

City Wide Insulation of Madison, Inc. d/b/a Builders Insulation Inc. and Milwaukee & Southern Wisconsin Regional Council of Carpenters, Petitioner. Case 30–RC–6503

February 27, 2003

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS LIEBMAN, SCHAMBER, AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held November 26, 2002, and the Regional Director's report (pertinent portions are attached as an appendix) recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 15 for and 5 against Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the Regional Director's findings and recommendations,¹ and finds that a certification of representative should be issued.

The Employer contends in its Objection 1 that the election should be set aside because employees in the bargaining unit blamed it for the failure to conduct the election on November 20, 2002, as originally scheduled and announced. It is undisputed that the Regional Office, not the Employer, was responsible for the election's postponement. However, for the reasons set forth in the attached portion of the Regional Director's report, we affirm his finding that the circumstances surrounding the postponement do not warrant setting aside the results of the election ultimately held on November 26, 2002.

Although we are not aware that many elections are postponed for administrative reasons, this is the second such case to come to the Board's attention recently. See *Superior of Missouri, Inc.*, 338 NLRB 570 (2002). In order to avoid objections similar to the one the Employer has raised here, we find that it would be preferable for Regional Offices to include in any notice of rescheduled election a statement that the election has been rescheduled for administrative reasons beyond the control of the employer or the union. The inclusion of such language would dispel any erroneous impression among employees that an either the employer or the union was responsible for the election's rescheduling.

¹ The Employer did not except to the Regional Director's recommendation to overrule its Objections 2 and 3. In the absence of exceptions, we adopt pro forma the Regional Director's recommendation to overrule Objections 2 and 3.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Milwaukee & Southern Wisconsin Regional Council of Carpenters, and it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All regular full-time and regular part-time job site insulation installers employed and working out of the Employer's Germantown, Wisconsin facility, excluding office and clerical employees, temporary and casual employees, managerial employees, guards and supervisors as defined in the Act.

APPENDIX

REGIONAL DIRECTOR'S REPORT

....

THE OBJECTIONS

1. Objection 1 (Board agent conduct)—The failure of the Board agent to appear at the scheduled election on November 20, destroyed the laboratory conditions required by the National Labor Relations Board for the conduct of a Board-supervised secret election. The failure of the Board agent to appear at the first scheduled election upset employees, resulted in antiemployer rumors and directly led to antiemployer prejudice that affected the outcome of the re-scheduled election.

The Employer contends that employees blamed the Employer for the November 20 missed election, and neither the Union nor the Region informed the employees otherwise. The Union contends that the Employer presented no evidence that it fostered any rumor that the Employer was responsible for the cancellation of the election, and this objection should be overruled.

The evidence shows that due to a snafu in the Regional Office, no Board agent appeared at the election originally scheduled for November 20 at 7 to 7:30 a.m. The Region learned of its error on November 20 at approximately 8:15 a.m., when the Employer called to find out why a Board agent had failed to appear. A Regional Office representative returned the Employer's call at about 8:20 a.m., at which time the Employer put the call on its speaker telephone so the Union's representatives could hear the conversation directly. The only explanation provided by the Regional Office's representative was that an internal miscommunication had occurred.³ A series of telephone calls among the two parties and the Region ensued that same day to determine when the election would be rescheduled. The Employer objected to holding the election later that day and also objected, despite the Union's willingness, to holding the election the next day. The parties ultimately agreed on November 20 to reschedule the election for November 26, with no change as to the original voting period and location. Several copies for posting of a new Notice of Election for the resched-

³ No other explanation was ever provided by the Regional Office.

uled election, bearing the word “rescheduled” in capital letters at the top of the notice, were hand delivered to the Employer’s facility in the late afternoon of November 20. The Employer, when posting the new notice, highlighted the November 26 date and voting time to distinguish it from the original election notice. All but one eligible employee voted in the November 26 election.

In support of this objection, the Employer provided affidavit testimony from its facility branch manager and from five employees. Branch Manager Troy Wetzel testified that on November 20, when he told the employees, still assembled in the voting area, at about 8:30 or 8:45 a.m., to go to work, it was his opinion that many were angry and that employees looked shocked and confused. An unidentified employee asked what was happening, to which Wetzel, uncertain as to what he could or should say, replied, “I simply said that there would be no election that day and that the employees should go to work.” Later that day or the next, employee Alfonso Casillas told Wetzel that some of the employees were “pissed off” about not having been able to vote. Wetzel, believing employees were blaming him for the canceled election, told Casillas the cancellation was not his fault. Wetzel held an employee meeting on November 21 to relate what little he knew about the November 20 election’s cancellation. He testified he did this so employees would not think either he or the Employer had tampered with the election process.

Employee Casillas testified in his affidavit that he was angry on November 20 when he did not have a chance to vote and that he believed other employees also were angry. He stated that one employee told him he (the other employee) thought company officials had stopped the election.⁴ Casillas also testified that at least four unidentified employees changed their minds on or after November 20 about “whether to vote for the company.” While Casillas testified he believed these employees had changed their minds based on conversations, he did not testify as to whom he had spoken with or what they had said. Casillas voted on November 26.

Employee Jose Rodriguez testified in his affidavit that when Wetzel instructed the employees at about 8:30 or 8:45 a.m. on November 20 to go to work, he was worried and concerned that he did not and would not have an opportunity to vote. He also stated that while the employees were waiting and wondering whether the November 20 election would be held, he believed some employees changed their minds about whether they would vote for the Union or the Employer. Rodriguez did not testify about the basis for this belief. Rodriguez voted on November 26.

Employee Scott Helm testified in his affidavit that he was concerned on November 20 when he did not have a chance to vote, that it was human nature to think the Employer was somehow to blame and that he was worried that the NLRB had pushed the employees aside because the Employer is small. Helm stated that on November 21, a fellow Spanish-speaking employee, who “speaks a little English,” said in a frustrated

⁴ While this other employee also gave an affidavit, he did not corroborate Casillas’ testimony in this regard.

tone, “Scotty, . . . the union . . . what the fuck?”⁵ Helms added he was certain from the words and tone that this employee was telling him he (the other employee) blamed the Employer for the delay in voting. Both Helm and the other employee voted on November 26.

Employee Jose Duenas testified in his affidavit that he was confused and surprised when he did not get a chance to vote on November 20 and that he knew approximately 13 other employees were similarly confused and/or surprised. Duenas did not testify about the basis for this asserted knowledge. Duenas voted on November 26.

Employee Ramon Martin testified he was concerned and surprised when he did not have a chance to vote on November 20. He stated he heard other employees asking each other what was going on as they waited in the voting area on November 20 for information. He stated he did not know whether other employees were concerned, as he was. Martin voted on November 26.

The Employer offered that other employees who had not provided affidavits would provide testimony similar to that which was provided by the five affiants. It added that one of these additional potential witnesses would testify he was nervous when no Board agent appeared on November 20 and that he believed he would be called out on strike by the Union as a direct consequence. None of the employees who did provide affidavits gave any testimony regarding such a possible strike or on what such a belief was based.

In further support of this objection, the Employer argued that the Region’s failure to conduct the November 20 election and its failure to adequately explain its failure to the parties and the employees, to make clear the November 20 election’s cancellation was not the Employer’s fault, breached the Board’s laboratory conditions standard for conducting elections. *General Shoe Corp.*, 77 NLRB 124 (1948); also citing, inter alia, *Austill Waxed Paper Co.*, 169 NLRB 1109 (1968); and *Sioux Products v. NLRB*, 703 F.2d 1010, 1013 (7th Cir. 1983). The Employer also cited *Flo-Tronio Metal Mfg.*, 251 NLRB 1546 (1980); *Rattan Art Gallery, Ltd.*, 260 NLRB 255 (1982); and NLRB Casehandling Manual (Part Two), Section 11314, in arguing the Board agent “has an official duty to effectively communicate information regarding the election to the electorate.”

In its position letter response, the Union argued that as a matter of Board law, the failure of a Board agent to appear at the November 20 election, inasmuch as the rescheduled election was conducted on November 26 and all but one employee voted, was not objectionable. *Malta Construction Co.*, 276 NLRB 1494, 1510 (1985). The Union also argued the rumors of employer responsibility were not objectionable because the Employer had ample opportunity to reply to those rumors. *Aladdin Plastics, Inc.*, 182 NLRB 64 (1970).

Discussion

As the objecting party, the Employer has the sole burden of providing evidence in support of its objections. NLRB Casehandling Manual (Part Two), Section 11392. 10. The Employer

⁵ This quote, with the indicated ellipses, is exactly as it appears in Helm’s affidavit. No affidavit was provided from the other employee.

may satisfy this burden by specifically identifying witnesses who would provide direct rather than hearsay testimony to support its objections. NLRB Casehandling Manual (Part Two), Section 11392.6; *Heartland of Martinsburg*, 313 NLRB 655 (1994); *Holladay Corp.*, 266 NLRB 621 (1983). The Employer also may satisfy this burden by providing specific affidavit testimony and other specific evidence in support of its objections. Cf. *River Walk Manor, Inc.*, 269 NLRB 831 (1984). This evidence or description of evidence must be provided to the Regional Office "within 7 days of the day the objections are required to be filed or within such additional time as may have, upon a timely request, been allowed by the Regional Director." NLRB Casehandling Manual (Part Two), Section 11392.6.

Two issues are posed by this objection: (1) whether the Regional Office's failure to provide a Board agent to conduct the November 20 election was, in itself, objectionable; and (2) whether the Regional Office's failure to provide an explanation for not conducting the November 20 election to the parties, and more particularly to the employees, was objectionable. As a matter of law and a failure of the evidence, I answer both questions in the negative. Regarding the matter of the Region's failure to conduct the November 20 election, the critical element is that the election was quickly rescheduled with the agreement of the parties for just 6 days later, and conducted as

rescheduled on November 26. The tally of ballots shows, and the parties agree, that all but one eligible employee voted on November 26. The vote margin as shown in the tally, 15 to 5, demonstrates that the missing employee's vote would not have affected the election's outcome. Neither the Region's failure to provide a more complete explanation than it did for why it did not conduct the November 20, election nor the fact that employees speculated among themselves about why the November 20 election was not held, is sufficient to establish that the laboratory conditions for the November 26 election were disrupted. *Superior of Missouri, Inc.*, 338 NLRB 570 (2002); *Malta Construction Co.*, supra; *Aladdin Plastics, Inc.*, supra. Moreover, the Employer's evidence failed to establish anything other than employees speculated about why the November 20 election was not held, and speculated about whether the Employer was somehow responsible. The Employer not only had ample opportunity to respond to these rumors; it expressly did so in its November 21 meeting with the employees. Under these circumstances, neither the rumors themselves, the Region's failure to more fully explain what had happened on November 20, nor the Region's failure to conduct the November 20 election itself, whether taken individually or together, provide adequate grounds for setting aside the November 26 election. I therefore recommend that this objection be overruled.