NYES Corp. *and* Local 813, International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 3–RC–11327

November 30, 2004

DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

The National Labor Relations Board, by a three-member panel, has considered objections to an election held May 8, 2003, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 5 for and 7 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1] and recommendation,[2] and finds that the election must be set aside and a new election held.

[Direction of Second Election omitted from publication.]

[1] 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.

[2] In finding objectionable conduct, the hearing officer relied on *Springs Industries*, 332 NLRB 40 (2000), in which the Board presumed that threats of plant closure are disseminated among employees, absent evidence to the contrary. Our decision in *Crown Bolt, Inc.*, 343 NLRB 776 (2004), overrules *Springs Industries*; however, it does so prospectively only. Therefore, we will continue to apply the *Springs Industries* presumption to pending cases, including this case.

In rejecting the Employer's argument that its conduct did not warrant setting aside the election, the hearing officer relied on the principle that conduct that is "violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election," *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962), unless the misconduct is so minimal or isolated that it is "virtually impossible to conclude that the misconduct could have affected the election results." *Clark Equipment Co.*, 278 NLRB 498, 505 (1986). The Board has applied the "virtually impossible" standard in consolidated unfair labor practice and representation cases in which conduct found to violate Sec. 8(a)(1) is also alleged in election objections. See, e.g., *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 (1996), enfd. in part 123 F.3d 899 (6th Cir. 1997). That standard does not apply in the instant representation proceeding where there has been no unfair labor practice allegation or finding. We rely instead on the standard set forth in *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995), and find that the misconduct here, taken as a whole, warrants a new election because it had "the tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." As in *Metaldyne Corp.*, 339 NLRB 352 (2003), Member Schaumber finds it unnecessary to pass on *Dal-Tex* or its progeny because the "virtually impossible" standard is inapplicable in this case.

Finally, in adopting the hearing officer's findings and recommendations, we note that, contrary to the Employer's assertion, employee Jerome Nial did not testify that he did not tell other employees about General Manager Russell Hilton's statements to him that the Employer's owners would rather shut down than negotiate or deal with a union.