

The J. H. Day Company, a Division of Leblond, Incorporated and Independent Machinists' Union, and Sheet Metal Workers' International Association, Local Union No. 183, AFL-CIO. Case 9-AC-35

July 9, 1973

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

On November 24, 1964, a representation election was conducted among the employees of the Employer and, thereafter, on December 7, 1964, the Independent Machinists' Union, hereinafter referred to as the Independent, was certified in Case 9-RC-6098 as the exclusive bargaining representative for the appropriate unit¹ of the Employer's employees. On January 17, 1973, the Sheet Metal Workers' International Association, Local Union No. 183, AFL-CIO, hereinafter referred to as Local 183, and the Independent filed the instant request to amend the certification in the respects indicated below.

A hearing on the petition was held on February 5, 6, 7, and 9, 1973, at Cincinnati, Ohio, before Hearing Officer Robert P. Hunter. During the course of the hearing, employee Harold Ward was permitted to intervene in the proceeding as an interested party representing other interested employees of the Employer. Both the Intervenor and Employer oppose the granting of the amendment, contending, *inter alia*, that the voting procedure at the merger affiliation meeting was not fair and regular and that a question concerning representation exists.

Pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director transferred the case to the National Labor Relations Board for decision. The Employer, Joint Petitioners, and Intervenor filed briefs with the Board.

The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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.

¹ The appropriate unit, as set forth in the Board's Decision, is. All production and maintenance employees, including pattern-matters, employed by Employer at its plant located at 4932 Beech Street, Norwood, Ohio, but excluding all office clerical employees, and all guards, professional employees and supervisors as defined in the Act

Upon the entire record in this case, the Board further finds as follows:

Since late 1940 or early 1941, the Independent has been recognized by the Employer. The most recent certification issued by the Board occurred on December 7, 1964, following an election in which the United Steelworkers of America, AFL-CIO, was the only other union on the ballot.

Pursuant to a wage reopener clause in the current agreement (which is effective from January 1, 1972, to December 31, 1974), the Employer and Independent began negotiations in November 1972 concerning a change in wages. Russelburg, president of the Independent, testified that disappointment in the wage negotiations and the Employer's procrastination in processing grievances led to discussions of the possibility of affiliation to improve the Union's bargaining strength. At a regular monthly meeting on January 4, 1973, a motion was made to call a special meeting for January 11, 1973, and, according to Russelburg, to invite representatives of Local 183 to discuss the possibilities of merger and take a vote whether to affiliate with Local 183. On January 9, 1973, pursuant to the Independent's constitution and bylaws, a notice of a special meeting calling for an affiliation vote was posted on the Employer's five bulletin boards.

The January 11 meeting was held in two parts: the first meeting began at 4 p.m. for second-shift employees, and the second meeting began at 5:45 p.m. for the first-shift employees. Eighty employees attended the first meeting and 68 attended the second. There was no name verification procedure before an employee could enter the hall. After a question and answer period, the ballots were distributed at each meeting without checking off names of employees as they received ballots. A number of employees who attended the first meeting also attended the second. As each employee completed his ballot, he folded it and deposited it into a bingo cage which had been appropriated for collecting the ballots. The number of ballots cast (including 1 blank ballot) equaled 134. Seventy-eight of the ballots had "YES" and "NO" blocks with the following legend stated at the top: "To Affiliate with Sheet Metal Workers' International Association Local Union # 183." The remaining ballots were blank except for the "YES" and "NO" blocks.

The votes were tabulated at the close of the second election. The tally of ballots indicated that ballots were cast by 134 employees (including employees who were not union members), of which 75 voted YES to affiliate, 58 voted NO, and 1 ballot was blank. At the time of the vote, there were 175 to 180 employees in the unit, including nonunion members. President Russelburg asked if anyone wanted to recount the ballots or to challenge the voting procedures. No one expressed an objection. The results were then noted in

the minutes of the meeting and, thereafter, were posted on all union bulletin boards in the plant.

On January 12, 1973, Local 183's business manager informed the Employer of the affiliation vote outcome and indicated that bargaining rights were transferred to Local 183. The Employer, by letter dated January 16, declined to recognize Local 183 as the Independent's successor and stated that it would continue to recognize and bargain only with the Independent. Thereafter, Local 183 by telegram offered further proof of its successorship, but the Employer again declined to meet and suggested that the questions raised would best be resolved through the representation procedures of the National Labor Relations Board. The Joint Petitioners then filed the instant petition.

Immediately following the January 11 meeting, the Intervenor and several members of the Independent prepared a petition which was circulated among employees in the unit. Following a meeting at the National Labor Relations Board office in Cincinnati, these employees destroyed the petition and circulated a second one which read:

"We, the undersigned, members of the J. H. Day Company IMU, do not wish to be represented by the Sheet Metal Workers Union Local 183, or any other than the IMU."

"We also feel that the election dated January 11, 1973, was not conducted legally."

The signatures of 95 employees were obtained on January 30, January 31, and February 1.

There is nothing in the Independent's constitution and bylaws pertaining to affiliation with any labor organization nor are there provisions pertaining to conducting secret ballot votes.

There has been no change from the name of the Independent to Local 183 on any bank account, checkoff authorization, or other record.

The Employer and Intervenor contend, *inter alia*, that a question concerning representation exists and that assuming, *arguendo*, a question does not exist, the Board should nevertheless conduct a midcontract election to determine whether a different agent should administer the contract for its duration.

In particular the Employer and Intervenor allege that the attempted change of affiliation took place under circumstances that do not indicate that the change reflected a majority view and under election procedures so lax as to negate the validity of the election. They contend that nothing was said at the January 4 meeting about a merger speech or a vote on January 11 and that the notice of the special affiliation meeting was not posted 2 full days before the election as required by the Independent bylaws. They

argue further that the election procedures were substantially irregular because drinking took place and a large number of ballots were blank except for YES and NO boxes, and that safeguards were not provided to prevent nonunit employees from voting or to prevent unit employees from voting more than once. For these reasons, they contend the joint petition should be dismissed.

We agree. The totality of circumstances surrounding the election reveals procedural flaws and conduct so lacking in due process as to convince us that a question concerning representation clearly exists. As the Board stated in *North Electric Company*, 165 NLRB 942:

In determining whether to grant a motion to amend a certification, we are guided by the general rule that such motions may not be granted when they raise a question concerning representation that can only be resolved by an election. Thus, we do not permit the amendment of a certification where a schism is involved; that is, where the certified representative remains in existence and opposes the amendment. Nor do we grant amendments where the possibility of a question concerning representation remains open because the change of affiliation took place under circumstances that do not indicate that the change reflected a majority view. [Footnotes omitted.]

Here the inadequacies are so numerous, and the potential for abuse is so strong, that we are unable to conclude that the change of affiliation occurred in a manner and under conditions as to substantially eliminate the possibility of a question concerning representation remaining open. The record discloses that no attempt was made to determine who received a ballot or how many ballots a member received; that beer was consumed during the voting process; it is not clear what happened to the ballot container between the first and second meetings, nor is it clear what happened to the unused ballots during the interval; 56 of the 134 ballots cast had no legend at the top, but contained only "YES" and "NO" boxes; and a number of employees who attended the first meeting also attended, and may have voted during, the second. Jesse Hopkins, business representative of the Sheet Metal Workers, testified that during the balloting he noticed that there were not enough ballots to accommodate all the voters, "[s]o, I just politely substituted enough of the other ballots [i.e., the blank ballots from his suitcase] along with them." This type of conduct reflects a cavalier disregard for reasonable election procedures and safeguards. The Board carefully protects the integrity of its certification process and, consequently, cannot grant a motion to amend a

certification under the circumstances enumerated above. Accordingly, we shall dismiss the petition.²

² In view of the above disposition of this case, Member Penello finds it unnecessary to decide at this time whether he would dismiss on the additional ground articulated by the Court of Appeals for the Third Circuit in *American*

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.

Bridge Division, United States Steel Corporation v N.L.R.B., 457 F.2d 660 (1972).