

tute an appropriate unit. They are in disagreement, however, as to whether the fire watchman and two underground watchmen should be excluded as guards.

The fire watchman is employed above ground protecting the mining property and equipment against fire, theft, and sabotage. He works from approximately 7 p. m. to 3 a. m., when the mine is closed. He is required to punch a watch-clock system periodically when making his rounds. As the fire watchman spends all his time in the performance of guard duties, we shall exclude him from the unit.⁴

The two underground watchmen work underground while the mine is not operating. Approximately 50 percent of their time is devoted to checking seals which prevent the spread of underground fires. The remainder of their time is spent in checking the circuit breakers in the generator house and the operation of the pumps. As these employees do not spend any of their time in the performance of guard duties, we find they are not guards within the meaning of Section 9 (b) (3) of the act and shall include them in the unit.⁵

We find that all production and maintenance employees at the Employer's Beulah, North Dakota, operations, including the underground watchmen, but excluding the fire watchman and all other guards, office and clerical employees, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

[Text of Direction of Election omitted from publication in this volume.]

⁴ *Memphis Cold Storage Warehouse Company, supra.*

⁵ *Georgia Fertilizer Company, 83 NLRB 180.*

WILKENING MANUFACTURING COMPANY and LOCAL 416, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, PETITIONER. *Case No. 4-RC-994. September 6, 1951*

Second Supplemental Decision and Certification of Representatives

On April 27, 1951, pursuant to a Decision and Direction of Election issued by the Board on March 29, 1951,¹ an election by secret ballot was conducted under the direction and supervision of the Regional Director for the Fourth Region, among the employees of the Employer in the unit found appropriate in the decision. The tally of ballots

¹ 93 NLRB 1672.

96 NLRB No. 4.

which was furnished the parties showed that of the 54 valid votes cast, 28 were cast for, and 26 against, the Petitioner. The ballot of 1 voter, Janet Elder, was challenged by the Employer.

On May 1, 1951, the Employer filed objections to the conduct of the election, alleging in substance that two employees, Eleanor M. Lyons and Miriam D. Humphreys, were denied an opportunity to vote in the election. In its objections, the Employer also withdrew its challenge made at the election to the ballot of Elder, and requested that her ballot be opened and counted. On May 28, 1951, the Regional Director issued and served upon the parties his report and recommendations on objections, in which he found that the Employer's objections raised no substantial or material issues, and recommended that the objections be overruled and the Petitioner certified. He made no recommendation as to the challenged ballot cast by Elder, for the reason that her ballot could not, in the light of his findings, affect the results of the election. The Employer timely filed exceptions to the Regional Director's report, and the Petitioner filed a statement in the nature of a supporting brief.

On July 1, 1951, the Board issued a Supplemental Decision and Direction,² which was amended on July 20, 1951,³ and in which it was found that Elder's ballot, the challenge to which had been withdrawn, could affect the results of the election so as to make unnecessary the disposition of the other issues in the case. It accordingly directed the Regional Director to open and count Elder's ballot, and deferred ruling on the remaining issues.

On August 6, 1951, the Regional Director issued and duly served upon the parties a supplemental report and recommendation on objections, in which he stated that Elder's ballot had been inadvertently lost or destroyed. In view of this circumstance, the Regional Director recommended that the Board proceed to a consideration of the other matters raised by the Employer in its objections. The Employer subsequently filed a "comment," urging that a new election be conducted, and the Petitioner filed a brief in support of the Regional Director's original recommendations on objections.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in this case to a three-member panel [Members Houston, Murdock, and Styles].

The Employer in its objections alleged in effect that (1) Humphreys was denied the right to vote because (a) the polls were prematurely closed, and (b) in any event, Humphreys appeared at the polls before the actual counting of the ballots had begun, but was not allowed to vote; and (2) Lyons was deprived of an opportunity to vote because she was informed that she was ineligible to vote.

² 95 NLRB No. 13, not reported in printed volumes of Board Decisions.

³ Unpublished.

Objection 1. The Regional Director found that, immediately before the opening of the polls,⁴ the Employer's personnel manager, Williams, and the Petitioner's business agent, Guench, left the voting area to await the end of the balloting in Williams' office. When the Employer's quitting buzzer sounded, Williams said to Guench, "Well, I guess the election is over—that's the 4:30 buzzer." Both of them thereupon proceeded to the polls where, at the time of their arrival, the Board agent was in the process of sorting and unfolding the ballots. About a minute later Humphreys arrived on the scene. The Employer's election observer, who became aware of her presence "a minute or so" thereafter, asked the Board agent if she could vote. The Board agent checked his watch, which showed the time to be 4:35 p. m., and advised Humphreys that the polls were officially closed.

Humphreys herself was questioned in the course of the Regional Director's investigation. Although stating that she was "pretty sure I got there before 4:30," Humphreys could not remember definitely whether she reached the polls before or after the 4:30 buzzer had sounded. She admitted, however, that when she arrived at the polls, Williams and Guench were there, and that the Board agent was in the process of counting the ballots. The Regional Director concluded that the polls were not prematurely closed and, as noted above, recommended that this objective be overruled.

The Employer excepts to the findings and conclusions of the Regional Director principally on the ground that the Regional Director, in concluding that the polls were not prematurely closed, disregarded additional testimony by Humphreys to the effect that she left her post at 4:25 p. m., according to the time shown by the wall clock, that she walked directly to the polls, a distance of only 150 feet, and that her walk to the polls could not have taken more than a minute. The Employer also indicates in its exceptions that the ballots were not yet being counted when Humphreys arrived at the polls and therefore contends, in effect, that she should have been permitted to vote. We find no merit in these exceptions.

While the Regional Director did not specifically advert in his report to the statements of Humphreys referred to by the Employer, we are not persuaded that this evidence was disregarded. In any event, in arriving at our conclusion we have fully considered those statements and, under all the circumstances, including the fact that the Employer's personnel manager and the Petitioner's business agent stated that they did not arrive at the polls until *after* 4:30 p. m., and

⁴ The balloting was scheduled to take place between 4 and 4:30 p m

Humphreys' admission that these individuals were at the polls at the time of her arrival there, we find, as did the Regional Director, that the polls were not prematurely closed.

As to the Employer's contention that Humphreys should nevertheless have been permitted to vote because she reached the polls before the actual counting of the ballots was begun, we are of the opinion that, even assuming that the ballots were not being counted at the time in question, the Board agent did not abuse his discretion by refusing to reopen the polls to permit Humphreys to vote. Accordingly, we shall overrule this objection.

Objection 2. The following are the significant circumstances with respect to Lyons:⁵

In a preelection conference called by Board Agent John W. Kelly on April 23, 1951, the Employer and the Petitioner agreed that Lyons and Elder were not eligible to vote because they had given notice of their intention to quit at the close of business on April 27, 1951, election day.⁶ On the day of the election Lyons asked Supervisor Braendel why she could not vote and Braendel, after checking with management, advised Lyons that she had been excluded from the eligibility list because of her announced intention to quit. Thereafter, about 5 minutes before the balloting began, the Petitioner raised the question of the voting eligibility of Lyons and Elder with Mark S. Kriebel, the Board agent conducting the election, who ruled that those employees were entitled to vote. Elder was subsequently advised by the Employer of the Board agent's ruling, and voted under challenge, but Lyons was not similarly notified, and did not vote, because "it had not been possible to contact her supervisor in order to pass the word on to her" before the polls closed.

The Employer contends in its exceptions that because of the confusion attending the election, due to the Petitioner's unwarranted delay in obtaining a ruling permitting Lyons and Elder to vote, Lyons was not afforded an opportunity to vote. However, it is clear that the Employer, by entering into the agreement disfranchising Lyons and by later advising Lyons that she could not vote, was in large measure responsible for the very "confusion" about which it now complains. In the circumstances, the Employer is manifestly in no position to assert Lyons' failure to vote as a ground for setting aside the election.⁷ Moreover, here, the Employer is seeking to raise, by means

⁵ The findings of the Regional Director as to Lyons are controverted in certain respects by the Employer. For purposes of this decision, we will assume that the relevant factual matters asserted by the Employer are true.

⁶ Neither Lyons nor Elder is presently in the employ of the Employer.

⁷ Cf. *NAPA New York Warehouse, Inc.*, 75 NLRB 1269. While the Board agent may have been present at the conference where the Employer and the Petitioner agreed that Lyons and Elder were ineligible to vote, it is not contended, and does not appear, that the Board agent was a party to such agreement.

of an *objection*, the question of Lyons' eligibility to vote, where that employee failed to exercise her right to vote subject to challenge. Such objection is thus in the nature of a postelection challenge, a type of challenge which the Board has uniformly rejected.⁸ Accordingly, we find no merit in this objection.

As we have overruled the Employer's objections and as the Petitioner has secured a majority of the valid votes cast in the election, we shall certify the Petitioner as the representative of the employees in the unit heretofore found appropriate in the Board's Decision and Direction of Election.

Certification of Representatives

IT IS HEREBY CERTIFIED that Local 416, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, has been designated and selected by a majority of the employees of the Employer in the unit heretofore found by the Board to be appropriate, as their representative for the purposes of collective bargaining and that, pursuant to Section 9 (a) of the Act, the said organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

⁸ See, e. g., *Halliburton Portland Cement Company*, 92 NLRB 1552.

U. S. PHOSPHORIC PRODUCTS DIVISION, TENNESSEE CORPORATION and
INTERNATIONAL CHEMICAL WORKERS UNION, A. F. OF L., PETITIONER.
Case No. 10-RC-1182. September 6, 1951

Decision and Direction of Election

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Morgan C. Stanford, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.¹

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Houston, Murdock, and Styles].

Upon the entire record in this case, the Board finds:

¹ At the hearing, and in its brief, the Intervenor, U. S. Phosphoric Products Corporation Employees Association, moved to dismiss the petition on grounds relating generally to the existence of a question concerning representation. For reasons stated in paragraph numbered 3, *infra*, the motion is denied.