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9 UNITED STATES OF AMERICA
10 BEFORE THE NATIONAL LABOR RELATIONS BOARD

11 PREMIER SCAFFOLD, INC.,

12 Employer,

13 v.

14 PACIFIC NORTHWEST REGIONAL
15 COUNCIL OF CARPENTERS,

16 Petitioner.
17

Case No. 19-RC-229377

**BRIEF IN SUPPORT OF EXCEPTIONS
OF PREMIER SCAFFOLD, INC. TO
DECISION AND CERTIFICATION OF
REPRESENTATIVE IN CASE 19-RC-
229377 [BOARD RULES &
REGULATIONS SECTION 102.69]**

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I.

Introduction

The Region in this case held a mail ballot election without providing advance notice why it would vary from the standard Board practice of manual in-person balloting. There were significant issues and difficulties experienced by unit employees in receiving ballots and voting by mail. In fact, less than half of the eligible voters cast valid ballots. Following a hearing the Region has confirmed it will overlook infirmities in this election and, instead, bless the result by certifying the Petitioner-Union as representative of the Unit.

The Employer filed a single objection which the Region has sliced and diced into sub issues which diminish the overall picture. In response to the Regional Director’s Decision and Certification of Representative (“Decision”), the Employer, Premier Scaffold, Inc., has filed seven Exceptions contemporaneously with this supporting brief.

II.

Background

An election was held in this case via mail ballot, an atypical method for conducting a Board election, and one to which Premier¹ voiced opposition early in this case. In carrying out the mail ballot election, there were problems in getting the ballots to employees, which led to problems in participation. Ultimately, less than half of the ballots — or half of the eligible voters — cast ballots, which were counted in this election. An Objection was filed to the election (Board Ex. 1(b)) and then a hearing was held on January 3, 2019 regarding the Objection.² The Region did not address the Employer’s Objection as filed. Instead, the Region broke it into seven (7) objections formulated by the Region itself (Board Ex. 1(d)).

An election in principle was agreed upon as evidenced in Jt. Ex. 1. The method remained to be determined by the Regional Director. When, theoretically, a high turnout is what everyone

¹ The transcript refers several times to Premier mistakenly as “Premium.” The record should be corrected accordingly.

² Commentary in the Transcript (“Tr”) attributed to Premier’s attorney Thomas Lenz on page 17, lines 8-11, is actually commentary of Union attorney Daniel Shanley and the record should acknowledge that correction.

1 should aspire to in an election, and when the Employer’s own facility would have permitted an in-
2 person manual ballot with employees present that was not allowed to occur. The parties submitted
3 position statements in anticipation of a reasoned decision from the Region on the method in which
4 an election would be conducted. (Board Ex. 1(b).) However, the Region sent no decision or
5 reasons. Instead, the Region suddenly sent Notices of Election in English and Spanish which told
6 the parties a mail ballot election was imminent. (Joint Ex. 2 and 3.) There is nothing in the record
7 to confirm that the parties’ position statements were read or considered before the Region ordered
8 mail balloting. (Bd. Ex. 1(b).)

9 The hearing record clearly reflects there were problems with this election. Eligible voters
10 who visit the Tacoma facility on a regular basis, and could have voted there in person rather than
11 by mail, experienced fear, confusion, distrust for the mail ballot process, delivery issues, failed
12 delivery, discussion and decision not to participate, and where at least one voter cast a mail ballot
13 there was no assurance his vote was counted. (Tr. 19-61, Employer Exs. 1-3.) The tally of ballots
14 is in the record showing that less than half the eligible voters cast valid ballots. (Board Ex. 1(b).)

15 Efforts to obtain further evidence, including witness testimony, were squelched by the
16 Agency. See for example Bd. Ex. 1(e) and Er. Ex. 5 as well as Hearing Officer rulings leading to
17 offers of proof which were rejected by the Hearing Officer at Tr. 28, 56-57.

18 The Regional Director’s Decision of March 14, 2019 leaves undisturbed the Hearing
19 Officer’s findings, rejects Premier’s Objection, and certifies the election result in favor of the
20 Petitioner-Union. Premier disputes the Regional Director’s Decision.

21 **III.**

22 **Analysis**

23 **A. The Decision relies on an incomplete record, because the Region cut off presentation**
24 **of evidence, and a misstatement of the Employer’s Objection by breaking it into**
25 **pieces, thus concluding there was no objectionable conduct. (Exceptions 1, 2, and 4)**

26 The Decision challenges sufficiency of the Employer’s evidence presented under the rubric
27 of the various Objections drafted by the Region rather than relying upon the single Objection filed
28 by the Employer. (Board Ex. 1(b)) All evidence should have been viewed cumulatively in the

1 context of that one comprehensive Objection. By playing alleged deficiencies in evidence and the
2 Objections the Region drafted against each other, the Employer’s position encompassed by one
3 sole Objection is prejudiced. Any of the Objections as drafted by the Region rejected for lack of
4 evidence should be reconsidered in the light of the Employer’s one sole Objection to the mail
5 ballot election.

6 The Objections as formulated by the Region are the Objections which were decided by
7 either the Hearing Officer or the Region. The Region’s stated Objections are not the Objection
8 filed by the Employer, a singular statement which encompasses the grounds the election should be
9 overturned.

10 Additionally, Premier tried to dig into the details of what occurred. There were difficulties
11 in reaching the voters with their ballots, as there was confusion. A request was made — and that
12 request is in the formal exhibits — for testimony from NLRB employees. That request was
13 denied. Premier also made a Freedom Of Information Act request to which there was no
14 meaningful response from the Agency to advance understanding of the pending issues. (See Bd.
15 Ex. 1(e) and Er. Ex. 5.) For the Hearing Officer’s Report to suggest that Premier presented
16 deficient evidence is mistaken. Premier was stopped from doing so (see offers of proof at Tr. 28,
17 56-57) and Premier reconfirms an exception to any ruling against Premier which results.

18 **B. The Region’s decision and pursuit of a mail ballot election were unexplained and did**
19 **not allow discussion or challenge. The circumstances do not warrant the exceptional**
20 **step of mail balloting, rather than in person manual balloting, at the Tacoma facility**
21 **where all employees regularly go. Mail balloting deterred, rather than enhanced, the**
22 **likelihood employees would participate. (Exceptions 3 and 5.)**

23 From the Employer’s perspective, the mail ballot election was arbitrary and a *fait accompli*
24 when Notices of Election were sent without any explanation of reasons or opportunity for appeal.
25 It was not something that showed basis in a documented and reasoned legal decision. (Bd. Ex.
26 1(b).) There was an election agreement which said there would be a decision as to the method of
27 the election. When that decision was made, the reasons remained a mystery. There was no public
28 showing of facts suggesting a mail ballot was necessary.

1 Once the Region proceeded to a mail ballot election some employees did not receive their
2 ballots. (Er. Exs. 1-3.) The record confirms at least one employee is not certain whether his mail
3 ballot was counted. (Tr. 41-50.) Yet, another employee confirmed the clear distrust for the mail
4 ballot process and preference for manual in person balloting. (Tr. 18-42.)

5 Separately, or cumulatively, the facts show something far less than the “laboratory
6 conditions” required for a Board election. General Shoe, 77 NLRB 124 (1948). Unfortunately, the
7 lack of documented reasons for the Region’s actions casts a shadow which continues to loom over
8 the process.

9 The Board’s own manual, Section 11301.5, on informing parties says that where election
10 arrangements are not set forth, the Regional Director should issue a letter formally notifying the
11 parties of the manner in which the Regional Director intends to conduct that election. Because
12 this was left to a Regional decision, it basically should have been treated like a typical Regional
13 decision in the representation case format that the Board so customarily works with. There was no
14 such letter. That the Hearing Officer’s Report deems the Board’s own guidance irrelevant
15 suggests an arbitrary rejection of the Board sets out to do the business of holding representation
16 elections.

17 Manual Section 11301.5 cites cases noting that the Regional Director should specify the
18 rationale relied upon in making that determination. It cites to Odebrecht Contractors of Florida,
19 326 NLRB 33 (1998); San Diego Gas & Electric, 325 NLRB 1143 (1998).

20 Indeed, there was no written analysis from the Region until the Decision to which
21 exceptions are now being filed to indicate why a mail ballot, the exception rather than the rule in
22 Board elections, would be conducted. **The Regional Director’s Decision prompting these**
23 **elections is de facto the only Decision and Direction of Election the parties have received,**
24 **long after balloting ended and votes were counted.** Such a backwards approach to this election

25 may have provided clarity and convenience to the Regional Office. However, the applicable
26 standard does not support mere Agency convenience. Instead, it is fundamentally a matter of
27 enhancing the opportunities for employees in the voting unit to vote in the event they choose to do
28

1 so and to do so in a way that enables all parties concerned to understand what is happening and
2 why..

3 Even when undertaken in the wake of an election agreement, the Board should insist that
4 Regional Offices explain themselves when deciding the method in which an election will take
5 place, especially where there is silence on deviation from the Board’s institutional preference for
6 manual in person balloting. Section 7 rights of employees and due process protections for all
7 parties warrant such steps.

8 Rather than address controlling principles of law, it seems that efforts have been made to
9 cast Premier in a negative light as if Premier sought to undo the election agreement. Such spin
10 maneuvers are false. Premier has at all times acknowledged an election agreement. At the same
11 time Premier acknowledges the Board has a duty as a government agency to explain its actions.
12 The Board is governed by existing Board law, regulation, and its own guidance. It is appropriate
13 for a party to raise questions when one chosen course differs substantially from another. It is the
14 Board’s duty as a government agency to explain the actions it takes which affect those parties,
15 those employees, within the Agency’s jurisdiction, particularly impacting voting methods, the
16 Section 7 rights of employees, and the method of balloting which impacts timing and actions to be
17 taken, or not to be taken, for everyone involved. And when a party takes issue with the Agency’s
18 process the party should not have its position misstated or its opportunity to present its case
19 curtailed and then criticized for not being complete. Premier is justifiably concerned that after
20 signing a Stipulated Election Agreement, Premier found itself in the spin cycle of an election case
21 where the Regional Office would not explain its own actions affecting the parties and the process.
22 That is unconscionable.

23 C. Mail balloting should be presumed by the Board to be void where less than half of the
24 eligible voters in the voting unit cast valid ballots. (Exception 6.)

25 The Decision casts the Employer’s position in a light of suggesting that employees have an
26 obligation to vote. That is mistaken. No one asserts that employees had an obligation to vote. It
27 is abundantly clear from Section 7 that employees have a right to refrain from protected activity.
28 Still, where less than half of the eligible voters cast ballots using a method intended to enhance

1 participation, doubts about the process are appropriate. Particularly so when the Regional Office
2 has refused to explain itself, or give the parties an opportunity to review or challenge reasons,
3 before ballots are mailed to employees.

4 The process allowed here is not the ordinary, customary one and not one that employees
5 trusted. When employees vote, they expect to go vote in person and cast a manual ballot. They
6 could have done so because the Employer has the facilities, has a shop, a yard, and areas separate
7 from the management offices, which could have been done, but were not.

8 The San Diego Gas & Electric case and the principle that it cites are very important. Mail
9 balloting should enhance rather than discourage the opportunity to vote. There were 40 eligible
10 voters according to the Tally of Ballots. Less than half of the eligible voters (19) actually cast
11 valid votes. (Bd. Ex. 1(d).) Premier asks that the Board presume that a mail ballot in which less
12 than half of the eligible voters cast valid votes should be void as a matter of law.

13 **D. The Petitioner-Union should not be Certified as Representative based upon this**
14 **election and these facts. (Exception 7.)**

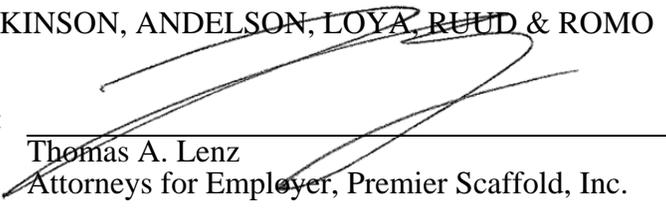
15 Premier has presented a case but has been hobbled in presenting the full scope of evidence
16 which should be made available. The evidence presented raises valid concerns by Premier as well
17 as by eligible voters. If employees do not receive their ballots, if they are afraid to vote by mail,
18 and the outcome of an election is driven by a minority, the outcome is a legal defect if
19 representation is thereafter imposed by Board blessing of the election. The Board should not
20 recognize a minority union, which is unfortunately an outcome this flawed mail ballot election
21 result tends to support.

22 The case of International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961)
23 dealt directly with the issue of majority support in a minority union recognition, and provides
24 Section 7 rights of employees are to freedom of choice and majority rule, not minority rule.
25 Individual and collective employee rights may not be trampled upon merely because it is
26 inconvenient for a Regional Office of the Agency to avoid doing so. The mail ballot, its flawed
27 execution, and the participation of less than half of eligible voters serves to trample upon the
28 Section 7 rights of Premier's employees. The outcome of this election should not be certified.

1 The Agency has seen that efforts to impose bargaining relationships in the absence of true
2 uncoerced majority support do not withstand judicial review. See Colorado Fire Sprinkler v.
3 NLRB, 891 F.3d 1031 (D.C. Cir. 2018). While Colorado Fire Sprinkler involved issues of
4 boilerplate language on Section 8(f) to 9(a) conversion of a bargaining relationship which are
5 distinct from a mail ballot election case, there is a clear policy lesson. The Agency should not
6 rush to judgment on an unexplained mail ballot election or imposition of a bargaining
7 representative by certification without providing safeguards for parties and employees to review
8 and understand the reasoning for underlying government action. It is arbitrary and capricious to
9 presume that NLRB should be do its work without having to explain itself and afford due process
10 to those within the Agency’s jurisdiction.

11 **IV.**
12 **CONCLUSION**

13 Based upon Premier’s Exceptions, Certification of the Petitioner-Union is improper absent
14 a properly held election. A new election with in-person manual balloting should be conducted at
15 the Employer’s facility in Tacoma.

16 Dated: March 28, 2019
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18 By: ATKINSON, ANDELSON, LOYA, RUUD & ROMO
19 
20 Thomas A. Lenz
21 Attorneys for Employer, Premier Scaffold, Inc.

SERVICE LIST

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