

**Yawman & Erbe of California Corp. and District 65,
Distributive Workers of America (Independent),
Petitioner. Case 21-RC-14426**

September 30, 1977

DECISION AND DIRECTION

**BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND MURPHY**

Pursuant to a Decision and Direction of Election issued on January 9, 1976, by the Regional Director for Region 21 of the National Labor Relations Board, an election by secret ballot was directed in a unit found appropriate.¹ Thereafter, the Employer filed a timely request for review of the Regional Director's decision, contending, *inter alia*, that three "swing persons," Murfett, Haight, and Lindburg, should be included in the unit. The Board, in denying the request for review, permitted the swing persons to vote under challenge. Upon the conclusion of the first election, the tally of ballots showed that there were 24 votes for, and 35 against, the Petitioner. There were three challenges. The Petitioner filed objections based on the Employer's alleged threats of plant closure. On March 18, 1976, the Regional Director issued a Supplemental Decision and Order Directing Hearing pursuant to which a hearing was held for the purpose of adducing evidence as to the Petitioner's objections.

On July 14, 1976, the Regional Director issued his Second Supplemental Decision, Order and Direction of Second Election, in which he sustained portions of the Petitioner's objections, set aside the election, and directed a second election. The Employer timely requested review, which request was denied by the Board on August 16, 1976.

The tally of ballots served on the parties at the conclusion of the second election showed that there were 34 votes for and 34 votes against Petitioner, with 8 challenged ballots and 2 ballots declared void. Both the Petitioner and the Employer filed objections.

On December 13, 1976, the Regional Director issued his Third Supplemental Decision, Order and Direction of Third Election, in which he sustained five challenges and overruled three; sustained Petitioner's Objections 4 and 9;² sustained Employer's Objection 7;³ and overruled all other objections. Thereafter, the Employer and the Petitioner, in accordance with Section 102.67 of the National

Labor Relations Board Rules and Regulations, Series 8, as amended, filed timely requests for review of the Regional Director's decision.

On May 10, 1977, by telegraphic order, the Employer's request for review was granted as to the Regional Director's decision to sustain the challenges to the ballots of Murfett, Haight, and Lindburg and to sustain Petitioner's Objection 4. The Petitioner's request for review was granted as to the Regional Director's decision to overrule the challenge to Elizabeth Rupracht's ballot and the Employer's Objection 7. In all other respects, the requests for review were denied as raising no substantial issues warranting review.

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 this case with respect to the issues under review and makes the following findings:

Challenged Ballots

The Petitioner challenged the ballot of Elizabeth Rupracht because she was not employed by the Employer on the date of the second election. The Petitioner claimed that she had gained permanent employment elsewhere, whereas the Employer contended that she was on an authorized leave of absence with a reasonable expectation of future employment, and therefore was eligible to vote. The Regional Director overruled the challenge to her ballot and found her eligible. Rupracht was hired by the Employer in June 1975. Personnel forms indicate that on two occasions she was granted a leave of absence of 120 days, in August 1975 and again in February 1976. The Employer's treasurer stated that he extended Rupracht's leave indefinitely a few weeks before the second election. In view of the foregoing, we find that Rupracht did not have a reasonable expectation of future employment on the date of the second election and was therefore ineligible to vote. We therefore reverse the Regional Director's ruling and sustain the challenge to Rupracht's ballot.

The Petitioner challenged the ballots of Edward Murfett, LaVerne Haight, and Bill Lindburg, contending that they were supervisors and therefore ineligible to vote. The Employer contends that they were production employees and should therefore be

¹ The unit is: All employees of the Employer at its facility located at 201 South Santa Fe Avenue, Los Angeles, California; excluding all office clerical employees, estimator and requisition employees, sales employees, guards, watchmen, and supervisors as defined in the Act.

² Petitioner's Objection 4 was based on the Employer's prepared speech to 10 employees, individually, in the office of the Employer's president and

the statement therein, "I hope you are here a long time." Petitioner's Objection 9 was based on the Employer's massed assembly speech to employees the day before the election.

³ This objection was based on Petitioner's showing of the film "Salt of the Earth" to a gathering of employees.

included in the voting unit. The Regional Director found Murfett, Haight, and Lindburg to be supervisors in his Decision and Direction of Election, dated January 9, 1976, and sustained the challenges to their ballots after concluding that the Employer offered no new evidence to the contrary. The record reveals that the three swing persons, Murfett, Haight, and Lindburg, distribute work orders and are responsible for getting jobs done in their respective departments. They interview job applicants and make recommendations to the Employer as to whether to hire the applicant. New employees report to the swing person for directions and job assignments. The Employer's factory manager, Bill Francis, testified that he hires applicants that Haight recommends.

The swing persons are consulted prior to the granting of a wage increase to an employee. Francis testified that if a swing person's report is not good the wage increase is not granted until the employee's job performance improves. Francis testified further that he sought and subsequently followed Haight's recommendations as to which employees to lay off.

The swing persons have the authority to correct employees' work. They can grant an employee permission to be absent or to leave work early. We find that there is ample basis in the record to support the Regional Director's finding that Murfett, Lindburg, and Haight are supervisors, and we therefore sustain the challenges to their ballots.

Objections

Employer's Objection 7 alleges that the Petitioner appealed to the racial prejudice of the Employer's minority employees by showing them a film entitled "Salt of the Earth."⁴ The Petitioner's western region director, Robert H. Burke, stated that the film was shown to emphasize the benefits of union solidarity. The Regional Director concluded that, in view of the unemployment problems of members of ethnic minority groups in the Los Angeles area and the fact that the Employer's work force is largely "Chicano" while management is "Anglo," the film contained sufficient racially inflammatory material to have affected the free uncoerced atmosphere required for a Board election. He therefore sustained this objection.

The film is set in New Mexico in the early 1950's. It depicts a confrontation between unionized Mexican-American miners and their "Anglo" employer over

safety standards and other working conditions. The miners walked off the job following an accident which resulted in injury to a miner. The strike continued for a period of several months during which time the employer refused to negotiate and used pressure tactics to force the men back to work. The miners picketed the mine and prevented the employer from resuming operations. As the strike continued, the miners' wives demanded equality with the men and a role in making the decisions that were vital to the whole community. After the employer obtained an injunction against picketing by the striking miners, their wives maintained the picket line and continued to prevent the employer from operating. Some of the women were arrested and jailed along with their children. In the end, the employer apparently negotiated a settlement.

We have viewed the film "Salt of the Earth" and are of the opinion that it does not contain racially inflammatory material, such as would inhibit a free uncoerced preelection atmosphere.⁵ We therefore reverse the Regional Director's ruling and dismiss the Employer's Objection 7.⁶

Upon the basis of the foregoing, we hereby remand this proceeding to the Regional Director for Region 21 to take the action set forth below.

DIRECTION

It is hereby directed that, as part of the investigation to ascertain a representative for the purposes of collective bargaining among certain employees of Yawman & Erbe of California Corp., in the unit found appropriate, the Regional Director for Region 21 shall, pursuant to the Board's Rules and Regulations, within 10 days from the date of this Decision and Direction, open and count the ballots of Maria Soto and Margarita Jimenez, and, thereafter, prepare and cause to be served on the parties a revised tally of ballots, including therein the count of said ballots.

In the event that the revised tally of ballots shows that a majority of the valid votes have been cast for the Petitioner, the Regional Director shall issue a Certification of Representative. In the event that said tally shows that a majority of the valid votes have not been cast for the Petitioner, the Regional Director shall set aside the election and conduct a new election, at such time as the Regional Director deems appropriate.

⁴ The film was made in 1953 and directed by Michael Wilson.

⁵ See *Heckethorn Manufacturing Co.*, 208 NLRB 302 (1974), in which we said that the exhibition of the film "And Women Must Weep" by the employer was not a sufficient basis for setting aside the election.

⁶ In view of our disposition of the case, we find it unnecessary to rule on the Petitioner's Objection 4. All other issues have been resolved in our telegraphic order of May 10, 1977.