Akron Engraving Company, Inc., Employer-Petitioner and Cleveland Local No. 24–P, Lithographers *and* Photoengravers International Union, AFL–CIO. Case 8–RM–470

March 11, 1968

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN MCCULLOCH AND MEMBERS FANNING AND ZAGORIA

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Joseph A. Szabo of the National Labor Relations Board. Thereafter, the Employer and Union filed briefs in support of their positions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error.[1] They are hereby affirmed.

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

1. The Employer is engaged, primarily, in the manufacture of letterpress printing plates at its Akron, Ohio, plant. During the fiscal year February 1, 1966, to January 31, 1967, its gross income was about $250,000, which amount included sales to Standard Oil Company of Ohio in the amount of almost $30,000 and sales to the Goodyear Tire and Rubber Company in the amount of about $12,000. During the same period, the Employer shipped across State lines materials valued at about $45,000. We are satisfied that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.[2]

2. The labor organization involved claims to represent certain employees of the Employer.

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

4. As agreed to by the Employer and Union, the following employees constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All production employees, excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act.

5. An economic strike was instituted at the Employer's Akron, Ohio, plant on November 11, 1965,[3] and was still in existence at the time of the hearing, which was held on various dates between May and September 1967. The Employer has continued to operate during the strike with replacements, but has instituted certain changes in its operations. Thus, prior to the strike, the Employer employed 10 employees in the bargaining unit, each assigned to one of the Employer's seven departments. There were three employees in stripping and plating, two in camera, and one each in zinc etching, copper etching, routing-blocking, finishing, and proofing.Following the strike, the method of departmentalization was abolished, and the seven replacements hired by the Employer were assigned, generally, to "production" duties, working on whatever jobs were to be done in the plant, each employee being capable of performing several jobs. The Employer states that its volume of photoengraving work has been permanently reduced following the strike, citing the fact that during the fiscal year prior to the strike, namely, from February 1, 1965, to January 31, 1966, gross sales of photoengraving plates amounted to about $192,000, while in the first fiscal year following the strike, namely, from February 1, 1966, to January 31, 1967, sales of photoengraving plates amounted to about $142,000. Under these circumstances, the Employer alleges, generally, that there is no reasonable likelihood of its business returning to the prestrike level when and if the strike is ended. The Union claims, however, that the Employer has subcontracted much of its work, that such subcontracting is a temporary measure, and that such work has not been permanently lost to the bargaining unit. The Union also points to new work allegedly gained through the Employer's acquisition of McNitt Engraving Co. in 1965 or 1966. This issue is discussed, *infra*.

We turn, first, to a consideration of the eligibility of the 7 replacements and the 10 economic strikers to vote in the election hereinafter directed.

[1] We need not now determine the validity of the Hearing Officer's rulings on numerous motions and petitions to revoke *subpoenas duces tecum*, since, as hereinafter appears, we find it unnecessary, at this time, to resolve the issue of whether the Employer has suffered a permanent loss of work by reason of the strike.

[2] We note, moreover, that the Board has previously exercised jurisdiction over the Employer. See *Cleveland Local No. 24–P, Lithographers and Photoengravers International Union, AFL–CIO (Akron Engraving Company, Inc.)*, 160 NLRB 949

[3] Since the strike commenced on November 11, 1965, and the petition was not filed until November 28, 1966, it is clear that the election hereinafter directed will not occur within 1 year from the inception of the strike

Voter Eligibility-Replacements

The Employer contends, *inter alia*, that the seven replacements are permanent replacements and therefore eligible to vote in the election. On the other hand, the Union claims that the Employer's method of operation adopted subsequent to the strike is temporary, and that all newly hired employees are merely fill-in, or temporary, replacements for the strikers.

James Gill, Joseph Jones, David Holtzapple, Burker Johnson, and Paul Keener: These employees were hired by the Employer subsequent to the strike, and the uncontroverted record testimony establishes that each of these individuals, when hired, was told by the Employer that his job was permanent. Under these circumstance and in view of the Union's failure to rebut the presumption of permanence,[4] we find that these replacements are permanent employees and are eligible to vote in the election.[5]

Robert Shriver: Prior to the strike, Shriver was employed by the Employer in a nonbargaining unit position; namely, as a salesman. Soon after the inception of the strike, his prime account, the Goodyear Tire and Rubber Company, to which he devoted approximately 75 percent of his time, shifted its work to firms utilizing the offset printing process. In January 1966, Shriver was told by the Employer that he was being assigned to production duties, and he was subsequently assured by the Employer that his job would not be affected by the end of the strike. In this connection, the record reflects that the Employer has continued to retain, in a sales capacity, the three other salesmen in its employ. Under the circumstances, we find that Shriver is a permanent replacement, and is, accordingly, eligible to vote in the election.

David Ellis: Ellis, a brother-in-law of Eugene Rohrich, president of the Employer, was employed as a plant superintendent prior to the strike. Shortly after the strike began, he started performing production duties, "since there was nobody else there to do it." Ellis testified that, in early 1966, he was told by the Employer that due to the strike, the Employer needed production employees and did not need a superintendent any more because at that time there were very few employees to do production work. He also testified he was told that, thenceforth, he would be permanently in production. Nonetheless, at a hearing before the Summit County Common Pleas Court on March 9, 1966, Ellis testified his position at that time was "plant superintendent." His testimony at the instant hearing likewise causes us to believe that, while Ellis is undoubtedly performing production tasks, he still possesses much of the authority he held prior to the strike.[6] Ellis does not punch a timeclock. He has continued to be a salaried employee and in fact has received a raise in pay. Under these circumstances, we find that Ellis is still a supervisor. Moreover, in our view, the above facts show that, by virtue of his family relationship with the president of the Company, Ellis enjoys a special status which allies his interests more closely with those of management.[7] Accordingly, we find that Ellis is not eligible to vote in the election. Ellis testified in effect that, whatever his authority, he has been performing production work for over a year and a half, and that while he "assumed" that he was a replacement for a striker, it was difficult to say because the Employer now operates differently. The Union contends the alleged changes in the Employer's operations are merely temporary. We shall not at this time pass on the question of whether Ellis is a permanent replacement, but shall do so, as indicated below, only if that issue should become determinative of the election.

Voter Eligibility-Strikers

The Employer contends that the 10 strikers have been permanently replaced, or, alternatively, that they abandoned the strike by accepting permanent, and more remunerative, employment elsewhere. In any event, the Employer contends, since there has been a permanent reduction of unit work since the strike, no striker has any reasonable expectation of further employment. On the other hand, the Union, as indicated heretofore, claims that there has been no elimination of unit work for economic reasons, that the replacements are temporary, and that all the strikers are eligible to vote since it has not been affirmatively shown that they have abandoned their interest in the struck work.

Jerome Clifford, Ted Varga, Tod Kittinger, William Sagedy, Gus Schott, John Tobias, Edward Bancroft, and Victor Emerson: The record evidence establishes that each of these strikers has obtained employment elsewhere in the industry, receiving

[4] *Pacific Tile and Porcelain Company*, 137 NLRB 1358.

[5] The record shows that in the early days of the strike, Paul Keener, while still an employee of Akron Litho Plate Company, a related corporation, did some camera work for the Employer herein. Contrary to the Union's contention, we do not believe that the fact that Keener performed some unit work prior to his employment with the Employer detracts from his status as a replacement.

[6] Ellis testified: ". . . that isn't the reason I am superintendent. I am the superintendent because I know how to do the work, not a superintendent but I am the production man because I know how to do the work."

[7] *Taunton Supply Corp.*, 137 NLRB 221, 222.

from $12.50 to $30 more weekly, and is receiving fringe benefits not heretofore available at the Employer's plant. Each striker, however, testified to his intent to return to work for the Employer, if the Employer were to have a union contract. Employees Clifford, Varga, Sagedy, Schott, Bancroft, and Emerson are presently employed in Cleveland, but continue to maintain their homes in the Greater Akron area, or in Canton, Kittinger works in Wadsworth, Ohio, about 12 miles from Akron, while Tobias works in Akron. We do not believe that the employees can be held to have abandoned interest in their jobs with the Employer merely because they qualified their intent to return with the provision that the Employer have a union contract; that is a condition that formerly existed at the Employer's plant, and whether or not it returns may well depend on the outcome of the election here directed. Moreover, the Board has held that the mere acceptance of a job with better benefits does not establish that a striker has forfeited his eligibility.[8] Upon the foregoing facts, we conclude that the presumption of continued eligibility has not been rebutted and that all eight of these strikers, notwithstanding their employment with other employers, have not abandoned their struck jobs and are, subject to conditions outlined below, eligible to vote in the election hereinafter directed.

Norman Perkins and Vincent McGuire: The record shows that these individuals have obtained better jobs in Cleveland, Ohio, working a lesser number of hours, with increased fringe benefits. While Perkins and McGuire have testified to their intent to return to work at the Employer's plant once the strike is over, the record discloses, nevertheless, that Perkins has sold his home in Akron and is living in the Cleveland area, and that McGuire is in the process of selling his home in Akron and is living in the Cleveland area. Under the circumstances, we conclude that Perkins and McGuire have abandoned their prestrike jobs and, accordingly, are ineligible to vote in the election.

In this connection, we note that there were 10 jobs in the bargaining unit at the time of the strike and that the Employer is presently operating with at least 6 replacements. We have held, *supra*, that these six replacements are eligible to vote in the election, and that they are to be considered as permanent replacements for the striking employees. The Union does not contend, nor would the record support, a finding that more than a total of 10 strikers should be deemed eligible.[9] Accordingly, it appears that, of the eight economic strikers who are deemed not to have abandoned their jobs with the Employer, a minimum of zero and a maximum of four are eligible to vote, depending on a determination as to whether, and to what extent, the Employer's workload and work force have been permanently reduced, and as to whether Ellis' performance of unit work is permanent and constitutes him a permanent replacement. We shall make no present determination as to these questions. Rather, we shall permit each of the eight economic strikers to vote subject to challenge. The Regional Director is instructed that in the event the vote of four economic strikers, the most that will be permitted to vote in any event, is determinative of the election results, he shall return the case to the Board for disposition of the issues as to whether there has been a permanent reduction in the Employer's work load for economic reasons, as to whether Ellis, though ineligible to vote, is a permanent replacement for a striking employee, and for the further determination as to which, if any, of the economic strikers were eligible to cast a valid ballot in the election. In the event the vote of four economic strikers is not determinative of the election results, the Regional Director is instructed to issue the appropriate certification.

[Direction of Election[10] Omitted from Publication.]

---

[8] *Pacific Tile and Porcelain Co*, *supra* 1362–63

[9] Section 9(c)(3) of the Act indicates that, once 12 months from the commencement of an economic strike has passed, only those strikers who have not been permanently replaced are eligible to vote

[10] An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 8 within 7 days after the date of this Decision and Direction of Election The Regional Director shall make the list available to all parties to the election No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc*, 156 NLRB 1236