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Guardsmark, LLC and International Union, Security, Police, and Fire Professionals of America (SPFPA), Petitioner. Case 05–RC–143199

January 29, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA,
HIROZAWA, AND MCFERRAN

The National Labor Relations Board has considered the Employer’s objections to a mail ballot election held January 28, 2015, through February 11, 2015, and the Regional Director’s report recommending disposition of them.¹ The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 11 for and 2 against Petitioner, with 2 void ballots and 0 challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the Regional Director’s findings and recommendations, as further discussed below.

The Employer’s Objection 2 alleges that the Employer was improperly prohibited from holding a mass campaign meeting—routinely called a “captive-audience meeting”—with employees on the morning the ballots were to be mailed. This raises the issue of when the captive-audience speech prohibition begins in mail ballot elections. We agree with the Regional Director’s decision to overrule the objection, but we do not rely on his rationale.

As the facts here illustrate, the Board’s existing rule with respect to the mass captive-audience meeting prohibition in mail ballot elections has been a source of confusion. In *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953), the Board prohibited mass captive-audience speeches by parties within the 24-hour period prior to the start of a *manual* election. Although it is modeled on *Peerless Plywood*, the mail-ballot rule at issue here, adopted in *Oregon Washington Telephone Co.*, 123 NLRB 339 (1959), does not begin the mass-meeting prohibition 24 hours *before* the ballots are scheduled to be mailed—the point that seems to correspond most naturally to the *Peerless Plywood* rule. Instead, *Oregon Wash-*

ington Telephone holds that the prohibition begins *when* the ballots are scheduled to be mailed by the Regional Office (as opposed to 24 hours before). Predictably, this counter-intuitive difference between the mail-ballot rule and the manual-election rule of *Peerless Plywood* invites confusion. To avoid perpetuating that confusion, we have decided to overrule *Oregon Washington Telephone* and to align the mail-ballot rule more closely with the manual-ballot rule.

Facts

Pursuant to a Stipulated Election Agreement, a mail ballot election was scheduled in a unit of approximately 33 security officers. The ballots were scheduled to be mailed to employees at 3 p.m. on January 28, 2015. On January 21, the Employer requested clarification from the Regional Office as to the Board’s position regarding mass meetings with employees prior to a mail ballot election; it wanted to hold a mass meeting with employees on the morning of January 28. The Board agent handling the election informed the Employer that it was prohibited from conducting a mass meeting within 24 hours of the scheduled time for the mailing of the ballots. The Employer disputed that answer, relying in part on *Oregon Washington Telephone*, and it subsequently sent two emails to the Board agent requesting further clarification. During a telephone conversation on the morning of January 26, the Board agent confirmed that mass meetings were not permitted within the 24 hours prior to the mailing of the ballots. In the afternoon of January 26, however, the Region faxed a letter to the Employer that stated as follows:

Employers and unions are prohibited from making speeches on company time to massed assemblies from the time and date the ballots are scheduled to be sent out by the Region until the time and date set for their return. *Oregon Washington Telephone Co.*, 123 NLRB 339 (1959); *San Diego Gas & Electric*, 325 NLRB 1143 (1998).

In light of the discrepancy between the letter and the Board agent’s previous statements, the Employer immediately sent another email to the Board agent seeking clarification. During a telephone conversation later that afternoon, the Board agent instructed the Employer to ignore the written directions and not to hold any mass meetings with employees within the 24 hours before the ballots were scheduled to be mailed. At 5:10 p.m., the Board agent sent an email to the Employer confirming that the Region’s position was what he had stated during the telephone conversation: “the parties in the instant case may not make speeches on company time to massed

¹ The Regional Director’s “Report on Objections” inadvertently contains rulings on the objections at issue, rather than recommendations, and provides for the filing of a request for review, rather than exceptions. We have treated the Regional Director’s findings as recommendations and the Employer’s request for review as exceptions to the Regional Director’s Report.

assemblies after 3:00 p.m. on Tuesday, January 27, 2015.”

The Employer chose not to hold any mass meetings with employees prior to the mailing of the ballots.

Following the ballot count, the Employer filed, *inter alia*, an objection alleging that the Region improperly refused its request to hold a mass meeting in the hours prior to the mailing of the ballots, thereby “limiting notice to employees about the election.” The Employer argued that the Region’s prohibition contributed to the alleged disenfranchisement of a large number of voters, and that pursuant to *Oregon Washington Telephone*, the Employer should have been allowed to hold a mass meeting on the morning of the election to tell employees that ballots were being mailed out that day. The Regional Director recommended overruling this objection, relying on *Peerless Plywood*.² The Regional Director found that the Employer’s reliance on *Oregon Washington Telephone* was misplaced because, although the meeting in that case occurred several days after the ballots had been mailed to employees (and therefore was indisputably within the prohibition period), the parties had not been put on notice of the time and date set for the mailing of the ballots. Therefore, in *Oregon Washington Telephone*, the election was not set aside. See 123 NLRB at 341. Here, by contrast, the Employer had the requisite notice of the scheduled mailing time because it was included in the Stipulated Election Agreement and in the notice of election. The Regional Director did not directly address the Employer’s argument that under *Oregon Washington Telephone* the mass meeting prohibition period begins when the ballots are scheduled to be mailed, not 24 hours earlier.

The Employer, continuing to rely on *Oregon Washington Telephone*, asserts that it should have been allowed to hold a captive-audience meeting on the day the ballots were to be mailed, and that the Region’s instructions to the contrary require that Objection 2 be sustained and the election be set aside. Our dissenting colleague agrees with the Employer. For the following reasons, we disagree.

Analysis

In *Peerless Plywood*, supra, 107 NLRB 427, the Board established a rule to be applied “in all election cases,” prohibiting employers and unions “from making election speeches on company time to massed assemblies of employees *within 24 hours before the scheduled time for*

² The Regional Director cited *American Red Cross*, 322 NLRB 401 (1996), for the proposition that the *Peerless Plywood* prohibition “is explicitly extended to mail-ballot elections with stipulated election agreements.”

conducting an election.” *Id.* at 429 (emphasis added). That rule was established because “last-minute speeches . . . have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect.” *Id.* The Board further found that “the real vice” of last-minute mass captive-audience speeches is that they tend “to create a mass psychology” that gives an unfair advantage to the party that “obtains the last most telling word.” *Id.*

In *Oregon Washington Telephone*, the Board stated that “the reasons for promulgating the *Peerless Plywood* rule are relevant to situations where balloting is conducted by mail.” 123 NLRB at 340. The Board articulated a rule for mail ballot elections providing that notice will be given to the parties at least 24 hours before the time and date the ballots will be dispatched and that the parties will be prohibited from making election speeches on company time to massed assemblies of employees “within the period set forth in the notice, i.e., from the time and date on which the ‘mail in’ ballots are scheduled to be dispatched by the Regional Office until the terminal time and date prescribed for their return.” 123 NLRB at 341.³

We agree with our dissenting colleague that the rule of *Oregon Washington Telephone* is that the mass captive-audience meeting prohibition in mail ballot elections begins when the ballots are scheduled to be mailed and not 24 hours before that time. Nevertheless, a more recent, full-Board decision strongly suggests that this prohibition in mail ballot elections *does* begin 24 hours before the ballots are scheduled to be mailed. See *San Diego Gas & Electric*, 325 NLRB 1143 (1998) (clarifying the circumstances under which it is within the Regional Director’s discretion to order a mail ballot election). In setting forth their views in *San Diego Gas & Electric* on the implementation of the *Peerless Plywood* prohibition in mail ballot elections, all five Board members—despite their awareness of the *Oregon Washington Telephone* decision—agreed that the prohibition begins 24 hours before the ballots are scheduled to be mailed.⁴ The

³ In *American Red Cross*, supra, 322 NLRB 401, the Board clarified this rule with respect to stipulated election agreement cases, stating that a stipulated election agreement that included the dispatch time and date “provided sufficient written notice to the parties about the election.” *American Red Cross* dealt with the impact of the Region’s failure to send a formal notice of the date and time of ballot dispatch pursuant to *Oregon Washington Telephone* and did not address the issue presented here.

⁴ See 325 NLRB at 1151 (Members Hurtgen and Brame, dissenting) (citing *Oregon Washington Telephone* for the proposition that “the *Peerless Plywood* rule applies to the entire period beginning 24 hours before the ballots are mailed by the Regional Director and ending with the return of the ballots”); 325 NLRB at 1148–1149 (Chairman Gould, concurring) (“As the majority notes, an employer is free to conduct

statements made in *San Diego Gas & Electric* were dicta, but they reflect a shared misreading of *Oregon Washington Telephone*—and they represent the Board’s most recent articulation (or misarticulation) of the *Oregon Washington Telephone* rule. Moreover, although not binding on the Board, Section 11336.2(b) of the Casehandling Manual also cites *Oregon Washington Telephone* but provides that the mass-meeting prohibition in mail-ballot elections begins 24 hours before the “dispatch time.” That section states as follows:

Written notification is sent to the parties at least 24 hours before the time and date on which mail ballots will be dispatched to the voters, informing the parties of the dispatch time and thus the time of the ‘start’ of the election for application of the *Peerless Plywood* rule. *Oregon Washington Telephone Co.*, 123 NLRB 339 (1959); *Peerless Plywood*, 107 NLRB 427 (1953).

Although we note the ambiguity of this section, the statement that the “dispatch time” is the “‘start’ of the election” suggests that the captive-audience prohibition begins 24 hours before the time the ballots are scheduled to be mailed.

Given the confusion reflected in Board precedent and the General Counsel’s instructions to the regional offices, it is appropriate that we clarify at what point the captive-audience speech prohibition begins in mail ballot elections. As discussed above, *Peerless Plywood*, which applies “in all election cases,” prohibits employers and unions “from making election speeches on company time to massed assemblies of employees *within 24 hours before the scheduled time for conducting an election.*” 107 NLRB at 429 (emphasis added). The *Oregon Washington Telephone* Board did not provide a policy rationale for a different rule in mail ballot elections, but our colleague speculates that the Board selected the ballot dispatch time as the starting time of the captive-audience speech prohibition “because this would normally provide at least 24 hours free of captive-audience speeches before employees receive their ballots.” Even if so, the essential purpose of the *Oregon Washington Telephone* rule, like the *Peerless Plywood* rule, was to provide a “bright line” standard. That endeavor has not been successful. Thus, our overriding goal here is to achieve the clarity,

‘captive audience’ speeches throughout the campaign period until the *Peerless Plywood* rule takes effect 24 hours before the ballots are mailed” (footnotes omitted); 325 NLRB at 1146 (Members Fox and Liebman, joined in pertinent part by Chairman Gould) (“[W]e reject the dissent’s contention that because, under the rule in *Peerless Plywood Co.*, 107 NLRB 427 (1953), employers are prohibited from giving mass ‘captive audience’ speeches to employees during the period beginning 24 hours before the actual balloting period begins, the use of mail ballots ‘significantly silences’ the employer.”

uniformity, and simplicity that a single rule for all elections will provide.

The question, therefore, is what is “the scheduled time for conducting” a mail ballot election. In our view, it is the time that the ballots are scheduled to be mailed.⁵ Accordingly, we believe that it is appropriate to provide for a full 24-hour period before the ballot mailing that is free from speeches that tend to interfere with the “sober and thoughtful choice which a free election is designed to reflect.” 107 NLRB at 429.⁶ To the extent that *Oregon Washington Telephone* is inconsistent, it is overruled. Although it is within the Board’s authority to apply this new rule retroactively,⁷ we find it unnecessary here in the absence of objectionable conduct, as explained below.

As we indicated previously, we agree with our dissenting colleague that the mass-meeting rule in effect at the time of the events in this case was not *Peerless Plywood*, but the one set forth in *Oregon Washington Telephone*. We also agree that the Regional Office did not coherently communicate this rule to the Employer, at least arguably resulting in the Employer’s decision to forgo a mass meeting of its employees within the 24-hour period before the ballots were mailed. Even assuming, however, that the Region erred in this regard, we do not agree with our colleague that the “inflexible consequence” of setting aside the election is required or appropriate. There was no “mass meeting” violation here, which was the problem that the *Peerless* Board and the *Oregon Washington Telephone* Board addressed. Assuming there was an error, it amounted to a procedural irregularity in the Region’s conduct of the election. In such circumstances, a different legal standard applies.

⁵ This view is consistent with the Board’s Rules and Regulations. See Sec. 102.67(k) (“In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the regional office in the mail.”). See also *FJC Security Services Inc.*, 360 NLRB No. 115, slip op. at 8 (2014) (same); *Club Demonstration Services*, 317 NLRB 349, 349 (1995) (“The parties’ Stipulated Election Agreement provided that the ballots in the instant mail ballot election were to be mailed from the Regional Office on Wednesday, May 27, 1992, thereby commencing the election on that date.”).

⁶ The dissent relies on the length of the captive-audience speech prohibition in mail ballot elections as a reason not to include the 24 hours before the ballots are mailed in the prohibition period. We do not share that view. The majority in *San Diego Gas & Electric* noted that “during the *Peerless Plywood* period, the employer and its agents remain free to continue to campaign against the union not only through mailings to employees at their homes, but also in the workplace, where they can distribute and post literature, communicate with employees one-on-one, and even continue to conduct mass meetings, as long as the meetings are on the employees’ own time and attendance is not mandatory.” 325 NLRB at 1146. See also 325 NLRB at 1148–1149 (Chairman Gould, concurring).

⁷ See, e.g., *UGL-UNICCO Service Co.*, 357 NLRB No. 76, slip op. at 8, fn. 28 (2011).

The goal of the Board's election procedure is to establish "those safeguards of accuracy and security thought to be optimal in typical election situations."⁸ The Board acknowledges both that "strict compliance with its election procedures does not guarantee the validity of an election," and that "deviation from these procedures does not necessarily require setting aside an election."⁹ There is no "per se rule that . . . elections must be set aside following any procedural irregularity."¹⁰ The test for setting aside an election based on regional office conduct is whether the alleged irregularity raised "a reasonable doubt as to the fairness and validity of the election."¹¹ The objecting party's showing of prejudicial harm must be more than speculative to establish that a new election is required.¹²

In its exceptions, the Employer argues that the Region's alleged procedural error contributed to a disenfranchisement of eligible voters. Specifically, the Employer contends that the purpose of its proposed mass meeting was to inform employees of the time when the ballots would be mailed. It argues that the Region's mixed messages on the meeting-prohibition period resulted in a chilling of its right to hold the meeting. The Employer thus concludes that the Region engaged in objectionable conduct that, together with other alleged objectionable conduct, resulted in a low ballot return in the election and requires a second election. We disagree.

We have overruled the Employer's other objections.¹³ Thus, we are left with this single instance of alleged voter disenfranchisement. There is no question that the Employer was free to hold a mass meeting up until 3 p.m. on January 27 to convey its intended message. In light of this and other means available to remind the employees of the date the ballots would be mailed,¹⁴ we are not persuaded that the Employer's decision not to hold a mass meeting for this purpose on January 28 raises any serious

questions regarding the validity of the election.¹⁵ More significantly, we fail to see how employees not being reminded again of the mailing date of the ballots in itself resulted in employees being unable to complete their ballots once received. The Employer's evidence of disenfranchisement is decidedly speculative.

Consistent with the foregoing discussion, the Regional Office's instruction prohibiting a mass campaign meeting on the morning that the ballots were scheduled to be mailed was not objectionable conduct. Accordingly, Objection 2 is overruled.

ORDER

IT IS ORDERED that the Employer's Objections 1, 2, 3,¹⁶ and 5 are overruled.¹⁷

Dated, Washington, D.C. January 29, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

In this case, the Region improperly prohibited "captive audience" speeches¹ for a longer period of time than is established in longstanding Board case law. Employer

⁸ *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970).

⁹ *Affiliated Computer Services*, 355 NLRB 899, 909 (2010).

¹⁰ *St. Vincent Hospital, LLC*, 344 NLRB 586, 587 (2005) (quoting *Rochester Joint Board v. NLRB*, 896 F.2d 24, 27 (2d Cir. 1990)).

¹¹ *Polymers, Inc.*, supra at 282; see also *Physicians & Surgeons Ambulance Service, Inc.*, 356 NLRB No. 42, slip op at 1 (2010), enfd. 477 Fed.Appx.743 (D.C. Cir. 2012).

¹² See, e.g., *Transportation Unlimited*, 312 NLRB 1162 (1993), and cases cited there.

¹³ In a separate decision issued today, the Board adopted the hearing officer's findings and recommendations overruling Objections 3 and 4, finding that the failure of some eligible voters to receive ballots did not warrant setting aside the election.

¹⁴ Here, it is undisputed that the date and time of the mailing was included in the Stipulated Election Agreement, as well as the notice of election.

¹⁵ See, e.g., *San Diego Gas*, 325 NLRB at 1146, 1148–1149 (listing available means of communicating with employees other than last minute captive-audience meetings).

¹⁶ As noted by the Regional Director, objection 3 relates to two void ballots and was to be considered at a hearing only if those two ballots were determinative after objection 4 was resolved.

¹⁷ In light of the overruling of objections 1, 2, and 5 in this Decision and Order, and the overruling of objections 3 and 4 in its separate decision issued today, the Board issued a Certification of Representative attached to that decision.

¹ The term "captive-audience speech" is commonly used to describe election speeches made by employers or unions "on company time to massed assemblies of employees." *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953). For the past 50 years, the Board has maintained similar restrictions on captive-audience speeches in conventional (manual) elections and mail-ballot elections, respectively. See the text accompanying fn. 6 infra (*Peerless Plywood* standard applicable to manual elections) and text accompanying fn. 8 infra (*Oregon Washington Telephone* standard applicable to mail-ballot elections).

Objection 2 complains that the Region prohibited captive-audience speeches beginning 3 p.m. Tuesday, January 27, 2015, which was 24 hours before ballots were to be mailed from the Baltimore Regional Office.² This was clearly the wrong starting time for the prohibition against captive-audience speeches in a mail-ballot election. More than 50 years ago, in *Oregon Washington Telephone Co.*,³ the Board held that, in a mail-ballot election, the prohibition against captive-audience speeches begins *when the regional office puts the ballots in the mail*. In the instant case, the Region's prohibition started 24 hours too early. In *Peerless Plywood*,⁴ another case decided in the 1950s, the Board stated a captive-audience-speech rule that applies to *manual* elections (when voters cast ballots in person). In a manual election, the prohibition against captive-audience speeches begins 24 hours before the *scheduled commencement of the election*.

Ironically, my colleagues deal with the Region's error by making the Region's mistake into a new requirement applicable to all future mail-ballot elections. Summarily overruling *Oregon Washington Telephone*, the majority now holds that, in all mail-ballot elections, the prohibition against captive-audience speeches starts 24 hours earlier than it did before. In my view, there is no valid reason to change the rule established by *Oregon Washington Telephone* that, in a mail-ballot election, the prohibition against captive-audience speeches begins when the ballots are scheduled to be mailed. The *Oregon Washington Telephone* "time of mailing" rule, which applies to mail-ballot elections, is *consistent* with the *Peerless Plywood* 24-hour rule, which applies to manual elections. Therefore, I disagree with my colleagues' statement that overruling *Oregon Washington Telephone* will "align the mail-ballot rule more closely with the manual-ballot rule." To the contrary, my colleagues' decision misaligns what was already aligned and has been consistently applied by the Board for more than 5 decades. Accordingly, as to this issue, I respectfully dissent.

Discussion

The principles that govern captive-audience speeches are set forth in two cases applicable here. The first is *Peerless Plywood*, which dealt with a conventional (manual) election, where the Board expressed concern that "last-minute speeches by *either* employers *or* unions delivered to massed assemblies of employees on compa-

ny time have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect."⁵ Therefore, in the context of a manual election, the Board articulated an "election rule" "that employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees *within 24 hours before the scheduled time for conducting an election*. Violation of this rule *will cause the election to be set aside whenever valid objections are filed*."⁶

The Board in *Peerless Plywood* was careful to explain that, not only did the prohibition apply to employers and unions alike, but there were two sides to the rule: *within* 24 hours of the election, captive-audience speeches are prohibited; *before* the 24-hour prohibition begins, captive-audience speeches "will not interfere with a free election," and parties are free to engage in such speech:

We institute this rule pursuant to our statutory authority and obligation to conduct elections in circumstances and under conditions which will insure employees a free and untrammelled choice. Implicit in this rule is our view that the combined circumstances of (1) the use of company time for preelection speeches and (2) the delivery of such speeches on the eve of the election tend to destroy freedom of choice and establish an atmosphere in which a free election cannot be held. *Also implicit in the rule is our judgment that noncoercive speeches made prior to the proscribed period will not interfere with a free election*, inasmuch as our rule will allow time for their effect to be neutralized by the impact of other media of employee persuasion.⁷

The second case that governs this area is *Oregon Washington Telephone Co.*, where the Board established the following "election rule" applicable to mail-ballot elections:

Henceforth, the Regional Director will give the parties written notice setting forth the time and date on which "mail in" ballots will be dispatched to the voters, and also setting forth a terminal time and date by which the ballots must be returned to the Regional Office. Such notice will be given [to] the parties at least 24 hours before the time and date on which the ballots will be dispatched by the Regional Office. Employers and unions alike *will be prohibited from making election speeches on company time to massed assemblies of employees within the period set forth in the notice, i.e., from the time and date on which the "mail in" ballots are*

² The scheduled time of mailing was 3 p.m. Wednesday, January 28, 2015.

³ 123 NLRB 339 (1959).

⁴ 107 NLRB at 427.

⁵ 107 NLRB at 429 (emphasis added).

⁶ *Id.* (emphasis added).

⁷ *Id.* at 429–430 (emphasis added).

*scheduled to be dispatched by the Regional Office until the terminal time and date prescribed for their return. Violations of this rule by employers or unions will cause an election to be set aside whenever valid objections are filed.*⁸

As my colleagues recognize, the Board's language in *Oregon Washington Telephone* plainly states that in mail-ballot elections, the captive-audience speech prohibition begins at "the time and date . . . ballots are scheduled to be dispatched by the Regional Office." This language could not be clearer. In the instant case, however, the Region imposed a ban on captive-audience speeches at odds with *Oregon Washington Telephone*. The Region prohibited the Employer from making captive-audience speeches beginning 3 p.m. Tuesday, January 27, 2015, which was 24 hours before ballots were to be mailed from the Baltimore Regional Office (3 p.m. Wednesday, January 28, 2015).⁹ Instead of barring captive-audience speeches "from the time and date on which the 'mail in' ballots are *scheduled to be dispatched* by the Regional Office," the Region incorrectly prohibited such speeches during the 24 hours *preceding* the time of mailing (with the prohibition against captive-audience speeches continuing throughout the ensuing period during which mail ballots could be returned).

The "time of mailing" rule established for mail-ballot elections in *Oregon Washington Telephone* is a logical extension of the 24-hour rule established for manual elections in *Peerless Plywood*. There, the Board expressed concern about the impact of last-minute captive-audience speeches on employees' ability to make a "sober and thoughtful *choice*" in a manual election.¹⁰ Employees make this "choice" when they mark and cast their ballot, and the earliest they can do so in a manual election is when the polls open. Accordingly, the Board held that beginning 24 hours before the polls are scheduled to open, employers and unions alike are prohibited from giving speeches to massed assemblies of employees on company time. *Oregon Washington Telephone* adheres to the rationale of *Peerless Plywood*. In a mail-ballot election, the employee's *receipt* of the mail ballot—which occurs, at the earliest, the day after the ballots are mailed by the regional office—effectively constitutes the start of the election. Thus, the *Oregon Washington Telephone* rule prohibiting captive-audience speeches commencing at "the time and date on which . . .

ballots will be *dispatched* to the voters"¹¹ provides the same (or greater) protection from captive-audience speeches as the 24-hour rule applicable to manual elections that the Board adopted in *Peerless Plywood*.

By setting the starting time of the captive-audience-speech prohibition in mail-ballot elections 24 hours *before* a regional office puts ballots in the mail, my colleagues establish a new rule, contrary to over 50 years of precedent, that upsets the consistency between *Oregon Washington Telephone* and *Peerless Plywood*. My colleagues say the point in time 24 hours before ballots are mailed "seems to correspond most naturally to the *Peerless Plywood* rule." To the contrary, by overruling *Oregon Washington Telephone*, my colleagues all but guarantee that, in mail-ballot elections, there will be a 48-hour prohibition against captive-audience speeches,¹² *double* the 24-hour restriction adopted in *Peerless Plywood* for manual elections. Nor do I believe there is merit in my colleagues' explanation that they are providing "a single rule for all elections." There was already a single rule for all elections that the Board has applied for more than 50 years: no captive-audience speeches are permitted within 24 hours of the time that employees may actually mark a ballot. Although my colleagues state their goal is "to achieve . . . clarity, uniformity, and simplicity," the existing rule under *Oregon Washington Telephone* was already simple and clear. Indeed, my colleagues admit as much.¹³ As for achieving uniformity, I believe my colleagues' decision does just the opposite: it creates a double standard that, in my view, lacks any rational justification and is likely to increase litigation in mail-ballot election cases.¹⁴ Finally, my col-

¹¹ 123 NLRB at 341 (emphasis added).

¹² As illustrated by the instant case, my colleagues would prohibit, in every mail-ballot election, any captive-audience speeches during the 24 hours preceding the mailing of ballots, and the ban on captive-audience speeches would continue for a minimum of 24 hours from the time ballots were mailed until the time they are received by voters. In unusual cases, mail ballots might be received less than 24 hours after they were mailed. In the overwhelming majority of cases, however, it will take *at least* 24 hours from the time of mailing until ballots are received.

¹³ They say: "We agree . . . that the rule of *Oregon Washington Telephone* is that the mass captive-audience meeting prohibition in mail ballot elections begins when the ballots are scheduled to be mailed and not 24 hours before that time." Nothing could be simpler or more clear.

¹⁴ I disagree with my colleagues' suggestion that today's decision is warranted by a need to clarify confusion reflected in Board precedent and election guidelines. Although a 1998 Board decision, *San Diego Gas & Electric*, 325 NLRB 1143, contains language regarding mail-ballot elections that appears to differ from *Oregon Washington Telephone*, the issue addressed in *San Diego Gas & Electric* was whether and when it is proper to order a mail-ballot election in the first place, and the Board was not deciding any issue regarding the duration of the prohibition against captive-audience speeches in mail-ballot elections. Even if one regards *San Diego Gas & Electric* as introducing some

⁸ 123 NLRB at 341 (emphasis added).

⁹ The election was conducted by mail ballot pursuant to the parties' Stipulated Election Agreement, which I agree precludes the Employer from challenging the appropriateness of a mail-ballot election in post-election objections.

¹⁰ 107 NLRB at 429 (emphasis added).

leagues say the “essential purpose of the *Oregon Washington Telephone* rule . . . was to provide a ‘bright line’ standard.” Setting aside for the moment that *Oregon Washington Telephone* already provided a “bright line” standard, I disagree with my colleagues’ premise. The essential purpose of both *Oregon Washington Telephone* and *Peerless Plywood* was to strike a proper balance between protecting employees’ freedom of electoral choice, on the one hand, and preserving the free speech rights of the parties to inform the exercise of that choice on the other.¹⁵ In my view, the majority’s decision upsets this balance in mail-ballot elections at the expense of the free speech protection that is afforded to all parties involved in an election campaign.

It bears emphasis that, in a mail-ballot election, the captive-audience-speech prohibition imposed under *Oregon Washington Telephone* continues for considerably longer than the 24-hour prohibition period in advance of a manual election under *Peerless Plywood*. As stated in *Oregon Washington Telephone*, the captive-audience-speech prohibition starts on the date that ballots are dispatched by the Region and continues “until the terminal time and date prescribed for their return.”¹⁶ In the in-

“confusion” or “misarticulation” of the *Oregon Washington Telephone* rule, this would warrant, at most, a reaffirmation of the “time of mailing” rule that has been the law for more than 5 decades under *Oregon Washington Telephone*. Nor does “confusion” reasonably justify the creation of a new standard that creates a captive-audience-speech restriction double the time period established in *Peerless Plywood*. Although Sec. 102.67(k) of the Board’s Rules and Regulations states that a mail-ballot election “commences” when a regional office mails the ballots, this has nothing to do with the appropriate duration of the captive-audience-speech prohibition. Rather, this language involves a rule change adopted by the Board in 2014 that requires employers to post a notice of election at least 3 full working days “prior to 12:01 a.m. of the day of the election,” which required the Board, for this purpose, to state when a mail-ballot election would be deemed to commence.

Nothing in the Board’s Rules and Regulations abandons the captive-audience rule applicable to mail-ballot elections as established in *Oregon Washington Telephone*. Moreover, the Board’s Casehandling Manual states, with a citation to *Oregon Washington Telephone*, that “[w]ritten notification is sent to the parties at least 24 hours before the time and date on which mail ballots will be dispatched to the voters, informing the parties of the dispatch time and thus the time of the ‘start’ of the election for application of the *Peerless Plywood* rule.” Casehandling Manual Sec. 11336.2(b) (emphasis added). My colleagues read this language to support their position. In my view, it plainly opposes it—and any possible doubt on this score is dispelled by the citation to *Oregon Washington Telephone*.

¹⁵ As the Board explained in *Peerless Plywood*: “Implicit in this rule is our view that the combined circumstances of (1) the use of company time for preelection speeches and (2) the delivery of such speeches on the eve of the election tend to destroy freedom of choice and establish an atmosphere in which a free election cannot be held. Also implicit in the rule is our judgment that noncoercive speeches made prior to the proscribed period will not interfere with a free election.” 107 NLRB at 429–430.

¹⁶ 123 NLRB at 341 (emphasis added).

stant case, had the Region adhered to *Oregon Washington Telephone*, the captive-audience speech prohibition would have lasted 14 days (from January 28 to February 11).

In both *Peerless Plywood* and *Oregon Washington Telephone*, the Board imposed an inflexible consequence when parties deviate from the “election rule” established by these cases: violations “will cause an election to be set aside whenever valid objections are filed.”¹⁷ I do not believe we can reasonably apply a more flexible standard when the parties were improperly prohibited from engaging in protected speech that would not have interfered with a free election, contrary to the standard that has governed this important area for more than 50 years.¹⁸

Conclusion

I do not favor the delay associated with a new election, but I believe we have no choice in the unfortunate circumstances presented here: the Region improperly prolonged the time during which both sides were prohibited from making captive-audience speeches, contrary to decades-old rules established by the Board. We cannot reconstruct what would have occurred had the proper standard been utilized by the Region, and this involves such a fundamental issue—the parties’ protected right to engage in election-related speech—that it is unreasonable, in my view, for the Board to treat this error as if it did not occur.

Rather than correcting this error, my colleagues make it worse by summarily overruling *Oregon Washington Telephone*, which has controlled this area for more than 50 years. In my view, there is no valid reason to aban-

¹⁷ *Peerless Plywood*, 107 NLRB at 429 (emphasis added); *Oregon Washington Telephone*, 123 NLRB at 341 (emphasis added).

¹⁸ I would reach the same result even under the standard applied by my colleagues. See *Polymers, Inc.*, 174 NLRB 282, 282 (1969) (holding that to set aside an election based on the region’s conduct of the election, the objecting party must show that “the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election”), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). In my view, the Region’s interference with the Employer’s fundamental free speech right to express its views concerning the election at a time when the Employer was entitled, under governing precedent, to express those views in captive-audience speeches raises a reasonable doubt as to the fairness and validity of the election. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (“[A]n employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board.”); *United Rentals, Inc.*, 349 NLRB 190, 191 (2007) (“[T]ruthful statements that identify for employees the changes unionization will bring inform employee free choice which is protected by Section 7 and the statements themselves are protected by Section 8(c).”) Although Section 8(c) is not, by its terms, applicable to representation cases, “the strictures of the [F]irst [A]mendment . . . must be considered in all cases.” *Allegheny Ludlum Corp.*, 333 NLRB 734, 737 fn. 20 (2001) (quoting *Dal-Tex Optical Co.*, 137 NLRB 1782, 1787 fn. 11 (1962)).

don *Oregon Washington Telephone*, and the new rule adopted by my colleagues creates different standards—one applicable to mail-ballot elections, the other to manual elections—that cannot be reconciled with one another or with *Peerless Plywood*.

For these reasons, as to the above issues, I respectfully dissent.

Dated, Washington, D.C. January 29, 2016

Philip A. Miscimarra, Member

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