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Hands Off My Ballot: NLRB Finds that Solicitation of Mail-Ballots is Objectionable Conduct That May Warrant Setting Aside an Election

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Since the onset of the COVID-19 pandemic, mail-ballot elections—rather than manual, in-person elections, have been mandatory for most NLRB representation elections. The NLRB's recent ruling, on June 9, 2021, in *Professional Transportation Inc.*, 370 NLRB 132 (2021), provided important guidance regarding when solicitation in the context of such elections constitutes objectionable conduct, such that it can set aside an election. Solicitation typically comes in the form of when the employer or union offers to collect a voter's ballot and mail it to the Region. In this case, the Board held that solicitation constitutes objectionable conduct, but importantly, such conduct is a basis for setting aside an election ***only*** where the evidence shows that the solicitation affected a determinative number of voters.

Background

In April 2020, the Union filed a representation petition. The election was conducted by mail, and ballots were mailed to employees. Following the election, the Employer objected on the grounds that Union representatives contacted eligible voters and offered to collect and mail their ballots.

Acknowledging that Board precedent does not resolve whether mail-ballot solicitation is objectionable conduct, the Regional Director held that the Employer's offer of proof did not warrant a hearing as a matter of law and failed to establish a *prima facie* case of objectionable conduct.

The Employer requested review of the Regional Director's decision, and the Board granted the request.

Analysis

The Board affirmed the Regional Director's decision overruling the Employer's objections, but found that solicitation of mail ballots does constitute objectionable conduct and may warrant setting aside an election in certain circumstances. The Board's decision comes in the wake of *Fessler & Bowman Inc.*, 341 NLRB 932 (2004), in which the Board unanimously held that it is objectionable conduct for a party to handle employees' mail ballots. Citing *Fessler*, the Board emphasized its obligation to protect the integrity and neutrality of elections and to ensure that elections are conducted under as close to "laboratory conditions" as possible.

Recognizing that mail-ballot elections may be "more vulnerable to the destruction of laboratory conditions than are manual elections," the Board described the ways in which mail-ballot solicitation constitutes objectionable conduct.

First, the Board explained that a party's offering to collect ballots contradicts voting instructions stating that parties other than the voter may not handle or collect ballots.

Second, the Board noted that ballot solicitation suggests to employees that a party other than the Board is involved in running the election, thus undermining the Board's responsibility in controlling the election process. In light of these considerations, the Board concluded that even where ballot solicitation does not result in actual ballot tampering or loss of ballot secrecy, it nevertheless undermines the integrity of the election and constitutes objectionable conduct.

Significantly, however, the Board found that ballot solicitation does not necessarily require that an election be set aside. Rather, an election must be set aside only where the evidence shows that the ballot solicitation affected a determinative number of voters.

In determining whether solicitation warrants setting an election aside, the Board found it relevant to consider evidence of:

- the number of unit employees whose ballots were solicited;
- the number of unit employees who were aware of ballot solicitation; and
- whether a party engaged in a pattern or practice of solicitation.

The Board further explained that the test regarding whether solicitation occurred is objective—that is, the inquiry is whether a party's conduct could reasonably be interpreted as ballot solicitation. Importantly, the Board also noted that merely asking an employee if they have received their ballot, or offering an employee assistance with understanding the election process, is ***not*** ballot solicitation.

Dissenting in part, Member Emanuel favored establishing a bright-line rule that elections should be set aside whenever a party is shown to have solicited ballots, irrespective of the number of voters affected. Additionally, Chairman McFerran expressed concerns that parties could easily manipulate dissemination of information about solicitation in order to set aside an election; accordingly, she would only consider the number of employees who were made aware of solicitation *by a solicited employee*.

Application

As is typical, the Board held that its decision applies retroactively to the instant case and to all pending cases. In the instant case, the Board concluded that the Employer's offer of proof was sufficient to show that the Union solicited employee ballots. However, it found that there was insufficient evidence to set aside the election because the misconduct was limited to at most two voters, which could not have affected the election's outcome, given that the Union prevailed by at least ten votes.

Takeaways

As mail-ballot elections continue to become the norm across the country, this case expands the opportunities for parties to raise challenges. Chairperson McFerran declined to endorse the view that mail-ballot elections are inherently more vulnerable than manual-ballot elections, and she opined that it is "time for the Board to reevaluate its historic preference for manual elections and to consider expanding and normalizing other ways to conduct elections on a permanent basis."

Once the Board shifts with new appointees, there is a chance that mail, telephone, and even electronic voting may become more normalized. Such procedures may illuminate new vulnerabilities in the election process, and although it remains unclear what other behaviors may be objectionable conduct that warrants setting an aside an election, it is likely that the Board will continue to seek ways to safeguard the integrity of elections.

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