

John Rosetta and Jim Rosetta d/b/a Fresno AG Hardware, Employer-Petitioner and Retail Clerks' Union Local 1288, Retail Clerks International Association, AFL-CIO. Case 20-RM-1173

August 27, 1970

DECISION, ORDER, AND DIRECTION

BY MEMBERS FANNING, MCCULLOCH, AND JENKINS

Pursuant to stipulation for certification upon consent election approved by the Regional Director for Region 20 on May 16, 1969, an election was conducted on June 5, 1969, in the above-entitled proceeding, under the direction and supervision of said Regional Director. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 44 eligible voters, 36 cast ballots, of which 16 were cast for, and 14 were cast against the Petitioner. There were six challenged ballots. The challenged ballots are sufficient in number to affect the results of the election. On June 12, 1969, the Union filed timely objections to the election.

The Regional Director investigated the challenges and the objections, and, on September 5, 1969, issued and served on the parties his Report on Objections and Challenged Ballots, and, on September 9, 1969, a Supplemental Report on Objections and Challenged Ballots, and, on September 9, 1969, a Supplemental Report on Objections and Challenged Ballots. In his Report, as supplemented, the Regional Director recommended to the Board that the objections be overruled, and that the challenges to the ballots of Carl, Regina, and Dennis Rosetti and Roger and Mary Struthers be overruled and their ballots be opened and counted. In view of his recommendation with respect to the challenges to the aforementioned five ballots, the Regional Director made no recommendation concerning the challenge to the ballot of Floyd Struthers, since his ballot would not likely be determinative of the election results.

Thereafter, on September 19, 1969, the Union filed timely exceptions to the Regional Director's Report and Supplemental Report, requesting that all the challenges and several of the objections be sustained, and the Union be certified, based upon the present vote count, or that the election be set aside and a new election be conducted.

On December 15, 1969, the National Labor Relations Board issued an Order Directing Hearing in which it was ordered that a hearing be held on the challenges and the objections.

On February 11 and 12, 1970, a hearing was held at Fresno, California, before Hearing Officer Robert G. Mayberry. The Employer, the Union, and the Regional Director were represented by counsel, and all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. Thereafter the Employer and the Union entered into a stipulation to certain additional facts which was made part of the record.

On March 27, 1970, Hearing Officer Mayberry issued his Report on Challenges and Objections, in which he recommended that all the objections be overruled, and that the challenges to the ballots of Carl and Regina Rosetti, and Floyd and Mary Struthers be overruled. The Hearing Officer recommended that the challenges to the ballots of Dennis Rosetti and Roger Struthers be sustained.

Thereafter the Employer filed timely exceptions to the Hearing Officer's recommendation that the challenges to the ballots of Dennis Rosetti and Roger Struthers be sustained.

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.

Upon the entire record in this case, 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 the employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
4. The parties stipulated and we find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(c) of the Act:

All full time and regular part-time selling and nonselling employees of the Employer at its Fresno, California, location, excluding confidential employees, guards and supervisors as defined in the Act.

5. The Board has considered the Hearing Officer's Report, the Employer's exceptions, and the entire record in this case, and hereby adopts the findings

and recommendations of the Hearing Officer except as herein modified.¹

We find merit in the Employer's exceptions to the recommendations of the Hearing Officer that the challenges to the ballots of Dennis Rosetti and Roger Struthers be sustained.

Dennis Rosetti is the son of Carl and Regina Rosetti. Carl Rosetti is a half-brother of owners James and John Rosetta.

The Hearing Officer found that Dennis Rosetti was accorded special treatment in three particulars, and concluded that because of his family relationship to the owners, the special privileges "were of such a nature and magnitude" as to cause his interests to be more closely aligned with management than with other rank-and-file employees. The recommendation that the challenge to Dennis Rosetti's ballot be sustained was based on his receipt of holiday pay "while other part-time employees were not granted this benefit"; a \$20 advance, "contrary to the Employer's stated policy of not granting loans"; and the Hearing Officer's finding that he "was permitted to leave his automobile inside the Employer's premises for 2 days while he made alterations on it."

In its exceptions, the Employer points out that other employees, including nonrelatives, who are included in the unit, used its premises to repair their automobiles. The record supports this assertion. The Employer asserts also that an advance against earned wages in no way conflicts with its policy against *loans* to employees, a different matter not at issue here. We agree.

Finally, the Employer asserts that Dennis Rosetti was treated no differently in regard to holiday pay from other part-time employees who, like him, regularly worked 30 or more hours per week.² The stipulation provides, however, that "Part-time employees working June 5, 1969, and who worked full time during the summer vacation period were entitled to paid holidays occurring during that time. Length of service did not apply."

The Hearing Officer noted that of the part-time employees, only Dennis Rosetti and Roger Struthers (discussed below) received pay for the Easter and Memorial Day holidays. He indicated that Gregory Heguiagaray, who was also paid for those 2 days, was a full-time employee. The Employer asserts that Heguiagaray was a part-time employee who regularly

worked more than 30 hours per week. Although the record is not entirely clear as to whether Heguiagaray was a part-time or full-time employee, it does not appear that any part-time employees other than Dennis Rosetti and Roger Struthers who regularly worked more than 30 hours per week denied pay for the two indicated holidays.

Roger Struthers is the son of Floyd and Mary Struthers. Mary Struthers is a sister of owners James and John Rosetta. The Hearing Officer recommended sustaining the Petitioner's challenge to his ballot, finding he had received holiday pay and sick pay, and that he was granted permission not to work on two weekends, all benefits not granted to other employees in similar circumstances.

Struthers was granted permission to be absent from work for two weekends in 1969, one of them after the election date. However, it appears that another unit employee, not a relative of the owners, may also have been given one such weekend off. Testimony by another employee, that he was told a Sunday off was difficult to arrange, was contradictory, and even if true is insufficient to establish special treatment of Struthers.

As indicated, the facts and considerations in respect to holiday pay are identical to those considered in connection with Dennis Rosetti, *supra*.

The Hearing Officer found that Struthers received sick pay for 1 day, "a benefit not enumerated by the Employer as being available to part-time employees, while part-time employee Barron reported on his time card as being sick" for a day when he was not paid. In its exceptions, the Employer argues that "sick pay, like holiday pay and the entitlement to participate in the Employee Health Insurance Program, is a benefit given to all part-time employees regularly working thirty or more hours per week, after 30 days. Struthers regularly worked over thirty hours per week, Barron did not. . ." The stipulation provides that "Sick leave followed the same pattern as vacations, with the same number of eligible days and eligibility the same. . . . No paid vacations were given part-time employees in 1968 or 1969." Although neither the stipulation nor the record support the Employer's argument as to sick pay for part-time employees, the record does not disclose that any part-time employees in that category were denied sick pay with the arguable exception of Barron on one occasion.

It therefore appears that at most the only special privileges granted these two employees consisted of 2 days' holiday pay for both and 1 day's sick pay for Floyd Struthers. We find that these privileges, if in fact special by reason of their family relationship

¹ In the absence of exceptions thereto, we adopt *pro forma* the Hearing Officer's recommendations to overrule the objections and the challenges to the ballots of Carl and Regina Rosetti and Floyd and Mary Struthers.

² The Employer asserts that full-time employees worked 48 hours a week. The stipulation provides that part-time employees who regularly worked 30 hours or more per week were permitted to participate in the health insurance plan after 30 continuous days on the job.

to the owners, were not substantial enough to cause their interests to be more closely aligned with management than with other rank-and-file employees, some of whom, including these two employees' parents, are also relatives of the owners. *International Metal Products*, 107 NLRB 65; cf. *Cherrin Bros. Co.*, 147 NLRB 527, fn. 2, enfd. *Cherrin Corporation v N.L.R.B.*, 349 F.2d 1001 (C.A. 6, 1965), cert. denied 382 U.S. 981 (1966). Accordingly, we shall overrule the challenges to the ballots of Dennis Rosetti and Roger Struthers.

ORDER

It is hereby ordered that the objections and the challenges be, and they hereby are, overruled.

DIRECTION

Inasmuch as the objections to the election and challenges to ballots have been overruled, the Regional Director for Region 20 shall, pursuant to the Board's Rules and Regulations, within 10 days of the date below, open and count the ballots of Carl Rosetti, Regina Rosetti, Dennis Rosetti, Floyd Struthers, Mary Struthers, and Roger Struthers, and thereafter prepare and cause to be served on the parties a revised tally of ballots, including therein the count of said ballots, and on the basis thereof issue the appropriate certification.

MEMBER JENKINS, concurring:

Member Jenkins concurs in the result.