

**Allstate Manufacturing Co., Inc. and International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, Petitioner. Case 25-RC-6711**

May 17, 1978

**DECISION AND ORDER DIRECTING REGIONAL DIRECTOR TO OPEN AND COUNT CHALLENGED BALLOT**

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 the determinative challenge in an election held October 31, 1977,<sup>1</sup> and the Hearing Officer's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs and hereby adopts the Hearing Officer's findings and recommendations except as modified below.<sup>2</sup>

The Hearing Officer recommended that the Employer's challenge to the ballot of Thelma Grassic, a probationary employee who had been laid off prior to the election, be overruled and that her ballot be opened and counted. His recommendation was based on his conclusion that Grassic had a reasonable expectation of recall at the time of the election. We agree with the Hearing Officer's recommendation, but reach this result relying solely on the following:

Allstate Manufacturing Co., Inc. (hereinafter the Employer), is engaged in the business of reconditioning used vending machines at its Terre Haute, Indiana, facility. On August 17, 1977,<sup>3</sup> Thelma Grassic was hired by the Employer. At the end of August or beginning of September, Plant Manager Harold Fox met with five probationary employees, including

<sup>1</sup> The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 35 for, and 35 against, the Petitioner; there was 1 challenged ballot.

<sup>2</sup> The Employer asserts that the Hearing Officer's resolutions of credibility, findings of fact, and conclusions of law are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the Hearing Officer resolved important factual conflicts in favor of the Petitioner's witnesses. As the Supreme Court stated in *N.L.R.B. v. Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, it is the Board's established policy not to overrule a Hearing Officer's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *The Coca-Cola Bottling Company of Memphis*, 132 NLRB 481, 483 (1961); *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing his findings.

<sup>3</sup> All dates hereinafter are for the year 1977 unless otherwise noted.

Grassic, and informed them that, due to a decrease in work resulting from a decline in the shipment of machines to be reconditioned from a major customer, they were going to be "permanently laid off" as of September 1. At this meeting, however, at least one employee, Kevin Pine, was told in the presence of the other employees to keep in contact with the plant. At this time, a notice was also posted on the bulletin board indicating that the probationary employees affected would be terminated.

Consistent with its statement to Pine, approximately 3 weeks later, the Employer contacted two of the above employees, Pine and Mike McCoy, and offered them work. McCoy returned on September 28, while Pine returned on October 24 after failing to hear affirmatively about a job elsewhere. While McCoy completed an application for employment upon his return, Pine did not and reported directly to the line and began working. On October 27, a few days after Pine returned and prior to the election of October 31, Grassic called Plant Manager Fox, and in answer to her request for work was told that there was "nothing available."

Subsequent to the election, Pine was called to the office and was informed for the first time that he had been a new hire on October 24.

The facts, as set out above, support the Hearing Officer's conclusion that Grassic was eligible to vote. As the Hearing Officer correctly stated, the Board has found that the reasonableness of a laid-off employee's expectation of recall is dependent upon objective factors, including the past experience of the employer, the employer's future plans, and the circumstances of the layoff, including what the employees were told as to the likelihood of recall.<sup>4</sup>

The Employer asserts that it does not recall laid-off workers and that Pine and McCoy were hired and not recalled. Further, it alleges that the two above-named employees were rehired based on their exceptional and meritorious work records, in accordance with the Employer's past practice. The Employer argues that, as Grassic had a poor work record, she would never have been rehired and therefore could not have had such an expectancy.

In the instant case the Employer had no prior significant layoff which could be used as a guide to determine its policy regarding the recall of employees. However, in accordance with the Hearing Officer's finding, the credited evidence clearly shows that Pine and McCoy were recalled and not rehired after their "permanent" layoff. The Employer's "new hire" position appears to have been one arrived at after the election and its challenge to Grassic's ballot. Further, contrary to its repeated claim that the supe-

<sup>4</sup> *D. H. Farms Co.*, 206 NLRB 111, 113 (1973).

rior work performances of Pine and McCoy accounted for their reemployment, there is no credible evidence in the record supporting such an assertion, or that Grassic's performance was poor. There were, in fact, no references to work performance in any of the three employees' folders. Moreover, McCoy's employment record was filled with notices for repeated absences and tardiness.

Further, we are not convinced that the decline in the orders from one of the Employer's major customers, while economic justification for the layoff, was permanent at the time of the election. In addition, a sampling of the Employer's billing records, the only evidence offered, does not provide sufficient support for the Employer's position of an overall business decline.<sup>5</sup>

Finally, regarding the circumstances surrounding the layoff, as stated above, at least one employee had been told by Plant Manager Fox to keep in touch with the Company subsequent to being laid off. The

fact that two of the five employees laid off on September 1 were contacted and asked to return to work within a month thereafter lends credence to Pine's assertion that this comment was in fact directed to all five of the employees. It also undermines the Employer's characterization of the layoff as a "permanent" one.

Accordingly, based on the above reasons, we find that at the time of the election Thelma Grassic had a reasonable expectation of reemployment. We shall therefore direct the Regional Director to open and count her ballot, to prepare a revised tally of ballots, and to issue the appropriate certification.

#### ORDER

It is hereby ordered that the Regional Director for Region 25 shall, within 10 days from the date of this Decision, open and count the ballot of Thelma Grassic and thereafter prepare and serve on the parties a revised tally of ballots, including therein the count of said ballot, and take such further action as may be necessary in accordance with this Decision.

<sup>5</sup> *D. H. Farms, supra* at 112.