

Princeton Refinery, Inc. and Oil, Chemical And Atomic Workers International Union, AFL-CIO
Petitioner. Case 25-RC-7012

August 9, 1979

DECISION AND DIRECTION

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

Pursuant to a Stipulation for Certification Upon Consent Election approved on November 24, 1978, an election by secret ballot was conducted on December 15, 1978, under the direction and supervision of the Regional Director for Region 25, among the employees in the stipulated unit. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that, of approximately 16 eligible voters, 16 cast ballots, of which 8 were for, and 5 were against, the Petitioner; there were 3 challenged ballots, a number sufficient to affect the results. Thereafter, the Employer and the Petitioner, respectively, timely filed objections to the election.

In accordance with the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, the Acting Regional Director conducted an investigation and on January 11, 1979, issued and duly served on the parties his Report on Objections to Conduct Affecting Results of Election, Challenged Ballots, Recommendations to the Board, Order Directing Hearing, and Notice of Hearing. In his report the Acting Regional Director recommended that the challenge to the ballot of Jack E. Erwin and Employer's Objection 3 be overruled, and that Erwin's ballot be opened and counted in the event that the other two challenged voters are found eligible. Further, the Acting Regional Director ordered that a hearing be conducted to resolve the challenges to the ballots of Eldon Lomas and Jim McCorkle and to resolve the issues raised by the Employer's Objections 1 and 2 and the Petitioner's objection. On January 29, 1979, the Employer filed exceptions to the Acting Regional Director's report on objections and challenges. On February 5, 1979, the Board denied the Employer's exceptions as lacking in merit¹ and ordered that the issues raised by the remaining two challenges and objections be processed pursuant to the Acting Regional Director's order and notice of hearing.

Accordingly, a hearing was conducted on February 8, 1979, before Hearing Officer Otto P. Witt. All parties participated and were given full opportunity to

¹ In the absence of exceptions thereto, the Board adopted, *pro forma*, the Acting Regional Director's recommendations with respect to the challenge to the ballot of Jack E. Erwin and the Employer's Objection 3.

examine and cross-examine witnesses and to introduce evidence bearing on the issues. On February 22 and 23, 1979, the Hearing Officer issued and duly served on the parties his report and errata to the report, respectively. In his report he recommended that the Petitioner's objection be overruled; that challenges to the ballots of Eldon Lomas and Jim McCorkle be overruled; and that in the event that the Petitioner receives a majority of the votes cast after opening and counting the ballots of McCorkle, Lomas, and Erwin the Employer's Objections 1 and 2 be sustained, the election be set aside, and a new election conducted; if, however, the Petitioner does not receive a majority of the votes cast, that the Board certify the results of the election. The Petitioner timely filed exceptions to the Hearing Officer's report.

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.

Upon the entire record in this case the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated and we find that all production and maintenance employees employed by the Employer at its Princeton, Indiana, facility including all truckdrivers; but excluding all office clerical employees, all professional employees, and all guards and supervisors as defined in the Act, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. The Board has reviewed the rulings made by the Hearing Officer at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Hearing Officer's report, the Petitioner's exceptions, and the entire record in the case and hereby adopts the Hearing Officer's recommendations but only to the extent that the Petitioner's objection be overruled and that the challenges to the ballots of Eldon Lomas and Jim McCorkle be overruled and that their ballots be opened and counted. We do not, however, agree with the Hearing Officer's recommendations that the Employer's Objections 1 and 2 be sustained, the election be set aside, and a new election ordered if the Petitioner receives a majority of the votes cast after counting the ballots of McCorkle, Lomas, and Erwin. Rather, we find that the Employer's Objections 1 and

2 have no merit and shall overrule them and direct that the Regional Director issue an appropriate certification after opening and counting the ballots of McCorkle, Lomas, and Erwin and serving on the parties a revised tally of ballots.

The Employer's Objections 1 and 2 involve two separate conversations between the Petitioner's observer, Carl Vogel, and Jack Erwin, a challenged voter. In the first conversation Vogel allegedly said to Erwin, in response to the latter's query as to why his ballot was being challenged, that "its the same thing as always going on . . . same problem: Musgrave [referring to the Employer's president]." In the second conversation Erwin, in the words of the Hearing Officer, asked Vogel "if he had wasted his time going to the union meetings." In response to this question Vogel told Erwin that he had not wasted his time.

With respect to the first conversation the Hearing Officer found that there was "a serious question as to whether this conversation occurred before or after Erwin voted" but, nevertheless, concluded that: (1) the response by Vogel to Erwin's query as to why his ballot was being challenged was uttered merely to inform Erwin that his ballot had been challenged by the Employer; (2) Vogel's response to Erwin's question did not amount to electioneering, and the conversation was not a "prolonged" one within the meaning of the Board's *Milchem* rule;² and (3) it was therefore irrelevant whether the conversation had occurred before or after Erwin voted.

With regard to the second conversation the Hearing Officer found that it took place before Erwin had voted, that it was not a "prolonged" conversation, but that Vogel's negative response to Erwin's question as

to whether he had wasted his time by attending the union meetings amounted to electioneering within the meaning of the Board's *Milchem* rule.

We find that neither conversation alone nor both conversations when considered together constitutes a "prolonged" or "sustained" conversation within the meaning of the Board's *Milchem* rule.³ As stated by the Board in *Milchem, supra* at 363:

[T]his does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election. We will be guided by the maxim that "the law does not concern itself with trifles."

Milchem was designed to prevent last-minute electioneering in the immediate vicinity of the polls. The brief exchanges here, both resulting from questions initiated by the voter, in no way constitute election campaigning and are trifling in substance. Accordingly, we overrule the Employer's Objections 1 and 2.

DIRECTION

It is hereby directed that the Regional Director for Region 25 shall, pursuant to the Board's Rules and Regulations, Series 8, as amended, within 10 days from the date of this Decision and Direction, open and count the ballots of Jack E. Erwin, Eldon Lomas, and Jim McCorkle and thereafter prepare and cause to be served on the parties a revised tally of ballots and thereafter issue the appropriate certification.

IT IS HEREBY FURTHER DIRECTED that the instant proceeding be, and it hereby is, remanded the Regional Director for Region 25 for the purpose of taking the actions set forth above.

² See *Milchem, Inc.*, 170 NLRB 362 (1968).

³ See *Resins, Solvents & Varnishes Corp.*, 227 NLRB 959 (1977).