Madera Enterprises, Inc. *and* Wine & Allied Workers Union, Local 45, Distillery, Wine & Allied Workers International Union, AFL–CIO, Petitioner. Case 32–RC–3411

December 10, 1992

DECISION ON REVIEW AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Regional Director's Supplemental Decision and Certification of Representative. The request for review is granted as it raises substantial issues warranting review. Based on the Regional Director's factual findings, which are essentially undisputed, as well as our own administrative investigation, we find, contrary to the Regional Director, that the integrity of the Board's election procedures was compromised when two Board agents opened a sealed envelope containing impounded ballots outside the presence of the parties.

An election was conducted among the Employer's production and maintenance employees on October 1, 1991. During the election, the Board agent challenged the ballots of employees designated as seasonal, as well as those whose names did not appear on the *Excelsior* list. He did not, however, keep a separate list of the names of the challenged voters.[1] At the end of the election, the Board agent placed all ballots, both challenged and unchallenged, in a large envelope and properly sealed the envelope with the parties' representatives' signatures across the seal. The Board agent impounded the ballots pending the Board's ruling on the Petitioner's then-pending request for review of the Decision and Direction of Election.

On March 4, 1992, the Petitioner made a formal request for the names of all challenged voters. On April 8, while preparing a response to the request, the Region discovered that the file contained no such list. Thereafter, the Region's election specialist and a regional supervisor obtained the impounded ballot envelope from the safe, opened it, removed the challenged ballot envelopes, and prepared a list of the challenged voters. The Board agents subsequently returned the challenged ballots to the impounded ballot envelope (which still contained the unchallenged ballots), and returned the envelope to the safe.

The ballots were counted on June 23. The tally of ballots showed 36 ballots cast for the Petitioner, 24 against, and 17 challenged ballots, a sufficient number to affect the results of the election.

The Employer filed timely objections to the election, contending, inter alia, that the Region's unsealing of the impounded ballot envelope outside the presence of the parties compromised the integrity of the election. Characterizing the Region's purpose in opening the impounded ballots envelope as administrative, i.e., to prepare a list of the challenged voters, and relying on *N. Sumergrade & Sons*, 123 NLRB 1951 (1959), the Regional Director overruled the Employer's objection. Contrary to the Regional Director, we find merit in the Employer's objection and set aside the election.

The Board goes to great lengths to ensure that its election procedures raise no reasonable doubt as to the fairness and validity of the election. *Jakel, Inc.*, 293 NLRB 615 (1989); *Athbro Precision Engineering Corp.*, 166 NLRB 902 (1967). To that end, the General Counsel's Casehandling Manual (CHM) serves as ''procedural and operational guidance for the Agency's staff in the handling of representation cases.'' Section 11344.2 provides that impounded ballots shall be sealed in the presence of the parties and that the parties sign across the seal. It also provides that the sealed envelope shall be placed in the regional office safe, and specifies that ''[r]emoval of the ballots for counting shall be done at the count *in the presence of the parties' representatives*.'' (Emphasis added.)

Neither *Paprikas Fono*, 273 NLRB 1326 (1984), relied on by the Employer, nor *N. Sumergrade & Sons*, relied on by the Regional Director, is directly on point. Those cases concern the opening of sealed envelopes which contained only challenged ballots.[2] In this case, by contrast, the sealed envelope breached by the Board agents contained all ballots, challenged and unchallenged, which had been placed in the envelope and sealed by the parties. Significantly, none of the unchallenged but impounded ballots had been counted; there was no list maintained of the challenged ballots, even on the eligibility list itself; and, thus, there was no independently verifiable way to determine even the total number of ballots cast. We find, therefore, that the Board agents' conduct in breaking the signed seal on the impounded ballot envelope, and opening that envelope, out of the presence of the parties, compromised the integrity of the election process and constituted conduct which reasonably would destroy confidence in the election process. See *Jakel, Inc.*, supra.

Our ruling in this case is consistent with our recent decision in *Rheem Mfg. Co.*, 309 NLRB No. 63 (Nov.

[1] We have been administratively advised that the Board agent conducting the election failed to record the names of the challenged voters either on the eligibility list, as required by Sec. 11338.1 of the Casehandling Manual, or on the outside of the large envelope in which the ballots were sealed (customarily Form NLRB-5126, which specifically provides spaces for such a listing).

[2] As noted below, even though *Paprikas Fono* concerned only the opening of a sealed envelope containing individually sealed challenged ballots, the Board set the election aside nonetheless, because of the particular circumstances involved.

10, 1992) (not printed in Board volumes), in which we overruled the employer's objection and certified the union notwithstanding that the agent permitted three employees to vote during the break between voting sessions and carelessly handled the ballots. In *Rheem*, we found that the parties' observers agreed to allow the between-sessions voting and the votes that were ultimately challenged were not determinative of the results of the election, and were never counted. In so finding, we distinguished *Paprikas Fono*, stating that the conduct in that case was ''considerably more compromising'' than the conduct at issue in *Rheem* in that the Region's conduct in opening the envelope outside the presence of the parties ''to inspect the condition of the ballots. . . ., [t]hus [deprived the parties] of the opportunity to monitor the Region's handling of the determinative challenged ballots and to assure themselves that the challenge envelopes were secure.'' *Rheem*, slip op. at 6–7.[3] As noted above, that reasoning is even more compelling where, as here, the breached envelope contained uncounted, unchallenged ballots as well as challenged ballots.[4]

Accordingly, the Regional Director's Supplemental Decision and Certification of Representative is reversed, the Employer's Objection 1 is sustained, and the election is set aside. The case is remanded to the Regional Director for proceedings consistent with this Decision on Review and Order.

[3] Member Oviatt, who dissented in *Rheem* and would have set that election aside, agrees that the Board agents' conduct in this case went even farther in compromising the election process.

[4] Further, we agree with the Regional Director that the Regional Office's handling of this matter was not ''ideal'' for additional reasons. We note that the election was held on October 2, 1991, in a unit of the Employer's regular and seasonal employees. That date was chosen because the Employer informed the Regional Office that its work force would be at its fullest capacity by that point. The Employer's election objections, filed with the Regional Office on June 29, 1992, were overruled on October 1, 1992. Thus, in view of the Region's delay in ruling on the objections, it appears that another election timed to occur at the Employer's peak employment level will not be possible until mid or late 1993. We are dismayed by this delay, and we regret that effectuation of the employees' desires as to union representation may be postponed another year, despite the lack of any objectionable conduct by either party.