Nouveau Elevator Industries, Inc., Nouveau Industries, Inc., and Elevator Industries Association, Inc. and Its Employer *and* Local 1, International Union of Elevator Constructors, AFL–CIO, Petitioner. Cases 29–RC–8701 and 29–RC–8732

August 27, 1998

ORDER DENYING APPEAL

By CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On March 26, 1998, the Regional Director for Region 29 issued a Decision and Direction of Election in the above-captioned cases, in which he directed elections in three separate units of employees of the members of the Elevator Industries Association [unit A], Nouveau Elevator Industries, Inc. [unit B], and Nouveau Industries, Inc. [unit C]. On May 1, 1998, the Board agent notified the parties that a manual election in unit A would be conducted on May 28 and 29, 1998, between the hours of 8 a.m. and 5 p.m. on each day (subsequently extended to 6 p.m.) at the Southgate Tower Hotel in Manhattan. Manual elections in units B and C were scheduled to be held in the Employers' Brooklyn office on the same days. Thereafter, on May 4, 1998, the Petitioner filed a Special Request for Leave to Appeal from Regional Director's Decision to Refuse to Conduct Mail Ballot Election. On May 11, 1998, the Regional Director filed a memorandum with the Board which was served on the parties. In response to points raised by the Petitioner regarding the scheduling of a manual election in unit A, the Regional Director observed that:

> [B]ecause about 75% of the eligible voters work in Manhattan, the polls are open for 2 days for 9 hours a day,[1] longer than the normal work days of the unit employees,[2] and since the polling place is centrally located in Manhattan and readily accessible by numerous forms of public and private transportation to the entire unit, including those who do not work in Manhattan, it was well within the discretion of the undersigned to direct a manual election . . . . [M]oreover, the election is being held at a time of year that will not discourage voters from traveling to the centrally located polling place. In addition, holding of the election manually, will save the Agency about $1000 over what it would cost to conduct this election of over 1600 employees by mail. Finally, it is well known that voter turnout is considerably higher in manual as opposed to mail ballots elections, and maximizing voter turnout is a legitimate objective in all elections.

The Petitioner, citing *London's Farm Dairy*, 323 NLRB 1057 (1997), argues that the unusual circumstances of this case make a mail ballot election the only feasible voting arrangement that would make it possible for all eligible employees to vote. The over 1600 employees of the different employers involved are located throughout the New York City metropolitan region, including New Jersey, and are assigned by their employers to travel to various locations at thousands of sites on a daily basis. The Petitioner contends that these employees work a myriad of schedules, including being on-call 24 hours a day, and argues that mass transportation problems and traffic congestion within New York City would subject voters to unforeseen grid lock or unpredictable delays. Further, the Petitioner contends, dissimilar employer reimbursement policies with regard to expenses related to voting could lead to objections. Moreover, many evening and night-shift employees who are assigned to work outside the Borough of Manhattan might not be willing to travel into Manhattan to vote, as to do so might mean either subjecting themselves to discipline for failing to report to their assignments on time or losing the chance to rest before their next shift begins. Lastly, the Petitioner maintains that the 25 employers of employees in unit A would have to revise work schedules and reroute all employees to allow them the opportunity to vote in Manhattan during the limited hours set by the Regional Director.

On May 13, 1998, the Employers filed a brief in opposition to the Petitioner's special request for leave to appeal the Regional Director's decision. The Employers contend that a manual election (in unit A) would ensure maximum employee participation for the following reasons: the voting was scheduled to take place in a centrally located facility within close proximity to the overwhelming majority of the electorate who work in New York City on a daily basis, within a few short miles of the polling site—close to public bus and subway transportation; the small number of employees working in the suburbs have vehicles and could drive to the voting facility where ample parking is available, and they would be reimbursed as a work-related expense; less than 2 percent of the electorate are on a second-shift schedule; many of these employees work in Manhattan and would be able to vote on their way to work; no employee works on-call during the daytime voting hours; and employees could vote on company time so that no one would lose any pay (or have their schedules disrupted or altered) as a result of his or her decision to vote.

The elections were held on May 28 and 29, 1998, and the ballots were impounded pending the Board's consideration of the Employers' request for review[3] and the Petitioner's Special Request for Leave to Appeal from Regional Director's Decision to Refuse to Conduct Mail Ballot Election.

Having duly considered the matter, we have decided to deny the Petitioner's appeal of the Regional Director's deci-

[1] As noted above, the polling period subsequently was extended by 1 hour; thus, the polls were scheduled to be open 10 hours each day.

[2] The current collective-bargaining agreement between the Employers and Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO (Intervenor) provides that the work shift consists of any 8 hours between 7 a.m. and 4:30 p.m., with a half hour lunch period. The Regional Director noted that the normal workweek for unit employees is Monday through Friday.

[3] The Employers' request for review of the Regional Director's decision to process the petitions (originally held in abeyance pending the resolution of an antiraiding proceeding under art. XX of the AFL–CIO's constitution) as well as certain unit determinations, was withdrawn on June 3, 1998.

sion to conduct the elections by manual ballot. We find that the Regional Director acted within his discretion in determining that manual ballot elections would maximize turnout and afford all eligible voters an adequate opportunity to cast ballots.

It is well established that a Regional Director has broad discretion in determining the method by which an election is held, and whatever determination a Regional Director makes should not be overturned unless a clear abuse of discretion is shown. *San Diego Gas & Electric*, 325 NLRB 1143, 1144 fn. 4 (1998); *National Van Lines,* 120 NLRB 1343, 1346 (1958). Under Board precedent and policy, the applicable presumption favors a manual, not a mail-ballot election. *San Diego Gas*, supra, slip op. at 2. See also NLRB Casehandling Manual (Part Two), Representation Proceedings, section 11336; *Willamette Industries,* 322 NLRB 856 (1997).

There are factors in this case that would have supported the Regional Director's direction of either a mail ballot or a mixed manual-mail ballot election. See *San Diego Gas,* supra; *London's Farm Dairy*, supra; and *Reynolds Wheels International,* 323 NLRB 1062 (1997). Indeed, had the decision been ours as an initial matter, we would have determined to conduct some or all of the election by mail. Specifically, the employees work at jobsites scattered throughout the New York City metropolitan area, including New Jersey, their hours of work are widely varied, and they spend most of their workday traveling to other sites. In addition, a manual election required most of the employees to adjust their work schedules or their off-hour commitments to travel to a hotel in Manhattan, which was the designated voting facility for unit A, and they may well have encountered travel or other personal difficulties to get to the polling place.

Nevertheless, under the circumstances of this case, and given the broad discretion that the Board has invested in the Regional Director, we find that the Regional Director did not abuse his discretion by ordering a manual election.

Accordingly, the Petitioner's appeal of the Regional Director's direction of elections by manual ballot is denied, and the case is remanded to the Regional Director for further appropriate action.

MEMBERS HURTGEN AND BRAME, concurring.

We agree with our colleagues that the Regional Director was correct in directing a manual election. However, we disagree with them that a mail ballot or a mixed mail manual ballot would also have been proper.

It is undisputed that there was no mutual agreement among the parties to utilize mail ballots, and no party requested mixed mail manual balloting. Further, the facts fail to establish that the presumption in favor of a manual election has been rebutted. In this regard, the Regional Director found that 75 to 80 percent of the eligible voters work in Manhattan and all voters, even those who work outside of Manhattan, would have access to the polling sites by several available modes of transportation. The Employers stated that they would permit the employees to vote on company time. Although Petitioner claims that "some" of the unit employees are on 24-hour call, the Regional Director noted that fewer than 5 percent of the employees work on-call, and such employees usually work during the day shift and would be able to cast their ballots during either of 2 days. Further, the small number of employees who work evening shifts would have most of the day to vote while they are not working.

Our dissenting colleague refers to difficulties that certain employees might face in getting to the polls, and to the "attendant inconvenience" (as to family responsibilities or plans) that would befall those who would be on their normal off-worktime. However, while all of this may be true, there is no evidence to support it. In addition, the Employers have indicated that they would permit employees to vote on company time, and most employees are accustomed to traveling during the course of their work duties. Further, the Regional Director, who is more familiar with the logistics of traveling in this area than we are, directed a manual ballot. Finally, we note that 1333 out of 1556 individuals in fact voted in the election—a figure in excess of 85 percent of the eligible voters.[1]

In sum, for the reasons set forth above, we agree that a manual election was correct.[2]

CHAIRMAN GOULD, dissenting.

Contrary to my colleagues, I would grant the Petitioner's request for leave to appeal the Regional Director's direction of a manual election and would direct a mail ballot election for those eligible employees who work outside of Manhattan and for whom the logistics of traveling into and out of Manhattan may restrict their ability to reach the polls.[1] As I have previously observed,[2] the use of mail ballots is appropriate in all situations where the prevailing conditions are such that they are necessary to conserve Agency resources and/or enfranchise employees. Thus, in the circumstances

[1] Our dissenting colleague says that there is "no evidence" to support the assertion that the 15 percent (nonvoters) are not geographically scattered. We disagree with this "double negative" approach. We believe that the burden of proof is on the party who wishes to depart from the norm of a manual ballot. See our dissent in *San Diego Gas & Electric.* In this case, the burden is on the Union to show affirmatively that employees are widely scattered.

The dissent correctly notes that the facts concerning the election were not available at the time of the preelection appeal. But, this need not blind us to those facts. In the instant case, we have the advantage of hindsight. That is, we can ascertain, from objective ascertainable evidence, how well or poorly the election process turned out. Unlike the apparent position of the dissent, we would not ignore these matters, or change the burden of proof with respect to them.

[2] The Regional Director relied in part on his finding that a manual ballot would be cheaper than a mail ballot. We would not rely on this finding. Absent extraordinary expenses (not present here), we would not rely on the monetary savings to be achieved by a mail or manual ballot. See our dissent in *San Diego Gas & Electric,* supra at 1149-1152 (1998).

[1] I agree with my colleagues that the Employer's request for review of the Regional Director's Decision of Election raises no substantial issues warranting review..

[2] See my concurring opinion in *San Diego Gas & Electric,* 325 NLRB 1143, 1146-1149 (1998).

of this case, where the record establishes that a significant number of eligible voters are scattered throughout the five boroughs of New York City and several cities in New Jersey, I would find that the Regional Director abused his discretion by not directing a mixed mail and manual election.

The Regional Director directed that the election be held on 2 consecutive days at a hotel in midtown Manhattan. The polling hours were originally scheduled as 8 a.m. to 5 p.m. but were extended by the Region to 6 p.m[3]. In directing a manual only election, the Regional Director noted that approximately 75 percent of the over 1600 eligible voters work in Manhattan, the polls are open for 9 hours each day, longer than the normal workday for the unit employees, and the polling place is centrally located and readily accessible by public and private transportation. The Regional Director also noted that holding the election manually will save the Board approximately $1000 over what it would cost to conduct this election by mail and that the turnout is considerably higher in a manual election.

The overriding objective when considering the mail ballot procedure is expanded enfranchisement so that those employees who would have limited or no opportunity to cast a ballot in a manual election will be able to vote in a mail ballot election. Contrary to the assertion of Members Fox and Liebman, the teaching of *Shepard Convention Services*[4] and its progeny is that a Regional Director abuses his discretion by directing a manual election in circumstances where it will not afford full enfranchisement to employees in the appropriate unit. In the instant case, although 75–80 percent of the eligible employees work in Manhattan or within 3 miles of the polling place, it is undisputed that 20–25 percent do not. These 20–25 percent or between 320 and 400 employees have only a brief period of time to reach the mid-Manhattan polling site and must rely on rush-hour public or private transportation. In view of the burden placed on these employees in terms of the time and expense to travel to and from the polls and the attendant inconvenience on their family responsibilities or plans for what would normally be their off-worktime, it is likely that a significant number will be unable or unwilling to participate. The use of mail ballots for these employees significantly reduces this risk of decreased participation in the election process.

In directing a mail ballot election, the Regional Director also relied on the added cost of a mail ballot election in a unit of 1600. To be sure, cost is an extremely important factor in determining the mechanics of an election—a factor which may establish the propriety of a postal ballot.[5] However, under the circumstances of this case, cost is only one factor and must be balanced against considerations such as the question of whether a manual ballot will disenfranchise eligible voters.[6]

In the instant case, I do not dispute the Regional Director's conclusion that an all mail ballot election would be more costly than a manual ballot election. I simply find that where it is possible to direct a mixed mail and manual ballot, the total additional cost is diminished and certainly outweighed by the likelihood of enfranchising a significant number of eligible voters.

Finally, the Regional Director relies on the assertion that turnout is higher in manual elections. There is insufficient evidence, however, to suggest that the use of mail ballots would result in lower voter turnout.[7] To the contrary, where as here nearly one quarter of the eligible workers are geographically scattered, the use of mail ballots for those voters will eliminate the additional burdens on their participation and will likely encourage higher voter turnout than would be the case with a manual ballot.

[3] Under the Employer's collective-bargaining agreement with the Intervenor, the work shift consists of any 8 hours between 7 a.m. and 4:30 p.m. with a half hour lunch period.

[4] 314 NLRB 689 (1994), enf. denied 85 F.3d 671 (D.C. Cir. 1996).

[5] In my concurring opinion in *Willamette Industries*, 322 NLRB 856 (1997), I emphasized the importance of "an unduly burdensome strain" on Agency resources as a factor to be taken into account by the Regional Director in ordering postal ballots. See also NLRB Office of the General Counsel Field Memorandum OM 98–7, issued January 30, 1998.

[6] My position here accords with the Board's action in *San Diego Gas & Electric,* supra, and *Lone Star Northwest, Inc.,* 36–RD–1434 (unpublished). See also *Shepard Convention Services*, supra.

[7] In resolving the Petitioner's appeal of the Regional Director's failure to direct a mail ballot election, I have treated the appeal the way it was presented, namely as a preelection appeal. Members Hurtgen and Brame, however, have taken administrative notice of the fact that approximately 85 percent of the eligible employees voted. Yet, as previously noted, 75–80 percent of the eligible employees work in Manhattan. My concern is and remains the enfranchisement of the 20–25 percent of employees who work at widely scattered jobsites outside of Manhattan. There is no evidence that the 15 percent who did not vote in the election were not predominately from that group of scattered employees. Therefore, I do not conclude, as my colleagues do, that those scattered employees were not disenfranchised by the burdens of traveling to the polling place. Unlike Members Hurtgen and Brame, I am unwilling to place the burden on the Petitioner to refute facts that were not in existence at the time the Petitioner filed its preelection appeal.