The Glass Depot, Inc. *and* Local 243, International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 7–RC–20253

August 25, 1995

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, COHEN, AND TRUESDALE

The National Labor Relations Board has considered an objection to an election held February 25, l994, and the Regional Director's report recommending its disposition. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 6 for and 9 against the Petitioner. There were no challenged ballots.

The Board has reviewed the record in light of the exceptions and brief. Contrary to the Regional Director's recommendation, the Board has decided to overrule the objection and to certify the results of the election.

The election was conducted at the Employer's Oak Park facility, where most of the employees work. Two employees who work at another facility and two Oak Park employees on assignment elsewhere were to travel to Oak Park to vote. At about 3:l5 p.m. on election day, heavy snow started to fall, creating hazardous driving conditions. The polls at the Oak Park facility remained open from 3:30 p.m. until 5:15 p.m., as scheduled, in spite of the weather. The four employees at issue were unable to reach the Oak Park facility while the polls were open due to the snowstorm.

In *Monte Vista*, 307 NLRB 531, 533 fn. 6 (l992), the Board, departing from earlier precedent, established a bright-line rule to determine how to treat late-arriving voters:

> [A]n employee who arrives at the polling place after the designated polling period ends shall not be entitled to have his or her vote counted, in the absence of extraordinary circumstances, unless the parties agree not to challenge the ballot. . . . Extraordinary circumstances shall include a showing that one of the parties was responsible for the tardiness of the late-arriving voter or voters.

The Board concluded that such a rule did not detract from the requirement that employees be provided adequate notice and opportunity to vote.

The Regional Director found that *V.I.P. Limousine*, 274 NLRB 641 (1985) (election set aside because snowstorm prevented 25 percent of the eligible employees from voting), remained good law after *Monte Vista*. He therefore concluded that the four employees were prevented from voting by an act of nature that compromised the laboratory conditions under which Board elections are conducted. We disagree.

Unlike *Monte Vista* in which the issue was whether employees who arrive late at the polls should be allowed to vote, the issue here is whether a snowstorm that prevented 4 of l9 employees from voting warrants a rerun election. We conclude that it does not.

In deciding whether an act of nature or other unexpected event constitutes ''extraordinary circumstances'' justifying a new election, we shall examine both the event itself and whether it resulted in a situation where less than a representative complement of employees voted in the election.[1]

The dissent and the concurrence each attack our concept of ''representative complement,'' albeit from wholly different perspectives. The dissenters say that ''the eligible voters as a group'' must have an opportunity to vote. They further say that if a storm ''potentially affected'' the ability of all employees to get to the polls, the election would be set aside. Notwithstanding our colleagues' protestations to the contrary, this very language suggests that if a storm ''potentially affected'' the entire group of eligible voters in a 100-employee unit, and a tree felled by the storm actually prevented one of the members of that group from voting, the election would have to be set aside, even if the tally were 99-0. We see no point in holding a second election.

The concurring opinion would not rely on any numerical test to determine the validity of an election. Thus, for example, the election would not be set aside in circumstances where a storm prevented 99 of 100 employees from voting. We would set the election aside.

In sum, we would avoid the extremes of our colleagues, and we would set the election aside if an extraordinary event resulted in a turnout of less than a representative complement. Phrased differently, the ''representative complement'' test represents a balance between the value of employee opportunity to vote and the values of finality and economy.

We have declined to use a precise percentage figure. Each case is unique, and we do not wish to be bound by an inflexible number. However, we do offer guidance. In this regard, we note that, in manual elections, the average participation vote is near 90 percent. If, because of uncontrollable forces (e.g., a storm), the

[1] Where less than a representative complement votes, and this is *not* the result of some extraordinary event, we would uphold the election. See *Lemco Construction*, 283 NLRB 459 (1987).

We respectfully disagree with the view expressed by Chairman Gould. In *Lemco*, the Board held that a factor in determining the validity of an election is whether employees had an ''opportunity to vote.'' Apparently, the Chairman would not distinguish between cases where one employee lacked such opportunity and cases where virtually all employees lacked that opportunity. We would draw that distinction.

participation rate drops below 50 percent, that would be a substantial cause of concern. It would mean that, as a matter of mathematical necessity, the result in all cases could be affected by the happenstance of a storm. In such circumstances, we would likely order a new election, so as to ensure that the question of representation is resolved by a representative complement of employees.[2]

Here, the storm may well have been an extraordinary circumstance. However, it prevented only 4 of l9 voters from voting. Thus, as a representative complement of voters was able to vote in spite of the storm, we would uphold the election results.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Local 243, International Brotherhood of Teamsters, AFL–CIO, and that it is not the exclusive representative of these bargaining unit employees.

CHAIRMAN GOULD, concurring.

I agree with my colleagues that the election should not be set aside because a snowstorm prevented some voters from casting their ballots. I do not, however, agree with their finding that a snowstorm can in some situations constitute extraordinary circumstances which would warrant setting aside an election. Snowstorms are common events which do not, in my opinion, constitute an extraordinary circumstance within the meaning of *Monte Vista Disposal Co.*, 307 NLRB 531, 533 (1992), such that an election should be set aside. See *Wanzer Dairy*, 232 NLRB 631, 632 (1977) (a snowstorm that prevented an employee from arriving at the polls was found to be ''not at all unusual''). Indeed, I think we should adopt the same rule that is applicable in political elections, that is, that acts of nature or *force majeure*, as our dissenting colleagues so elegantly put it, are immaterial in determining whether an election is valid.

My concurring colleagues, in deciding whether extraordinary circumstances justify a new election, state that they will examine whether a representative complement voted. The Board abandoned use of the representative complement test in *Lemco Construction*,, 283 NLRB 459, 460 (1987), when it decided to no longer rely on ''any analysis dependent on a numerical test to determine the validity of a representation election.'' In my view, its reinstatement, even in these limited circumstances, is not justified and will needlessly prolong and foster litigation. However, if the Board determines that extraordinary circumstances exist—such as where the winning party is responsible for the tardiness of the late-arriving voters—which results in a determinative number of voters having been denied an opportunity to cast ballots, the election should be set aside without any consideration of how many other employees cast ballots.

MEMBERS BROWNING and TRUESDALE, dissenting.

Contrary to our colleagues, we would affirm the Regional Director's recommendations to sustain the objection to the election and to set the election aside.

More specifically, and contrary to our plurality and concurring colleagues, we agree with the Regional Director that the proper standard to be applied to the issue here is that of *V.I.P. Limousine*, 274 NLRB 641 (1985), and that the application of that standard warrants the setting aside of this election.

The issue in *V.I.P. Limousine*, and in this case, is whether an unusually severe storm resulted in a substantial number of employees being denied a sufficient opportunity to get to the polling place in time to vote—or even to get there at all.

Thus, the issue here is different from the issue in *Monte Vista Disposal Co.*, 307 NLRB 531 (1992), cited both by our colleagues in the plurality and their concurring colleague. *Monte Vista* concerned the question whether employees who arrived at the polls too late to vote because of their own negligence should nevertheless have been permitted to vote. Here, and in *V.I.P. Limousine*, the voters were hindered by a *force majeure* and not by their own negligence.

In *Lemco Construction*, 283 NLRB 459 (1987), which expressly endorsed *V.I.P. Limousine*, the Board held in pertinent part that

> [E]lection results should be certified where *all* eligible voters have an *adequate opportunity to participate in the election*, notwithstanding low voter participation. . . . only if it can be shown by objective evidence that eligible employees were not afforded an ''*adequate opportunity to participate in the balloting*'' will the Board decline to issue a certification and direct a second election.[3]

In certifying the results of the election in *Lemco*, the Board found that there had been no showing that the nonvoting employees had failed to vote because of unusual circumstances. But at that point, factually distinguishing *Lemco* and endorsing *V.I.P. Limousine*, the Board stated:

> [T]he election process [in V.I.P.] was disrupted by circumstances so severe that the Board had no alternative but to set the election aside. In reaching that result, the Board focused on ''whether the election was conducted properly and in such a manner as to assure that all employees were given a sufficient opportunity to vote,'' *a test essentially identical to the one we have used in this case*

[2] By contrast, in *V.I.P. Limousine*, 75 percent of the employees voted. We would have upheld the election in that case.

[3] 283 NLRB at 460 (emphasis added; citations omitted).

> [i.e., *Lemco*]. In [this] case, the circumstances leading to the employees' failure to vote, although unfortunate, were *within their control*, and do not constitute ''unusual circumstances.''[4]

Thus, *V.I.P. Limousine* is fully applicable here. Our colleagues' application of the so-called ''representative complement'' test to the unusually severe circumstances confronting the eligible voters in this case is unsupported.[5] As the Chairman himself accurately notes in his separate opinion, the Board abandoned that test in this procedural context in *Lemco*—in the same context in which it then endorsed *V.I.P. Limousine*.

In our view, the ''representative complement'' test is unworkable and will invite unnecessary litigation. The test in *V.I.P.*, on the other hand, is simply based on a common-sense recognition that a snowstorm or other calamity which is not within the control of potential voters or of the parties can have a devastating effect on voter participation. Rather than trying to determine whether or not an elusive ''representative complement'' of voters has voted, we would simply analyze all the circumstances to determine if the storm or other *force majeure* was so severe that the eligible voters, as a group, did not have an adequate opportunity to vote. Like the Regional Director, we would conclude that in this case the snowstorm did have such an affect on the election.

In light of all of the above considerations, and in agreement with the Regional Director, we would sustain the objection and set aside the election.

[4] Id. at fn. 11 (emphasis added).

[5] Contrary to the suggestion of our colleagues in the plurality, this case does not present, and we do not address, the issue of the effect on the election of the inability of one employee to vote because of conditions that affected only that one employee, such as a tree falling on the employee's car. Both this case and *V.I.P. Limousine* concern conditions that were so severe and widespread that they affected, or at least potentially affected, the ability of all the employees to get to the polls to vote.