

The Nyack Hospital and Local 200, Service Employees International Union, AFL-CIO and Local 363, International Brotherhood of Electrical Workers, AFL-CIO, Joint-Petitioners

The Nyack Hospital and Local 200, Service Employees International Union, AFL-CIO, Petitioner.
Cases 2-RC-17762, 2-RC-17774, and 2-RC-17775

September 21, 1978

DECISION AND DIRECTION OF SECOND ELECTIONS

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the objections to elections held on March 31, 1978,¹ and the Regional Director's report recommending disposition of same. Pertinent portions of that report are attached hereto as an Appendix. The Board has reviewed the record in light of the exceptions and brief, and hereby adopts the Regional Director's findings and recommendations.

[Direction of Second Elections and *Excelsior* footnote omitted from publication.]

APPENDIX

REPORT ON OBJECTIONS AND RECOMMENDATIONS

Pursuant to Stipulations for Certification Upon Consent Election in the above-captioned consolidated proceeding, approved by me on December 2, 1977, an election was held on March 31, 1978, in the following units:²

Case No. 2-RC-17762: All full-time and regular part-time service and maintenance employees employed by the Nyack Hospital at its Midland Avenue hospital in certain job classifications and departments, but excluding all other employees, technical employees, clerical employees, profes-

sional employees, managerial employees, guards and supervisors as defined in the Act.

Case No. 2-RC-17774: All full-time and regular part-time technical employees employed by the Nyack Hospital at its Midland Avenue hospital in certain job classifications and departments, but excluding all other employees, clerical employees, service and maintenance employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

Case No. 2-RC-17775: All full-time and regular part-time office clerical employees employed by the Nyack Hospital at its Midland Avenue hospital in certain job classifications and departments, but excluding all other employees, service and maintenance employees, technical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

The Tally of Ballots in Case No. 2-RC-17762, the service and maintenance unit, duly served upon the parties, showed the following:

Approximate number of eligible voters 350
Void ballots 4
Votes cast for Joint-Petitioner 41
Votes cast for Intervenor 106
Votes cast against participating labor organizations 77
Valid votes counted 224
Challenged ballots 24
Valid votes counted plus challenged ballots 248

Challenges are sufficient in number to affect the results of the election.

The Tally of Ballots in Case No. 2-RC-17774, the technical unit, duly served upon the parties, showed the following:

Approximate number of eligible voters 325
Void ballots 0
Votes cast for Petitioner 19
Votes cast for Intervenor 68
Votes cast against participating labor organizations 109
Valid votes counted 196
Challenged ballots 14
Valid votes counted plus challenged ballots 210

Challenges are not sufficient in number to affect the results of the election.

A majority of the valid votes counted plus challenged ballots has been cast for neither labor organization.

The Tally of Ballots in Case No. 2-RC-17775, the office clerical unit, duly served upon the parties showed the following:

Approximate number of eligible voters 200
Void ballots 2
Votes cast for Petitioner 39
Votes cast for Intervenor 26
Votes cast against participating labor organizations 86
Valid votes counted 151
Challenged ballots 20
Valid votes counted plus challenged ballots 171

¹ The elections were conducted pursuant to Stipulations for Certification Upon Consent Election. In Case 2-RC-17762, the tally was 41 for Joint-Petitioner, 106 for District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, Intervenor, 77 against participating labor organizations, and 4 void ballots; there were 24 challenged ballots, a sufficient number to affect the results of the election. In Case 2-RC-17774, the tally was 19 for Petitioner, 68 for Guild of Professional, Technical and Office Employees, a Division of District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, Intervenor, 109 against participating labor organizations; there were 14 challenged ballots, an insufficient number to affect the results of the election. In Case 2-RC-17775, the tally was 39 for Petitioner, 26 for Intervenor, 86 against participating labor organizations, and 2 void ballots; there were 20 challenged ballots, an insufficient number to affect the results of the election.

² For the sake of brevity, the detailed lists of job classifications and departments within the inclusions and exclusions in each unit, noted below, are not reproduced herein.

Challenges are not sufficient in number to affect the results of the election.

A majority of the valid votes counted plus challenged ballots has been cast for neither labor organization.

On April 7, 1978, District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, herein called District 1199, filed timely objections to conduct affecting the results of the election in Case Nos. 2-RC-17774 and 2-RC-17775, copies of which were served upon the parties.

The objections, verbatim, are as follows:

"1. On the day of the election the polls were not opened until at least one hour after the time they were supposed to be open, thereby resulting in low turnout of voters, many of whom did not vote because of the delay."

* * * * *

On April 10, 1978, Local 200 filed timely objections to conduct affecting the results of the election in Case Nos. 2-RC-17762, 2-RC-17774, and 2-RC-17775, copies of which were served upon the parties.³

The objections, verbatim, are as follows:

* * * * *

OBJECTIONS TO THE CONDUCT OF REPRESENTATIVES OF THE NATIONAL LABOR RELATIONS BOARD THAT AFFECTED THE CONDUCT OF THE ELECTION OR CONSTITUTE A CONDUCT AFFECTING THE RESULTS OF THE ELECTION THAT WOULD WARRANT THE DETERMINATION THAT THE ELECTION SHOULD BE SET ASIDE.

The Board agent in charge of the election . . . was tardy in arriving at the election site and opening the polls.

The polls were scheduled to be opened at 6:05 a.m. On the morning of the election, the Board Agent telephoned the election site and advised . . . he would be late in arriving at the election site and opening the polls. As a result of the late opening of the polls, over one hour late, the night shift consisting of a large number of employees was unable to exercise their franchise and participate in the election process. In fact, groups of employees who had waited patiently to cast their ballot, gave up in disgust and left before the polls opened.

* * * * *

Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation was conducted of the objections concerning the late opening of the polls.⁴ During the

³ Although Local 200's objections were mailed on April 5, 1978, they were not received by me until April 10, 1978, one business day after the expiration of the five day period for filing objections prescribed by Section 102.69 of the Board's Rules and Regulations, Series 8, as amended. As Local 200's mailing of the objections on April 5, 1978, could reasonably have been expected to result in the timely filing of its objections, and as the delay in receiving the objections does not appear to be attributable to Local 200, its objections were timely filed. *Rio de Oro Uranium Mines, Inc.*, 119 NLRB 153 (1957).

⁴ In view of the recommendations set forth below with respect to these objections, I find it unnecessary to conduct an investigation or make recommendations concerning the remaining objections. In this connection, it is noted that conduct which occurred prior to the March 31, 1978, election could not be the basis for setting aside any second election in the instant proceeding. *Regency Electronics, Inc.*, 198 NLRB 627, fn 3 (1972); *The Singer Company, Wood Products Division*, 161 NLRB 956, fn 2 (1966).

investigation, the parties were afforded a full opportunity to submit evidence bearing upon the issues.⁵ The results of the investigation are discussed below:

The Objections with Respect to the Late Opening of the Polls

District 1199 takes the position that the late opening of the polls prevented employees from voting, thereby destroying the laboratory conditions necessary for the conduct of the election so as to require that the election in Case Nos. 2-RC-17774 and 2-RC-17775, the technical and office clerical units respectively, be set aside and a second election directed.

Local 200's position is similar to that of District 1199, except that Local 200 contends that the election in Case No. 2-RC-17662, the service and maintenance unit, should be set aside as well and a second election directed therein.

The Employer's position is that those employees who did not vote in the election were not prevented from voting by the late opening of the polls, and merely chose not to vote. Thus, the Employer contends the elections should not be set aside, or in the alternative, that I should conduct an investigation to determine the reasons for each employee's failure to vote in the elections.

The Employer further contends that it requires the *Excelsior* lists used by the observers in order to conduct its own investigation of the impact upon the election caused by the late opening of the polls.⁶

Finally, the Employer contends that prior to the counting of the ballots, the parties agreed to conduct the election with full knowledge of the late opening of the polls, thereby waiving their right to file objections with respect thereto.

For the reasons stated below, I find the objections concerning the late opening of the polls to be meritorious, and the Employer's contentions to be without merit.

The investigation revealed that there were two voting sessions scheduled on the day of the election at the Employer's premises in order to afford employees in the day, evening, and night shifts an opportunity to vote. The first voting session was scheduled to begin at 6:00 a.m. and end at 11:00 a.m., with the second voting session scheduled to begin at 2:00 p.m. and end at 5:00 p.m. The Board agent charged with bringing the election materials, including, *inter alia*, the ballots and voting eligibility lists, arrived at the Employer's premises at about 6:40 a.m. Accordingly, the polls did not open until approximately 6:55 a.m., after the

⁵ On April 20, 1978, the Employer made a request, pursuant to the Freedom of Information Act, for a copy of the *Excelsior* lists herein with the election observers' markings showing which persons appeared to vote in the elections conducted on March 31, 1978. I denied this request on April 28, 1978, on the ground that said *Excelsior* lists were privileged from disclosure under one or more exemptions contained in the Freedom of Information Act. Thereafter, the Employer filed an appeal with the General Counsel requesting a review of this determination which appeal was denied on June 5, 1978. For the reasons stated more fully herein, I find that the Employer was not denied an opportunity to submit evidence on whether employees were disenfranchised by the late opening of the polls as a result of its inability to obtain said *Excelsior* lists.

⁶ The Employer filed a motion with the General Counsel requesting a transfer of the investigation of the instant objections to another Regional Office and a stay of the investigation pending decision on said motion to transfer. This motion was denied by the General Counsel on May 24, 1978.

election materials were set up and the polling area was cleared of the parties' representatives.⁷

In Case No. 2-RC-17762, the service and maintenance unit, 248 employees voted in the election out of 312 employees on the eligibility list.⁸

In Case No. 2-RC-17774, the technical unit, 210 employees voted in the election out of 290 employees on the eligibility list.⁹

In Case No. 2-RC-17775, the office clerical unit, 171 employees voted in the election out of 196 employees on the eligibility list.¹⁰

Inasmuch as "[t]he Board is responsible for assuring properly conducted elections . . . its role in the conduct of elections must not be open to question."¹¹ Thus, as in the instant case, where there is some irregularity in the conduct of an election which "irregularity exposes to question a sufficient number of ballots to affect the outcome of the election,"¹² there is no alternative but to set the election aside and direct a new election in the interest of maintaining the Board's strict standards for the conduct of elections.

In *B & B Better Baked Foods, Inc.*,¹³ the Board set aside an election where there were two voting sessions and the Board agent charged with conducting the election arrived at 7:40 a.m., 40 minutes after the polls were scheduled to open. The Regional Director had recommended that the election be set aside only if the ballots of the employees whose shifts ended at 7:00 a.m. and who had not voted proved determinative, after counting the ballots to which challenges were overruled. The Board, however, held:

[I]t is frequently impossible to determine to what extent a substantial departure by the Board agent from scheduled election voting hours has affected the outcome of the ensuing election. In this case, the votes of those possibly excluded from voting could have been determinative. Moreover, the ensuing votes may have been affected by the conduct of the Board agent. To preclude such occurrences as this, which cast doubt on the results of elections which we are responsible for certifying, and to carry out our responsibility for assuring properly conducted elections and maintaining our own standards, we see no alternative but to set aside this election and direct a second election.¹⁴

Accordingly, the Board found "that the late arrival of the Board agent so disturbed the laboratory conditions neces-

sary for the conduct of the election as to require that the election be set aside and a second election directed," regardless of whether the ballots of the employees possibly excluded from voting proved determinative.¹⁵

In *Kerona Plastics Extrusion Company*,¹⁶ where morning and afternoon voting sessions were scheduled and the Board agent conducting the morning session inadvertently closed the polls 20 minutes early, the Board held:

It is impossible here to determine whether the aforementioned irregularity affected the outcome of the election. However, we find that the laboratory conditions have been disturbed to such a serious extent that in the interest of maintaining our standards there appears no alternative but to set this election aside and to direct a new election.¹⁷

In *G.H.R. Foundry Division, The Dayton Malleable Iron Company*,¹⁸ where the election began 35 to 45 minutes late, the Regional Director interviewed substantially all of the 93 eligible voters who did not cast votes in the election to ascertain their reasons for not voting. Based upon this investigation, the Director concluded that only three employees had been denied an opportunity to vote because of the late opening of the polls, and recommended that the election be set aside only if the votes of the three employees could have affected the results of the election. The Board reversed the Director, stating that it was not persuaded that only three employees were precluded from voting by the late opening of the polls. Moreover, the Board stated that postelection statements of employees regarding their voting intentions cannot be used as a basis for determining whether to set aside elections. Accordingly, the Employer's contention, in the instant case, that the reasons for each eligible employee's failure to vote should be ascertained through an investigation is without merit. Similarly, the Employer's contention concerning its inability to conduct its own investigation into employees' reasons for not voting due to the unavailability of the *Excelsior* lists used by the observers is without merit. Such an investigation, whether conducted by the Board or by the Employer, would, for the most part, merely adduce the subjective reasons of eligible employees as to why they did not vote. It was precisely this type of investigation, consisting of postelection subjective statements, that the Board rejected in *G.H.R., supra*. The Board stated that it was precluded "from accepting from eligible voters subjective reasons as to why they did not vote."¹⁹ Such postelection subjective statements are therefore not relevant to the effect of the late opening of the polls upon the instant election.

Furthermore, the Board's responsibility to establish an election procedure affording all eligible employees an opportunity to vote is not subject to waiver by the parties.²⁰ Therefore, assuming, *arguendo*, that prior to the counting of ballots, the parties had agreed to conduct the election notwithstanding the late opening of the polls, as the Employer contends, such agreement could not relieve the Board of its

⁷ Local 200 submitted an affidavit in support of its objections stating that the Board agent in possession of the ballots did not arrive until 7:00 a.m. In view of my finding that the polls did not open until approximately 6:55 a.m., accepting, *arguendo*, Local 200's version of the time of arrival would not change my recommendations herein.

⁸ Although the eligibility list contained the names of 339 employees, at the preelection conference, it appeared that the employment of 26 employees had been terminated prior to the date of the election, and that one individual on the eligibility list was excluded from the unit.

⁹ Although the eligibility list contained the names of 304 employees, at the preelection conference, it appeared that the employment of 14 employees had been terminated prior to the date of the election.

¹⁰ Although the eligibility list contained the names of 204 employees, at the preelection conference, it appeared that the employment of 5 employees had been terminated prior to the election, that 4 employees were employed in job classifications excluded from the unit, and that one employee's name had been inadvertently omitted from the eligibility list.

¹¹ *New York Telephone Co.*, 109 NLRB 788, 790 (1954).

¹² *Id.*

¹³ 208 NLRB 493 (1974).

¹⁴ *Id.* (footnote omitted).

¹⁵ *Id.*

¹⁶ 196 NLRB 1120 (1972).

¹⁷ *Id.*

¹⁸ 123 NLRB 1707 (1959).

¹⁹ 123 NLRB at 1709.

²⁰ *Alterman-Big Apple, Inc.*, 116 NLRB 1078, 1080 (1956).

responsibility to assure all eligible employees an opportunity to vote.

In *Alterman-Big Apple, supra*, the Employer contended that the Petitioner had waived its right to object to the timing of the election by agreeing to conduct the election with knowledge that some eligible employees would be away from the plant during the entire time the election was conducted. The Board held that the matter of affording eligible employees an opportunity to vote is not subject to waiver by the parties, and it set aside the election because a number of employees sufficient to affect the results were denied an opportunity to vote as a direct consequence of improper scheduling of the election.

In view of the foregoing, I find the Employer's contention concerning an alleged waiver to be without merit.

In the instant case, it is clear that the votes of employees possibly disenfranchised by the late opening of the polls are sufficient in number to affect the outcome of the election in the technical and service and maintenance units.²¹

²¹ In the service and maintenance unit, the votes of 64 eligible employees who did not vote, out of 312 employees on the eligibility list, may have affected the outcome of the election. In the technical unit, the votes of 80 eligible employees who did not vote, out of 290 employees on the eligibility list, may have affected the outcome of the election. Thus, in both the technical and service and maintenance units the ballots of those employees possibly precluded from voting were determinative.

Moreover, as in *B & B, supra*, and *Kerona, supra*, in all three units, the votes cast may have been affected by the conduct of the Board agent. Accordingly, in the office clerical unit, as well as the technical and service and maintenance units, the late opening of the polls disturbed the laboratory conditions to such an extent as to require the election be set aside and a new election be directed.²²

Based on the foregoing, I find that the late opening of the polls destroyed the laboratory conditions necessary for the conduct of an election in all three units herein. I therefore find merit to the objections of District 1199 and Local 200 with respect thereto, and recommend that the elections be set aside based thereon.

Conclusions and Recommendations

Having found merit to the objections of District 1199 and Local 200 regarding the late opening of the polls, I recommend that they be sustained, that the elections be set aside, and second elections be directed in the three units of employees herein. [Footnote omitted.]

²² Although the ballots of employees in the office clerical unit possibly precluded from voting were not determinative of the outcome of the election therein, the votes cast may have been affected by the conduct of the Board agent. *B & B, supra*. See also *Marvin Neiman d/b/a Concourse Nursing Home*, 230 N.L.R.B. 916, 919, fn.7 (1977); *Vegas Village Shopping Corporation*, 229 N.L.R.B. 279, 280 (1977).