

**Levitz Furniture Company of the Eastern Region, Inc., Employer-Petitioner and Retail Clerks and Store Employees Union Local 1361 a/w U.F.C.W.—AFL-CIO-CLC. Case 4—RM—983**

March 3, 1980

**DECISION AND CERTIFICATION OF RESULTS OF ELECTION**

**BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE**

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 determinative challenges in an election held on October 11, 1979,<sup>1</sup> and the Regional Director's report, pertinent portions of which are attached hereto, recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Regional Director's findings and recommendations.

**CERTIFICATION OF RESULTS OF ELECTION**

It is hereby certified that a majority of the valid ballots have not been cast for Retail Clerks and Store Employees Union Local 1361 a/w U.F.C.W.—AFL-CIO-CLC, 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.

CHAIRMAN FANNING, dissenting:

For the reasons stated in my dissent in *Wahl Clipper Corporation*, 195 NLRB 634, 636-638 (1972), I would not adopt the Regional Director's recommendation that the challenges to the ballots of Samuel Fink and Ralph Werner be sustained. As I emphasized in *Wahl Clipper, supra*, the issue which should be considered by the Board in cases such as this is whether replaced strikers have a reasonable expectancy of future employment. Inasmuch as the Regional Director failed to consider this issue, I would remand this case for a determination of this question.

<sup>1</sup> The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: eight votes for, and eight against, the Union; there were two challenged ballots.

**APPENDIX**

The Employer challenged the ballots of *Samuel Fink* and *Ralph Werner* on the ground that they were not employed during the eligibility period. The facts with respect to the challenged voters are undisputed. The Union

has represented a unit of Sales Associates at the Employer's Whitehall, Pennsylvania facility for some time and the parties have entered into a series of collective bargaining agreements, the last such contract having expired July 10, 1979. During this time, the Union has also represented a separate unit of Warehouse Associates at the same facility under separate collective bargaining agreements. The Labor agreement covering the Warehouse Associates expired on August 14, 1977. After negotiations to reach a new agreement failed, the Warehouse Associates commenced a strike on September 17, 1977. Thirteen Sales Associates scheduled to work that day declined to cross the picket line established by the striking Warehouse Associates and did not report to work. Thereafter, the Employer urged the Sales Associates honoring the picket line to return to work, contending that their work stoppage was prohibited by the no-strike clause in their contract. On September 19, 1977, the Employer advised the employees and the Union that it intended to hire permanent replacements for the Sales Associates who had not returned to work.

Prior to October 15, 1977, the Employer hired eight permanent replacements. On October 15, the thirteen Sales Associates who had declined to cross the Warehouse Associate's picket line since September 17, 1977, sought to return to work. The Employer then reinstated three Sales Associates to their prior positions. The remaining Sales Associates were placed on a preferential hiring list. Of the ten Sales Associates placed on the list only three remain as of this date. The others were either offered reinstatement or affirmatively severed their employment with the Company. The last two offers of recall from the preferential hiring list occurred in February 1979. *Samuel Fink* and *Ralph Werner* are still on the preferential recall list.

The Employer contends that Fink and Werner must be viewed as replaced economic strikers whose eligibility to vote in an election is restricted to a 12-month period following the commencement of the strike, in accordance with Section 9(c)(3) of the Act. The Union argues that the eligibility of "sympathy" strikers is not the same as that of economic strikers, and that Fink and Werner are eligible to vote based upon a reasonable expectancy that they will be recalled to their former positions.

The Board has held that employees respecting the picket line of employees engaged in an economic strike,<sup>1</sup> where the picket line was located at the Employer's own place of work, have the same status as the strikers with whom they sympathize. *American Telephone & Telegraph Co.*, 231 NLRB 556; *Southern Greyhound Lines*, 169 NLRB 627; *Canada Dry Corporation*, 154 NLRB 1763. In such circumstances, where the activities of those striking in sympathy with economic strikers were found to be protected, the Board has viewed sympathy strikers to be in a position "equivalent" to that of the economic strikers they support. *Southern Greyhound Lines, supra*.

As noted earlier, the sympathy strike of the Sales Associates continued only until October 15, 1977, at which time they sought to return to work and those who were

<sup>1</sup> Neither of the parties to this proceeding has contended that the primary dispute was other than economic in nature.

not immediately reinstated were placed on a preferential hiring list. Section 9(c)(3) of the Act provides that replaced economic strikers remain eligible to vote in an election conducted within a 12-month period following the commencement of the strike. *Tractor Supply Co.*, 235 NLRB No. 53; *L.E.M., Inc. d/b/a Southwest Engraving Co. and Towell Printing Co.*, 198 NLRB 694. However, replaced strikers are not eligible to vote in an election

held more than 12 months after the commencement of an economic strike, even if they are entitled to reinstatement after the departure of the replacements. *Wahl Clipper Corporation*, 195 NLRB 634. As the strike herein commenced over two years prior to the date of the election, I find that replaced strikers Samuel Fink and Ralph Werner were ineligible to vote.