

Triple J. Variety Drug Company, Petitioner, and Retail Clerks Union, Local 1288, AFL-CIO. Case 20-RM-964

December 26, 1967

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS FANNING, BROWN, JENKINS, AND ZAGORIA

Pursuant to a stipulation for certification upon consent election, an election was conducted on May 23, 1967, under the direction and supervision of the Regional Director for Region 20 in two voting groups:

Group A: All pharmacists of the Employer at its Fresno, California, store; *excluding* all other employees, guards, and supervisors as defined in the Act.

Group B: All selling and non-selling employees of the Employer at its Fresno, California, store; *excluding* pharmacists, coffee shop employees, store manager, assistant store manager, confidential employees, guards, and supervisors as defined in the Act.

At the conclusion of the election, the Acting Regional Director served on the parties a tally of ballots which showed that, in Group A, 1 void ballot was cast; and, in Group B, 13 ballots were cast for, and 12 against, the Union, and 2 ballots were challenged. Thereafter, the Employer filed timely objections to the election.

In accordance with the Rules and Regulations of the National Labor Relations Board, the Acting Regional Director conducted an investigation and on June 23, 1967, issued and duly served on the parties her report on objections and challenged ballots, in which she recommended that the challenges be sustained, that the objections be overruled, and that an appropriate certification of representative be issued. Thereafter, the Employer filed timely exceptions to the Acting Regional Director's report.

Upon the entire record, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Union is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. We have considered the Acting Regional Director's report, which is attached hereto as Appendix A, and the exceptions thereto, and hereby

adopt the Acting Regional Director's findings and recommendations.¹

In view of the results of the election, and in accord with the stipulation of the parties, we find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All selling and non-selling employees of the Employer at its Fresno, California, store; *excluding* pharmacists, coffee shop employees, store manager, assistant store manager, confidential employees, guards, and supervisors as defined in the Act.

Accordingly, as the tally shows that the Union received a majority of the valid ballots cast in the above-appropriate unit, we shall certify it as the representative of the employees in such unit.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that Retail Clerks Union, Local 1288, AFL-CIO, has been designated and selected by a majority of the employees of the Employer in the appropriate unit as their representative for the purposes of collective bargaining and that, pursuant to Section 9(a) of the Act, as amended, the said labor organization is the exclusive representative of all 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.

MEMBER ZAGORIA dissenting:

I would set aside the election for the reason that the procedure employed for the self-determination election of the single professional employee in voting Group A, while in accordance with established Board procedure, was in violation of Section 9(c)(1) of the Act and Section 102.69(a) of the Rules and Regulations, which provide that all elections shall be by secret ballot.

While I recognize that secrecy could not have been preserved completely, it could have been preserved with regard to the question of representation by a relatively simple procedure. Thus (1) two separate ballots would be used for Group A; (2) the first ballot, containing the inclusion question, would contain some identifying feature or be placed in a separate ballot box; (3) the second ballot, containing the representation question, would in no way differ from the ballots in Group B, would be sealed in an envelope, and deposited in the same ballot box as the Group B ballots; and (4) if the Group A employee voted to be included, the second ballot would be removed from the envelope, mixed with the ballots of Group B, and counted with them. It is the policy of the Act and the duty of the Board that secrecy be preserved to the fullest extent possible.²

Director's recommendations that the challenges be sustained are adopted *pro forma*.

² Cf. *J. Brenner & Sons, Inc.*, 154 NLRB 656, 659, fn. 4.

¹ The exceptions, which relate solely to the Petitioner's objection to the conduct of the election in voting Group A, in our opinion, raise no issue of fact or law warranting reversal of the Acting Regional Director's findings and recommendations. Absent exceptions thereto, the Acting Regional

APPENDIX A

REPORT ON OBJECTIONS AND CHALLENGED BALLOTS

Pursuant to a stipulation for certification upon consent election approved May 4,¹ an election by secret ballot was conducted on May 23 under the direction and supervision of the Acting Regional Director in two voting groups:

Group A: All pharmacists of the Employer at its Fresno, California, store; *excluding* all other employees, guards, and supervisors as defined in the Act.

Group B: All selling and non-selling employees of the Employer at its Fresno, California, store; *excluding* pharmacists, coffee shop employees, store manager, assistant store manager, confidential employees, guards, and supervisors as defined in the Act.

The stipulation provided that the one employee in group A would vote on two questions: (1) Do you wish to be included in a unit with employees of group B? and (2) Do you wish to be represented by the Union? If the employee in group A voted "yes" to the first question, his ballot was to be pooled with those of group B as to the second question. If the employee in group A voted "no" to the first question, he was not to be included with the employees in group B and his vote on the second question would not be counted. The tally of ballots in voting group A furnished the parties at the conclusion of the election showed that the pharmacist cast a void ballot with respect to both questions. The tally of ballots with respect to voting group B showed that of approximately 27 eligible voters, 13 cast ballots for and 12 cast ballots against Petitioner. Two ballots were challenged. The challenged ballots are thus sufficient in number to affect the results of the election in voting group B.

On May 29 the Employer filed objections to the election, a copy of which was served on Petitioner. Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the Acting Regional Director has investigated the challenges and the objections and hereby reports as follows:

THE CHALLENGED BALLOTS

The ballots of Joanne True and Paul Zimmer were challenged by the Board agent because they did not appear on the eligibility list.

The investigation disclosed that Joanne True is an office employee, who directs the activities of two other office employees. Mrs. True has interviewed job applicants and has effectively recommended employment of applicants she considered qualified.

Upon Mrs. True's recommendation one employee was terminated without further inquiry by any company official. The investigation further disclosed that Mrs. True has authorized time off for office employees without consulting her supervisors.

Paul Zimmer is manager of the garden shop and in that capacity determines what items and quantities to purchase. Mr. Zimmer then places either a written or phone order for merchandise and signs the purchase order. Depending on the season of the year, such orders vary from \$1,000 to \$10,000. He also decides which items to advertise in the newspapers, and determines the price to be charged, either by himself or in consultation with the assistant store manager.

Mr. Zimmer directs the activities of one employee and has in the past interviewed job applicants. He has authority to terminate the employee under his supervision. He is paid a monthly salary; others employed in the garden shop are paid an hourly rate. Mr. Zimmer is also covered by a life and disability insurance program limited to himself, the general manager, assistant general manager, and the supervising pharmacist.

Under these circumstances, the Acting Regional Director concludes that Joanne True is a supervisor within the meaning of the Act and that Paul Zimmer is both a supervisor and a managerial employee. Therefore it is recommended that the Board sustain the challenges to their ballots.

THE OBJECTIONS

The objections allege:

There were two voting groups. In voting group A there was a single voter, Ed Jacobs. Mr. Jacobs appeared at the polling place, and requested his ballot. When handed his ballot he observed that it was of a definitely different color than any of the other ballots. Mr. Jacobs immediately orally protested to the effect that a distinguishing color on his single ballot would destroy its secrecy, and that therefore he was not being given the opportunity to cast a secret ballot. He was instructed to take the ballot and to vote, and he entered the polling booth. He thereupon decided that he would not vote by the use of a distinctively identifiable ballot, and did not mark same. Mr. Jacobs then returned to the table where were seated the Board Agent and official observers, again stating that he could not vote, and would not vote, unless the secrecy of his ballot was preserved. He claims that notwithstanding this he was instructed by the Board Agent to deposit his unmarked blank ballot in the ballot receptacle. When the company observer was requested to sign Form 750,

¹ All dates are in the year 1967 unless otherwise noted.

Certification on Conduct of Election, she stated that she could not sign in relation to Mr. Jacobs' voting group because it was not a secret ballot. It will be observed that her signature does not appear on one of the two Forms 750. Solely through inadvertence her signature was taken as to the certification on voting group A, which was Mr. Jacobs' group, and her signature was withheld from the certification of voting group B. However, her expressed and actual intention at the time was to withhold her signature from the Certification On Conduct of Election for voting Group A, since that was the group which she stated had not been accorded a secret ballot. H. L. Sutton, observer for the Union, expressed the same objection and made the same contention that Mr. Jacobs had [sic] not been afforded the opportunity of a secret ballot; but upon the request of the Board Agent did sign the certification covering the voting group for Mr. Jacobs. The Tally of Ballots showed that 13 votes were cast for the Union and 12 votes were cast for No Union. There were two challenged ballots. Assuming that the challenges are sustained, it is obvious that the single vote of Mr. Jacobs could control the outcome of the election. Under the unusual factual circumstances, present in this case, it is the Employer's contention that the required secrecy of the ballot was not preserved as to voting Group A, and that the specific requirements of the Act were unfortunately and unintentionally violated in the conduct of this election. There is absolutely no suggestion or allegation of intentional improper conduct in the matter by the Regional office or any Board representative. We believe that the established

and usual procedures were carefully followed, but, again, that the peculiar circumstances here resulted in the failure to effectuate a secret ballot election as to the voting Group A.

In accordance with established Board procedure in self-determination elections for professional employees, the ballot for the pharmacist contained the two questions referred to above. Thus, even if the pharmacist's ballot had been the same color as the ballots for the voters in voting group B, it would have been distinguishable. It is also noted that the Board has directed the opening and counting of one challenged ballot, where such ballot was determinative of the outcome of the election. Under these circumstances, it is concluded that the objections do not raise substantial or material issues with respect to the election and it is recommended that the Board overrule them.

SUMMARY

In summary, it is recommended that the Board sustain the challenges to the ballots of Joanne True and Paul Zimmer, overrule the objections, and issue an appropriate certification of representative.

Within the time prescribed by the Board's Rules and Regulations, any party may file with the Board in Washington, D. C., an original and seven copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on each of the other parties, and shall file a copy with the Acting Regional Director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. If no exceptions are filed, the Board may decide the matter forthwith upon the record, or may make other disposition of the case.