

NOT INCLUDED IN
BOUND VOLUMES

PGB
Nanuet, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

S & H ASSOCIATES

Employer

and

Case 02-RC-082036

LOCAL 259, UNITED AUTO WORKERS,
AFL-CIO

Petitioner

DECISION AND DIRECTION OF SECOND ELECTION

The National Labor Relations Board has considered objections to an election held on July 18, 2012, 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 15 for and 15 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations,¹ and finds that the election must be set aside and a new election held.

¹ The Petitioner filed seven objections. In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule Objections 6 and 7. By Decision and Order issued November 16, 2012, the Board adopted the Regional Director's recommendation to overrule Objections 1, 2, and 3. Thus, only Objections 4 and 5 are before the Board.

In adopting the hearing officer's recommendation to set aside the election, we rely on her finding that the Employer's agent, David Martin Nystrom, stated in an employee meeting that the Employer would not sign a contract if the Union won. Because this statement was sufficient to require setting aside the election, we find it unnecessary to pass on the hearing officer's findings regarding the Employer's other allegedly objectionable statements.

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 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 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 have carefully examined the record and find no basis for reversing the findings.

In its exceptions brief, the Employer "reserves all rights" to argue that the President's recess appointments are constitutionally invalid and that the Board therefore lacks a quorum. We reject this contention. We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the recess appointments were not valid. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), pet. for cert. filed April 25, 2013 (No. 12-1281). However, as the court itself acknowledged, its decision conflicts with rulings of at least three other courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied, 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). This question remains in litigation, and, pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. See *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1, fn. 1 (2013).

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 Local 259, United Auto Workers, 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). 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., May 29, 2013.

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD