

Globe Molded Plastics Company, Inc., Employer-Petitioner and Textile Workers Union of America, AFL-CIO-CLC. Case 8-RM-635

November 21, 1972

DECISION AND DIRECTION

BY CHAIRMAN MILLER AND MEMBERS
FANNING AND JENKINS

Pursuant to a Stipulation for Certification Upon Consent Election, an election by secret ballot was conducted in the above-entitled proceeding on January 26, 1972, under the direction and supervision of the Regional Director for Region 8, among the employees in the appropriate unit. At the conclusion of the balloting, the parties were furnished a tally of ballots, which showed that of approximately 35 eligible voters, 33 cast ballots, of which none were cast for the Union, 7 were cast against the Union, and 26 were challenged. The challenged ballots were sufficient in number to affect the results of the election. No objections to the election were filed.

Pursuant to the provisions of the National Labor Relations Board Rules and Regulations, after reasonable notice to the parties and opportunity to present relevant evidence, the Regional Director conducted an investigation of the issues raised by the challenges and, on February 25, 1972, issued and served on the parties his Report on Challenged Ballots recommending that the challenges to the ballots cast by Roy Allen, Samuel Bradshaw, Harley Church, Joseph Chester, Jr., Robert Enochs, Gregory Fogle, Russell Funk, David W. Gadd, Charles Gerdau, David Kochur, Keith Larrick, Robert Lashley, Gary McGeary, Richard Milhoan, Harold Moore, Daniel Nealey, George Nealey, Gary Nicholson, Joe Proctor, John Rothwell, John Robish, Dale Smith, David Stevens, Richard Stillion, Ernest Wheeler, and Glen Wheeler be sustained. Thereafter, the Union filed timely exceptions to the Regional Director's recommendations regarding the challenges to ballots cast by the 26 above-named individuals. The Employer filed a reply to the Union's exceptions. Subsequently, pursuant to a Union telegram citing changed circumstances, the Regional Director conducted a further investigation and issued a Supplemental Report on 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.

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 employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties agreed, and we find, the following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of the Act.

All production and maintenance employees employed by the Employer at its Byesville, Ohio plant, excluding all office clerical employees, and professional employees, guards and supervisors as defined in the Act.

5. The Board has considered the Regional Director's report, the Union's exceptions thereto, and the Employer's reply. In his Report on Challenged Ballots the Regional Director found that due to the loss of business during the period of time the employees had been engaged in an economic strike the Employer had only enough work for its present seven employees and that it could not reasonably anticipate receiving any additional business in the foreseeable future due to the depressed conditions in the plastics industry. In view of the foregoing, the Regional Director recommended that the challenges to the ballots of the 26 above-named individuals should be sustained since the employees did not have any reasonable expectancy of recall. We disagree.

Section 2(3) of the Act provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he has not obtained regular and substantially equivalent employment, and Section 9(c)(3) of the Act clearly provides that:

Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.

The Supreme Court has stated that it is the primary responsibility of the Board to "strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy."¹ Later, in *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, the Court recognized

¹ *N.L.R.B. v. Great Dane Trailers*, 388 U.S. 26.

that strikes frequently affect the level of production and the number of jobs, holding that a striker's basic right to a job cannot depend upon job availability as of the moment he applies for reinstatement, but as a striker, his employee status continues until he has obtained "other regular and substantially equivalent employment."² With these basic principles in mind, we turn to the facts in this case where the 26 above-designated economic strikers, employees under Section 2(3) of the Act until they obtain other regular and substantially equivalent employment, had been engaged in their strike for 3 months prior to the election.³ Notwithstanding the alleged depressed conditions in the plastics industry, there is no contention nor any evidence that the work of the strikers has been permanently abolished or that they have abandoned interest in their jobs. The Employer has shown that certain work has been lost and obtaining new customers is difficult, possibly because of the effectiveness of the strike, but this is not the type of permanent abolition of jobs or the elimination of jobs for economic reasons⁴ which justifies disenfranchising strikers otherwise eligible to vote.⁵ Accordingly, we find that the economic strikers herein involved are entitled to exercise their employee franchise and are eligible to vote. Chal-

lenges to the ballots of the 26 above-designated individuals are hereby overruled.⁶

We shall direct that the Regional Director open and count these ballots, and issue and serve on the parties a revised tally of ballots and an appropriate certification of the results of the election.

DIRECTION

It is hereby directed that, as part of his investigation to ascertain the representative for the purpose of collective bargaining with the Employer, the Regional Director for Region 8 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 Roy Allen, Samuel Bradshaw, Harley Church, Joseph Chester, Jr., Robert Enochs, Gregory Fogle, Russell Funk, David W. Gadd, Charles Gerdau, David Kochur, Keith Larrick, Robert Lashley, Gary McGeary, Richard Milhoan, Harold Moore, Daniel Nealey, George Nealey, Gary Nicholson, Joe Proctor, John Rothwell, John Robish, Dale Smith, David Stevens, Richard Stillion, Ernest Wheeler, and Glen Wheeler, and thereafter prepare and cause to be served on the parties a revised tally of ballots including therein the count of above-mentioned ballots and an appropriate certificate.

² Compare, *The Laidlaw Corporation*, 171 NLRB 1366; *C H Guenther & Son, Inc., d/b/a Pioneer Flour Mills*, 174 NLRB 1202, 1203

³ In *Pacific Tile and Porcelain Company*, 137 NLRB 1358, 1359, the Board stated that it would presume that an economic striker continues in such status and, hence, is eligible to vote under Sec. 9(c)(3). To rebut such presumption, the party challenging his vote must affirmatively show by objective evidence that the employee has abandoned his interest in his struck job. Moreover, even the acceptance of other employment, without informing the new employer that only temporary employment is sought, will not of itself be recognized as evidence of abandonment of the struck job so as to render the economic striker ineligible to vote. The Board therein overruled *Horton's Laundry, Inc.*, 72 NLRB 1129, and *Remington Rand, Inc.*, 74 NLRB 447, to the extent that they are inconsistent with the approach adopted for the resolution of the issue under discussion. The Board has consistently applied the presumption it announced in *Pacific Tile and Porcelain Company*. See, *Roylyn, Inc.*, 178 NLRB 197; *Akron Engraving Company, Inc.*, 170 NLRB 232, *S & M Manufacturing Company*, 165 NLRB

663, *Kingsport Press*, 146 NLRB 1111, 1112; *American Metal Products Company*, 139 NLRB 601.

⁴ Cf. *Meridian Plastics, Inc.*, 108 NLRB 203, 205; and *E. J. Kelley Company*, 98 NLRB 486, 488.

⁵ *NLRB v. Fleetwood Trailer Co., Inc.*, *supra*, where in the concurring opinion of Mr. Justice Harlan, he noted that the employer had neither abolished nor filled the strikers jobs, but intended at all times to return to full production as soon as practicable.

⁶ In his Supplemental Report on Challenged Ballots of July 17, 1972, the Regional Director recommended that his initial Report on Challenged Ballots, dated February 25, 1972, be disregarded and that a hearing be held to resolve the alleged issues raised by the Employer's challenges to the ballots of the 26 voters involved. Such recommendation of the Regional Director is overruled since a literal reading of Sec. 9(c)(3) of the Act makes the changed economic conditions in the circumstances of this case irrelevant to the issue of voting status.