

**Family Service Agency, San Francisco and Service Employees International Union, Local 790, AFL-CIO.** Case 20-RC-17214

July 24, 2000

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

The issue in this case is whether a supervisor's acting as an election observer for the Union in a Board-conducted representation election is objectionable. For the reasons explained below, we announce a new rule that either party's use of a statutory supervisor as an election observer constitutes objectionable conduct.

Background

On September 17, 1998, the National Labor Relations Board issued an unpublished Decision and Order remanding the instant case for a hearing on the question of whether the representation election conducted on January 24, 1997, should be set aside because a statutory supervisor, Catherine Lucero, acted as the Union's election observer and campaigned on behalf of the Union.<sup>1</sup> The hearing was conducted, and on December 12, 1998, the hearing officer issued her report recommending that the objection be overruled. The Employer filed exceptions to the report and a supporting brief.

The Board has considered the record in light of the exceptions and briefs, and has decided to adopt the hearing officer's findings<sup>2</sup> and recommendations only to the extent consistent with this decision and to set aside the election.

The Hearing Officer's Report

The hearing officer found that Lucero made effective recommendations regarding merit increases for two of the three employees she supervised based on annual evaluations that she conducted, and that, accordingly, Lucero was a supervisor within the meaning of Section 2(11) of the Act.<sup>3</sup> The hearing officer then examined Lucero's preelection conduct in order to determine its effect on the employees' expression of free choice in the election, and concluded that it was not objectionable.<sup>4</sup>

<sup>1</sup> The tally of ballots was 15 for and 10 against the Union, with 1 challenged ballot, that of Lucero.

<sup>2</sup> The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

<sup>3</sup> In the absence of exceptions, we affirm the hearing officer's finding that Lucero was a statutory supervisor.

<sup>4</sup> Under *Sil-Base Co.*, 290 NLRB 1179 (1988), a supervisor's prouion conduct may warrant setting aside an election where: (1) the employer takes no stand contrary to the supervisor's prouion conduct, and employees may be led to believe the employer favors the union; or (2) the supervisor's prouion conduct could coerce employees into

Finally, relying on *Plant City Welding*,<sup>5</sup> the hearing officer concluded that Lucero's serving as the Union's election observer was not objectionable.<sup>6</sup>

Analysis

In order to insure free and fair elections, the Board has long held that *employers* may not designate supervisors or others closely associated with management as their election observers. *Paragon Rubber Co.*, 7 NLRB 965 (1938); *International Stamping Co.*, 97 NLRB 921 (1951); *Mid-Continent Spring Co. of Kentucky*, 273 NLRB 884 (1984). This proscription against the use of supervisory personnel by employers has been applied per se, without a showing of actual interference with the election.

On the other hand, the Board has recognized that a union's use of a statutory supervisor as an observer does not raise the same likelihood that the supervisor will unduly influence the employees to vote for the union. Thus, in *Plant City Welding & Tank Co.*, supra, the Board refused to set aside an election in which a supervisor acted as an observer for the union. The Board concluded that since the employer's opposition to the union was known to the employees, the supervisor's presence as an observer could not have been construed by the employees as an endorsement of the union by the employer. See also *Masoneilan International, Inc.*, 223 NLRB 965, 974 (1976).

While we have no quarrel with the rationale underlying the Board's distinction between a union's use of a supervisor as an observer and an employer's, we have decided that a rule barring supervisors from serving as observers for *any* party to an election represents the better practice.<sup>7</sup>

It is well settled that the Board in conducting elections must maintain and protect the integrity and neutrality of its procedures. See, e.g., *Glacier Packing Co.*, 210 NLRB 571 (1974); *Kerona Plastics*, 196 NLRB 1120 (1972); *NLRB v. Frontier Hotel*, 625 F.2d 293, 295 (9th Cir. 1980). The Board has stated that election conditions must approach, as nearly as possible, ideal "laboratory" conditions so as to facilitate expression of the uninhibited desires of the employees. *General Shoe Corp.*, 77 NLRB 124, 127 (1948). To this end, agents of either party are not allowed in the polling area during the election hours, and electioneering at or near the polling place during the

supporting the union out of fear of future retaliation by that supervisor or out of hope of reward by the supervisor. The hearing officer found that neither situation existed in this case.

<sup>5</sup> *Plant City Welding & Tank Co.*, 119 NLRB 131, 132 (1957).

<sup>6</sup> In view of our disposition of this case, we find it unnecessary to pass on whether Lucero's prouion conduct was objectionable.

<sup>7</sup> Member Brame, while agreeing with the result in this case, rejects the rationale underlying the Board's prior distinction between a union's use of a supervisor as an observer and an employer's use of a supervisor as an observer. See his concurring opinion in *Randell Warehouse*, 328 NLRB 1034, 1038 (1999).

hours of voting is not permitted. See NLRB Casehandling Manual, Part Two, Representation Proceedings, Section 11326. See also *Milchem, Inc.*, 170 NLRB 362 (1968). Further, the Board's standard Stipulated Election Agreement, Form NLRB-652, provides that "[e]ach party may station an equal number of authorized, *nonsupervisory*-employee observers at the polling places to assist in the election" (emphasis added).

In our opinion, the Board's creation of an exception to these general rules to allow a union to use a supervisor as an observer is not warranted. Thus, to avoid the possibility that voters may perceive the participation of a statutory supervisor in the actual balloting process, even in the limited role of an observer, as calling into question the integrity of the election process, we have decided to eliminate this exception and announce a rule prohibiting the use of supervisors as observers.<sup>8</sup>

Accordingly, we find that the Union's use of Lucero, an undisputed statutory supervisor, as its observer in the election, constituted objectionable conduct. We therefore direct that the election be set aside and a new election conducted.<sup>9</sup>

#### ORDER

It is ordered that the election held on January 24, 1997, is set aside and that this matter is remanded to the Regional Director for Region 20 for the purpose of conducting a new election.

[Direction of Second Election omitted from publication.]

CHAIRMAN TRUESDALE, dissenting.

Contrary to my colleagues, I would not overrule the Board's decision in *Plant City Welding & Tank Co.*, 119 NLRB 131 (1957), and therefore would not set aside the election in this proceeding.

In *Plant City Welding*, as here, the employer objected to the petitioner's use of a statutory supervisor as an election observer. In overruling the objection, the Board noted that the Board's Rule that an employer's use of a supervisor as an election observer is objectionable is based on the likelihood that the supervisor's presence at the polling place would influence employees to cast "no-union" votes. The Board concluded, however, that the same potential for undue influence does not arise when

the supervisor serves as an observer for a union, noting that employees would not reasonably perceive the supervisor's presence as an endorsement of the union by the employer when the employer had clearly stated its contrary position before the election. In *Plant City Welding*, supra, the union received a majority of votes, and the Board found no basis for setting aside the election.

The Board has adhered to the approach adopted in *Plant City Welding* for over four decades, during which the election process has remained fundamentally the same. Moreover, employees participating in elections today, like their counterparts 43 years ago, are typically well aware of their employers' views regarding union representation. Under these circumstances, the presence of a supervisor as a union observer is unlikely to cause employees to believe that the employer supports the union, and to influence their votes in the election. Thus, the rationale of the Board's precedent under *Plant City Welding* remains valid, and I find no basis for changing the Board's longstanding policy.

I note further that supervisory status under the Act is the subject of much litigation before the Board, particularly with respect to low-level supervisors, such as Catherine Lucero here, whose eligibility to participate in an election is in dispute. Such disputes are often unresolved at the time of the election, and are decided, if necessary, through the postelection challenge procedure. In the preelection proceeding in this case, the Acting Regional Director found that Lucero was not a supervisor; however the Board found that her status raised a substantial issue and permitted her to vote by challenged ballot. This limited opportunity of parties to obtain a Board determination of an individual's status prior to the election, considered with the improbability that a supervisor's serving as an observer for the Union in the instant circumstances could unduly influence employees' votes, strongly favors the Board's policy under *Plant City Welding* rather than the new rule adopted by the majority.

In the present case, the parties stipulated that every employee knew that the Employer was firmly opposed to the Petitioner. In addition, the hearing officer found no evidence that Lucero ever engaged in any coercive conduct regarding the election.

Accordingly, I dissent from my colleagues' decision to set aside the election. Because the Petitioner received a majority of the ballots, I would certify it as the representative of the bargaining unit employees.

<sup>8</sup> To the extent that Board precedent is inconsistent with this decision, it is overruled.

<sup>9</sup> Applying the new rule in the case in which it is announced is consistent with our precedent. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994).