Q-T Tool Company, Inc. *and* Susan Fish Petitioner, and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). Case 25–RD–289

October 4, 1972

SUPPLEMENTAL DECISION AND DIRECTION TO OPEN AND COUNT CHALLENGED BALLOTS

BY MEMBERS FANNING, KENNEDY, AND PENELLO

Pursuant to a Stipulation for Certification Upon Consent Election, an election by secret ballot was conducted on May 14, 1971, under the direction and supervision of the Regional Director for Region 25 among the employees in the appropriate unit. At the conclusion of the election, the parties were furnished a tally of ballots which showed that, of approximately 61 eligible voters, 50 cast ballots, of which 13 were for and 22 against the Union. There were 15 challenged ballots. The Petitioner challenged eight ballots and the Employer challenged seven ballots. These challenges were sufficient in number to affect the results of the election. No objections to conduct affecting the election were filed.

In accordance with the Rules and Regulations of the National Labor Relations Board, the Regional Director conducted an investigation and on August 13, 1971, issued and duly served on the parties his Report on Challenged Ballots and Recommendations to the Board in which he recommended that the challenges to all 15 ballots be overruled and that these ballots be opened and counted with a revised tally of ballots and an appropriate certification to issue at an appropriate interval thereafter. Subsequently, the Petitioner and the Employer filed exceptions to the Regional Director's report.

The Board considered the Regional Director's report and the exceptions filed thereto by the Petitioner and the Employer and on November 23, 1971, issued a Decision, Direction, and Order [1] in which it adopted the Regional Director's recommendation with regard to 10 of the 15 challenged ballots.[2] The Board therefore ordered that these 10 ballots be opened and counted and a revised tally of ballots served on the parties and that if the remaining 5 challenged ballots, i.e., the ballots of Velma Chambers, Elvin Clark, Bobby Elliott, Donald Gratzer, and Betty Inman, were still determinative that a hearing be held concerning the eligibility of those who cast the 5 remaining challenged ballots.

Thereafter, the 10 ballots whose challenges were overruled were opened and counted and a revised tally of ballots was served on the parties. The revised tally showed that of approximately 61 eligible voters, 50 cast ballots, of which 22 were for and 23 against the Union with 5 challenged ballots still outstanding.

As the remaining challenged ballots were determinative of the election results, a hearing was thereafter held on these five ballots pursuant to the Board's Decision before Hearing Officer Frederick G. Winkler. On March 23, 1972, Hearing Officer Winkler issued his Report on Challenges in which he recommended that the challenges to all five ballots be overruled, that these ballots be opened and counted, and that the Regional Director be directed to issue an appropriate certificate of results. The Employer and the Petitioner thereafter filed exceptions to the Hearing Officer's recommendation with respect to each of the five challenged ballots.

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.

The Board has considered the record in this case, including the Hearing Officer's report and the Employer's and Petitioner's exceptions thereto and has decided to overrule the challenges to the ballots of Betty Inman, Bobby Elliott, and Velma Chambers, but to sustain the challenges to the ballots of Elvin Clark and Donald Gratzer.

The record reveals that a strike commenced at the Employer on August 10, 1970. Betty Inman and Bobby Elliott were among the group of employees who struck the Employer on that date. On August 11, 1970, the Employer sent a letter to the group of its employees who had earlier been laid off. This group included Velma Chambers, Elvin Clark, and Donald Gratzer, who had all been laid off on February 12, 1970. In the letter, the Employer notified the laid-off employees of the strike that had just commenced and stated to them that they were now being recalled. The letter went on to say, "Please notify [the Employer] if you intend to return to work within seventy-two hours and you must return to work within five working days of this letter. *Failure to do so will result in placing you on the strike roster.*" (Emphasis supplied.) The three laid-off employees, Chambers, Clark, and Gratzer, did not respond to the letter.

On the basis of the foregoing evidence, the Hearing Officer found all five of the challenged voters to be economic strikers. In the absence of exceptions to the Hearing Officer's findings that each of the five

[1] Not published in Board volumes.

[2] The Board determined that the Petitioner's and Employer's exceptions to these 10 ballots raised no material or substantial issues warranting reversal of the Regional Director's findings and recommendations or warranting a hearing of any of these challenges.

voters was an economic striker, we adopt these findings *pro forma.*

The Hearing Officer then concluded that each of the five voters was eligible to vote under the applicable Board criteria for determining the eligibility of economic strikers to vote in elections held within 1 year of the commencement of a strike.[3] Both the Employer and the Petitioner except to this finding of the Hearing Officer with respect to each of the five voters since they claim that each of these five had obtained other permanent and substantially equivalent employment by the date of the election and hence was ineligible to vote.

We conclude that on the applicable criteria for determining the eligibility of these voters, only employees Inman, Elliott, and Chambers were eligible. Therefore, we sustain the challenges to Clark and Gratzer.

Initially, we note that our determination of these five voters' eligibility is to be weighed in light of the Board's decision in *Pacific Tile and Porcelain.*[4] There, the Board stated that an economic striker is presumed to continue in that status and thus is eligible to vote under Section 9(c)(3) of the Act. In order to rebut the presumption of eligibility the party challenging must affirmatively show by *objective* evidence that the economic striker has abandoned his interest in his struck job. The Board noted that the nature of the evidence which might rebut the presumption would be determined on a case-by-case basis, but it cautioned that "acceptance, of other employment, even without informing the new employer that only temporary employment is sought, will not of itself be evidence of abandonment of the struck job so as to render the economic striker ineligible to vote."[5]

With these considerations in mind we proceed to an analysis of the status, on the date of the election,[6] of each of the five voters challenged herein.

The following challenges are overruled.

(1) *Betty Inman:*[7] Inman, who was among the group of employees who struck the Employer in August 1970, began work at RCA in Bloomington, Indiana, in March 1971. At the time of the election she was working at RCA and was earning $2.215 per hour in contrast to the $2.45 per hour she was making at the Employer on the date of the strike. RCA's fringe benefits are comparable to or better than those of the Employer.

An RCA representative testified that a month after the election, at the Employer's request, he asked Inman what were her intentions when she took the job at RCA, and that her response was that she had no desire to return to the Employer. However, Inman, herself, testified that she had stated that she would not return to the Employer, but she specifically noted that it was only after she had moved her residence from Bedford to Martinsville, Indiana, that she made this comment. The record shows that Inman moved after the election.[8] Inman stated that prior to her moving if the Union had settled a contract she would have returned to the Employer.

Although Inman testified that she was told at the time of the interview at RCA the job she sought was a permanent position, she testified that she never told the interviewer she had no intentions of returning to the Employer. She did say that the Union was on strike and she did not think there was any hope of settlement. Further, although she stated that she would not return to the Employer to make less money, it is on record that her rate of pay was higher at the Employer on the day she struck *vis-a-vis* her rate at RCA on the election date.[9]

The evidence demonstrates that on the election date, Inman had not abandoned her interest in returning to the Employer and she was therefore eligible to vote. Her change of attitude, occasioned by her moving, coming as it did after the election date is immaterial.[10]

(2) *Bobby Elliott:* Elliott was also in that group of the Employer's employees who struck in August 1970. He secured work at Cornwell Company, Paoli, Indiana, in January 1971, and was working there at the time of the election. Elliott was earning $2.80 per hour at the Employer when he went on strike and he started at Cornwell at $2 per hour.[11] Cornwell is only 10 blocks from Elliott's home while the Employer is located 13 miles away. Elliott now has a second job which is something he did not have while he worked at the Employer. However, there is nothing in the record showing what that second job entails and how much additional money is supplied by it.[12]

[3] See *Pacific Tile and Porcelain Company,* 137 NLRB 1358 This case is discussed below.

[4] See fn 3, *supra,* for citation.

[5] 137 NLRB 1358 at 1359–60.

[6] It is this date and not some later date which is crucial here. *T E. Mercer Trucking Co.,* 138 NLRB 192.

[7] In his report, the Hearing Officer commented that certain evidence submitted by the Employer and the Petitioner with respect to Inman, Clark, and Chambers consisted of alleged postelection utterances by these three individuals. The Hearing Officer mistakenly concluded that under the authority of *T E Mercer Trucking Co, supra,* and *Roylyn, Inc,* 178 NLRB 197, those postelection statements were entitled to no weight. Neither *T E. Mercer* nor *Roylyn* stands for the proposition that post election *statements generally* are entitled to no weight but rather those cases state that *changes in status* after an election are immaterial. Thus, we have considered those postelection statements of Inman, Clark, and Chambers in conjunction with all the other evidence presented with respect to their eligibility.

[8] While her testimony does not make it clear precisely when she moved, it is undisputed that (1) her husband tranferred jobs after the election and (2) it was this transfer which precipitated her moving.

[9] It was only after the election date that her rate of pay at RCA became larger than what she had been making at the Employer.

[10] *Roylyn, Inc, supra,* 200, fn 3, and *T E Mercer Trucking, supra,* 193, fn. 4.

[11] There is no definite evidence of how much he was making at Cornwell on the day of the election.

[12] In light of the considerably smaller salary Elliott started with at Corn-

Continued

A representative of Cornwell was called to testify by the Employer. This man had interviewed Elliott at the time of his hire. The witness testified that Elliott had written on his application that the reason he had left the Employer was "strike-quit." The representative further testified that Elliott had also told him that there was a strike at the Employer and that he had quit and that he would not go back to the Employer. When asked when Elliott told him this, the witness said "at the time I employed him. Because we've got the same policy the other companies have. We don't like to hire people that's [sic] on strike, that work for us six weeks and then go back to where they're striking from."

On the evidence before us we do not find that the Employer and Petitioner have rebutted the presumption of Elliott's continued eligibility. With regard to Elliott's statement to Cornwell's official, even accepting such statement to be true, we do not view that as sufficient *objective* evidence to rebut the presumption in the circumstances under which the statement was made.[13] We thus find that Elliott was eligible to vote and the challenge to his ballot is overruled.[14]

(3) *Velma Chambers:* Chambers was among that group of employees laid off by the Employer in February 1970.[15] Although she was not working in August 1970, when she was sent a copy of the Employer's letter in which it offered jobs to all its laid-off employees, she did not return to the Employer. She subsequently obtained a job at W. T. Grant in her hometown of Bedford, Indiana, in September 1970. She was working there at the time of the election and was then earning $2 per hour. She was earning $2.35 per hour at the Employer when she was laid off.

A representative of Grant's, which has a policy against hiring employees for temporary work, was called to testify by the Petitioner and stated that on two occasions after the election he had asked Chambers whether she intended to seek permanent employment at Grant's and both times she indicated she had no desire to return to the Employer.[16] The conversations were initiated by the witness and the question concerning Chambers' intentions was asked at least the first time and possibly the second at the behest of the Employer. The witness stated that he could not remember if Chambers had said in the first conversation that she did not intend to return to the Employer on the day she voted, but in the second conversation the witness said Chambers told him that she voted only because her husband said she might as well.

There was no showing that Chambers had been assured of any legitimate business reason for the questioning by Grant's representative and, in the circumstances in which Grant's representive broached the question of her return to the Employer, we hardly consider her response to the second questioning as objective evidence of her intent at the time of the election.

Accordingly, we find that Chambers was eligible to vote and the challenge to her ballot is overruled.

The following challenges are sustained:

(1) *Elvin Clark:* Like Chambers, Clark was laid off in February 1970, by the Employer.[17] Unlike Chambers, however, Clark was working (at General Electric in Bloomington, Indiana) at the time the Employer sent its letter of recall to the laid-off employees in August 1970. In fact, Clark had been working at G.E. since April 1, 1970, and was working there at the date of the hearing. Clark, whose G.E. workplace was 40 miles from his home in Mitchell (where the Employer is located), was earning $2.69 per hour at G.E. on the date of the election. This was $.04 more per hour than he made at the Employer at the time of his layoff. G.E. has a policy against hiring temporaries, and it is its practice to explore with a job applicant at the time of his interview any intention he might have to return to his previous employment at some later date. Clark, who commented on his job application that he had been laid off at Employer, testified that he understood that the job at G.E. was a permanent job at the time he applied for it.

On the basis of the above we find Clark was ineligible to vote. We note that he was laid off even before the Union was certified as the bargaining representative and that he obtained what he understood to be a permanent job some 4 months before the strike began. We note also that Clark made no reply to the Employer's August 1970 letter. In fact, the only evidence that Clark still had an interest in the Employer on the election date was the fact that he voted. In these circumstances, we sustain the challenge to Clark's ballot.

(2) *Donald Gratzer:* Gratzer was also laid off in February 1970. He initially obtained a job at the Hamilton Harris Company from May 1970 to November 1970 at which time he was terminated. He then worked at General Electric in Bloomington for

well, the fact that Elliott has a second job may be more a necessity than the luxury the Employer and Petitioner intimate.

[13] *Pacific Tile and Porcelain, supra* at 1362 (employee Kuhlmey); *Roylyn, Inc., supra* at 202 (employee Keith).

[14] To the extent that the Hearing Officer and our dissenting colleague address themselves to Elliott's *subjective* intent, in a discussion of his eligibility, we herewith state our disagreement with their approach The Board noted in *Pacific Tile* at 1359 that attempting to discern an individual's subjective intent at any particular time is a less facile approach than viewing the objective evidence presented.

[15] At the date of the layoff, the Union had not yet been certified as the collective-bargaining representative of the employees. Certification followed the layoff by 8 days.

[16] The witness did not interview Chambers initially, however, and thus did not know if Chambers had been told Grant's policy on hiring when she applied for the job.

[17] As noted, this was before the Union was certified as the bargaining representative

a month in January-February 1971 but he quit there because he was dissatisfied with the job. Gratzer was unemployed at the date of the election in May 1971. Notwithstanding the fact that he was unemployed from February to May 1971, there is no indication that Gratzer participated in the strike at any time. With respect to the two jobs Gratzer held after his layoff, he testified that the first job was not just a temporary job when he took it and the second was "supposedly" permanent.

On the basis of the foregoing we find that Gratzer was ineligible to vote and that the challenge to his ballot should be sustained. As with Clark, Gratzer testified that before the strike commenced he secured employment which was not just temporary and as with Clark he did not respond to the Employer's recall letter from layoff. And subsequent to Gratzer's layoff there is no evidence of his interest in the affairs of the Employer other than his voting in the election. On such facts we find Gratzer ineligible.

As we have overruled the challenges to three ballots and these are determinative of the results of the election, we shall direct that the Regional Director open and count the ballots of Betty Inman, Bobby Elliott, and Velma Chambers and cause to be served on the parties a revised tally of ballots and an appropriate certificate of results.

DIRECTION

It is hereby directed, that, as part of the investigation to ascertain a representative for the purposes of collective bargaining with the Employer, the Regional Director for Region 25 shall, pursuant to the Board's Rules and Regulations, within 10 days from the date of this direction, open and count the ballots cast by Betty Inman, Bobby Elliott, and Velma Chambers and thereafter cause to be served on the parties a revised tally of ballots including therein the count of the above-mentioned ballots. Thereafter the Regional Director shall issue the appropriate certification in accordance with the Board's Rules and Regulations.

MEMBER KENNEDY, dissenting in part:

I agree with my colleagues that Betty Inman's and Velma Chambers' ballots should be counted and that Elvin Clark's and Donald Gratzer's ballots should not be counted. Contrary to my colleagues, however, I would also sustain the challenge to the ballot of Bobby Eliott.

Elliott sought and obtained employment with the Cornwell Company several months prior to the election, and was still employed there at the time of the hearing. On his application for employment with Cornwell, he wrote the reason for leaving the Employer as "strike-quit." Uncontradicted testimony shows not only that Cornwell had an established policy of hiring only permanent employees but that this was specifically explored with Elliott at the time of being hired. Elliott not only stated that he had no intention of returning to work at Q-T Tool, but furnished specific reasons as the basis for his decision. The Hearing Officer concluded that Elliott's subjective intent might have been different from that stated by him and, accordingly, found that his status continued to be that of an economic striker after his acceptance of permanent employment with Cornwell.

Examination of the record does not disclose the slightest evidence of a different subjective intent on the part of Elliott than that expressed by him at the time of employment at Cornwell. In my view, on the facts of this case there is no warrant for a presumption that Elliott's subjective intent was any different from that which was stated by him. I am of the view that the presumption that an economic striker continues in that status can be rebutted without adducing evidence to foreclose every other possibility that can be conjured up. Just like any other question of fact, the status of an economic striker must be evaluated on the evidence presented. In my opinion, the evidence is here clearly sufficient to show that Elliott abandoned his struck job with the Employer on successfully obtaining permanent employment with Cornwell.