

**Monterey Carmel Convalescent, Inc., d/b/a Carmel Convalescent Hospital and Nancy R. Larsen, Petitioner and Hospital and Institutional Workers Union, Local 250, Service Employees International Union, AFL-CIO. Case 32-RD-179**

September 19, 1980

**DECISION AND CERTIFICATION OF RESULTS OF ELECTION**

**BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO**

Pursuant to a Decision and Direction of Election issued on October 2, 1979, an election by secret ballot was conducted on October 30, 1979, in a unit composed of all full-time and regular part-time employees employed by the Employer at its Carmel, California, facility, excluding all registered nurses, office clerical employees, guards, and supervisors as defined in the Act. At the conclusion of the election, the parties were furnished a tally of ballots which showed that of approximately 73 eligible voters 19 cast ballots for the Union, 27 cast ballots against the Union, and 2 cast challenged ballots.

On November 2, 1979, the Union filed and served on the parties nine objections to conduct affecting the results of the election. Following an investigation, the Acting Regional Director for Region 32, on December 31, 1979, issued a Supplemental Decision, Order and Direction of Second Election, wherein he overruled Objections 1 through 8, sustained a portion of Objection 9, and directed a second election.

Thereafter, the Employer filed a request for review of the Acting Regional Director's decision. The Board, by telegraphic orders on February 21 and 22, 1980, granted the request for review and directed that a hearing be held with respect to Objection 9. Such hearing was conducted on March 28, 1980, and, on June 19, 1980, the Hearing Officer issued his Report and Recommendation on Objections wherein he concluded that there was merit to the objection and recommended that the election be set aside and a new election held. Thereafter, exceptions and a supporting brief were filed with the Board by the Employer and a brief was filed by the Union.<sup>1</sup>

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>1</sup> Counsel for the Employer, by letter dated July 22, 1980, filed with the Board a motion to strike certain assertions made in the Union's brief by counsel for the Union. Inasmuch as the assertions are contrary to the record testimony, the motion is hereby granted. *Valley Iron & Steel Co.*, 224 NLRB 866 (1976).

The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Hearing Officer's findings and recommendations only to the extent consistent herewith.

Objection 9 concerns the alleged failure of the Board agent conducting the election adequately to instruct the Union's observer, Ahren, at the morning voting session, on the proper challenge procedures which thereby caused the observer to believe that a failure or refusal to initial a voter's name on the eligibility list constituted a challenge of that voter.

The record shows that at the preelection conferences the Board agent's instructions were fully adequate, covering all essential points, including the challenge ballot procedure. Ahrens testified that the Board agent "explained things very well," but that she did not understand because of inattention and nervousness. At some point after balloting had begun, Ahrens "may have" told the Board agent that she intended to challenge voters she did not recognize, and she admittedly was under the impression that her refusal to place her initials on the eligibility list next to the names of such voters constituted a challenge of these voters.

During the election she refused to initial the eligibility list some 10 to 15 times and, when this occurred, the Board agent againtold her, as he previously had instructed all observers, that she could ask for identification. When identification was sought and corresponded with that name on the list, Ahrens nevertheless continued to refuse to initial the voter's name. The record shows also that upon a number of such occasions the Board agent specifically asked Ahrens if she wished to challenge without receiving an affirmative response.<sup>2</sup> Thus, it is clear that the Board agent gave Ahrens the opportunity clearly and unambiguously to "challenge" and that she declined to do so.

The Hearing Officer found that Ahrens intended to challenge and that the Board agent reasonably should have construed her refusals to initial the voters' names on the eligibility list as constituting challenges.

We do not agree. It is well settled that an observer should indicate clearly an intent to challenge, and that in the absence of such clarity, particularly when the question specifically is asked by the Board agent and there is no affirmative response, the Board agent cannot reasonably be ex-

<sup>2</sup> There is no evidence that any ineligible voter was permitted to vote. None of the dozen or so individuals sought to be challenged were among those whose eligibility was in dispute at the conference the day before the election, with one possible exception; and the two voters who voted challenged ballots in the afternoon were challenged properly.

pected to interpret the observer's conduct as conveying an intent to challenge.<sup>3</sup>

In view of the foregoing, we find that the Board agent correctly handled the voting procedures at the election. Inasmuch as the two challenged ballots are insufficient to affect the results of the election, we shall, accordingly, certify the results of the election.

### CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for Hospital and Institutional Workers Union, Local 250, Service Employees International Union, AFL-CIO, and that said labor organization is not the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

<sup>3</sup> *H & L Distributing Company*, 206 NLRB 169 (1973); *Fern Laboratories, Inc.*, 232 NLRB 379 (1977); *Computer Sciences Corporation Applied Technology Division, Aerospace Systems Center*, 234 NLRB 1163 (1978), enf'd 589 F.2d 232 (5th Cir. 1979).

### DECISION

#### STATEMENT OF THE CASE

MARTIN S. BENNETT, Administrative Law Judge: This matter was heard before me in Phoenix, Arizona, on May 6 and 7, 1980. The complaint, issued December 28 and based on charges filed November 13 and December 17, 1979, by Warren J. McCarty, an Individual, alleges that Respondent, Alfred M. Lewis, Inc., has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act. Briefs have been submitted by the General Counsel and Respondent and have been carefully considered.

Upon the entire record in the case, and from my observation of the witnesses including their demeanor, I make the following:<sup>1</sup>

#### FINDINGS OF FACT

##### I. JURISDICTIONAL FINDINGS

Alfred M. Lewis, Inc., a California corporation, maintains an office and place of business at Phoenix, Arizona, where it is engaged in the wholesale sale and distribution of dry groceries, refrigerated foods and related products. It annually purchases and causes to be transported in interstate commerce and delivered to its place of business in Arizona groceries and other items valued in excess of \$50,000 directly from suppliers located in States other than the State of Arizona. I find that the operations of Respondent affect commerce within the meaning of Sec-

<sup>1</sup> A post-hearing motion by the General Counsel to correct the record in 33 respects, dated May 30, 1980 and unopposed, is hereby granted. It may be noted that a reference therein to p. 272 is actually to p. 275.

tion 2(6) and (7) of the National Labor Relations Act, as amended.

##### II. THE LABOR ORGANIZATION INVOLVED

Transport & Local Delivery Drivers, Warehousemen & Helpers, Local No. 104, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein the Union, is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. Introduction; The Issue

The sole issue herein is whether Respondent in August 1979 denied employee Warren J. McCarty<sup>2</sup> a 15-minute break, and whether Respondent thereafter, about September 17 and 20, discriminated against and discharged McCarty because he asserted rights under the collective-bargaining agreement between the Union and Respondent. According to Respondent, he was discharged solely because he had stolen production time at work or, stated otherwise, had falsified production records by claiming payment for work not actually performed by him. As found below, the evidence preponderates in favor of Respondent's position.

###### B. Sequence of Events

The warehouse and trucking employees of Respondent are represented for the purposes of collective bargaining by the Union and, at the time relevant herein, a 3-year collective-bargaining agreement covered the term from March 1, 1978, up to and including February 28, 1981.

McCarty initially entered the employ of Respondent on February 20, 1978, as a part-time employee on the night shift. Approximately 1 month later, he became a full-time employee on the night shift in the grocery warehouse and, during the months of July, August, and September 1979, he was employed principally in the tobacco, candy and repack rooms of the grocery warehouse. His starting time for the night shift commenced at 2 p.m., and he was under the primary supervision of Supervisor Randy Baughman.

Article XI of the contract treats with meal and break periods and generally provides that during an 8-hour shift employees are entitled to two rest breaks, each of 15 minutes duration, which are compensated, and also to a 1/2-hour lunchbreak, which is not compensated. Employees who work overtime past 8 hours are entitled to an additional 15-minute break at approximately the 10th hour when an employee is to work 11 or more hours. During the 3-month period, stated above, these employees did work a great deal of overtime. Stated otherwise, employees who started their shift at 2 p.m., as did McCarty, and then worked until 1:30 a.m. would have put in 11 hours of time for which they were compensated.

On a particular shift, during August 1979, McCarty was working in the candy room around 1 a.m. Shortly

<sup>2</sup> To be distinguished from fellow employee and Job Steward Michael K. McCarthy of Local 104.

after 1 a.m., he admittedly made a comment to his co-workers in the presence of Baughman that the other employees should slow down in order to obtain an additional 15-minute break. Several minutes later and shortly before 1:30 a.m., Baughman, who had heard this comment, told McCarty to punchout and go home; one effect of this was to deprive him of eligibility for an additional 15-minute break.

Some weeks later, on September 17, 1979, McCarty was given an indefinite suspension by Respondent. As he was told, and his own testimony so demonstrates, this resulted from the Company's conclusion that he was suspected of cheating on his production cards. Several days later, on September 20, this discipline was increased to a discharge.

As for the August incident, it is clear that McCarty was not entitled to an extra break because he did not work a full 11 hours. And there is substantial evidence that it was the normal practice of Respondent to give the break at different times, varying from 1 to 1:30 a.m.

Baughman testified that he generally tried to send home employees who disliked working overtime, and on the night in question he followed this policy precisely. Thus, it is uncontroverted that shortly after 1 a.m., he sent home employee Wesley because he knew of the latter's distaste for working late. As Baughman testified, and I find, he did not need McCarty any longer that evening and, moreover, he was aware of McCarty's prior statement to employees suggesting a slowdown so as to be awarded an additional break.

On September 17, just after McCarty reported to work at 2 p.m., he was called to a meeting with Dave Ashby, superintendent of operations; Baughman; and Union Steward Mendias. Ashby told McCarty, as the latter testified, that he was suspected of cheating on his production cards and that he was suspended until further notice. He was further told that Baughman had observed this cheating on the prior shift, and that fellow union members had turned him in, and the record supports the latter finding.

Indeed, in his testimony at the instant hearing McCarty, in effect, admitted that he had cheated on his production card on the night in question. While the precise facts are not entirely clear, it appears that his production card showed him as working time that he had not.

Both Ashby and Baughman testified, and I find, that McCarty admitted his cheating at the meeting on September 17. McCarty did deny that he had made such an admission, but he did not deny that he was actually engaged in cheating. And the cheating is corroborated elsewhere.

The basic case of the General Counsel is that Respondent was determined to "get" McCarty for his persistence in asserting his rights under the collective-bargaining agreement. There is evidence of a number of contract grievances filed by McCarty with the Union. However, although he was suspended on a number of occasions during 1979, only one such suspension was ever submitted to the grievance and arbitration procedures set forth in the agreement, and this was won by McCarty after his discharge. These grievances to the

Union include those dated January 10, July 2, and September 4, 1979.

There is also most persuasive evidence from Normal Thelen, employee relations manager and safety coordinator of Respondent. The General Counsel adduced evidence that various employees including McCarty had gone to OSHA and filed a grievance about working conditions. Her testimony is not controverted, and I find that this never came to the attention of Respondent although another matter involving other employees in an OSHA matter did. And the testimony of Thelen also discloses, and this is not controverted, that Respondent does not receive copies of complaints filed by an employee with the Union. She was aware of only one grievance filed by him which came to the attention of Respondent.

The General Counsel does rely on certain testimony by Union Steward Mike McCarthy. According to Baughman, it was McCarthy who initially notified him that McCarty was cheating on his production cards. Significantly, McCarthy, although presumably available, was not brought back as a rebuttal witness to controvert this.

According to McCarthy, Baughman told him in June or July that McCarty was a thorn in the side of Respondent which would like to find a way to discharge him.<sup>3</sup> Baughman flatly denied that there was any attempt to "set-up" McCarty on the subject of cheating on production records and testified, without contradiction, that it was McCarthy who approached him in the warehouse and advised him that McCarty was cheating on his production records, and that the other men did not like this. As a result, Baughman reported this incident to Ashby and it was Ashby who instructed him to conduct an investigation of employees to determine whether any cheating was taking place.

As a result, Baughman investigated the matter on the next shift of September 16, and determined that McCarty was in fact cheating. Indeed, Night Warehouse Supervisor Jim Theis was called to the scene by Baughman to verify this; this was done at the prior suggestion of Ashby who desired verification of any such matter. And the record has disclosed this verification by Theis both in his testimony and in writing.

If the testimony of McCarthy is to be believed, it would follow that he, a union steward, sat by idly and did nothing while McCarty, his union brother, was discharged according to a plan setup by Respondent. McCarty did present some testimony that other employees were cheating on their production records in similar fashion, but this is not supported. He did name a number of employees who were so engaged and two of them, Kuban and Bond were called as witnesses; they were unimpressive or evasive and denied that they were involved in any such system of cheating on production. Indeed it was only Steward McCarthy, who admitted

<sup>3</sup> There is testimony about an incident when Baughman and other employees were drinking beer after work and there was some joking about the incident when McCarty was sent home before completing 11 hours, and as a result was allegedly put in his place. I see nothing here which assists the General Counsel or is dispositive of the issue before me.

that he was involved on occasion in cheating in this manner.

There is also evidence that at a later date, on January 28, 1980, management personnel questioned all employees in the tobacco, candy, and repack rooms about McCarty's allegations of widespread cheatings, but understandably received no admissions of such misconduct.

### *C. Concluding Findings*

To sum up, the General Counsel has not met its burden of proof with respect to McCarty. On the other hand, Respondent has offered plausible and sensible reasons for the actions taken against him, and specifically because he was caught cheating on his production records, a factor he in effect admitted. And as for the incident when he was sent home several minutes early because he was not needed, and because several minutes earlier he had openly encouraged other employees to slow down in order to get an additional break, I fail to see how this assists the General Counsel, although Respondent may not have been averse to the opportunity to take this action.

In essence then, I find that the evidence preponderates in favor of the position of Respondent herein, although the General Counsel has argued forcefully at length in favor of its position. And while there is some testimony as to working practices of an unauthorized nature, I see

nothing sufficient to affect these findings in favor of Respondent. I shall therefore recommend dismissal of the complaint.

### CONCLUSIONS OF LAW

1. Alfred M. Lewis, Inc., is an employer whose operations affect commerce within the meaning of Section 2(6) and (7) of the Act.

2. Transport & Local Delivery Drivers, Warehousemen & Helpers, Local No. 104 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

### ORDER<sup>4</sup>

The complaint is dismissed in its entirety.

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<sup>4</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.