

NOT TO BE INCLUDED  
IN BOUND VOLUMES

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Janesville, WI

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RATHGIBSON, INC.

and

Case 30-RC-6747

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 139, AFL-CIO

DECISION AND DIRECTION OF SECOND ELECTION

The National Labor Relations Board<sup>1</sup> has considered objections to an election held April 2, 2009, and the hearing officer's report recommending disposition of them. The election was

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<sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Teamsters Local 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct. 488 (2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564

conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 60 votes for and 62 against the Petitioner.<sup>2</sup>

The Board has reviewed the record in light of the exceptions and briefs,<sup>3</sup> has adopted the hearing officer's findings<sup>4</sup> and recommendations, as specified below, and finds that the election must be set aside and a new election held.<sup>5</sup>

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F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

<sup>2</sup> The initial ballot tally showed 60 votes for and 59 against the Petitioner, with challenged ballots sufficient in number to affect the result. In the absence of exceptions to the hearing officer's resolution of the ballot challenges, the Board, on September 29, 2009, directed the Regional Director to open and count the ballots of Robert Dibble, Timothy Armstrong, and Tracy Pankhurst. Subsequently, the Regional Director issued the revised tally and transferred this proceeding back to the Board for consideration of the Employer's exceptions to the hearing officer's findings of objectionable conduct.

<sup>3</sup> We affirm the hearing officer's approval of the Petitioner's post-hearing request to withdraw its challenge of employee Dibble's ballot. Accordingly, we deny the Employer's exception that the hearing officer erroneously failed to consider the challenge on the merits.

In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule Objections 2, 5, and A, and portions of Objections 1, 4, and 6.

<sup>4</sup> The Employer has 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 find no basis for reversing the findings.

<sup>5</sup> We find no merit in the Employer's exception to the hearing officer's denial of its request to reopen the record for evidence of its post-hearing bankruptcy filing under Chapter 11. The hearing officer found the filing irrelevant to the issues in this proceeding, and we agree. Even assuming arguendo a measure of relevance, the Employer has not demonstrated that an

We agree with the hearing officer that the Employer engaged in objectionable conduct when Supervisor Tony Cichella threatened employee Robert Powers that the Employer's corporate owner might "come in and run a company like this into the ground to keep the union out." We also agree that Supervisor Otto Maldonado's statements to employee Brady Schultz that Schultz and other employees would be "crazy" to think that they would be able to keep their current wage rates in negotiations constituted objectionable threats that the Employer would cut wages if the Petitioner were elected to represent the employees. Because this objectionable conduct is sufficient to require a new election, we find it unnecessary to consider the hearing officer's findings of additional misconduct.

#### 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

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evaluation of its proffered documents would require a different result concerning the findings of objectionable conduct we affirm here. Thus, the Employer has not established

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 first election and who retained their employee status during the eligibility period and their replacements. Jeld-Wen of Everett, Inc., 285 NLRB 118 (1987). 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 election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Union of Operating Engineers, Local 139, AFL-CIO.

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).

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"extraordinary circumstances" for reopening the record. See Sec. 102.65(e) of the Board's Rules and Regulations.

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 if proper objections are filed.

Dated, Washington, D.C. , February 23, 2010.

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Wilma B. Liebman, Chairman

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Peter C. Schaumber, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD