Window to the World Communications, Inc. *and* International Brotherhood of Electrical Workers Local 1220, Petitioner. Case 13–RC–289039

November 15, 2022

DECISION ON REVIEW AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND WILCOX

The Petitioner's request for review of the Regional Director's Decision on Objections and Certification of Results is granted as it raises substantial issues warranting review. On review, we conclude that the singular circumstances of this case warrant a departure from the Board's normal approach for dealing with mail ballots that arrive after the count date.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On January 18, 2022,[1] International Brotherhood of Electrical Workers Local 1220 (the Petitioner) filed a petition seeking an *Armour-Globe*[2] election to determine whether a single unrepresented employee—Jose Roberto Gsam—wished to join an existing bargaining unit represented by the Petitioner. On February 4, the Acting Regional Director approved a Stipulated Election Agreement that provided that the election would be conducted by mail. Gsam completed and returned his ballot in a timely manner, but at the March 16 ballot count his ballot was declared void because the Region had erroneously sent him a ballot that contained the name of the wrong employer and the wrong union. On March 24, the Acting Regional Director approved a stipulation to set aside the election and to hold a second election by mail. The stipulation scheduled the ballot count for April 21.

Gsam again completed and mailed his ballot to the Region, but his ballot was not received prior to the April 21 count, which went forward as scheduled. The resultant tally of ballots showed 0 votes cast for the Petitioner and 0 votes cast against representation, with no challenges or void ballots. On April 26, the Petitioner timely filed an objection to the election arguing that the second election should be set aside as the only voter's ballot was missing; in support of its objection, the Petitioner submitted an affidavit from Gsam stating that he had mailed his ballot on April 5. Gsam's ballot was received by the Region on May 4. The Region has administratively advised us that Gsam's ballot was indeed postmarked April 5.[3]

On May 26, the Acting Regional Director issued a Decision on Objections and Certification of Results in which he overruled the Petitioner's objection and certified the results of the election. Applying *CenTrio Energy South, LLC*, 371 NLRB No. 94 (2022), the Acting Regional Director concluded that Gsam's determinative mail ballot could not be counted because it had arrived after the date of the ballot count. The Acting Regional Director additionally noted that the apparent failure in mail delivery was not the type of "severe" circumstance that would warrant setting an election aside. The Petitioner timely filed the instant request for review.

In *CenTrio*, the Board reiterated that it "does not count mail ballots that arrive after the tally, even if those votes are determinative." *CenTrio*, 371 NLRB No. 94, slip op. at 1 (citing *Classic Valet Parking*, 363 NLRB 249, 249 (2015)). In *Classic Valet*, the Board explained that the practice of not counting late-arriving mail ballots is intended to balance the Board's "strong interest in effectuating employee choice" and "substantial policy considerations favoring finality of election results." *Classic Valet*, 363 NLRB at 249. The Board expressed a concern that if it allowed late-arriving mail ballots to be counted, "election results could well be delayed for significant periods of time as mail ballots trickle into the regional office." Id.

After careful consideration, we have concluded that the singular facts of this case warrant a narrow exception to the general rule articulated in *CenTrio* and *Classic Valet*. We will therefore rescind the Certification of Results and remand this case to the Region for further proceedings, including opening and counting the ballot Gsam cast in the second election (if the parties so agree) or holding a third election (if the parties cannot agree to open said ballot).

The following highly unusual combination of circumstances informs our conclusion. First, the second election was necessary only because the Region provided Gsam with a ballot listing the wrong union and employer; had Gsam been provided with a correct ballot, there would have been no need for this second election. Second, it is undisputed that Gsam promptly placed his second ballot in the mail, so the delay in its receipt is not attributable to any action or inaction on his part.[4] Third, Gsam was the

[1] All dates hereinafter 2022 unless otherwise noted.

[2] *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

[3] The Region has further advised us that the return envelope provided to Gsam was a business reply envelope. To the extent that the use of this delivery method may have contributed to the delay in the delivery of his ballot to the Region, we observe that Regions have been instructed to discontinue the use of business reply envelopes in mail-ballot elections.

[4] As indicated, that delay may potentially be due to the Region's provision of a return envelope that used business reply mail, a practice that has since been discontinued.

sole voter in this self-determination election, and if the Certification of Results is permitted to stand he will, through no fault of his own, have to wait for a year before being able to vote again on whether to be included in the existing unit. See Sec. 9(c)(3). Finally, Gsam's ballot was in fact received by the Region prior to the issuance of the Certification of Results.

As this combination of circumstances indicates, the usual balancing of enfranchisement and finality that animated *CenTrio* and *Classic Valet* is not present here. Gsam is the sole voter in the election, so opening his ballot or holding a third election clearly furthers enfranchisement interests; by contrast, allowing the results of the second election to stand would definitively disenfranchise 100 percent of the eligible voters in this election. At the same time, permitting Gsam's late-arriving ballot to be counted or holding a third election implicates almost no finality interests: here too, Gsam is the sole eligible voter, so counting his late-arriving ballot or holding a third election does not detract from any other voters' interest in finality. Nor would counting his ballot or holding a third election significantly detract from any interest in finality the Employer might have; the Employer is already obligated to bargain with the Petitioner in the existing unit, and at most counting Gsam's ballot or holding a new election will result in the addition of one employee to the unit. These singular circumstances thus present an entirely different balance of interests than is present in ordinary late-arriving mail ballot cases. If there is any interest in finality here, it is conclusively outweighed by the interest in enfranchisement.

In conclusion, the singular circumstances of this case warrant a departure from the Board's usual approach to late-arriving ballots.[5] We therefore rescind the Certification of Results and remand the case for further action consistent with this decision. With respect to further action on remand, we observe that the stipulation to the rerun election provided that ballots had to be received by April 21; opening and counting Gsam's second ballot, which arrived after April 21, would therefore be contrary to the stipulation,[6] but we emphasize that the parties are free to agree to open and count Gsam's second ballot, thereby obviating the need for a third election. If the parties agree to open and count Gsam's second ballot, the Regional Director shall issue a revised tally of ballots and, ultimately, a new certification of results. If the parties do not agree to open and count Gsam's second ballot, then the Regional Director shall sustain the Petitioner's objection and proceed to a third election.[7]

ORDER

The May 26, 2022 Certification of Results is rescinded. The case is remanded to the Regional Director for Region 13 for further appropriate action consistent with this Decision on Review and Order.

Dated, Washington, D.C. November 15, 2022

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] Although Member Kaplan joins his colleagues in granting review and remanding the case for further appropriate action, he does not believe that their narrow exception to *CenTrio* is sufficient. Instead, he would find more broadly that the bright-line rule set forth in *CenTrio* should not be applied whenever doing so would irrationally interfere with employees' fundamental right under the Act to choose whether or not to be represented by a union. That would certainly be the result of applying *CenTrio* here. See generally *Premier Utility Services, LLC*, 363 NLRB 1524, 1524 (2016) (Member Miscimarra, dissenting) (explaining that the Board's normal rules governing late-arriving ballots "must be balanced against our statutory responsibility to assure that employees have been reasonably permitted to freely exercise their rights under the Act" (internal citations omitted)); *Classic Valet*, 363 NLRB at 249 (Member Miscimarra, dissenting in part) (urging "a departure" from the normal rule in "extremely unusual case[s] . . . when our regular procedures have been deficient" in order to "satisfy our overriding statutory responsibility to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act" (internal citations omitted)). Member Kaplan further observes that this case presents a convincing example of why manual elections are preferable to mail-ballot elections. See *Starbucks Corp.*, 371 NLRB No. 154, slip op. at 7 (2022) (Members Kaplan and Ring, dissenting) (cataloguing other recent failures in the administration of mail-ballot elections).

[6] See *T & L Leasing*, 318 NLRB 324, 326 (1995).

[7] In its request for review, the Petitioner asks that a third election be conducted manually, rather than by mail ballot. Both the original Stipulated Election Agreement and the stipulation to a rerun election, however, provide for a mail-ballot election. Thus, if the parties will not agree to open and count Gsam's second ballot, the third election will also be conducted by mail ballot, unless the parties agree to a manual election.