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Auto-Chlor System of Washington, Inc. and International Brotherhood of Electrical Workers Local 46 Case 19–RC–305488

May 16, 2024

DECISION AND ORDER

BY CHAIRMAN McFERRAN AND MEMBERS PROUTY
AND WILCOX

On October 18, 2022, International Brotherhood of Electrical Workers Local 46 (the Petitioner) filed a representation petition in Case 19–RC–305488, seeking to represent a unit of employees working for Auto-Chlor System of Washington (the Employer). The Region conducted a secret ballot election on November 30, 2022, in which the Petitioner failed to receive a majority of votes cast. Neither party filed objections to the election, and, in the absence of objections or determinative challenges, the Regional Director issued a Certification of Results on December 8, 2022.

On March 9, 2023, the Petitioner filed an unfair labor practice charge against the Employer in Case 19–CA–313715,¹ alleging that the Employer violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act during the critical period for the election in Case 19–RC–305488. On December 15, 2023, the Regional Director issued his Order Revoking Certification of Results and Dismissing the Petition in Case 19–RC–305488. In his Order, the Regional Director explained that he had found merit to the Petitioner’s unfair labor practice allegations in Case 19–CA–313715, and that “the Employer’s unlawful conduct warrants setting aside the election and seeking a remedial bargaining order” pursuant to the Board’s decision in *Cemex Construction Materials Pacific LLC*, 372 NLRB No. 130 (2023) (*Cemex*).² The Regional Director therefore revoked the Certification of Results in Case 19–RC–305488 and dismissed the representation petition.

Thereafter, in accordance with Section 102.67 of the Board’s Rules and Regulations, the Employer filed a

request for review of the Regional Director’s Order Revoking Certification of Results and Dismissing the Petition. The Petitioner filed an opposition.

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 Order Revoking Certification of Results and Dismissing the petition is granted as it raises substantial issues warranting review. The Regional Director’s actions here are akin to a merit-determination dismissal—a procedural mechanism which allows a Regional Director to dismiss a representation petition, subject to reinstatement, when the Regional Director has found merit to unfair labor practice charges that would, if proven, result in an affirmative bargaining order.³ But the Board has not previously engaged in merit-determination dismissals under circumstances where, as here, the Regional Director has already issued a certification of results in the underlying representation case due to the absence of objections and/or equivalent unfair labor practice charges. Although the General Counsel is seeking a *Cemex* bargaining order as a remedy for an alleged refusal to bargain in violation of Section 8(a)(5) in Case 19–CA–313715, the propriety of such a remedial order and its effect, if any, upon the certification, must be litigated in those unfair labor practice proceedings. In such circumstances, no purpose is served by reopening a closed representation case simply to dismiss the petition subject to potential reinstatement.⁴

Under these circumstances, we find that the Regional Director erred in revoking the Certification of Results in Case 19–CA–313715 and dismissing the petition. We shall accordingly reinstate the petition and certification.

ORDER

The Regional Director’s Order Revoking Certification of Results and Dismissing the Petitioner is reversed and the petition and Certification of Results in Case 19–RC–305488 are reinstated.

Dated, Washington, D.C. May 16, 2024

Lauren McFerran,

Chairman

¹ The Petitioner subsequently amended its charge twice, on May 1 and August 18, 2023.

² The Region issued its complaint and notice of hearing in Case 19–CA–313715 on March 18, 2024.

³ See *Rieth-Riley Construction Co.*, 371 NLRB No. 109, slip op. at 7 (2022); *Brannan Sand & Gravel*, 308 NLRB 922, 922 (1992); *Big Three Industries, Inc.*, 201 NLRB 197, 197 (1973).

⁴ Chairman McFerran agrees with her colleagues that the Regional Director’s Order Revoking Certification of Results should be reversed for the reasons stated above. She also notes that reinstating the petition and certification of results, in the circumstances presented here, is

consistent with the principles stated in *Irving Air Chute Co.*, 149 NLRB 627 (1964) (bargaining order should not be issued following an election unless the election was set aside based upon meritorious objections filed in the representation case), enfd. 350 F.2d 176 (2d Cir. 1965), and its progeny. See, e.g., *Kolpin Bros. Co.*, 149 NLRB 1378, 1379–1380 (1964) (“Where, as here, the election has not been set aside on [the basis of meritorious objections] and its validity stands unimpaired, we will presume that the election, which the Union lost, truly expressed the employees’ desires as to representation.”), enfd. 379 F.2d 488 (7th Cir. 1967).

David M. Prouty, Member

Gwynne A. Wilcox, Member

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