

Tractor Supply Co. and Robert A. Rinker, Thomas M. Ropa, Patricia A. Richardson and Gayle M. Marshall, Petitioners, and Retail Clerks Union Local No. 10, Chartered by Retail Clerks International Association, AFL-CIO. Case 25-RD-530

March 20, 1978

DECISION, DIRECTION, AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND MURPHY

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 objections to an election held August 19, 1977,¹ challenged ballots voted in said election, and the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief and hereby adopts the Regional Director's findings and recommendations.

The Employer in its exceptions to the Regional Director's "Report on Objections to Conduct Affecting Results of Election and Challenged Ballots, Recommendations to the Board, and Order Directing Hearing," maintained, in part, that challenged voters Bojrab, Gibson, and Holley were ineligible to vote since they were former economic strikers who, although they had made unconditional offers to return to work, had not been reinstated at the time of the election. In support thereof it cited *The Martin Bros. Container & Timber Products Corp.*, 127 NLRB 1086 (1960) (and several other cases² which cited *Martin Bros.*), for the proposition that former economic strikers who have been replaced are not employees entitled to vote in an election subsequent to the strike even though the election is within 12 months³ of the commencement of the strike.

We note, however, that *Martin Brothers* was modified in *L.E.M., Inc., d/b/a Southwest Engraving Co. and Towell Printing Co.*, 198 NLRB 694 (1972),⁴ where the Board, in pertinent part, adopted the Trial Examiner's finding that replaced former economic strikers were eligible to vote in an election conducted within a 12-month period following commencement

¹ The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was seven for, and nine against, the Petitioner. There were four challenged ballots.

² *Wagner Electric Corp.*, 127 NLRB 1082 (1960); *Canton Sterilized Wiping Cloth Company*, 127 NLRB 1083 (1960).

³ See Sec. 9(c)(3) of the Act which provides:

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes

of the strike. The Trial Examiner discussed Section 9(c)(3) of the Act as well as several post *Martin* decisions⁵ and concluded after extensive discussion (198 NLRB at 705):

Accordingly, I find on the basis of *Pioneer Flour Mills* and *Laidlaw* and the Supreme Court's holding in *Fleetwood Trailer* that the *Martin Brothers* case has been modified to the extent that the bargaining unit consists of economic strikers, whether on strike or not, as well as strike replacements and nonstrikers. I further find that it is of no consequence that the strike had terminated so long as the election was conducted within a 12-month period following the commencement of the strike.

As stated, the Board agreed with the Trial Examiner for the reasons given by him.

The Employer further urges, however, that *Southwest Engraving, supra*, has itself been at least impliedly modified by the Board's decision in *Eck Miller Transportation Corporation*, 211 NLRB 251 (1974). The relevant issue in *Eck Miller*, however, was whether certain truckdrivers whose votes had been challenged in an election had been economic strikers and, if so, whether there had been affirmative action prior to the election, such as termination for valid economic reasons, which would have brought their economic striker status to an end. A hearing was directed for the purpose of determining these issues. In reaching this result, the Board stated, in dictum, that *Laidlaw* was inapplicable to the *Eck Miller* facts since *Laidlaw* arose in an unfair labor practice context and was concerned with the entitlement of economic strikers to jobs when they become available rather than with the voting eligibility of economic strikers which was governed by Section 9(c)(3) of the Act.

It is obvious, however, that the issue in *Eck Miller* is clearly distinguishable from the issue herein of whether former economic strikers who have unconditionally offered to return to work are entitled to vote in an election within 12 months from the commencement of the strike. The Board thus in *Eck Miller* did not intend to modify the holding of *Southwest Engraving* that such employees are indeed eligible

and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

⁴ Chairman Fanning and Member Jenkins note that their dissent in *Southwest Engraving* was not related to the instant issue.

⁵ *C. H. Guenther & Son, Inc., d/b/a Pioneer Flour Mills*, 174 NLRB 1202 (1969), enfd. 427 F.2d 983 (C.A. 5, 1970); *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967); *The Laidlaw Corporation*, 171 NLRB 1366 (1968).

voters. Therefore, to the extent that the Employer contends that the holding in *Southwest Engraving, supra*, has been modified by the dictum of *Eck Miller, supra*, we disagree and we reaffirm the holding of *Southwest Engraving* and find that the former economic strikers herein who had unconditionally applied for reinstatement were entitled to vote in the election held on August 19, 1977. We shall therefore direct that the ballots of the three remaining challenged voters be opened and counted.

DIRECTION

It is hereby directed that, as part of his investigation to ascertain a representative for the purposes of collective bargaining with the Employer, the Regional Director for Region 25 shall, within 10 days from the date of this Decision open and count the challenged ballots of Charles Bojrab, Alice Gibson, and Patricia Holley, and shall thereafter prepare and cause to be served on the parties a revised tally of ballots, including therein the count of said ballots.⁶ If the revised tally shows that the Union has received a majority of the valid ballots cast, the Regional Director shall issue the appropriate certification.

Should the revised tally of ballots show that the Union has not received a majority of the valid ballots cast, the following Order shall become applicable.

⁶ The parties are in agreement that Theresa Rivir, also challenged at the election, was not an eligible voter.

ORDER

It is hereby ordered that a hearing be held before a Hearing Officer to be designated by the Regional Director for Region 25, for the purpose of receiving evidence to determine the issues raised by the Union's Objection 1(c) and in that portion of the Regional Director's report entitled "Additional Alleged Objectionable Conduct," and that said Regional Director be, and he hereby is, authorized to issue notice thereof.

IT IS FURTHER ORDERED that the Hearing Officer designated for the purpose of conducting the hearing shall prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said 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 the filing of such exceptions, the party filing the same shall serve a copy on the other party, and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Hearing Officer.