

**Sewell Plastics, Inc. and Glenn E. Teague, Jr., and
Glass Bottle Blowers Association of the United
States and Canada, Local Union #248.** Case 11-
RD-265

April 16, 1979

DECISION AND DIRECTION

BY CHAIRMAN FANNING AND MEMBERS PENELLO
AND MURPHY

Pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted in this case on November 16, 1977. The tally was 44 for, and 35 against the Union; and there were 10 challenged ballots. Thereafter, the Employer filed timely objections to conduct affecting the results of the election and, on January 5, 1978, the Regional Director issued a Report on Objections and Challenges. The Regional Director recommended that the objections be overruled in their entirety; the challenge to the ballot of King be sustained; the challenges to five ballots (those of Chapman, Davis, Harrison, Hoss, and McGraw) be overruled and the ballots counted, as agreed to by the parties; and a ruling on the four remaining challenges which raise a supervisory issue concerning Steele, Gilchrist, Parker, and Ratliff be deferred until after counting of the five ballots as to which challenges are overruled, and a hearing conducted on them only if they then appear to be determinative of the election. On January 27, 1978, the Employer filed timely exceptions to the Regional Director's report and a brief. The Union filed a statement in support of the Regional Director's report.

Upon previous consideration, the Board decided that one objection, Objection 13, raised issues warranting a hearing. By Order dated June 22, 1978, the Board directed a hearing on that objection and deferred further action. A hearing was conducted on Objection 13 and July 27, 1978, and the Hearing Officer on October 12, 1978, issued a report recommending that the election be set aside. The Union filed timely exceptions and a brief.

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 reviewed the entire record in light of the exceptions to the reports of the Regional Director and the Hearing Officer, and the briefs. Except with respect to Objection 13, we adopt the Regional Director's findings and recommendations with re-

spect to overruling Employer's objections,¹ sustaining the challenge to the ballot of King, overruling the challenges to the ballots of Chapman, Davis, Harrison, Hoss, and McGraw, and deferring determination of the challenges to the ballots of Steele, Gilchrist, Parker, and Ratliff. With respect to Objection 13, we adopt the Hearing Officer's credibility resolutions and fact findings but reject the recommendation that the election be set aside.

Essentially, the Hearing Officer recommended that the election be set aside because two observers testified that during the election they could see how a substantial number of ballots were marked.² The individual RD petitioner, who was his own observer, testified that he could see the markings on certain ballots when voters pushed the ballots into the ballot box. He identified several voters whose ballots he was able to read, but stated he told no one except, after the election, the company attorney and the Board attorney investigating the election objections, how individuals voted. The Employer's observer also testified that he could see how some ballots were marked as voters deposited them in the box.³ He further testified that between the two voting sessions he told a company supervisor that he was able to read some ballots; and he stated that he may have told some people how individuals voted. Neither observer told the Board agents handling the election that markings on ballots could be seen. Apparently the voters were unaware that observers could see how ballots were marked.

In these circumstances we see no reason to set aside the election. Any possible impairment of the secrecy of the ballot could not have affected the outcome of the election or intimidated the voters in making their choice as to representation.⁴ The Union was not involved in any misconduct affecting the secrecy of the ballot, and the two observers and company supervisor, who were aware that marked ballots could be read, did not inform the Board agents of the problem at the election. Indeed, they made no objection concerning it until the election was over and the ballots counted.

¹ In adopting the Regional Director's recommendations, Chairman Fanning does not rely on *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), cited by the Regional Director as an additional reason for overruling Objections 9 and 15. See *General Knit of California, Inc.*, 239 NLRB 619 (1978), in which a majority of the Board, Members Penello and Murphy separately dissenting, overruled the *Shopping Kart* decision. Member Penello relies upon *Shopping Kart*. Member Murphy relies upon her concurring opinion in *Shopping Kart*.

² The other irregularities referred to by the Hearing Officer were of a minor nature.

³ The Union's observer, who was located in a different position with respect to the ballot box than were the other two observers, testified that she could not see how ballots were marked.

⁴ *Imperial Reed & Rattan Furniture Co.*, 118 NLRB 911 (1957), and *The Royal Lumber Company*, 118 NLRB 1015 (1957), are not apposite herein, because they involved voting arrangements which could have given voters the impression they were observed as they voted.

As we find no reason to set aside the election, we shall direct the Regional Director to count the five ballots, the challenges to which have been overruled, and to prepare and furnish the parties a revised tally of ballots. If the tally shows that the Union has received a majority of the ballots cast, the Regional Director shall issue a certification of representative. In the event the election is not determined by these five ballots, the Regional Director shall conduct a hearing on the supervisory issue raised concerning the challenged ballots of Steele, Gilchrist, Parker, and Ratliff, and resolve those remaining 4 challenges.

DIRECTION

It is hereby ordered that, as part of the investigation to ascertain a representative for the purposes of collective bargaining with the Employer, the Regional Director for Region 11, pursuant to the Board's Rules and Regulations, within 10 days from the date of this Decision and Direction, shall open and count the ballots of Melvin Chapman, Faye Davis, Marcene Harrison, Christian Hoss, and Cindy McGraw, and shall prepare and cause to be served on the parties a revised tally of ballots including the count of said ballots. If the revised tally shows that the Union has received a majority of the ballots cast,

the Regional Director is hereby ordered to issue the appropriate certification of representative.

IT IS FURTHER DIRECTED that in the event the revised tally of ballots does not determine the results of the election, and the remaining ballots Allen Steele, Robert Gilchrist, Andrew Parker, and James Ratliff are determinative of the results, a hearing be held before a Hearing Officer, to be designated by the Regional Director, for the purpose of taking evidence with respect to the issue of whether Steele, Gilchrist, Parker, and Ratliff are supervisors as defined in the Act. The Hearing Officer designated for the purpose of conducting such a hearing shall prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the issues. Within 10 days from the date of issuance of such report either party may file with the Board in Washington, D.C., eight copies of exceptions thereto. Immediately upon filing such exceptions the parties filing the same shall serve a copy with the Regional Director. If no exceptions are filed, the Board will adopt the recommendations of the Hearing Officer.

IT IS FURTHER DIRECTED that the case be referred to the Regional Director for the aforementioned purposes, including the conduct of a hearing if necessary, and the Regional Director is hereby authorized to issue notice thereof.