

CEVA Logistics U.S., Inc. and Teamsters Local Union No. 570, a/w International Brotherhood of Teamsters, Petitioner. Case 05–RC–016452

August 24, 2011

ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

The National Labor Relations Board, by a three-member panel, has carefully considered the Petitioner's request for review of the Regional Director's Supplemental Decision and notice of hearing (pertinent portions of which are attached as an appendix) overruling Petitioner's Objections 2 through 4.¹ The request for review is denied as it raises no substantial issues warranting review.²

The Regional Director overruled the Petitioner's Objection 3, which asserted that the delay by the Board's Regional Office 5 in forwarding the *Excelsior* list to the Petitioner interfered with the Petitioner's ability to communicate with employees prior to the representation election and precluded a fully informed electorate. We agree with the Regional Director that, under extant Board precedent, the Petitioner's delayed receipt of the *Excelsior* list does not constitute objectionable conduct warranting setting aside the election.

We observe that the recurring issue of delay in a petitioner's receipt of an *Excelsior* list from our Regional Offices is addressed by the procedures set forth in the Board's recent proposal to amend its rules and regulations governing the filing and processing of representation petitions. See 76 F.R. 120 (June 22, 2011). The proposed amendments would require that the employer serve the *Excelsior* list on the other parties electronically at the same time it is filed with the Board's Regional Office, thus eliminating this potential source of delay and resulting litigation.

The Regional Director also overruled Petitioner's Objection 4, alleging that the Regional Director erred in holding the election on a nonworking day on which the Employer held a mandatory employee meeting. We disagree with our dissenting colleague that holding the election on that day constitutes grounds for setting aside the election.

¹ The Regional Director directed a hearing on Petitioner's Objection 1. On September 7, 2010, an administrative law judge issued a decision recommending that Objection 1 be overruled and no exceptions were filed to that decision.

² Pursuant to Sec. 102.69(c)(4) of the Board's Rules and Regulations, we have treated the Petitioner's "Exceptions" as a "Request for Review."

Prior to scheduling the election, the Region ascertained that 6 of 19 eligible voters did not regularly work at the Employer's facility and lived out of state. It also learned that the Employer had previously scheduled a mandatory meeting for all employees to be held on Sunday, July 11, 2010, to discuss safety issues, customer quality initiatives, and operational issues and procedures, and that the Employer in the past had required employees to attend periodic "town hall" meetings, including at least one other on a nonworking day for which employees were paid to attend. To maximize the opportunity for all eligible employees to vote, the Regional Director decided to schedule the election on July 11, the date on which all employees were scheduled to be at the Employer's facility.

It is well settled that the mechanics of an election, such as the date, time, place, and method are left to the discretion of the Regional Director. See *Manchester Knitted Fashions*, 108 NLRB 1366, 1366 (1954); *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998). We find that the Regional Director acted within his discretion in scheduling the election on the only date on which all employees were scheduled to appear at the Employer's facility. We disagree with our dissenting colleague that the election should be overturned because the election scheduling conveyed the impression to employees that the Employer controlled the election process, that the election scheduling interfered with employees' right not to vote, and that a mail ballot election should have been directed.

First, it does not appear that the Petitioner made any of these arguments to the Regional Director. Its brief in support of its objections failed to provide any argument, or to cite applicable precedent, explaining why the scheduling of the election on the day of the mandatory meeting was objectionable. The Petitioner asserts simply that the election was "scheduled on a non-working day at times that coincided with a meeting the Employer had with bargaining unit employees at which they were required to attend."³ Nowhere did the Petitioner argue to the Regional Director that the monetary payment to employees for attending the meeting rendered the scheduling objectionable. In its Request for Review to the Board, the Petitioner argues for the first time that the monetary payment to attend the meeting was tantamount

³ Petitioner's related Objection 2 merely asserts that the meeting was mandatory, was within 24 hours of the election, and coincided with the election. Absent any specific argument by the Petitioner, the Regional Director reasonably treated the 24 hours reference as alleging a *Peerless Plywood* "captive audience" type meeting. See *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953). The Regional Director rejected that claim, and the Petitioner does not request review of this finding.

to paying employees to “attend elections.” The Petitioner argues that the payment could be perceived as a quid pro quo for securing their votes, relying on *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995). There, the Board found objectionable monetary payments made to employees expressly for the specific purpose of coming in for the election. That situation is clearly different from the facts of this case, but, in any event, the Board has long held that a party’s request for review may not raise any issue or allege any facts not timely presented to the Regional Director. See Board Rules and Regulations, Sec. 102.67(d).

Second, we find it significant that the Employer scheduled its meeting and announced it to employees *prior to* the Regional Director’s direction of election. Accordingly, and unlike the dissent, we are not persuaded that employees would likely have the impression that it was the Employer, and not the Board, that controlled the election process.⁴

Third, there is no evidence demonstrating, or from which we can reasonably infer, that the employees were coerced or pressured to vote by their mere attendance at the Employer’s meeting. There is no indication that the Employer observed who had voted or not voted before or after the meeting or that the Employer encouraged employees or directed them to vote on the day of the election. It is undisputed that the Employer did not discuss the Union or the election at the July 11 meeting. And it is undisputed that the employees learned of the scheduled meeting before the election was even directed by the Regional Director.

Finally, as to the dissent’s argument that the Regional Director should have ordered a mail ballot or partial mail-ballot election, under longstanding Board policy it is left to the Regional Director’s discretion as to which type of election to conduct. See NLRB Casehandling Manual (Part Two), Representation Procedures Sec. 11301.2; *San Diego Gas & Electric*, supra. There is no evidence that any party, including the Petitioner, had requested a mail ballot or partial mail-ballot election as an alternative to a manual election. Inasmuch as all employees were already scheduled to appear at the facility on the date of the mandatory meeting, unlike on regular workdays, we cannot say that the Regional Director

⁴ *Kalin Construction Co.*, 321 NLRB 649 (1996), cited by the dissent, is distinguishable, inasmuch as it involved an employer’s distribution of paychecks to employees as they approached the polls to vote, in a manner, time, and amount that constituted a change in the employer’s normal procedures. Such employer conduct, which is totally within the control of the employer and which involves employee paychecks, is different than the Regional Director’s scheduling of an election.

abused his discretion in scheduling a manual election on a date that would enfranchise all eligible voters.⁵

MEMBER BECKER, concurring in part and dissenting in part.

I agree with my colleagues that the Regional Director properly overruled the Petitioner’s Objection 3 concerning the delayed receipt of the *Excelsior* list under existing law. Contrary to my colleagues, however, I would grant review as to the Petitioner’s Objection 4, sustain that objection, and accordingly find that the election must be set aside and a new election held.

The election was scheduled to take place, and was held, at the Employer’s facility on a Sunday, which is ordinarily a nonwork day for employees in the unit. Prior to the scheduling of the election, the Employer had announced a mandatory meeting for all employees in the unit for Sunday, July 11, to discuss safety, customer quality, and operational procedures.¹ This fact was disclosed to the Regional Office during informal discussions concerning the selection of the election date. Based on the fact that 6 of the 19 eligible voters did not regularly work at the Employer’s facility and lived out of state at distances up to 430 miles from the facility, and “[d]esiring to provide all employees an opportunity to vote,” the Regional Director selected July 11 as the date to hold the election at the Employer’s facility. The election was held on that day from 8:15 until 9:30 a.m. The mandatory meeting was held from 9 until 11 a.m. The Petitioner asserts in its Objection 4 that this scheduling of the election was inappropriate. I find merit in the Petitioner’s objection.

A representation election should be conducted under the exclusive direction and supervision of the Board as an agency of the Federal government. “There is well established precedent that the Board in conducting elections must maintain and protect the integrity and neutrality of its procedures.” *Alco Iron & Metal Co.*, 269 NLRB 590, 591 (1984). Neither the employer nor the union is permitted to control any aspect of the election process or convey the impression to eligible employees that it does so. The Board has thus overturned the results of elections when its agents have “delegate[d] nonminor official election duties to a party.” *North of Market Senior Services v. NLRB*, 204 F.3d 1163, 1168 (D.C. Cir. 2000). The Board has, for example, overturned election results when a Board agent delegated the task of translating voting instructions to a union observer, on the grounds that “[t]he delegation of an important part of the election pro-

⁵ Eighteen of 19 eligible voters voted in the election.

¹ The record discloses that the employer had called similar mandatory meetings in the past, although they were not regularly scheduled. There is a factual dispute about whether and how many such meetings had been scheduled on employees’ nonwork days.

cess to the Petitioner's observer conveyed the impression that the Petitioner, and not the Board, was responsible for running the election." *Alco*, supra, at 592. The United States Court of Appeals for the D.C. Circuit has reversed the Board for not overturning the results of an election when a Board agent asked union observers to go to employees' work stations and release them to vote. *North of Market*, supra. Here, the Region effectively delegated to the Employer the task of insuring that employees appeared at the voting site during the hours the polls were open.

The Employer required that all employees be at its facility, where the election was being held, 30 minutes after the polls opened and for the duration of the polling, on their usual day off. That conduct, far more than a union observer translating voting instructions or union observers releasing employees to vote, conveyed the impression to employees that the employer controlled elements of the election process.

The conduct here also involved another danger to the integrity of the election process not present in the delegation cases. The coincidence of the mandatory meeting and the election reinforced in employees' minds, just as they stepped into the polls to vote, the employer's unilateral authority to control their work lives. The Board recognized that similar circumstances warranted setting aside election results in *Kalin Construction Co.*, 321 NLRB 649 (1996). In that case, the Board established a prophylactic rule prohibiting any change in the distribution of pay during the 24-hour period prior to an election. The Board reasoned that "the paycheck is a visible symbol of what the Supreme Court has termed 'the economic dependence of the employees on their employer.'" 321 NLRB at 652, quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

In *Kalin*, the employer merely changed the manner in which it distributed paychecks on the day of the election. Here, the Employer actually exercised its authority over employees by ordering them to come to work on their regular day off, for a period of time almost completely coincident with the polling hours. An employer's power to order that employees (some of whom live considerable distances away from and did not regular work at the facility) travel to the employer's facility on a regularly scheduled day off is a potent, tangible reminder to employees of the employer's control over them. The exercise of that control at the very time that employees cast their ballots creates too great a danger to employee free choice. Here, the palpable exercise of the Employer's authority could not but have been on employees' minds as they arrived at the polling location pursuant to the Employer's direction, proceeded directly from voting to

the Employer's mandatory meeting, or even left that mandatory meeting (presumably pursuant to the Employer's permission) in order to vote. For both of these reasons, I believe these circumstances are sufficient to constitute objectionable conduct warranting a second election.

To be sure, the Regional Director scheduled the election on the same morning as the mandatory meeting for a laudable purpose—to make it as easy as possible for employees to vote. But in our system of elections, and in the U.S. system generally, voting is voluntary. While no barriers should be placed in the way of employees wishing to vote, employees also have a right not to vote. Relying on the employer's authority over its employees to insure that they appear at the polling site threatens the right to choose not only how to vote but whether to vote at all. This is particularly true where, as in this case, an entirely acceptable alternative existed—permitting the employees who did not work at the employer's facility to cast their ballots by mail. See *GPS Terminal Services, Inc.*, 326 NLRB 839, 839 (1998) (upholding regional director's decision to conduct mail-ballot election when employees were "scattered because of their job duties"); *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998) (regional director has discretion to conduct elections using "a combination of mail and manual ballots"). Indeed, in *GPS Terminal*, 326 NLRB at 839, we upheld the regional director's decision to conduct a mail-ballot election after the director found that "a significant proportion of the unit employees would be unavailable at the Employer's premises for a manually conducted election absent significant alteration of the work schedules of a substantial proportion of employees." I would hold that the latter alternative is not acceptable absent express consent by all parties.

I agree with my colleagues that our regional directors must continue to exercise discretion in selecting the date and location of elections, but the Board nevertheless plays an important role in establishing rules to guide that discretion. I also agree with my colleagues that in this case there is no evidence that any particular employee felt coerced to vote, was improperly influenced by the Employer's exercise of its authority to require employees to be present on the day of the election at the election site, or perceived that the Employer controlled elements of the election process. But the Board's role in supervising elections is not simply to remedy individual acts of misconduct (which are often difficult to discover, much less prove). The Board's role is to establish rules that minimize the risk of improper influence and, in so far as possible, supervise a process that is fair to all interested parties. Scheduling an election on a day when the Em-

ployer, which campaigned actively against employee representation, has required all employees to be present at the election site (outside their regular work schedule and for over 30 percent of employees away from their regular work site) and for a time period 40 percent of which was during the meeting the Employer had required the employees to attend, creates too great a risk of improper influence and is not fair. For that reason, I would sustain the objection and overturn the results of the election.

APPENDIX

.....

Objection 2

During the critical period, the Employer, by its supervisors and agents, held a meeting with bargaining unit employees at which they were required to attend within 24 hours of the election. Specifically, the meeting coincided with the election.

In support of this objection, Petitioner submitted an employee statement which confirmed the Employer did schedule a mandatory meeting on Sunday, July 11. This employee remembered similar mandatory “town hall” meetings were held four other times since December 2009; one other meeting, on May 23, was also scheduled on Sunday, a regular day off.

The *Peerless Plywood* rule prohibits employers and unions from “making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election.”⁴

The Region’s file indicates that the Employer did conduct a previously announced mandatory meeting on July 11; the meeting was scheduled to begin at approximately 9 a.m. The purpose of this meeting was to discuss safety issues, customer quality initiatives, and operational issues/procedures. Petitioner failed to submit any evidence that any other topics were discussed: during this meeting.

The *Peerless* rule is aimed only at “captive audience” type meetings where either the employer or union is given an unfair advantage by delivering the “last word” in an organizing campaign, thereby overriding all other arguments made through various campaign media. A mandatory meeting held to go over general work protocols and procedures does not fall within the sort of meeting prohibited by the Board in *Peerless Plywood*.

Accordingly, Objection 2 is overruled.

Objection 3

The Company sent the *Excelsior* list to the NLRB in a timely fashion; however, the NLRB did not forward it to the Union and Union’s counsel for another three and-one-half calendar (one-and-one-half working) days.

As the Petitioner acknowledges, a complete *Excelsior* list was received by the Region in a timely manner, on Thursday, June 24, 7 days after the Decision and Direction of Election issued. The Region faxed the *Excelsior* list to the Petitioner’s counsel on Monday, June 28. Accordingly, there is no issue as to whether the Employer fully complied with the requirement

of the *Excelsior* rule.⁵ Instead, the issue is whether the Region’s delay in providing the *Excelsior* is ground for setting aside the election.

In situations involving delayed receipt of the list, “the relevant inquiry is whether the delay—however caused—interfered with the purpose behind the *Excelsior* requirements.”⁶ The principle behind the *Excelsior* rule is to “achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning their representation and can freely and fully exercise their Section 7 rights.”⁷

The Petitioner received the list on June 28, and had full use of the list for 13 calendar days prior to the election. The bargaining unit was composed of 19 employees, 13 of whom worked out of the Employer’s central operations in Glen Burnie. The six remaining employees were dispersed over several out-of-state locations ranging in distance from 160 miles to 438 miles from the Employer’s Glen Burnie operations.

While six members of the bargaining unit were geographically dispersed, there is no evidence that the Petitioner was prejudiced in communicating with these employees because it did not receive the list on June 24. To the contrary, Petitioner had ample time to communicate with all bargaining unit employees prior to the election.⁸

Accordingly, Objection 3 is overruled.

Objection 4

The NLRB scheduled the election on a nonworking day at times that coincided with a meeting the Employer had with bargaining unit employees at which they were required to attend.

As stated above, the election was conducted on July 11, the same date the Employer had previously scheduled a mandatory meeting for all employees, including the bargaining unit employees.

Proper Board procedure dictates that “when the Regional Director directs an election, the election normally should not be scheduled prior to the 25th day thereafter, unless the right to file a request for review thereafter.”⁹ Further, when selecting a date, consideration should be given to a date which balances the desires of the parties and operational considerations, and facilitates employee participation.

⁵ *Excelsior Underwear Inc.*, 156 NLRB 1236, 1240 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

⁶ *Special Citizens Futures Unlimited, Inc.*, 331 NLRB 160, 161 (2000), citing *Alcohol & Drug Dependency Services*, 326 NLRB 519 (1998).

⁷ *Mod Interiors, Inc.*, 324 NLRB 164, (1997), citing *North Macon Health Care Facility*, 315 NLRB 359, 360–361 (1994).

⁸ See *Pole-Lite Industries, Ltd.*, 229 NLRB 196 (1977), where the Board found a delay of six days between the date the list was due and the date it was received by the petitioner did not warrant setting aside the election because the petitioner had the list for 14 days in a relatively small unit (29 employees); see also *Bon Appetit Management Co.*, 334 NLRB 1042 (2001), where the Board found a delay of one day was minimal and did not interfere with the purposes underlying the *Excelsior* rule.

⁹ Case Handling Manual, Part Two, Representation Proceedings, Sec. 11302.1; Rules and Regulations, Sec. 101.21(d).

⁴ *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953).

After issuance of the Decision and Direction of Election, the assigned Board agent contacted the parties to discuss an appropriate date, keeping the above considerations in mind. The Board agent's inquiries disclosed that a mandatory meeting had previously been scheduled for all employees on July 11. The meeting was announced on June 15, two days prior to the issuance of the Decision. As stated earlier, the purpose of the meeting was to discuss safety issues, customer quality initiatives, and operational issues/procedures; Petitioner's evidence did not indicate that, any other topics were discussed.

Six of the 19 voters lived out of state, at distances of up to 430 miles. As the record in the preelection hearing reflects,

these individuals were not required to report to the Employer's central facility in Glen Burnie, Maryland on a daily basis; these employees were, however, required to attend periodic "town hall" meetings, like the one scheduled on July 11. Desiring to provide all eligible employees an opportunity to vote, this date was selected as an, appropriate one to conduct the election. The Board has long held that mechanics of an election, such as date, time and place are best left to the discretion of the Regional Director.¹⁰

Accordingly, Objection 4 is overruled.

¹⁰ *Manchester Knitted Fashions*, 108 NLRB 1366 (1954),