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**Schwarz Partners Packaging, LLC d/b/a MaxPak and
United Steelworkers International Union.** Cases
12–CA–109207 and 12–RC–073852

June 17, 2019

DECISION, ORDER, AND DIRECTION OF
THIRD ELECTION

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On August 29, 2012, the National Labor Relations Board issued an unpublished Decision and Direction in this proceeding adopting in large part the hearing officer's findings that the Respondent had engaged in objectionable conduct prior to a March 15, 2012 election held pursuant to a Stipulated Election Agreement. The decision also directed the Regional Director to open and count two challenged ballots, as to which no exceptions were filed, and to issue a revised tally. If the revised tally showed that the Union did not receive a majority of the valid ballots cast, the decision directed the Regional Director to set aside the election and order a new election. In a second election, the Union received a majority of valid votes, and it was certified on November 6, 2012.

On June 26, 2015, the National Labor Relations Board issued a Decision and Order, reported at 362 NLRB 1131, granting the General Counsel's motion for summary judgment and finding that the Respondent unlawfully withdrew recognition from and subsequently failed and refused to recognize and bargain with the Union. Thereafter, the Respondent filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed an application for enforcement.

At the time of the Decision and Direction in the representation proceeding, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments were not valid. Thereafter, the court of appeals, at the Board's request, remanded this case for further proceedings consistent with the Supreme Court's decision.¹

¹ While the Respondent's petition for review was pending, several post-*Noel Canning* court decisions made clear that *Noel Canning*-based objections to the Board's composition can be raised at any time, including after the parties had engaged in bargaining, as was the circumstance here. See *UC Health v. NLRB*, 803 F.3d 669 (D.C. Cir. 2015); *SSC Mystic Operating Co. v. NLRB*, 801 F.3d 302 (D.C. Cir. 2015); and

The National Labor Relations Board has consolidated the underlying representation proceeding with the unfair labor practice proceeding and delegated its authority in both proceedings to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the Respondent's objections to the election held on March 15, 2012, and the hearing officer's report recommending disposition of them. A de novo review was necessary because the Board's August 29, 2012 decision in the representation proceeding ordered that the election be set aside if the Union lost and in that way directly affected the election results at a time when the Board lacked a valid quorum.² Based on this review, as discussed below, we set aside the August 29, 2012 Decision and Direction of Election and order a new election. We also dismiss the underlying unfair labor practice complaint, which was based on the Respondent's refusal to bargain with the invalidly certified union.

The initial tally of ballots showed 39 votes for and 38 against the Union, with 2 challenged ballots. Notably, no exceptions were filed regarding the hearing officer's recommendation to overrule the challenged ballots, which resulted in a revised tally showing 39 for and 40 against the Union, with no challenged ballots. We find that because the challenged ballots were cast before any action by the invalidly constituted Board and no exceptions were filed, the Decision and Direction could not have affected those ballots, and we accept the revised tally.

With regard to the Union's objections, the Board has reviewed the hearing officer's report and record in light of the exceptions and briefs. We adopt the hearing officer's findings and recommendations only to the extent discussed herein. Specifically, while the Hearing Officer found that Objections 5, 7, and 11 should be sustained and the election set aside on that basis, we review and sustain only Objection 11. Because we find the conduct alleged in Objection 11 sufficient to warrant setting aside

Hospital of Barstow, Inc. d/b/a Barstow Community Hospital v. NLRB, 820 F.3d 440 (D.C. Cir. 2016). Based on these decisions, the Board requested remand to address the Respondent's challenge, which the Board had previously found the Respondent had waived by entering into negotiations with the Union. *MaxPak*, 362 NLRB 1131 (2015).

² The invalid Board's imprint on the election sets this case apart from other post-*Noel Canning* cases in which the Board relied on the results of elections that occurred when the Board's composition was invalid. See, e.g., *Panera Bread*, 361 NLRB 1236 (2014); *Stamford Hospitality*, 361 NLRB 1012 (2014); *Sands Casino Resort Bethlehem*, 361 NLRB 916 (2014); *STG Int'l, Inc.*, Case 21–RC–097525 (June 22, 2015). In the above cases, the constitutionally infirm Board did not issue a decision that directly affected election results. Here, however, we find that the August 29, 2012 Decision and Direction of Election lacks a valid Board imprimatur and cannot stand.

the election results, we find it unnecessary to pass on Objections 5 and 7.

With respect to Objection 11, the hearing officer found that Converting Superintendent Doug Stewart engaged in objectionable conduct by stating to employee Sonja Phillips, when he wrongly accused her of being tardy, that if the Union represented her, he would already have discharged her. Stewart then echoed that sentiment by stating to employees in weekly safety meetings that he liked unions because it was easier to get rid of people. We note that the hearing officer credited the employees' testimony in this regard over Stewart's denials. In doing so, the hearing officer properly considered the employees' current employee status. See *Flexsteel Industries*, 316 NLRB 745, 745 (1995) (current employee testimony contradicting statements of supervisors is "particularly reliable because those witnesses are testifying adversely to their pecuniary interests"), *affd. mem.* 83 F.3d 419 (5th Cir. 1996).

We agree with the hearing officer that Stewart's statements threatened the employees with stricter discipline if they selected the Union as their exclusive bargaining representative, implying that any protections the employees currently had shielding them from discipline would diminish once the Union was elected. As the hearing officer explained, each employee "got the message from Stewart," which was that "the surest protection of your job security is a vote against the Union." See, e.g., *Pacific Coast Sightseeing Tours & Charters, Inc.*, 365 NLRB No. 131, slip op. at 5-7, 9-10 (2017) (statements that if the union came in, supervisor would write up employee for being 30 seconds late, and employees would have more requirements, found objectionable); *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1074, 1084 (2004) (general manager's statement that if the union was elected, the employer would have to enforce breaktimes and lunchtimes more strictly); *Family Foods, Inc.*, 300 NLRB 649, 661-662 (1990) (supervisor's statement that unionization would make it easier to discharge people was an unlawful threat of reprisal), *enf. denied on other grounds*, 968 F.2d 1214 (6th Cir. 1992). These statements were unlawful threats that had a tendency to interfere with the employees' free choice and could have affected the election results.

The record does not support the Respondent's claim that these statements occurred outside the critical period. Phillips testified that Stewart's statement to her occurred after a safety meeting "a couple of days before the election," and employee Waldemar Ortiz noted that on more than one occasion, and at least at two or three of the weekly safety meetings leading up to the election, Stewart stated that unions made it easier to "get rid of peo-

ple." Equally meritless are the Respondent's claims that Stewart's statement to Phillips was not objectionable because there was no evidence of dissemination and Phillips was personally unaffected. These arguments ignore that Stewart repeated a similar message to the unit during the weekly meetings and that Phillips' subjective reaction to the statement is irrelevant in determining whether it is objectionable. *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) (Board applies an objective test, i.e., whether the conduct of a party to an election has the tendency to interfere with the employees' freedom of choice; hearing officer erroneously considered whether a threat altered an employee's behavior).³

Accordingly, because it was directed by an infirm Board, we shall set aside the second election and the November 6, 2012 certification of representative based on it. We review *de novo* the hearing officer's first decision, sustain the Union's objection 11, and direct a third election. Having found the certification invalid, we vacate the Board's Decision and Order reported at 362 NLRB No. 138, and we dismiss the complaint.⁴

ORDER

The complaint issued August 1, 2013, is dismissed.

DIRECTION OF THIRD ELECTION

It is directed that the Regional Director for Region 12 shall set aside the second election in this proceeding.

A third 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 imme-

³ In sustaining this objection, we do not rely on General Manager Steve Wasko's statement to employees at a mandatory meeting that a group of employees who were "on the borderline of losing their jobs" were the ones who wanted a union.

⁴ After the court's remand, the Respondent filed a statement of position in which it asserted for the first time that the complaint in this proceeding was unlawfully issued because the Supreme Court found that Acting General Counsel Lafe Solomon lacked authority under the Federal Vacancies Reform Act in *NLRB v. SW General, Inc. d/b/a Southwest Ambulance*, 137 S.Ct. 929 (2017). The Respondent's contention is untimely, because the Respondent failed to raise the issue in its answer to the complaint. See, e.g., *H&M Int'l Transp. Inc.*, 363 NLRB No. 139 (2016) (FVRA-based challenge to complaint's validity is waived if not timely raised), *enf. 719 F. Appx. 3* (D.C. Cir. 2018). In any event, in view of our dismissal of the complaint, we need not otherwise address this contention or the Respondent's challenge to the notice-reading remedy. Moreover, there is no merit to the Respondent's additional claim that its petition for review to the circuit court divested the Board of jurisdiction over the representation proceeding. Pursuant to Sec. 9(c) of the Act, 29 U.S.C. § 159(d), the Board retains authority to resume processing the representation case in a manner consistent with the court's ruling in the unfair labor practice case. See *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-479 (1964).

diately before the date of the Notice of Third Election, including employees who did not work during that 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 election directed herein 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 election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by United Steelworkers International Union.

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, Inc.*, 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 Respondent with the Regional Director within 7 days from the date of the Notice of Third 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. June 17, 2019

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD