

Lange and Perkins, LLC d/b/a The Daily Grind and Industrial Workers of the World, IU 660, Petitioner. Case 36–RC–6113

June 7, 2002

DECISION AND DIRECTION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND BARTLETT

The National Labor Relations Board, by a three-member panel, has considered a ballot challenge and objections to an election held February 6, 2002, and the Regional Director's reports recommending disposition of them.¹ The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 14 for and 14 against the Union, with 1 determinative challenged ballot.

We have reviewed the record in light of the exceptions and briefs, and we adopt the Regional Director's findings and recommendations with respect to Aaron Allen's challenged ballot and the Employer's election objections. Specifically, we agree with the Regional Director, for the reasons stated, that Allen is an eligible voter and that the Employer's evidence in support of its objections was not timely filed.² Our dissenting colleague does not disagree as to Allen's eligibility, but he would find that the evidence in support of the objections was presented in a timely fashion. Contrary to our dissenting colleague, none of the assertions in the Employer's exceptions warrant further consideration of the objections.

The Employer does not dispute that it received a letter dated February 13, from the acting officer in charge requiring it to submit its evidence in support of its objections to the Board office by the close of business on February 20, 2002. The Employer contends that its evidence was ready to be hand-delivered to the Board office on February 20, but that it mailed the evidence instead after a conversation with the acting officer in charge.

The Employer concedes that "no specific extension of time was requested by counsel for the Employer or discussed with the acting officer in charge." Instead, the

¹ The Regional Director also issued a reply to the Employer's exceptions.

² With respect to Employer's objection 3, which requests the Board to reevaluate its process of resolving ballot challenges only after they are shown to be determinative, we do not adopt the Regional Director's reasoning that this objection should be dismissed for untimely submission of supporting evidence. Rather, we rely on and adopt the Regional Director's rationale in his Report on Challenged Ballot and find no compelling reason to alter our long-held practice of resolving only determinative ballot challenges. However, in adopting the Regional Director's rationale, we note, contrary to his assertion, that the Employer did in fact raise this issue in its election objections.

Employer asserts in its exceptions, with no supporting evidence, that "[a]t some point during the day [February 20] counsel for the Employer was told by the Subregional Office or was led to believe either through a voice mail message or a live telephone conversation with the acting officer in charge that it would be permissible under the circumstances to mail the affidavit to the Subregional Office." Exceptions at pages 7–8 (emphasis added). This vague and uncertain statement is insufficient to warrant further consideration.³ Moreover, we disagree with our colleague's inference that the content of the Employer's objections somehow relieved it of Rule 102.69(a)'s strict requirement for the timely submission of supporting evidence. Employer's Objection 1 alleges in pertinent part:

Allen and Bill Bradley, the Union's representative, made serious misrepresentations about the NLRB's process of balloting and counting votes. Specifically, the Union representatives made misrepresentations and pressured and coerced employees by telling them that if an employee did not vote in the election, the NLRB would count the total number of eligible voters (29) and automatically assign a "no" vote to anyone who did not vote.

The issue presented by Employer's Objection 1 is not whether two Board agents misrepresented the Board's election procedure to Allen, as our dissenting colleague states, but rather what Allen and Bradley told other employees that they had allegedly learned from the Board agents and whether these alleged statements interfered with the election. This is more than mere semantics—it is the difference between a misrepresentation by union supporters regarding the conduct of the election and misstatements by a Board agent regarding election procedure. And significantly, even though, as our colleague states, evidence from the two Board agents "was within the province of the Board," evidence from employees as to what they were told by Allen and Bradley—the essence of the objection—was not.

But, even if we were to consider the Employer's objections as raising the issue of misrepresentations by Board agents, we reject the notion that such an unsupported allegation is sufficient, by itself, to trigger an administrative investigation. The Employer must do more than simply raise the specter of Board agent misconduct to

³ Compare *Excalibur Extrusions, Inc.*, 296 NLRB 1292 (1989), where the Board remanded to determine whether a Board agent had granted the employer an extension to submit supporting evidence. In that case, unlike here, the employer asserted that a Board agent explicitly extended the deadline for the submission of supporting evidence to a date certain.

fulfill its obligation to submit timely supporting evidence. The Employer was required to supply the Board with some evidence supporting its allegation, preferably in the form of an affidavit or affidavits. At a minimum, the Employer should have identified witnesses and provided a description of the relevant information they could provide. It chose to do neither in a timely fashion. The Employer had many ways in which it could support its case, but it could not simply rely on its bare allegations.

In sum, it is directed that the Regional Director for Region 19 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Aaron Allen. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

CHAIRMAN HURTGEN, dissenting.

My colleagues dismiss the Employer's objections because the evidence was assertedly not presented in a timely fashion. I disagree.

The Employer's objections involve the issue of whether two Board agents misinformed employee Allen that his failure to vote in the NLRB election would be recorded as a "No" vote.

My colleagues say that the Employer's objection was different. They say that the objection was that Allen made the misrepresentation to employees. However, the Employer's objection included the allegation that Allen got this misinformation from the two Board agents. Further, such misinformation from a Board agent, and repeated to other employees, is at least an arguable ground for a meritorious objection.

The objections were timely filed on February 13. The evidence was due on February 20. Supporting evidence was mailed on February 20 and was received on February 22.

The facts concerning the alleged tardiness are asserted to be as follows.¹

On February 14, the Employer explained its objections to the Board's investigator. She said that she would be gathering information relevant to the objection. Inasmuch as the Employer could not itself get an affidavit from the two Board agents, the Employer reasonably

¹ The Region has failed to provide a hearing on this matter. Thus, for purposes of this decision, I will take the asserted facts as true.

thought that the investigator would talk to the two Board agents.

In addition, the Employer secured the affidavit of an employee. The affidavit, albeit hearsay, supports the proposition that Board agents made the aforementioned misrepresentation to Allen. The Employer avers that on February 20 the Board's officer in charge told him that the affidavit could be mailed that day. The Employer followed that instruction.

My colleagues say that the Employer's averment as to February 20 is "vague and uncertain." I disagree. Concededly, the Employer is not certain whether the Board agent expressly and specifically said that the affidavit could be mailed that day or simply uttered words that would lead the listener to reasonably believe that this was so. However, even in the latter case, it would be improper to lead the Employer to reasonably believe that the affidavit could be mailed that day, and to then default the Employer for acting on that belief.²

I recognize that the Employer has not supplied an affidavit as to the events of February 20. However, the Board's affidavit requirement was not announced until March 18.³ Further, the Employer is not claiming extenuating circumstances to excuse a late submission. The Employer is saying that it met the time requirement.

Finally, my colleagues say that the Employer has not supported its objections with sufficient evidence. However, the Region rejected the Employer's evidence on grounds of timeliness. As discussed above, that rejection was improper. It is also improper to reject evidence and then claim insufficiency of evidence.

In sum, the evidence from the two Board agents was within the province of the Board. The evidence from the employee was submitted pursuant to the instruction of the officer in charge. Accordingly, there is no basis for taking the Draconian step of entering a default judgment against the Employer.

² There is also uncertainty as to whether the Board agent's message was by live telephone conversation or by voice mail, and there is uncertainty as to the precise time on February 20 that the event took place. But these uncertainties are not dispositive of the issue. If the message was conveyed in some fashion at some time on February 20, that would be a sufficient basis on which the Employer could rely.

³ *Unitec Elevator*, 337 NLRB 426 (2002).