

**Alabaster Lime Company, Employer-Petitioner and  
United Steelworkers of America, AFL-CIO. Case  
10-RM-559**

May 18, 1971

**DECISION, ORDER, AND DIRECTION OF  
SECOND ELECTION**

BY MEMBERS FANNING, BROWN, AND KENNEDY

Pursuant to a Stipulation for Certification Upon Consent Election, an election by secret ballot was conducted under the direction and supervision of the Regional Director for Region 10 on January 20, 1971, among the employees in the stipulated unit described below. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 53 eligible voters, 51 cast ballots, of which 13 were for, and 26 against, the Union, 11 were challenged, and 1 was void. Thereafter, the Union filed timely objections to conduct affecting the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations, the Regional Director conducted an investigation and, on March 18, 1971, issued and duly served upon the parties his Report on Objections in which he recommended that the objections be overruled in their entirety and that the results of the election be certified. Thereafter, the Union filed exceptions to the Regional Director's report with supporting brief, and the Employer filed a brief in support of the Regional Director's report.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the 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 certain employees of the Employer within the meaning of Sections 9(c)(1) and 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(b) of the Act:

All production and maintenance employees, including truck drivers employed at the Employer's Scotrock Lime Plant and Verlie Quarry, Alabaster, Alabama, but excluding all office clerical employees, guards and supervisors as defined in the Act.

5. The Union's Objections 2 and 4<sup>1</sup> concern the refusal of the Board agent to permit 10 employees listed on the voter eligibility list to cast ballots, challenged or otherwise, in the election.

The facts show that an economic strike against the Employer, which had begun on June 6, 1970, was still in progress at the time of the election. In a separate section of the *Excelsior* list, the Employer had listed the 10 employees in question, among others, and noted that each had been discharged between July 8 and August 3, 1970. At the preelection conference, the Employer's counsel expressed his intent to challenge the ballots of these employees and explained that the 10 employees had been discharged for strike-connected misconduct because, according to counsel, they had violated a state court injunction concerning picketing. He stated that each of these employees had been notified of his discharge in writing. The union representative stated that charges had been filed on behalf of the 10 employees, but the Employer's counsel denied having any knowledge of charges having been filed and served. The Board agent telephoned the Regional Office and confirmed that there were no pending unfair labor practice charges against the Employer. At the request of the union representative, the Board agent then telephoned the Union's attorney who said he intended to file charges and would do so at that time. The Board agent advised him that charges could not be filed over the telephone and that the polls were to open in about 5 minutes. The Board agent further explained to the attorney that, under his interpretation of the Board's procedures, he could not permit the 10 discharges individuals to vote even challenged ballots. He notified the Union's counsel and its representative at the conference that it would be needless for the 10 employees to appear at the polls because he would deny them permission to vote even challenged ballots. The names of these 10 employees were then stricken from the eligibility list. The Board agent would not permit one of these employees to serve as an observer for the Union. During the course of the election, only one of the discharged employees appeared to vote and the Board agent refused to give him a ballot.

A charge, alleging the unlawful discharge of the 10 employees, was filed at the Regional Office on January 25, 1971, and a complaint on behalf of 8 of the employees issued on March 17, 1971.

The Regional Director states that, according to dictum in *Pacific Tile and Porcelain Company*,<sup>2</sup> a discharged employee is not eligible to vote unless a charge is actually pending before the Board at the time of the election. He concluded that *Pacific Tile* is controlling

<sup>1</sup> We adopt the Regional Director's recommendation that Objections 1,3,5, and 6 be overruled

<sup>2</sup> 137 NLRB 1358

especially where, as here, there has been ample time (approximately 5 months) for the discharges to have been contested by the filing of unfair labor practice charges. We do not agree.

In *Ace Letter Service Co.*, cited in the Regional Director's report, the Board stated:

The Board's challenge procedure generally guarantees the right to every individual who asserts other than a totally frivolous claim<sup>3</sup> to employee status to appear at the polls and cast a ballot. . . .

In the present case, we cannot say that the 10 employees' claims were merely frivolous. Although charges were not pending on the day of the election, the Board agent was told by the Union's counsel during the preelection conference that charges would be filed. Notwithstanding the fact that 5 months had passed since the employees were discharged, the Act establishes a 6-month period in which charges may be filed. As the charges were filed within the prescribed period, the employees should not be penalized by not being permitted to vote. Under these circumstances, we find

that the 10 discharged employees should have been permitted to cast challenged ballots. Accordingly, as we sustain Objections 2 and 4, we shall set aside the election and direct that a new election be held.

#### ORDER

It is hereby ordered that the election previously conducted herein on January 20, 1971, be, and it hereby is, set aside.

[Direction of Second Election<sup>4</sup> omitted from publication.]

<sup>4</sup> In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them *Excelsior Underwear Inc.*, 156 NLRB 1236, *NLRB v Wyman-Gordon Co.*, 394 US 759. Accordingly, it is hereby directed that 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 10 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. 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.

<sup>3</sup> 187 NLRB No 79 at p 3