

Rosewood Care Center, Inc. of Joliet and United Food & Commercial Workers Union, Local 1540, chartered by the U.F.C.W. International Union, AFL-CIO, Petitioner. Case 13-RC-18836

December 14, 1994

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The question presented in this election proceeding is whether the Regional Director correctly recommended overruling the Employer's objections alleging improprieties in the Board agent's conduct of the election and threats by Petitioner's agents and supporters.¹ The Board has reviewed the record in light of the exceptions and brief, has adopted the Regional Director's findings and recommendations,² and finds that a certification of representative should be issued.

The Employer's Objection I alleged that the Board agent improperly denied late-arriving employees an opportunity to vote while permitting another employee to vote before the polls were scheduled to open. Contrary to our dissenting colleague, we agree with the Regional Director that this objection should be overruled.

The stipulated voting hours were 7:15 to 7:45 a.m. and 2:15 to 2:45 p.m. At the morning preelection conference, the Employer's representative, Michael Brady, asked if there was any provision for employees to cast their ballots if they could not make either voting session. Brady referred to three employees who had to attend a relative's funeral. The Board agent replied that there was no provision for them to vote any other way, but that he would allow those people in line at the close of a polling period to vote. The morning voting session opened and closed as scheduled.

As the afternoon preelection conference was ending, an employee (not one of the three mentioned by Brady) entered the polling area and asked to vote early in order to attend a funeral. After securing the verbal consent of the parties' representatives, the Board agent permitted the employee to cast her vote approximately 1-10 minutes before the scheduled opening of the polls.

None of the three employees discussed at the morning preelection conference attempted to vote. One employee did not return to the Employer's facility from the funeral until after 4 p.m. The other two employees

arrived at the facility around 2:48 p.m. Fellow employees told them that they were too late to vote. They did not go to the polling place or speak to the Board agent.

The Regional Director noted that *Monte Vista Disposal Co.*, 307 NLRB 531, 533 (1992), established a "brightline" rule against permitting late arriving voters to vote. Since the three employees at issue did not even present themselves in the polling area, the Regional Director found that they were not denied an opportunity to vote.

The Regional Director also noted that when the integrity of the election process is challenged, the Board must decide "whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election." *Polymers, Inc.*, 174 NLRB 282 (1969), enf. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). The Regional Director recognized that one employee was permitted to vote before the scheduled beginning of the afternoon voting session, but she found that this event did not raise a reasonable doubt as to the fairness and validity of the election. She emphasized that (1) the Board agent acted pursuant to the parties' verbal agreement, (2) no voters appearing at the polls were denied the chance to vote, and (3) the deviation from the scheduled afternoon session starting time was slight.

The Employer and our dissenting colleague contend that the Board agent engaged in impermissible arbitrary conduct by seeking the parties' consent to allowing one employee to vote early, but failing to seek such consent to allow three other employees an opportunity to vote late. We disagree. At the morning preelection conference, the Board agent addressed an abstract question about three employees who might not be able to vote during the stipulated polling hours. There is no evidence that the Employer's representative, Brady, gave any indication at all of the extent to which the polling hours would have to be modified to accommodate those employees. Indeed, there is no indication that Brady even knew when or if any of them would arrive at the Employer's facility.

Under these circumstances, a Board agent can hardly be faulted for failing to explore the possibility of the parties' consenting to permit the employees to vote in the event that they arrived a few minutes after the polls closed. The issue is academic, in any event, because *none of the three employees ever appeared at the polls in an attempt to vote.*

Contrary to the dissent, we find the situation involving the one employee whom the Board agent permitted to vote in the early afternoon to be quite different. There was no conjecture about whether or when this employee might be available to vote. She was there, at the polls, a few minutes before the scheduled beginning of the voting. The Board agent faced a finite, lim-

¹The National Labor Relations Board, by a three-member panel, has considered objections to an election held on March 1, 1994, and the Regional Director's report recommending disposition of them. The election was held pursuant to a Stipulated Election Agreement. The tally of ballots shows 26 for and 24 against the Petitioner.

²Absent exceptions, we adopt, pro forma, the Regional Director's recommendation that Objection II(3) be overruled.

ited situation. Consistent with the Board's policy of affording employees the broadest possible participation in Board elections, he sought and secured the parties' consent to let the employee vote. *Monte Vista* expressly permits late-arriving employees to vote if the agreement of the parties can be obtained. 307 NLRB at 533-534. Therefore, we find no basis for faulting the Board agent's conduct in permitting an early-arriving employee to vote pursuant to the parties' agreement.

In sum, we find that there are important differences between the situation of the three employees who arrived at the facility after the polls had closed but did not attempt to vote, and the situation of the one employee who voted a few minutes before the scheduled afternoon polling session. We conclude that the Board agent's separate handling of these two different situations does not raise a reasonable doubt as to the fairness and validity of the election.³

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Food & Commercial Workers Union, Local 1540, chartered by the U.F.C.W. International Union, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time dietary employees, kitchen employees, certified nurses aides, laundry employees, and housekeeping employees employed by the Employer at its facility now located at 3401 Hennepin Drive, Joliet, Illinois 60435; but excluding activities department employees, social service employees, marketing employees, medical records employees, care plan employees, Licensed Practical Nurses, Registered Nurses, office clerical employees, guards and supervisors as defined in the National Labor Relations Act.

MEMBER COHEN, dissenting.

I believe that a substantial question has been raised as to whether this election was conducted in a manner consistent with the Board's high standards of fairness, and the appearance thereof, in the conduct of elections. Accordingly, in order to eliminate any reasonable doubt as to the integrity of the process, I would hold a second election. See *Polymers, Inc.*, 174 NLRB 282

³Our dissenting colleague applies what he terms an "admittedly high standard." We adhere to the *Polymers* standard quoted above. Although the Board seeks "to establish ideal conditions insofar as possible," we believe that Board elections "must be appraised realistically and practically, and should not be judged against theoretically ideal, but nevertheless artificial, standards." *Regency Hyatt House*, 180 NLRB 489, 500-501 (1969).

(1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970).

The election was scheduled at the Employer's facility between 7:15 a.m. and 7:45 a.m. and between 2:15 p.m. and 2:45 p.m. on March 1, 1994. At a morning preelection conference, Employer Representative Brady told the Board agent that three employees had to attend a funeral and might not be able to vote at the designated times. He asked the agent if there were any provisions that would allow these three employees to vote. The agent responded in the negative.¹

After the afternoon preelection conference, and shortly before the designated time for the afternoon voting to begin, an employee arrived and asked if there was a way for her to vote early because she had to attend a funeral. The Board agent said that she could do so if the parties consented. The agent then asked the parties' representatives if they would consent. They did so and the employee voted.

Of the three employees who were the subject of Brady's morning inquiry, two arrived at the Employer's facility around 2:48 p.m. They were told that they were too late to vote. The third employee arrived between 4 and 4:30 p.m. and did not attempt to vote.

The Regional Director found that the three employees named in the objection did not timely present themselves at the polling place and were not improperly denied an opportunity to cast a ballot by the Board agent. See *Monte Vista Disposal Co.*, 307 NLRB 531 (1992). Concerning the one employee whom the Board agent permitted to cast a ballot before the start of the afternoon session, the Regional Director found that the differences between her voting time and the official voting time was slight. In the Regional Director's opinion, this action did not raise a reasonable doubt as to the fairness and validity of the election. She therefore overruled the objection.

I would sustain the Employer's objection. The hallmark of the Board's responsibility for running elections is the obligation to be scrupulously fair and evenhanded, and to avoid even the appearance of being anything less than that. In the instant case, there were four employees who could not vote during the regular polling hours because they had to attend a funeral. As to three of them, the Employer asked if there was any way for them to vote. The Board agent flatly said "no." Accordingly, these three employees did not vote. By contrast, the fourth employee, in the same predicament, was told by the Board agent that there was a way for him to vote, i.e., by consent of the parties. The parties consented, and this fourth employee voted.

¹I do not agree that the question presented by Brady was "abstract." Brady mentioned a specific and real situation involving three employees whose attendance at a funeral would prevent them from voting during regular voting hours.

The only significant difference between the three employees and the fourth was the identity of the questioner. Concededly, the three employees were not physically present at the polls at the time of the Employer's question. However, if the Board agent had mentioned the possibility of consent (as he did for the fourth employee), and if such consent had been granted, the three employees could have been so apprised and they could have voted.² Indeed, two of the three did show up to vote a mere 3 minutes after the polls closed.³

²As shown in the case of the fourth employee, the parties have shown a willingness to give consent to accommodate employees who had to go to a funeral.

³Concededly, these two employees did not appear *at the polls*. However, my colleagues' reliance on this fact is misplaced. If the

Further, I note that the election was decided by a 26–24 margin. In essence, the three votes (or even two of them) could have affected the result.

I do not suggest the Board agent *intended* to show a bias in her treatment of the parties. I simply believe that a Board agent must avoid even the appearance of disparate treatment. Since the Board agent's conduct did not measure up to this admittedly high standard, and in view of the critical significance of the three votes, I would rerun the election.

Board agent had treated their "funeral" situation as she treated the "funeral" situation of the fourth employee, the parties could have agreed to their out-of-time voting just as they did for the fourth employee. In that event, the employees could have voted pursuant to the stipulation. If they then failed to appear at the polls, there would be no cause for anyone to complain.