

Judd Valve Co., Inc. and International Association of Machinists and Aerospace Workers, AFL-CIO, Petitioner. Case 17-RC-8784

March 4, 1980

DECISION AND DIRECTION

**BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND TRUSEDALE**

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the determinative challenged ballot in an election held July 18, 1979,¹ and the Regional Director's report and recommendations disposing of same, relevant portions of which are attached. The Board has reviewed the record in light of the exceptions² and brief and hereby adopts the Regional Director's recommendations.³

DIRECTION

It is hereby directed that the Regional Direction for Region 17 shall, within 10 days from the date of this Decision, open and count the challenged ballot of Ed Houser and thereafter prepare and cause to be served on the parties a revised tally of ballots, upon which basis he shall issue the appropriate certification.

MEMBER JENKINS, concurring:

I agree with my colleagues that Ed Houser is an eligible voter, but I rely on the fact that his name was included on a *Norris Thermador*⁴ list agreed to by the parties. The parties entered into a *factual*

¹ The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 8 votes for, and 7 against, the Petitioner; there was 1 challenged ballot, a sufficient number to affect the results.

² The Petitioner states in its exceptions, *inter alia*, that the Regional Director failed to contact an employee who was willing to give a sworn affidavit. The Petitioner has therefore attached to its exceptions a signed statement prepared by the employee for Board consideration. The National Labor Relations Board Rules and Regulations, sec. 102.69(g), states in pertinent part that:

... a party filing exceptions to a regional director's report on objections or challenges, a request for review of a regional director's decision on objections or challenges, or any opposition thereto, may append to its submission to the Board copies of documents it has timely submitted to the regional director and which were not included in the report or decision.

In the instant case the Petitioner has failed to state when the employee's name was given to the Regional Director and why the signed statement was not submitted to the Regional Director. In light of these circumstances, we will not now consider the contents of the submitted statement.

³ In adopting the Regional Director's finding that the parties' stipulation was not dispositive of Houser's eligibility, Chairman Fanning notes that he does not regard the Board as bound by parties' stipulations on issues of supervisory status. See *Laymon Candy Company*, 199 NLRB 547, fn. 2 (1972), and Chairman Fanning's dissenting opinion in *Cruis Along Boats, Inc.*, 128 NLRB 1019 (1960).

⁴ *Norris Thermador Corporation*, 119 NLRB 1301 (1958).

stipulation as to the duties and authority of Houser and other individuals, and the instant case is readily distinguishable from *Laymon Candy Company*, 199 NLRB 547 (1972), where the stipulation or agreement was only as to the ultimate legal question of *eligibility to vote*. Therefore, I see no reason to depart from our general policy that preelection agreements be accorded finality.

APPENDIX

Background

The Employer is engaged in the manufacture of check valves at its facility located in Caney, Kansas. It maintains a two shift operation employing a total of approximately 17 employees. Of that number, approximately 11 work the day or first shift under the supervision of Frank Wise, General Foreman, who in turn is under the direction of Al Nitz, Vice President and General Manager. Approximately 6 employees work on the second shift including Ed Houser, leadman, whose ballot was challenged by the Union with the contention that Houser possesses certain supervisory responsibilities.

The investigation discloses that the election agreement in this matter was obtained at the pre-hearing conference on June 23. The Petitioner was represented by Harold Lorenz, Grand Lodge Representative of Bridgeton, Missouri. He was accompanied by Larry Downing, a Coffeyville, Kansas, representative of the Union, and 3 employees of the Employer. The principal representative and spokesman for the Employer was Carl D. Hall, Jr., Attorney. At this conference the parties reached an agreement on a Stipulation For Certification Upon Consent Election. The agreement included the signing of a *Norris Thermador*³ list of the names of eligible voters, purportedly resolving all issues of eligibility. The name of Ed Houser was included on that list.

The investigation further reveals that the issue of Houser's eligibility was the principal topic of discussion between the parties prior to their reaching agreement. Carl Hall, in a position letter dated July 25, states that Lorenz and his party caucused for approximately 15 or 20 minutes after receiving a list of employees that the Employer considered eligible. Upon returning to the meeting room, Lorenz raised the question about Houser's status. Thereafter, upon assurances by Hall that Houser was a leadman and did not possess supervisory authority, Lorenz signed the election agreement. He also approved the *Norris Thermador* list with Houser's name on it and agreed that the employees named

not have the authority to hire, or fire or to effectively recommend such action; that they do not responsibly direct or assign work to employees, such assignment being of a responsible nature, nor do they otherwise meet any of the criteria which would make them supervisors as such term is defined in Section 2(11) of the Act.

Consequently, the Employer argues that the Petitioner was presented ample opportunity to investigate the em-

³ 119 NLRB 1301.

ployment status of Houser and, after having done so, entered into an agreement that should be regarded as final and binding. The Petitioner relies upon *Cruis Along Boats, Inc.*, 128 NLRB 1019 (1960), and argues that the holdings therein which admittedly refer specifically to stipulations entered into between the parties at formal hearings should also apply to stipulations where, as here, the matter at issue was discussed by the parties prior to the reaching of agreement.

With respect to the Employer's position, the Petitioner argues (1) that Houser's responsibilities were expanded between the date of signing of the agreement and the date of the election, and (2) the Petitioner discovered evidence of Houser's supervisory status in the post agreement period prior to the election. Curiously, Petitioner's principal witnesses to support its present position were the potential employee witnesses for Petitioner at the pre-hearing conference. The Employer maintains that no changes in Houser's status occurred during the interim period, that Petitioner was made fully aware of the facts of his status, and that he voluntarily entered into the agreement.

Under all the circumstances of this matter the Employer's position contains considerable appeal.⁴ Nevertheless, recent Board findings relating to challenges of voters as supervisors despite a *Norris-Thermador* agreement hold that the final issue of eligibility is to be decided upon the facts surrounding that voter's status rather than upon the finality of the agreement between the parties. See *Pilgrim Foods, Inc.*, 234 NLRB 136 (1977), wherein the Board stated in footnote 5:

Since the question of Basha's eligibility based on whether he was a regular or casual part-time employee does not involve a statutory exclusion, but rather a determination of his community of interests with other employees in the unit, no circumstances are presented warranting departure from the Board's practice of honoring the *Norris-Thermador* list. *Prior Aviation Service, Inc.*, 220 NLRB 460, 461 (1975).

The Investigation

Because of the position it has taken with regard to the validity of the *Norris-Thermador* List, the Employer has declined to submit any specific evidence relating to Houser's status. The Petitioner has provided several witnesses in support of its position, including the testimony of its potential witnesses.

Initially Houser indicated a willingness to provide sworn evidence relating to his employment duties and status, but subsequently declined to do so. Nevertheless, Houser has informally stated that:

⁴ In this regard see the dissenting opinions of Board Members Kennedy and Penello in *Laymon Candy Company*, 199 NLRB 547:

We see no reason for the Board's past practice of honoring agreements concerning eligibility reached at a hearing but failing to accord finality to similar agreements in a consent election situation. The considerations set forth in *Cruis Along Boats* are equally, if not more, applicable to the consent election in order to encourage expeditious resolution of questions concerning representation. To preclude [a stipulated agreement] disposing of unit placement or eligibility issues ignores the realities inherent in the informal resolution of such questions and strikes at the very heart of the consent election system.

- (1) He is hourly paid and punches a time card.
- (2) He receives his work assignments from job cards filled out daily by Frank Wise, as do all the other 2nd shift employees.
- (3) He has never been given authority to hire, fire, discipline or reward other employees and has not recommended such action. The only time he has been asked for a recommendation by the company on a prospective employee was when he was specifically named as a reference by the employee.
- (4) When he was named second shift leadman, he was assigned to train new employees and assist them based upon his experience, but he spends almost all of his time in his own work which is no different from that of the other employees.
- (5) He works the same hours and enjoys the same benefits as other employees.
- (6) If problems arise on the second shift, the standard procedure is to contact Al Nitz or Frank Wise.

Testimony obtained from a second shift employee corroborates the fact that Houser, like other second shift employees, punches a time card. Houser does not have a desk or office, and works off a job card like other employees. Frank Wise assigns work to second shift employees and he is generally present for the first 30 to 45 minutes of the second shift. When problems arise on the second shift, Houser contacts either Al Nitz or Frank Wise. Disciplinary matters are handled by Al Nitz. Permission for timeoff is obtained from Nitz or Wise.

Another second shift employee corroborates the duties of Houser described above. He confirms that Frank Wise has counseled another second shift employee concerning work related problems. He estimates that Houser spends about 75% of his time in production.

The bulk of Petitioner's evidence is from three first shift employees and Larry Downing, the Petitioner's local Coffeyville, Kansas, representative. Downing relates a casual conversation he had with Houser at the latter's home on July 13. Houser remarked that he had a fine group of employees working under him. Houser, in speaking of one former employee, stated that he and Al Nitz had discussed the situation and they didn't have any choice but to fire him because of his attitude, his failure to work Saturday and his failure to perform sufficient work.

With regard to the evidence supplied by first shift employees, it is summarized as follows:

- (a) Houser reports about 45 minutes early each day to talk to Wiser or Nitz.
- (b) When Wise is absent, Houser arrives early and replaces him. (A month and a half ago both Wise and Nitz left the premises. Houser came in around 2:00 p.m. and sat in the office where Wise usually sits. He did not run any machine. Houser also came early on July 27 when Frank Wise was not present and stayed in Al Nitz's office until 3:30 p.m. (quitting time for the first shift).)
- (c) First shift employees state that Houser leaves notes for Wise in Wise's office. One recent note stated that Don Mann had gone home early, around

8:00 a.m. Others relate to production and the machines.

(d) About two months ago Houser told one second shift employee to take another employee to the hospital. (The investigation reveals that the hospital bound employee had severed two fingers while working and that Houser had called an ambulance, but it was late in coming and the other employee volunteered his car. Al Nitz met the employees at the hospital.)

(e) Houser hands out the weekly paychecks to second shift employees.

(f) Houser has been heard by first shift employees at shift change to ask if second shift employees were having any problems.

(g) Houser's initials have been noticed on the time card of a second shift employee who hadn't timed in properly on a job.

(h) Wise opens the plant each morning and Houser locks it each night at midnight.

(i) Houser keeps a list of employees' tool needs on the second shift and notifies Wise.

It is noteworthy that the Petitioner's witnesses are in general first shift employees who do not closely observe Houser while he is performing his duties. The fact that

Houser reports early each day for work simply supports to the contention that he is closely supervised by Al Nitz and Frank Wise. The sporadic exercise of supervisory authority as described herein and attributed to Houser when Wise is absent, is not sufficient in itself to establish Houser as a supervisor. *Willis Shaw Frozen Food Express, Inc.*, 173 NLRB 487 (1968), and *Scott Paper Company*, 171 NLRB 821 (1968).

At best the evidence establishes that Houser acts as a conduit to management for the second shift. Job assignments for Houser and other second shift employees are actually made by Wise. Houser notifies either Wise or Al Nitz when anything unusual occurs. He is hourly paid and receives the same benefits as other employees. The principal distinctions between Houser and other employees on the second shift are that he comes in early each day to discuss the plant procedure with management, and, that by virtue of his expertise, he is relied on by management to lend technical assistance to his fellow employees. Under these circumstances, I conclude that Ed Houser is an eligible voter and therefore recommend that the challenge to his ballot be overruled; that his ballot be opened and counted at a time and place designated by me; that a revised tally of ballots be served upon the parties; and that thereafter an appropriate certification be issued.