreement between the parties concerning the voting location, the Board's guidelines require Regional Directors to consider the preferences of *all* parties to the rerun election.³ The Petitioners in *Austal* and *2 Sisters* objected to holding rerun elections onsite. Although the Board found these objections to be relevant, it emphasized that the analysis should consider the preferences of all the parties to the election. Accordingly, if a party files an

² 357 NLRB No. 40 (August 2, 2011).

³ Although the dissent suggested that the majority opinion holds that the Petitioner's preference would be the decisive factor, the Board's decision emphasizes that the Regional Director's evaluation should include the preferences of all parties to the proceeding.

objection to conducting an election onsite, in addition to that objection, the Regional Directors must also consider the positions of the other parties regarding the location of the election. Thus, if a party has not responded to another party's request for an offsite election, as was the case in *2 Sisters*, the Region should solicit the position of the other parties on this issue. Only after evaluating all the parties' positions should the Regional Director designate an election site.

2. *The extent and nature of the Employer's prior unlawful and objectionable conduct and whether the Petitioner makes a request to proceed despite the fact that the compliance period relating to the prior unlawful conduct has not yet closed.*

The second factor articulated by the Board requires consideration of the impact of any prior unlawful and objectionable conduct and whether a request to proceed has been filed.⁴ Workplace conduct that compromises employees' ability to exercise free choice weighs against an onsite election. In *Austal* and *2 Sisters*, the Board identified conduct relevant in considering the Petitioners' request for offsite elections to include discharges, threats and interrogations by high level company officials, election-day polling, and disparate enforcement of workplace rules that restricted union supporters from discussing the Union. Additionally, in *Austal* the Board noted that the Employer required employees to present identification to uniformed guards before they were admitted into the facility on the day of the first election.

In addition to the conduct identified by the Board in *Austal* and *2 Sisters*, Regions should also consider conduct of the nature identified in Section 11302.2 of the Manual. This includes discrimination directed at a significant portion of the voting unit, threats of plant closure or other serious consequences if the union prevails, and threats of violence to union adherents. In evaluating whether an employer's conduct has compromised the possibility of employees exercising free choice, Regions should consider the size of the petitioned-for unit, the degree of dissemination, and the extent of the employer's conduct, specifically, whether it was isolated or ongoing. Further, the Regional Director should afford the Petitioner an opportunity to make a choice as to whether to proceed to a rerun election despite the unfair labor practices and the nonexhaustion of the compliance period.

3. *The advantages available to the Employer over other parties to the proceeding if the election is conducted on Employer owned or controlled premises.*

The third factor discussed by the Board in *2 Sisters* requires an evaluation of potential advantages available to an employer over other parties to an election if it is conducted on premises owned or controlled by the employer. The Board noted that, with few exceptions (i.e. hospitals, college campuses, and libraries), in most workplaces public access is restricted. In this regard, citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) and its progeny, the Board in *2 Sisters* acknowledged that an employer's use of its premises to campaign while excluding union representatives and limiting employee campaigning, even on election day, does not violate the Act. *Id.*, slip op. at 6. The Board, nonetheless, expressed its concern that where employers engage in an active anti-union campaign in the workplace and limit union representatives and

⁴ A Regional Director may proceed with an election if a request to proceed has been filed. See, Section 11730.2 of the Casehandling Manual.

employees from spreading pro-union messages, such conduct weighs against holding rerun elections on their property if doing so gives them an unfair advantage. Given employers' rights to control their premises in these respects, holding an election onsite raises questions about the parties' relative opportunities to campaign, particularly in light of the Board's concern about the influence of campaign conduct in the 24-hour period immediately preceding the election.

The Board noted that there may be instances when an employer permits access to party representatives or circumstances where the Regional Director may be able to specify poll locations and hours so that all parties have equal access to employees during critical periods. For example, the election may be conducted prior to employees starting work at a location on the work site accessed directly from a public sidewalk. In these circumstances all parties have equal access to employees during critical periods and an onsite election would be appropriate. However, if those circumstances do not exist, Regions must evaluate whether holding an election on the employer's premises will result in the employer having an advantage over other parties to the proceeding. If it does, that factor weighs against holding the election onsite.

The Board has long recognized the significant advantage gained by the party who obtains the ability to communicate the "last, most telling word".⁵ When an employer restricts the access of the union or another party, it gains the advantage of having the last ability to communicate with employees about the election. In the Board's view, employers also recognize this advantage since they consent to holding elections on their premises in almost all instances, even though the Board lacks authority to require onsite elections. In *2 Sisters*, the Board expressed its concern that holding representation elections on premises controlled by one party without the consent of all others is inconsistent with the Board's obligation to "insure [] that no party gains a last minute advantage over the other."⁶

In discussing the application of the third factor, the Board stated that an employer's exercise of its constitutional right to freely speak to employees concerning an upcoming or ongoing election is entirely irrelevant to the choice of an election site. Likewise, the advantages or disadvantages generally possessed by any party prior to or after the opening of the polls are not relevant considerations. The only relevant consideration is the "advantages available to the employer over the other parties to [the] proceeding if the election is conducted on premises it owns or otherwise controls."

In *Austal* the Board observed that the Employer conducted an active campaign against the Union in the workplace, with Employer representatives meeting with employees individually and in small groups, while contemporaneously banning employees from engaging in pro-Union conversations. On the day of the first election, the Employer stationed uniformed guards at the facility's entrance and required employees to present identification before being admitted. Similarly, on the day of the election in *2 Sisters* employees were greeted by a number of security guards and law enforcement officers from the Sheriff's Department. Several employees were

⁵ *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953) ("Such a speech, because of its timing, tends to create a mass psychology which overrides arguments made through other campaign media and gives an unfair advantage to the party, whether employer or union, who in this manner obtains the last most telling word.")

⁶ See, *Milchem, Inc.*, 170 NLRB 362 (1968) (strict rule against prolonged conversations between representatives of any party to the election and voters waiting to cast ballots).

detained at the entrance gate and were required to have escorts take them to the voting area. In some instances this conduct prolonged the time it took employees to vote. Employer agents had free access to the premises on election day, speaking to numerous voters one-on-one before they voted. Conversely, union access was restricted to attendance at the pre-election conference and inspection of the polling place. Lastly, employees had to pass Respondent's campaign posters and several operational security cameras to get to the polls. The Board deemed all of these circumstances relevant to the consideration of the election site.

In evaluating the advantages to an employer if an election is conducted onsite, Regions should determine whether there are circumstances similar to those presented in *2 Sisters* and *Austal*. If the Region believes circumstances, other than those identified by the Board in *2 Sisters* and *Austal*, exist that would give an employer an advantage over other parties to the proceeding if the rerun election was conducted onsite, the Region should consult with the Division of Operations Management before making a final determination.

4. *Any alternative sites proposed by the Petitioner, as well as other readily available sites.*

Finally, consideration must be given to alternative sites, including those proposed by a petitioner, as well as those known by the Regional Director. This should take into account the following: (1) accessibility to employee-voters, (2) the ability of the Board to conduct and properly supervise the election, (3) whether the parties have equal access to and control over the site, and (4) the cost of conducting the election at the alternative site.⁷ The Board noted that it must defer to the sound discretion of its Regional Directors with respect to evaluating the suitability of alternative sites. The Board explained that this practice is based on the fact that the Regional Director, through his or her agents, is in the best position to investigate potential sites and to make an evaluation of their suitability. The Board cautioned, however, that the Regional Director's discretion to determine an appropriate election site must be exercised after considering the factors the Board identified as relevant in resolving election location disputes.

IV. CONCLUSION

It is the Board's fundamental responsibility to conduct free and fair elections. Ordinarily, there are many advantages to the parties and to the Agency in holding elections on the employer's premises. There is, however, no requirement that elections be held onsite. Accordingly, if a party opposes holding a rerun election at the workplace, Regional Directors must exercise their discretion to designate a voting site within the guidelines articulated by the Board in *2 Sisters*. Should a party oppose the holding of an *initial* election at the worksite, the Region should consult with Operations-Management before proceeding. Finally, in those circumstances where there is a dispute whether a rerun election should be held on the employer's premises, the Regional Director must issue a written explanation for the determination.

⁷ In cases where the Director is evaluating the possibility of conducting the election offsite, Regions are reminded that they must first check with the Facilities and Property Branch to determine if GSA controlled space is available at no cost to the Agency, as a prerequisite to obtaining space at market rates.

Regions should consult with their Assistant General Counsel or Deputy or the undersigned if there are questions concerning the implementation of this memorandum.

/s/
A.P.

cc: NLRBU
Release to the Public

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