

Fresenius Wins New Election In Union Spat

By **Erin Marie Daly**, erin.daly@portfoliomedia.com

Friday, Jun 06, 2008 --- The National Labor Relations Board has ruled that an administrative law judge erred in overruling objections by Fresenius USA Manufacturing Inc. that it was improperly denied the opportunity to monitor a colored-ballot union election that was being overseen by a colorblind man.

A two-member panel of the NLRB said in a ruling handed down May 30 that the cumulative effect of the colorblind man's conduct warranted setting aside the results of an election held at Fresenius' Chester, N.Y., facility in November 2006 in which the Teamsters Local 445 union sought to represent certain workers.

Fresenius had objected to what it said were potentially miscast ballots caused by the inability of NLRB agent Howard Shapiro to differentiate between the colors of the ballots and his failure to use two separate ballot boxes for two separate voting units, one for drivers and one for warehouse workers.

In the event that a union seeks an election of two separate bargaining units at the same employer at the same time, two simultaneous elections will be held. In such cases, the NLRB typically uses two different colored ballots for the two different bargaining units.

In this case, the drivers were supposed to have voted on green ballots, while the warehouse workers were supposed to have voted on yellow ballots.

During the election polling time, Shapiro — the Board agent assigned to the election through the regional director's office at the NLRB — stated that he was colorblind and that he could not differentiate between yellow and green — the colors of the ballots for the two voting units, court documents said.

In addition, rather than adding a level of protection from miscast ballots, Shapiro used only one ballot box to collect the ballots from the separate voting units. During the election, he also erroneously provided an incorrect colored ballot to one or more employees, court documents said.

After the polls closed and the ballots were counted, court documents said, Shapiro took the ballots home during the weekend, offering no evidence that he had secured them to assure against any tampering.

The tally of ballots for both units showed 9 votes for and 7 against the union, with no challenged ballots.

Fresenius objected to the process, arguing that the confusion caused by Shapiro's inability to differentiate colors may have undermined an employee's ability to vote in the correct bargaining unit, or to exercise an uncoerced and reasoned choice in the election.

The company also contended that the conduct of the election had cast doubt on the fairness and impartiality of the process. For one thing, Fresenius said, employees were required to write in erasable pencil, and Shapiro — who was the only person to actually see the markings made on the ballots and count the ballots — had admitted to the party observers that he was colorblind.

In May 2007, Administrative Law Judge Steven Fish acknowledged that Shapiro's handling of the ballot count did not comport with NLRB guidelines. However, he found that these irregularities were not objectionable absent evidence that they actually affected the election results.

Fish emphasized that his close examination of ballots had showed no questionable markings and had revealed that the number of ballots cast for each unit matched the number of eligible voters in each unit.

He also rejected as speculative the possibility that employees may have voted with incorrect ballots, finding that Shapiro could have determined which ballot to distribute by reading them, and that the party observers likely would have noticed and corrected any errors.

But the two-member panel of the NLRB disagreed with Fish's ruling, saying Shapiro hadn't ensured that all parties had an opportunity to monitor the ballot count.

"The board agent did not display the ballots for inspection during the count," the panel said. "Indeed, the board agent denied the employer's specific request to examine the ballots immediately after the count. By these actions, the board agent prevented the employer from verifying the accuracy of his count and interpretation of voter intent."

Nor was this irregularity cured by Shapiro's offer to allow Fresenius to inspect the ballots at the regional office at a later date, the panel said.

"The board agent did not secure the ballots against tampering or mishandling before taking them to his home over the weekend. In light of this unsupervised access to ballots that were marked — at the board agent's direction — with an erasable pencil, we cannot say with confidence that ballots remained in the identical condition as during the count," the panel said.

Shapiro's mistakes in ballot identification also cast additional doubt on the fairness and validity of the election, the panel said.

Although the judge had found that Shapiro could have independently

ensured proper distribution by reading the ballots, the panel said, Shapiro incorrectly identified a ballot during the pre-election conference and during the election.

“Even after the observers called out the correct ballot color, the board agent nevertheless failed to correctly identify the ballot on at least one occasion,” the panel said.

That error would have resulted in an employee voting with the wrong ballot if a party observer hadn't taken action to correct the mistake, the panel said.

“The cumulative effect of these irregularities, particularly those during the ballot count, raises a reasonable doubt as to the fairness and validity of the election,” the panel said. “This was especially so considering the closeness of the election, where even one mistake in the distribution or counting of the ballots could have altered the election outcome.”

The panel sustained Fresenius' objections and set aside the November 2006 election. It also ordered a second election to be held.

According to Duane Morris LLP partner Thomas G. Servodidio, who represented Fresenius in the proceedings along with Brian Crowner and Christopher Durham of the same firm, the ruling bodes well for employers in general.

“My sense is that this decision will provide a stronger basis on which employers may rely to challenge the results of an election in the face of certain board agent conduct such as failure to allow employers to inspect the ballots prior to removing them from the election area and essentially ceding authority to run the election to the party observers,” Servodidio said Friday.

Servodidio pointed out that Fresenius wasn't aware prior to the day of the election that Shapiro was colorblind, and so it had no opportunity to object to his assignment prior to the commencement of the pre-election conference.

“The company's position in this case was that the assigned board agent demonstrated he was unable to conduct the election in a manner so as to ensure the integrity of the election process such that the results of the election as reported by the board agent were not reliable, thereby requiring a rerun of the election,” he said. “The NLRB, in its decision, agreed with this position.”

As a result, Servodidio said, the NLRB ruling clarifies a fundamental principle.

“The board must conduct the election so as to ensure that there is no reasonable doubt as to the fairness and validity of the election process and deviation from this standard is grounds to overturn the election results,” he said.

Servodidio noted that it is typically difficult to challenge the results of the election and have an election rerun.

“In this case, the totality of the evidence demonstrated that the election was not conducted in a manner so as to ensure the integrity of the election process so the board agreed that the election needed to be held again,” he said. “Based on this decision, it may be somewhat easier for employers to challenge the results of an election based on board agent conduct.”