

Ohio Poly Corporation and District Lodge 79 of the International Association of Machinists and Aerospace Workers, AFL-CIO. Case 8-AC-102

October 16, 1979

DECISION ON REVIEW AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND PENELLO

On March 7, 1979, the Regional Director for Region 8 issued his Decision and Order Amending Certification in the above-entitled proceeding, in which he granted Petitioner's request and amended the Certification of Representative issued in Case 8-RC-11217 by substituting "District Lodge 79 of the International Association of Machinists and Aerospace Workers, AFL-CIO" for "Ohio Poly Corp. Employees Independent Union." Thereafter, in accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review, in which it contended, *inter alia*, that officially reported Board precedent requires that the petition be dismissed and the question of representation raised herein be resolved only by a Board-conducted election.

By telegraphic order dated April 24, 1979, the National Labor Relations Board (Member Murphy dissenting) granted the Employer's request for review. Thereafter, the Board received a timely brief on review from the Employer and a submission from the Petitioner which was untimely and accordingly returned.

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.

The Board has considered the entire record in this case with respect to the issues under review¹ and makes the following findings:

The issue in this case is whether an affiliation vote should be honored where certain employees in the unit were not eligible for membership in the incumbent union and thus were not eligible to vote on the question of affiliation with another union, but their number was insufficient to affect the results of the affiliation vote.

The operative facts can be briefly stated:

Ohio Poly Corp. Employees Independent Union (herein the Independent) has represented the Em-

ployer's employees since 1974 and was certified as the representative of the production and maintenance employees in early 1978.² During a strike in December 1978, the membership voted 27-3 to affiliate with District Lodge 79 of the International Association of Machinists and Aerospace Workers, AFL-CIO. At the time of the affiliation vote, the bargaining unit contained 65 employees, of whom 44 were members of the Independent. The remaining 21 were either willingly nonmembers, probationary employees who could be nonvoting members until the end of their 90-day probationary period, or maintenance employees who, under the Independent's constitution and by-laws, were excluded from membership. There was no evidence of record to indicate that any employees, either member or nonmember, voiced any objection to the entire affiliation vote process. Although one or two probationary employees attended the December 22, 1978, meeting, at which the affiliation vote was conducted, no probationary employee requested permission to vote.

The Regional Director granted the requested amendment, noting that the nonmembers were insufficient in number to change the outcome of the vote and that there was no evidence that any employees objected to the procedures or that any nonmember employee was specifically refused the right to vote. Under these circumstances, the Regional Director held that the exclusion of nonmembers from the affiliation vote was not disqualifying under the recent *Amoco* decision.³

While recognizing that the majority in *Amoco* held that affiliation votes limited to union members may be valid under some circumstances, the Employer argues in its request for review that this case differs substantially from the facts in that case and comes within its express reservations. In that case, a plurality of Chairman Fanning and Member Murphy stated that:

Where the nonmembers have not unwillingly been relegated to the status of onlookers because the membership ranks have been closed to them, we do not find their exclusion from an affiliation vote disqualifying.⁴

In this case all employees did not have the right to membership or the right to participate in the affiliation vote procedure; maintenance employees were ineligible in all respects.

² The certification followed a Stipulation for Certification Upon Consent Election in Case 8-RC-11217. The election was held during the term of a contract entered into on December 2, 1975, effective until December 2, 1978, and yearly thereafter unless either party gave written notice of desire to amend, modify, or terminate.

³ *Amoco Production Company*, 239 NLRB 1195 (1979) (Members Jenkins and Penello, dissenting separately).

⁴ *Id.* at 1196.

¹ Specifically, the issue of the validity of "members-only" union affiliation elections under the circumstances herein. The request for review is hereby denied as to all other issues raised, except as noted for Member Penello in fn. 6.

As noted above, the Board agrees that the issue in this case is the effect to be given a members-only vote for affiliation when some employees were excluded from membership, but disagrees on the consequences to be given that fact. However, this fact results in a majority of the Board members who would, for different reasons, refuse to amend the Independent's certification to reflect the affiliation vote and who would, instead, dismiss the petition. Chairman Fanning would do so because he finds invalid a members-only affiliation vote where a substantial number of employees in the bargaining unit have been excluded from membership not by choice or lack of tenure, but by the union's constitution and bylaws. Chairman Fanning notes that here, because of union-imposed restrictions, the maintenance employees have been permanently denied the opportunity to become members and participate in the affairs of the Independent.⁵ In his opinion, the minimum prerequisite for the Board's honoring a members-only affiliation vote is that the employees affected thereby have an opportunity at some point in time to become members and obtain voting rights. Thus, although Chairman Fanning is reluctant to intrude upon a basically internal

⁵ Thus, Chairman Fanning deems the situation surrounding the maintenance employees' exclusion to be significantly different from that of the probationary employees. Because of their status, probationary employees may be ineligible for membership until their probation ends but, unlike the maintenance employees herein, they eventually have an opportunity to obtain membership and voting rights. Normally, Chairman Fanning would not find that the exclusion of probationary employees, whose disenfranchisement is temporary and frequently pursuant to a lack of seniority as set forth in a collective-bargaining agreement, invalidates a members-only union affiliation vote. See *Bear Archery, Division of Victor Comptometer Corporation*, 223 NLRB 1169 (1976).

union matter, he would not find valid the affiliation vote herein. Member Jenkins would not find any members-only vote valid for the reasons he first enunciated in his dissent in *North Electric Company*, 165 NLRB 942, 944 (1967), most recently explicated at length in his dissent in part in *Providence Medical Center*, 243 NLRB 714, 715-717 (1979). Member Penello would apply the principles set forth in *American Bridge Division, United States Steel Corporation v. N.L.R.B.*,⁶ inasmuch as the affiliation sought here of an independent local union with an international would result in a change in the identity of the employees' bargaining representative. Thus, in addition to finding the members-only vote invalid for the reasons set forth by Member Jenkins, Member Penello would find that this case involves a question concerning representation which can only be resolved by a Board-conducted election. See particularly his dissent in part in *Providence Medical Center, supra* at 717-719, in which he fully articulated his position on affiliation votes.

Accordingly, as a majority of the Board agree to the result, we shall dismiss the petition.

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.

⁶ 457 F.2d 660 (3d Cir. 1972). See also Member Penello's concurring opinion in *Jasper Seating Company*, 231 NLRB 1025, 1026-28 (1977) (Chairman Fanning and Member Murphy dissenting). Member Penello dissents from the denial of the Employer's request for reconsideration by the Board of its position on the *American Bridge* doctrine.