

**Choc-ola Bottlers, Inc. and Retail, Wholesale and Department Store Union, AFL-CIO, Petitioner. Case 25-RC-4557**

August 27, 1971

**DECISION AND DIRECTION**

BY CHAIRMAN MILLER AND MEMBERS  
FANNING, BROWN, AND JENKINS

Pursuant to a Petition filed on January 22, 1971, and a Stipulation for Certification Upon Consent Election approved by the Regional Director for Region 25, an election by secret ballot was conducted on February 19, 1971, under the direction and supervision of the Regional Director among the employees in the appropriate unit. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 13 eligible voters, 13 cast ballots, of which 6 were for, and 6 against, the Petitioner, and there was 1 challenged ballot. The challenged ballot was sufficient in number to affect the results of the election.

In accordance with the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the Regional Director conducted an investigation and, on April 30, 1971, issued and duly served on the parties his Report on Challenged Ballot in which he recommended that the challenge to the ballot of William E. Viles be sustained, and that a certificate of results be issued. Thereafter, the Petitioner filed timely exceptions to the Regional Director's report and a supporting brief. The Employer filed an answering brief.

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

1. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
2. The Petitioner 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 Sections 9(c)(1) and 2(6) and (7) of the Act.
4. The parties stipulated, and we find, that the

<sup>1</sup> *Greenspan Engraving Corp.*, 137 NLRB 1308; *Gulf States Asphalt Company*, 106 NLRB 1212; *Reade Manufacturing Company, Inc.*, 100 NLRB 87; *Bill Heath, Inc.*, 89 NLRB 1555. In applying this standard, we have held that an employee employed on the date of the election is eligible to vote despite any intention to quit after the election. *Personal Products Corporation*, 114 NLRB 959; *Whiting Corporation*, 99 NLRB 117.

following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees of the Employer at its Indianapolis, Indiana, plant including truckdrivers, but excluding all office clerical employees, salesmen, professional employees and all guards and supervisors as defined in the Act.

5. The Board has considered the Regional Director's report, the exceptions thereto, the briefs of the parties, and the entire record in this case, and finds merit in the Petitioner's exceptions for the reasons discussed below:

The Regional Director's investigation disclosed that the Employer's observer challenged Viles when he came to the polls to vote. The observer claimed that before the polls opened the Employer instructed him to challenge Viles because Viles had been discharged earlier in the day. On these facts, the Regional Director concluded that Viles was in fact discharged before the start of the election and therefore ineligible to vote since he was not an employee at the time the election was in progress. We disagree.

It has long been recognized that an employee is eligible to vote in a Board election if he was employed during the eligibility payroll period and on the date of the election.<sup>1</sup> These requirements have been satisfied in the present case. Accordingly, we find that William E. Viles was eligible to vote in the election and that his ballot should be opened and counted.

**DIRECTION**

As part of the investigation to ascertain representatives for the purposes of collective bargaining with Choc-Ola Bottlers, Inc., Indianapolis, Indiana, it is hereby directed that the Regional Director for Region 25 shall, pursuant to the Rules and Regulations of the Board, within 10 days from the date of this Direction, open and count the challenged ballot of William E. Viles, and thereafter prepare and cause to be served upon the parties a revised tally of ballots, including therein the count of the challenged ballot.

Furthermore, in an analagous situation, the Board held in *West Texas Equipment Company*, 142 NLRB 1358, that employer conduct occurring on the day the representation petition was filed, although prior to the time of the filing, took place within the critical period. Therefore, in identifying the beginning of the critical period, we refused to fractionalize the day that the petition was filed.