Classic Valet Parking, Inc. *and* Local 1102, Retail, Wholesale & Department Store Union, United Food and Commercial Workers, Petitioner. Case 29–RC–148399

October 23, 2015

ORDER DENYING REVIEW

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Employer's Request for Review of the Regional Director's Supplemental Decision on Objections, Order consolidating cases, and notice of hearing is denied as it raises no substantial issues warranting review.[1]

In this mail-ballot election case, the Regional Director excluded from the tally of ballots 10 ballots not received by the Region until after the tally was completed. The Regional Director's decision to exclude those ballots was consistent with established Board precedent and policy. See, e.g., *Kerrville Bus Co.*, 257 NLRB 176, 177 (1981). For that reason, we find no basis upon which to grant the Employer's request for review of the Regional Director's further decision to overrule the Employer's objection contending that the late-received ballots should be counted.

Our dissenting colleague argues that we should make an exception in this case, and count the late-received ballots, under all the circumstances. Although we share our colleague's view that the Board has a strong interest in effectuating employee choice, we believe that adhering to our established practice—which balances that interest with the interest in finality of election results—is the better approach here.

The Board's rule already permits acceptance of mail ballots arriving after the date they are due, whatever the reason for the delay, as long as they are received before the scheduled ballot count. Thus, the rule provides a grace period for receipt of late ballots. At the same time, by excluding mail ballots received after the grace period expires, the Board's rule effectuates the substantial policy considerations favoring finality of election results. Absent that limitation, election results could well be delayed for significant periods of time as mail ballots trickle into the regional office. See generally *Versail Mfg., Inc.*, 212 NLRB 592, 593 (1974) (discussing importance of promptly completing representation proceedings).

We acknowledge that this approach creates the possibility, however remote, that determinative ballots could be excluded from a ballot count, but this alone is not a reason to set aside an election. See *J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850, 855 (5th Cir. 1978), cert. denied 439 U.S. 893 (1978) ("It cannot be said that an election by mail is per se invalid whenever a potentially decisive number of votes . . . is lost through the vagaries of mail delivery."), enforcing the Board's Order at 227 NLRB 1347 (1977), including the determination to reject three mail ballots that were potentially determinative but never received.[2]

MEMBER MISCIMARRA, dissenting in part.

I join my colleagues in denying review of the Regional Director's decision to direct a mail ballot election. However, I would grant review on the basis that the Employer has raised a substantial issue regarding the failure to count 10 ballots that were mailed by eligible voters prior to the June 2, 2015 deadline established by the Regional Director (with votes to be counted on June 4) but were received by the Region after the June 4 count. Of the counted ballots, 10 were cast for the Petitioner, and 6 were cast against representation. Therefore, although they arrived after the count, the 10 unopened ballots were equal to the larger of the votes cast for or against representation, they were potentially timely when mailed, and 6 of the unopened ballots, a determinative number, were postmarked 5 days or more before the count. In these circumstances, although the Board's normal practice is to exclude ballots received after the count is conducted, I would grant review because such a large number of mail ballots sent prior to the applicable deadline were not received by the Region, and because the Board has, at least on one occasion, counted such ballots when mailed reasonably in advance of the deadline. See *MCS Consultants, Inc.*, 29–RC–11339 (Sept. 25, 2006). In my view, a departure from the Board's normal practice may be warranted "in an extremely unusual case . . . when our regular procedures have been deficient," based on the need to "satisfy our overriding statutory responsibility to 'assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act.'" *Tekweld Solutions, Inc.*, 361 NLRB 123, 125 (2014) (Member Miscimarra, dissenting) (quoting NLRA Sec. 9(b)).

[1] Pertinent portions of the Regional Director's Supplemental Decision on Objections, Order consolidating cases, and notice of hearing are attached as an appendix.

[2] There is no suggestion here that the Region was in any way responsible for the untimeliness of the ballots, or that the Board's mail-ballot procedure was otherwise deficient.

In addition, we note that *MCS Consultants, Inc.*, 29–RC–11339 (Sept. 25, 2006), cited by our colleague, is neither precedential nor consistent with the Board's established rule on late-arriving mail ballots.

APPENDIX

SUPPLEMENTAL DECISION ON OBJECTIONS, ORDER CONSOLIDATING CASES, AND NOTICE OF HEARING

On March 18, 2015,[1] Local 1102, Retail, Wholesale & Department Store Union, United Food and Commercial Workers, herein called the Petitioner or Union, filed a petition in this matter seeking to represent certain employees employed by Classic Valet Parking, Inc., herein called the Employer.

Pursuant to a Decision and Direction of Election, issued by the undersigned on April 23, an election by secret mail ballot was conducted from May 19 until June 2, with the count on June 4, among the employees in the following unit:

> All full-time and regular part-time runners (also known as drivers), greeters and cashiers who are regularly employed by the Employer at its Stony Brook University Hospital site, located at Stony Brook, New York, but excluding all employees employed at other sites, administrative employees, clerical employees, professional employees, confidential employees, casual per diem employees, managerial personnel, guards and supervisors as defined by the Act.

The tally of ballots made available to the parties pursuant to the Board's Rules and Regulations, showed the following results:

Approximate number of eligible voters	29
Number of void ballots	1
Number of ballots cast for the Petitioner	10
Number of votes cast against participating labor organization	6
Number of valid votes counted	16
Number of challenged ballots	2
Number of valid votes counted plus challenged ballots	18

Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes cast has been cast for the Petitioner.

The Employer filed timely objections to conduct affecting the results of the election. The Employer's objections are attached hereto as Exhibit "A."

Pursuant to Section 102.69 of the Board's Rules and Regulations, the undersigned caused an investigation to be conducted concerning the above-mentioned Employer's objections, during which the parties were afforded full opportunity to submit evidence bearing on the issues. The investigation revealed the following:

Objection 1

In its first objection, the Employer objects to the Regional Director's decision to conduct this election by mail ballot. Specifically, the Employer alleges that the Region directed a mail ballot election over the Employer's objection. The Employer further alleges that certain eligible voters did not receive ballots. Finally, the Employer alleges that there were ten ballots which were postmarked before the count, but received by the Region after the count. The Employer asserts that these late ballots should be opened and counted. The Petitioner asserts that this objection lacks merit.

In its offer of proof, the Employer states its attorney, Bernard Burdzinski, will testify that the Employer objected to conducting the election by mail ballot and proposed alternatives for conducting a manual election. Specifically, prior to the election, the Employer stated that a mail ballot was not necessary because all the employees could be scheduled to work and available to vote from 6 to 8 a.m. or from 3 until 5 p.m. Additionally, the Employer stated that there were several locations at Stony Brook University Medical Center at which an election could be held. Further, Burdzinski will testify that two named eligible employees reported to the Employer that they had not received ballots and that, in turn, the Employer alerted the Region. Finally, the Employer states that Burdzinski will testify that the Board Agent conducting the election confirmed that the Region received ten ballots after the count, including one ballot which appears to have been delivered initially to U.S. District Court for the Eastern District of New York and forwarded to the Region by the clerk of that court. The Employer states that it will produce Postmaster Christopher Yanke to testify that mail delivery has been slow in 2015.

The Petitioner asserts that the Regional Director properly exercised his discretion in deciding to conduct the election by mail ballot. With regard to the voters who did not receive ballots, the Petitioner states the Region alerted voters that they could request a new ballot if they did not receive one. Further, the Petitioner states that any potential mail slowdown is not grounds for opening and counting ballots that were received by the Region after the count on June 4.

The independent investigation revealed that prior to the election, the parties took opposing positions regarding whether to conduct the election by mail ballot. The Employer opposed a mail ballot election. The Petitioner requested that the election be conducted by mail ballot for a number of reasons, including that unit employees are scattered temporally and geographically, that the Employer was engaging in unfair labor practices, that a mail ballot election would be more efficient for the Region, and that there was no location available at Stony Brook University Medical Center at which to hold the election. The investigation also revealed that the Region sent duplicate ballots to the two employees identified by the Employer and that those employees returned their ballots. In addition, the Region sent duplicate ballots to other individuals.

Discussion

With regard to the Regional Director's decision to conduct a mail ballot election, the Board has held that the mechanics of an election, such as date, time, and place are left to the discretion of the Regional Director. See *Ceva Logistics U.S., Inc.*, 357 NLRB 628 (2011) (in which the Board held that the Regional Director acted within his discretion when he directed an election on a day on which employees were scheduled to attend

[1] All dates hereinafter are in 2015 unless otherwise indicated.

a meeting at the Employer's facility, but were not scheduled to work); *San Diego Gas & Electric*, 325 NLRB 1143 (1998) (in which the Board stated that a Regional Director has broad discretion in determining the arrangements for an election); *Manchester Knitted Fashions*, 108 NLRB 1366 (1954) (in which the Board stated that the Regional Director has the discretion to determine the time and place for an election). The Board has specifically found that the Regional Director has the discretion to determine whether an election will be conducted manually or by mail ballot. See *Nouveau Elevator Industries*, 326 NLRB 470, 471 (1998) (in which the Board found that the Regional Director has broad discretion in determining the method by which an election is conducted and that such a decision should not be overturned unless clear abuse of discretion can be demonstrated).

In *San Diego Gas & Electric*, the Board specifically found that mail ballot elections are particularly appropriate in cases where employees are geographically or temporally scattered, or where there is a strike, lockout, or picketing in progress. In those cases, the Board found that a Regional Director should also consider the positions of the parties, the ability of the unit employees to read and understand a mail ballot, the availability of addresses for employees, and the most efficient use of Board resources. In such cases, the Board stated, "we will normally expect the Regional Director to exercise his or her discretion within the guidelines set forth above." *San Diego Gas & Electric*, 325 NLRB at 1145. Several of these considerations cited by the Board are present in the instant case, including the temporal and geographic scattering of employees, demonstrating that the Regional Director properly exercised his discretion in directing a mail ballot election. The Employer has not presented any evidence that that the Regional Director abused his discretion by directing a mail ballot in this case. See *Nouveau Elevator Industries*, supra.

With regard to the Employer's allegation that voters did not receive ballots, the independent investigation showed that the voters identified by the employer were provided with duplicate ballots and returned them. Further, duplicate ballots were provided to other employees. There is no evidence that any voter was disenfranchised. Compare *Oneida County Community Action Agency,* 317 NLRB 852 (1995) (finding that an election should be set aside if voters were disenfranchised during a mail ballot).

The Employer alleges that the ten ballots received by the Region after the count should be opened and counted. As the Board has found, "[t]here must be some degree of finality to the results of an election, and there are strong policy considerations favoring prompt completion of representation proceedings." *Versail Mfg., Inc.,* 212 NLRB 592, 593 (1974); see also *J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850, 855 (5th. Cir. 1978) (finding that parties have a substantial interest in the finality of representation proceedings). It would be unduly burdensome to revise a Tally of Ballots in order to include ballots that were received after the count. The Board has held that ballots received after the due date but *before* the count should be opened and counted as long as it does not interfere with the Board's election procedures. In *Kerrville Bus Co.*, 257 NLRB 176 (1981), seven mail ballots were received after the return date for the ballots, but before the count. The Board ruled that all seven ballots should be opened and counted. In so finding, the Board emphasized the fact that these ballots were received before the count was most significant, thus allowing employees the broadest possible participation "as long as 'the election procedures are not unduly interfered with or hampered.'" *Kerrville Bus Co.,* 257 NLRB at 177, quoting *New England Oyster House,* 225 NLRB 682 (1976); see also *Watkins Construction Co.*, 332 NLRB 828, 828 (2000) (in which the Board held that a late ballot should be counted if it is received before the count begins); *J. Ray McDermott & Co. v. NLRB*, 571 F.2d at 855 (finding the non-receipt of mail ballots does not render a mail ballot election invalid). This case is akin to a case where a voter appears at the polls after the count of ballots. See *Versail Mfg., Inc.*, 212 NLRB at 593 (in which the Board declined to set aside an election because an over-the-road driver was not able to return from a trip in time to vote in an election).

With regard to the Employer's allegation that delivery of the mail ballots was slow, the Board has found that the failure of the Postal Service to deliver mail ballots does not necessitate setting aside an election. See *J. Ray McDermott & Co. v. NLRB*, 571 F.2d at 855 ("It cannot be said that an election by mail is per se invalid whenever a potentially decisive number of votes, no matter how small, is lost through the vagaries of mail delivery."). For the reasons stated above, I overrule the Employer's first objection.