

mately 21 employees working at Amboy, Washington, in the operation of the log pond and the short line railroad used to transport the logs to the Northern Pacific Railroad. On this record we find that this group constitutes an appropriate bargaining unit.

We find that all employees of Harbor Plywood Corporation employed at its log pond at Amboy, Washington, including those engaged in operation of the short line railroad, but excluding guards 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.

We also find that all employees of Stacel Contracting Co., Inc., Amboy, Washington, including fallers⁷ and truckdrivers, but excluding guards 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.

Also, we find that all employees of Mt. St. Helens Logging Co., Amboy, Washington, including fallers⁸ and truckdrivers, but excluding guards 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.

Because the 1957 logging season has now passed, we shall, in accordance with the Board's usual practice with respect to a seasonal industry, direct that elections be held at or about the time of the employment peak of the next logging season on a date to be determined by the Regional Director among the employees in the appropriate units who are employed during the payroll period immediately preceding the date of issuance of notice of election by the Regional Director.

[The Board dismissed the petition as to Lewis River Logging Co., Pratt Bros., Maurice Anderson, Wisner & Lange, and Ted Wall.]

[Text of Direction of Elections omitted from publication.]

⁷ Including those fallers who in 1957 called themselves "Smith Creek Cutters"

⁸ Including those fallers who in 1957 called themselves "Bear Creek Cutters"

Westlake Plastics Company and Crystal-X Corporation and United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, Petitioner. *Case No. 4-RC-3183. February 3, 1958*

DECISION AND DIRECTION

Pursuant to a stipulation for certification upon consent election entered into by the parties hereto on November 14, 1956, an election by secret ballot was conducted on November 29, 1956, under the direction

and supervision of the Regional Director for the Fourth Region among the employees of the Employer in an appropriate unit. Upon the conclusion of the election a tally of ballots was furnished the parties in accordance with the Rules and Regulations of the Board. The tally of ballots shows that of approximately 61 eligible voters, 57 cast ballots, of which 28 were for the Petitioner, 27 were against the Petitioner, 1 was challenged, and 1 was void.

Thereafter on December 3, 1957, the Employer timely filed objections to the conduct of the election, which objections related solely to the void ballot. On December 28, 1956, the Regional Director issued his report and recommendations on challenged ballot and objections, recommending that the Employer's objections be overruled, and that the challenge be overruled and the challenged ballot be opened and counted. On February 25, 1957, the Board issued an order directing hearing, in which it deferred ruling on the objection to the election and ordered a hearing to resolve the issues raised by the challenge to the ballot of Ralph E. Ferguson, directing that the Trial Examiner designated for the purpose of conducting the hearing should prepare and cause a report to be served on the parties containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the issues. On March 20 and 21, 1957, a hearing was held at Philadelphia, Pennsylvania, before Robert E. Mullin, Trial Examiner. The Employer, the Petitioner, and the General Counsel appeared and participated. Full opportunity was afforded the parties to be heard, to examine, and cross-examine witnesses, to introduce evidence bearing on the issues, and to present oral argument and briefs. On May 31, 1957, the Trial Examiner issued his hearing officer's report and recommendations on objections to election, in which he recommended that the challenge to the ballot of Ralph E. Ferguson be sustained. On June 6, the Petitioner timely filed its exceptions to the hearing officer's report and recommendations on objections to election. The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's report, attached hereto, the exceptions and briefs, and, upon the basis of the entire record in this case, hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the modification noted below.

1. The Trial Examiner found that the Employer and the Petitioner, had expressly agreed, after a discussion of probationary employees by name, that probationary employees, including Ralph E. Ferguson, were to be excluded from eligibility to vote in the election, and that such agreement, under established Board policy, was final and binding on the parties thereto, notwithstanding the fact that the agreement runs counter to the Board's established policy, as expressed in the

National Torch Tip case¹ "that probationary employees are entitled to vote in Board elections."

We disagree. In the *Norris-Thermador* case² the Board carefully reviewed its entire procedure pertaining to the use of eligibility lists in representation elections. The Board concluded:

. . . that where the parties enter into a written and signed agreement which expressly provides that the issues of eligibility resolved therein shall be final and binding upon the parties, the Board will consider such an agreement, and only such an agreement a final determination of the eligibility issues treated therein, *unless it is, in part or in whole, contrary to the Act or established Board policy.* [Emphasis supplied.]

Accordingly, and contrary to the Trial Examiner, we do not accept the parties agreement as determinative of the eligibility of Ferguson. For the Board clearly indicated in its *National Torch Tip* decision³ that with respect to the eligibility of probationary employees, it would apply the rule that all such employees are entitled to vote in Board elections. It follows, therefore, that the parties' agreement is contrary to established Board policy and cannot be controlling as to the eligibility status of Ferguson.⁴ Accordingly, as Ferguson was a probationary employee on the eligibility date and on the date of the election, he was entitled to vote and the challenge to his ballot is overruled. As it appears that Ferguson's vote may affect the results of the election, we shall direct that his ballot be opened and counted with the other ballots.⁵

6. *The void ballot:* In its order directing hearing on the challenged ballot of Ferguson, the Board deferred ruling on the Employer's objections to conduct affecting the result of the election. We turn now to a consideration of this issue. The Employer's single objection involves a ballot which was ruled void by the Regional Director, which ruling was challenged by the Employer's refusal to sign the tally sheet and the tally of ballots, although its observers had signed the certificate of conduct of the election without question.⁶

The ballot in question contains no marking of any kind in the small squares under the words "YES" and "NO" or in the rectangle surrounding these squares. However, at the top of the ballot and slightly

¹ *National Torch Tip Company*, 107 NLRB 1271.

² *Norris-Thermador Corporation*, 119 NLRB 1301.

³ *Supra.*

⁴ See also *O. E. Szekely and Associates, Inc.*, 117 NLRB 42. We do not decide whether in other respects the agreement meets the requirements for a binding and final determination of eligibility matters. But see *Norris-Thermador Corporation, supra.*

⁵ The Employer's motion to vacate the proceedings in the event the challenge to Ferguson's ballot is overruled, is denied for the reasons given by the Trial Examiner in footnote 2 of his report.

⁶ The Regional Director recommended dismissal of the objection on the ground that it was in the nature of a post-election challenge. We find that it was timely made. See *F. J. Stokes Corporation*, 117 NLRB 951.

left of center, above even the dotted lines surrounding all of the printed material appearing on the ballot, is written in script, in lower case letters, the syllable "mo" with a wavy line almost bisecting downwards the third loop of the "m." In its objections the Employer contends that the markings on the rejected ballot clearly convey the attitude and sentiments of the particular employee who made the ballot and that it should be counted. The Employer states that after the election the particular employee who cast the ballot voluntarily identified himself, and on information, the Employer believes investigation would reveal that the employee is illiterate and without education and is incapable of reading or writing. We find no merit in the Employer's objection. Even assuming that the marks, though they be unusual, do not serve to identify the voter, the sense of the markings is by no means unmistakable. The markings themselves do not constitute a word of sense. Though the Board has accepted irregularly marked ballots in the past, it has done so only where the markings clearly indicated the intent of the voter. Here the meaning of the markings is not readily recognizable. Accordingly, as constructions of the markings as a "no union" vote could only rest on conjecture as to the voter's real intentions, even accepting *arguendo*, the fact that he is illiterate and incapable of reading or writing, we find that the ballot is void.⁷ We therefore overrule the objection.⁸

[The Board directed that the Regional Director for the Fourth Region shall, within 10 days from the date of this direction, open and count the ballot of Ralph E. Ferguson, and serve upon the parties a supplemental tally of ballots, and either a certification of representatives or a certification of results of election, as the circumstances may warrant.]

MEMBER FANNING took no part in the consideration of the above Decision and Direction.

⁷ Cf. *Jeffries Banknote Co.*, 116 NLRB 265.

⁸ Member Rodgers, contrary to the holding of the majority, is of the opinion that the ballot in question clearly indicates the intent of the voter. Accordingly, he would count the ballot as a vote against the Petitioner. *Crucible Steel Company of America*, 117 NLRB 1616.

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS TO ELECTION

On November 29, 1956, pursuant to a stipulation for certification upon consent election entered into by the parties hereto, an election by secret ballot was conducted in the above-entitled matter under the direction and supervision of the Regional Director for the Fourth Region, Philadelphia, Pennsylvania.¹ Thereafter, on December 3, 1956, the Employer filed timely objections to the election, alleging *inter alia*, that the challenge to the ballot of Ralph E. Ferguson should be sustained. Following an investigation, the Regional Director, in his report on objections, dated Decem-

¹ The tally of ballots, duly issued and served upon the parties, shows that of approximately 61 eligible voters, 57 cast ballots, 28 of which were for the Petitioner, 27 were against, 1 ballot was challenged and 1 was void.

ber 28, 1956, recommended that the foregoing and all other objections raised by the Employer be dismissed. Upon exceptions to this report filed by the Employer, as well as a brief in support thereof, the Board, on February 25, 1957, issued an order directing that a hearing be held before a Trial Examiner to resolve the issues raised by the challenge to the ballot of Ralph E. Ferguson.

Pursuant to notice, and in conformity with the aforesaid order, a hearing was held at Philadelphia, Pennsylvania, on March 20 to 21, 1957, before the duly designated Trial Examiner acting as hearing officer. The General Counsel, the Employer, and the Petitioner were represented by attorneys. All parties were afforded opportunity to be heard, to examine and cross-examine witnesses, and to introduce relevant evidence bearing on the issues. At the close of the Union's case, upon motion of the Employer, the hearing officer recessed the hearing to await a determination by the Board or the General Counsel on the request of the Employer that it be permitted to call an employee of the Regional Office as a witness. Thereafter, both parties filed petitions for leave to call employee of the Board or General Counsel as witness. On April 9, the General Counsel denied the request of the Union that Field Examiner Thomas J. Walsh be permitted to appear and testify, and on April 15, the General Counsel denied a similar request that the Employer made as to Field Examiner Chester S. Montgomery.

Immediately prior to the recess the parties had stated, on the record, that in the event the request to call any Board employee as a witness was denied they would have nothing further to submit. At the same time the hearing officer ruled that in the event any such application by the Employer, or Petitioner, or both, was denied, the hearing would be closed. Accordingly, on April 16, 1957, and in view of the aforesaid disposition of the petitions by the General Counsel, the Trial Examiner entered an order closing the hearing as of that date. On May 6, 1957, the Employer and the Union submitted able and comprehensive briefs which have been fully considered by the Trial Examiner.²

Upon the entire record in the case, and from my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

A. Introduction

On November 14, 1957, the Employer and the Petitioner executed a stipulation for certification upon consent election. The day before, during a conference held at the Regional Office, the parties agreed on using the pay period ending November 4, as the one for determining eligibility to vote in the forthcoming representation election. Ralph E. Ferguson³ was on the payroll on that date, having been hired October 23, 1957. At the election on November 29, however, Thomas J. Walsh, the Board agent in charge, challenged Ferguson's vote because his name was not on the eligibility list. The Employer contends that this challenge should be sustained because at the time of the conference on November 13, the parties had agreed that since Ferguson was a probationary employee his name should be excluded from the eligibility roster. The Petitioner, on the other hand, denies that any such agreement was made and urges that since Ferguson was an employee on the eligibility date his ballot should be opened and counted.

B. The evidence as to the events in question; conclusions with respect thereto

At the preelection conference on November 13, the Employer was represented by Mr. Archer, its counsel, E. B. Westlake, Jr., president of both companies here

² In its brief, the Employer includes a motion to vacate the stipulation for certification upon consent election, the election, and all subsequent proceedings, in the event the hearing officer concludes that the vote of Ferguson should be counted. Several grounds are urged in support of this motion. All, however, are based upon the assumption that the stipulation was a mere agreement between company and union, that the Board was not a party thereto, and that if the Employer's view does not prevail there could have been no meeting of the minds. Totally ignored in this argument is the fact that, by its terms, the stipulation was entered into subject to the approval of the Regional Director and that once that approval was given, all further procedures were to be in conformity with the Board's Rules and Regulations. It is in accordance with the latter that the election and all subsequent proceedings have been conducted. The Employer's motion, therefore, is totally lacking in merit. It should be, and hereby is, denied.

³ The name "Ralph Lee Ferguson" also appears on some of the exhibits and in portions of the transcript. This refers to the same employee, the correct name being Ralph E. Ferguson.

involved, D. David Dundore, plant manager of Westlake Plastics, and Robert W. Cockrill, plant manager of Crystal-X. The Union was represented by Michael G. Sabol and Gene Tormey, both international representatives, and Lawrence A. Johnson and John F. Blisard, Sr., two employees of the plants here involved. Field Examiner Chester S. Montgomery represented the Regional Office at this meeting. With the exception of Mr. Montgomery, all of the foregoing appeared as witnesses and testified at the hearing before the Trial Examiner.

According to the witnesses for the Employer the following events occurred during this conference:

After various matters, such as the appropriate unit and an eligibility date, had been agreed upon, discussion turned to a consideration of which employees should be on the eligibility list. Mr. Westlake brought to the meeting (1) the plant payrolls; (2) several photostatic copies of the foregoing; and (3) copies of a proposed list of eligible voters. At the outset of the meeting the union representatives were supplied with a copy of the latter and the other copies were used by the Employer's group as well as by Mr. Montgomery in discussing the various names on this list. Agreement was reached as to the supervisory status of several individuals listed thereon. As a result, the two plant managers were eliminated and a line was drawn through each of their names. The same was done with the names of two other employees, Robert Cater and Ernest Kiesel, who had been terminated a few days after November 4. At this point, Mr. Archer asked Dundore whether there were any new employees whose names were not on the proposed eligibility list. The latter replied in the affirmative and named Ferguson and two others, Jerome Davis and Joseph Murphy. Dundore then wrote these names in pencil on one copy of the list. (In evidence as Board's Exhibit No. 2.) Archer added these same names, also in pencil, to the copy which he had. (In evidence as Employer's Exhibit No. 3-C.) Thereafter a discussion arose as to the status of these employees. Both Davis and Murphy had been hired subsequent to November 4 and Ferguson on October 23. Mr. Westlake took the position that all three were still probationary employees and not entitled to vote. After some further discussion of the matter the parties agreed that none of the three should remain on the eligibility list. Mr. Archer then suggested at least three copies of the list should be conformed in accordance with this agreement. Upon making this suggestion, he borrowed a ballpoint pen from one of the union representatives⁴ and crossed out on each of the 3 copies the names of Ferguson, Davis, and Murphy, as well as the names of the 2 employees who had been terminated⁵ and those of the 2 plant managers.⁶ After he had done this, Sabol and Westlake examined the copies and then affixed their signatures to each page of the 4 pages that made up each of the 3 copies. One copy was then given to Mr. Sabol, another was given to Mr. Montgomery (Board's Exhibit No. 2), and the third was retained by Mr. Archer (Employer's Exhibit No. 3). The latter then stated that because of the various markings in pencil and ink on these copies he would have the list retyped and would supply each of the parties with a copy. Archer also advised the conferees that because Mr. Rappoport, general counsel for the Employer, might have some objection from a tax or corporate standpoint to the unit agreed upon, he wanted an opportunity to confer with the latter that afternoon. Mr. Archer further stated that if Mr. Rappoport voiced no objection, he (Archer) would sign the election agreement the next day. In accordance with this commitment, on November 14, Archer executed the stipulation for certification upon consent election. He also supplied to the Regional Office the retyped eligibility list, along with a letter addressed to Field Examiner Montgomery which read, in relevant part, as follows:

I am . . . handing you herewith a revised list of employees of the two corporations eligible to participate in the election, as determined by the payroll list of November 4th. You will wish to compare this clean copy with the material initialed by the Union and by the Companies and presently in your hands.

As agreed, I have communicated with Mr. Sabol's office to the above effect, and I am transmitting to him a duplicate copy of the employee list with copy of this letter.

The foregoing letter, along with the original of the eligibility list to which it refers, appears in the record of this proceeding as Board's Exhibit No. 3. Mr. Sabol

⁴ Mr. Sabol testified that he did not distinctly recall having loaned his pen to the Employer's counsel but conceded that he may have done so.

⁵ Cater and Kiesel.

⁶ Dundore and Cockrill.

conceded that shortly after November 14 he received a copy of this exhibit from Mr. Archer.

All four of the union witnesses denied that at this conference there was any discussion on the subject of probationary employees or any mention of Ferguson. Mr. Sabol further testified that when he signed Board's Exhibit No. 2 and Employer's Exhibit No. 3-C the names of Ferguson, Davis, and Murphy were not on those papers. Mr. Tormey testified to the same effect. Moreover, the union representatives denied that they were given any copies of this list. According to Sabol, he signed only the two complete sets of this roster which are in the record (Board's Exhibit No. 2 and Employer's Exhibit No. 3), and handed them across the table to the company representatives. He conceded that one set was handed to Field Examiner Montgomery within approximately 5 minutes thereafter. He further conceded that this document remained in the possession of the Regional Office from that time until it was produced by the General Counsel at the instant hearing and received in evidence as Board's Exhibit No. 2. This concession is most significant for on that exhibit Ferguson's name, as well as that of Davis and Murphy, appear in pencil and have been inked out in precisely the fashion described in the testimony of the Employer's witnesses. Moreover, the Employer's copy of this document, received in evidence at the hearing as Employer's Exhibit No. 3-C, is an exact duplicate and has the same three names, written in and crossed over in the same manner.

Sabol testified at the hearing that after he signed the lists and handed them across the table, "there was people on the other side of the table were doing markings." This would imply that in the few minutes that elapsed before Board's Exhibit No. 2 was handed to Mr. Montgomery, someone on the Employer's side of the table added the three names in pencil and then crossed them over in ink. Significantly, Mr. Tormey testified that he saw none of this activity which Sabol described in the passage from the transcript quoted above. An examination of Board's Exhibit No. 2 shows no evidence of any such bold and hasty alteration as would have been necessary, if one is to accept Mr. Sabol's inference. His suggestion that immediately after he had signed these documents the Employer's agents, with amazing prescience as to the importance of Ferguson's vote in an election still 2 weeks away, should have immediately set out to alter the documents which Sabol had signed and to do so before his very eyes is, in the opinion of the Trial Examiner, too far fetched to merit any serious consideration. The General Counsel's representative made no effort to refute the Employer's claim that Board's Exhibit No. 2 was unchanged between the moment when Westlake and Sabol signed it and the time it was offered in evidence. As noted earlier, the General Counsel denied a request of the Employer that Field Examiner Montgomery be permitted to testify. Yet the latter was the only disinterested party at the conference in question and he was the only potential witness who did not testify. Under these circumstances, and on the record here, it is my conclusion that Board's Exhibit No. 2 was not changed or altered by the Employer after Sabol and Westlake signed it, that it was almost immediately thereafter given to Mr. Montgomery, that it remained unchanged while in the possession of the Regional Office, and that it was received in evidence at the hearing just as it appeared immediately after it had been when signed by Westlake and Sabol. This conclusion, of course, very substantially corroborates the testimony of both Archer and Westlake. For this reason, and the further fact that their demeanor as witnesses, particularly during a vigorous and extended cross-examination, was convincing evidence of their credibility, I am convinced and find that their testimony is more accurate and reliable than that of the union representatives as to the events which took place at the conference on November 13. Accordingly, I find, on the basis of the foregoing, that the matter of probationary employees was discussed at this meeting and that Ferguson, Davis, and Murphy, by agreement of the Employer and the Petitioner, were taken off the list of eligible voters because they were probationary employees.

According to Mr. Sabol, he first heard of Ferguson at a union meeting held on November 25. He did not, however, communicate with either the Board or the Employer as to Ferguson's not being on the eligibility roster until the morning of the election. Shortly before the polls opened on November 29, a conversation took place at the scene of the election in which Sabol, Westlake, and Field Examiner Walsh participated. According to Sabol, when he arrived at the polling place the field examiner gave him Board's Exhibit No. 3 to examine and in so doing he discovered that Ferguson was not on the list. In response to his question as to the reason for this, Mr. Walsh replied by suggesting that he ask Westlake. When Sabol did so, the latter stated that he would check and then left the area for a few minutes. Sabol testified that when Westlake returned he stated that Ferguson was not on the roster because he was a probationary employee. At this point, Field Examiner

Walsh stated that although Ferguson would not be prohibited from voting, he (Walsh) would challenge his ballot since the employee's name was not on the list. Westlake's testimony as to the foregoing incident did not differ in any substantial or material manner from that of Sabol. He conceded that he had telephoned Mr. Archer to check on Ferguson's eligibility and that after returning to the polling place had raised no further issue as to the matter because the Board agent in charge stated that he would challenge Ferguson's ballot.⁷

One further factual issue remains to be resolved. Westlake testified that the probationary period for new employees was 30 workdays. He further testified that new employees were informed of this policy at the time of hiring, but that no other notice, either orally or in writing, is ever given. He conceded that the only written evidence of such a rule in the plant appears in Petitioner's Exhibit No. 1. This last is a document dated July 27, 1956, and is entitled "Basis for Settlement of Differences." There appears in this only one line on the question in issue here and that reads as follows:

4. Employment probationary period of 30 days.

The Union contends that the only possible construction of the above is 30 *calendar* days rather than 30 *workdays* as Westlake testified. It is certainly true that the Union's interpretation of this sentence is reasonable. However, there is nothing else in the document in which this line appears that supports the Union's interpretation, nor anything else in the record, for that matter. At best the passage is ambiguous, for by itself, it may also be read as support for the Employer's position. Consequently, in view of this fact and Westlake's uncontradicted testimony that the company policy was to require a probationary period of 30 working days, I accept the latter and so find. Since Ferguson had been in the company employ for less than 30 working days on November 29, he was still a probationary employee at the time of the election.

It is true, as the Union contends, that the test usually applied by the Board in determining eligibility is whether the voter was employed in the appropriate unit during the eligibility period and on the date of the election, unless that individual was absent for one of the reasons set out in the Direction of Election, or election agreement. *Barry Controls, Incorporated*, 113 NLRB 26, 27. It is uncontradicted that Ferguson satisfied this test and, further, that his status as a probationary employee did not, of itself, affect his right to vote. *National Torch Tip Company*, 107 NLRB 1271, 1272-1273; *Sheffield Corporation*, 108 NLRB 349, 352.

On the other hand, the Board has a "well established policy of honoring concessions made in the interest of expeditious handling of representation cases in general." *Stanley Aviation Corporation*, 112 NLRB 461, 462-463 (citing *New York Shipping Association and its Members*, 109 NLRB 1075, 1077-1078). In accordance with this policy the Board will not permit, subsequent to an election, the litigation of eligibility matters which were settled before the election by stipulation or agreement of the parties. *Stanley Aviation Corporation, supra*; *Consolidated Industries, Inc.*, 116 NLRB 1204, 1206-1207; *Gulf States Asphalt Company*, 115 NLRB 100, 102; *Texas Prudential Insurance Company*, 115 NLRB 1383, 1385. Of course, the Board will not honor a stipulation that is contrary to the Act, *F. M. Reeves & Sons, Inc.*, 114 NLRB 1243, footnote 2 (Board rejected an agreement of the parties to include individuals who were supervisors within the unit), nor will it honor a stipulation which is contrary to Board policy. *Yale and Towne Manufacturing Company*, 112 NLRB 1268, 1270 (Board rejected agreement of parties to include timekeepers in an office clerical unit because it found the timekeepers to be plant clerical employees whom the Board customarily included in a production and maintenance unit). The issue here is similar in many respects to that presented in *Consolidated Industries, Inc., supra*. In the latter case, at a pre-election conference the parties had agreed on a list of eligible voters. At the election the ballot of an employee who satisfied all the requirements for eligibility but whose name was not on the list was challenged. In sustaining the challenge, the Board restated its policy of honoring pre-election concessions of the parties. It also stated that "The application of this policy is particularly warranted where, as here, during the 5-week period which

⁷The Union attacks Westlake's credibility on the ground that at one point he testified that there were two union representatives at the polling place that morning. Although Westlake testified to this effect at one point, he later qualified this statement with the remark that he was not "positive" as to whether there was any one with Mr. Sabol. The latter testified that he was the only union representative present that day and I am satisfied that in this instance his was the more accurate recollection.

intervened between the date of the eligibility agreement and the election, no objection was made by either of the parties to the eligibility list." *Ibid.*, at 1207. In this latter respect the instant case can be distinguished, for here the Union did, on the very eve of the election, question the omission of Ferguson's name from the eligibility list. On the other hand, in *Consolidated*, as the Board pointed out, the eligibility of the specific employee in question was not discussed at the preelection conference (*Ibid.*, at 1207, footnote 5). In the present case, the status of Ferguson and the other probationary employees had been discussed and the parties had agreed on their exclusion from the eligibility list.⁸ Here, presumably, in view of Mr. Sabol's efforts on the morning of the election to have Ferguson's name placed on the list, there came a time when the Union wanted to amend the earlier agreement. The question thus becomes one of whether such a last minute, unilateral, change should be permitted, or whether the better policy would be to hold the parties to the agreement made at the preelection conference. The latter appears the more equitable, in view of the fact that in those cases where the parties agreed on an eligibility roster as being the complete list of eligible voters and subsequently an employee was found to have been omitted through mistake or inadvertence, the Board, for the stated reason that it preferred to honor the stipulation of the parties, adhered to the list in the original agreement and sustained a challenge to the ballot of such an employee. *Gulf States Asphalt Company*, 115 NLRB 100, 102; *Texas Prudential Insurance Company*, 115 NLRB 1383, 1385. If this is the policy as to the finality of an agreement on the completeness of an eligibility list drawn up by the parties, it would seem to follow that where the parties at a preelection conference agree on the specific exclusion of an employee, such an agreement would be equally final and binding. Moreover, although in the normal situation the Board follows a practice of allowing probationary employees to vote (*National Torch Tip Company*, and cases cited, *supra*), it would appear that such a practice will not prevail over the Board's frequently stated policy of honoring an agreement such as that here involved, which was likewise made in the interest of expeditiously processing an election.

[Recommendations omitted from publication.]

⁸ In a more recent case, *O. E. Szekely and Associates, Inc.*, 117 NLRB 42, the Board pointed out that the *Consolidated Industries* decision should not be construed to mean that the mere preparation and checking of an eligibility list prior to an election precludes the possibility of challenges at the election. In the *Szekely* case the Board concluded that the eligibility list originally prepared by the parties should not be controlling as to the eligibility of employees voting in the election regardless of whether the names of these employees appeared on the list or had been omitted therefrom. That case is distinguishable from the present, however, for in *Szekely* the Board considered it significant that, at the time the eligibility roster in question was prepared, there had been no "specific agreement as to the affected individuals, i. e., a discussion by name of the affected persons, with an agreement reached as to their eligibility" (*Ibid.*). This contrasts with the present situation, where, as found above, Ferguson's circumstances had been discussed at the preelection conference and, as a result, his name was deleted from the aforesaid roster.

Flight Enterprises, Inc. and International Association of Machinists, AFL-CIO, Petitioner. Case No. 11-RC-939. February 3, 1958

**SUPPLEMENTAL DECISION AND CERTIFICATION
OF REPRESENTATIVES**

Pursuant to a Decision and Direction of Election issued by the Board on May 23, 1957,¹ an election was conducted on July 10, 1957, under the direction and supervision of the Regional Director for the

¹ Not reported in printed volumes of Board's Decisions and Orders.