

West Coast Meat Packing Company, Inc. and Butchers' Union Local No. 516, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. Case 20-RC-10219

January 24, 1972

DECISION, DIRECTION, AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING 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 20 on October 1, 1971, among the employees in the unit described below. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 41 eligible voters, 41 cast ballots, of which 17 were for, and 19 against, the Petitioner, and 5 were challenged. The challenged ballots are sufficient in number to affect the results of the election.

In accordance with the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, the Regional Director conducted an investigation and on November 22, 1971, issued and duly served on the parties his Report on Challenged Ballots and Objections in which he recommended that three of the challenges be overruled, that these ballots be opened and counted, and that a revised tally of ballots issue; that one of the challenges be sustained; and that in the event the revised tally of ballots reveals that the fifth challenged ballot is determinative of the results of the election, a notice of hearing issue to resolve the eligibility status of that voter. He further recommended that, in the event that the resolution of the challenged ballots results in a majority vote against the Petitioner, the Board sustain Objections 1 and 2; but if the Board overrules Objections 1 and 2 and adopts the recommendation with respect to Objection 5, that a notice of hearing issue to resolve the issues raised by Objections 3 and 4. Subsequently, both the Petitioner and the Employer filed exceptions to the Regional Director's report, and the Employer filed a brief in opposition to the Petitioner's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding 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(b) of the Act:

All employees of the Employer at its Union City, California location including maintenance workers, boners, kill-floor butchers, cooling helpers, washers, kill-floor scalers, laborers, packers and calf-skinners, and truck loaders, excluding office clerical employees, salesmen, guards and supervisors as defined in the Act.

5. The Board has considered the Regional Director's report and the Petitioner's and the Employer's exceptions thereto, and hereby adopts the Regional Director's findings and recommendations, except with respect to Objections 1 and 2. In Objections 1 and 2 the Petitioner urges that the election be set aside because of substantial errors in the *Excelsior* list. The Regional Director found that since 10 of 42 addresses, or more than 22 percent were inaccurate, and 2 of 44 eligible voters, or more than 4 percent were omitted from the list, the Employer did not comply with the *Excelsior* requirements and, therefore, the election should be set aside. Although the record supports the Regional Director's factual findings of inaccuracies and omissions, we do not believe that the number of errors in the list is substantial enough to require setting aside the election.¹ Furthermore, "Generally, the Board will not set an election aside because of an insubstantial failure to comply with the *Excelsior* rule if the employer has not been grossly negligent and has acted in good faith." *The Lobster House*, 186 NLRB No. 27. Here, the Employer obtained the addresses from the W-4 forms completed by the employees in January 1971. He omitted one name because of his belief that the employee was not in the unit, and left the other employee's name off the list because the employee was on a temporary leave of absence and the Employer thought that he was therefore ineligible to vote. Although the Employer was wrong on both counts, we do not believe these mistakes constitute gross negligence or indicate bad faith. Accordingly, we do not adopt the Regional Director's recommendation as to Objections 1 and 2 and find that these objections should be overruled.

¹ Cf. *Pacific Gamble Robinson Co.*, 180 NLRB 532, where 11 percent of the names were omitted. See *Fontainebleau Hotel Corp.*, 181 NLRB No. 176, where, although 18 percent of the addresses were inaccurate, the Board found the errors to be insubstantial.

DIRECTION AND ORDER

It is hereby directed that, as part of the investigation to ascertain a representative for the purpose of collective bargaining with the Employer, the Regional Director for Region 20 shall, pursuant to the National Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, and within 10 days from the date of this Decision, open and count the ballots of Kenneth A. Moore, Tony Certuche, and Leo J. Morotti, the challenges to which have been overruled herein, and shall thereafter prepare and cause to be served on the parties a revised tally of ballots, including therein the count of said challenged ballots. If the results are not determinative after the aforementioned three ballots have been opened and counted, and the unresolved challenge would be determinative, a hearing shall be held concerning the eligibility of Walter N. Batteate.

IT IS FURTHER ORDERED that, in the event that resolution of the challenged ballots results in a majority vote against the Petitioner, a hearing be held before a duly designated Hearing Officer for the purpose of re-

ceiving evidence to resolve the issues raised by the Petitioner's Objections 3 and 4.

IT IS FURTHER ORDERED that the Hearing Officers designated for the purpose of conducting such hearings shall prepare and cause to be served on the parties reports containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said issues. Within 10 days from the date of issuance of such reports, either party may file with the Board in Washington, D.C., eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other party and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Hearing Officers.

IT IS FURTHER ORDERED that the above-entitled proceeding be, and it hereby is, referred to the Regional Director for Region 20 for the purpose of conducting such hearings, if necessary, and that the said Regional Director be, and he hereby is, authorized to issue notice thereof.