

Alfred Nickles Bakery, Inc. and Bakery Drivers Union Local No. 52, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 8-RC-9162

April 4, 1974

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN MILLER AND MEMBERS
FANNING AND JENKINS

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director for Region 8 on August 20, 1973, an election by secret ballot was conducted on September 5, 1973, among the employees in an appropriate unit. Upon the conclusion of the election a tally of ballots was furnished the parties in accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended. The tally of ballots shows that there were approximately 11 eligible voters, and that of a total of 9 ballots cast, 4 were cast for the Petitioner, 3 were cast against, and 2 ballots were challenged. The challenged ballots are sufficient in number to affect the results of the election. Thereafter the Employer and the Petitioner filed objections to conduct affecting the results of the election.¹

The Regional Director conducted an investigation of the objections and challenges and thereafter, on November 8, 1973, issued and served on the parties his Report on Objections and Challenged Ballots. In his report the Regional Director recommended to the Board that the Employer's motion to dismiss Petitioner's objections be denied, that the Employer's objections be overruled in their entirety, that Petitioner's Objection 1 be sustained and Objection 2 be overruled, that the challenge to the ballot of Ralph E. Roser be overruled, that the challenge to the ballot of Gladys Marie Campano be sustained on the ground she is a supervisor, that the ballot of Roser be opened and counted and a revised tally of ballots be served on the parties, that if the revised tally of ballots shows that the Petitioner has secured a majority of the valid ballots cast a certification of representative issue to the Petitioner, and, in the event the revised tally of ballots shows that the Petitioner did not receive a majority of the valid ballots cast, that the election be set aside and a second election be held. On May 24, 1973, the Employer filed timely exceptions to the report with respect to the Regional Director's recommendations that the Employer's

¹ The Petitioner filed its objections on September 12, 1973, but failed to serve a copy on the Employer immediately thereafter. On September 28, 1973, the Employer filed a motion to dismiss the Petitioner's objections for lack of service on the Employer. On or about October 9, 1973, the Petitioner served on the Employer a copy of its objections.

motion to dismiss Petitioner's objections be denied, that its objections be overruled, and that the Petitioner's Objection 1 be sustained.

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 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 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 purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All truck loaders, warehouse employees, checkers and retail store employees employed at the Employer's store located at 240 Sieberling Street, Akron, Ohio, but excluding all office clerical employees, driver salesmen and professional employees, guards and supervisors as defined in the Act.

5. The Board has considered the Regional Director's report and the Employer's exceptions thereto, and with regard to the Regional Director's rulings on the Union's objections finds merit in said exceptions.² In our view, neither the factors on which the Regional Director relied nor the record before us taken as a whole warrants the conclusion reached by the Regional Director.

Initially, the Employer excepts to the Regional Director's conclusion that although the Petitioner did not serve a copy of its objections on the Employer until October 9, 1973, approximately 27 days after the objections were filed with the Regional Office, the objections were timely filed and served within the meaning of Section 102.69 of the Board's Rules and Regulations. The Employer, in support of its position, cited to the Regional Director our decision in *Peoples Natural Gas, Division of Northern Natural Gas Company*, 191 NLRB 272. The Regional Director, in rejecting the Employer's contention, distinguished the *Peoples Natural Gas* case from the facts of the

² In the absence of any exceptions thereto, we adopt the Regional Director's recommendations that the challenge to the ballot of Ralph E. Roser be overruled, that the challenge to the ballot of Gladys Marie Campano be sustained, and that the ballot of Roser be opened and counted and a revised tally of ballots be served on the parties.

instant case noting that in *Peoples* the delay in serving the objections on the employer was 36 days and in that case, the Board found that there had been an "utter and repeated disregard of the [Board's] Rules and Regulations" In addition, the Regional Director, citing the Board's decision in *Certain-Teed Products Corporation*, 173 NLRB 229, 230, noted that there was no evidence of any prejudice to the Employer resulting from the delay in service of the objections. In *Certain-Teed Products*, the record showed and the Board found that the union had timely served copies of its December 26, 1967, objections on the employer. However, that election case had been initiated by employee Jaynes' petition to decertify the union. Thus, Jaynes was a party to the proceeding and should have been served a copy of the objections. Although Jaynes was not served a copy of the union's objections, the record shows that on the day the objections were filed, Jaynes was advised by the Regional Office that objections had been filed and, on the next day, Jaynes was permitted by the employer to examine those portions of its copy of the objections relating to conduct of Jaynes during the election campaign. Jaynes was finally served a copy of the objections on January 12, 1968. On January 30, 1968, the employer filed its motion to dismiss the objections without regard to their merits on the ground that the union had failed to timely serve a copy on Jaynes. We rejected the employer's contention, noting in our decision in the *Peoples Natural Gas* case that the employer in *Certain-Teed* had received a copy of those objections pertaining to its own conduct. We would also now note for the record that the election in *Certain-Teed* was set aside based on objectionable conduct committed by that employer. Thus, in *Certain-Teed* the employer was timely served with those objections relating to its conduct, and having been timely served with the objections could not and did not suffer any prejudice from the failure to timely serve Jaynes.

In our opinion, the Regional Director has misconstrued the import of the cited cases in resolving the issue of noncompliance with our Rules and Regulations. Our decision in *Certain-Teed* does not stand for the proposition that the time requirements in our Rules and Regulations will be ignored on the singular ground that a party has not produced any evidence that it was prejudiced by another party's failure to comply with those requirements. Our Rules and Regulations have been developed and adopted for the purpose of providing for the orderly processing of representation cases within the framework of the National Labor Relations Act. In order to maintain the orderly processing of these cases, there must be adherence to the Board's Rules and

Regulations. We do not say that there will be a "slavish" adherence to form rather than substance. What we do say, however, is that in order to support a variance or deviation from the clear requirements of the Board's Rules, there must be some showing that there has been an honest attempt to substantially comply with the requirements of the Rules, or, alternatively, a valid and compelling reason why compliance was not possible within the time required by the Rules.

In the instant case, the record shows that initially the Petitioner did not serve its objections on the Employer. Approximately 2 weeks after the filing date, the Employer filed a motion to dismiss the objections on the ground that it had not been served with a copy of the objections. Notwithstanding the Employer's motion, which was served on the Petitioner, the Petitioner still did not serve a copy of its objections on the Employer until almost 11 days later. No explanation or reason was given for the delay. Thus, we have nothing in the record that would bring this case within either of the critical factors that would support a departure from the Board's Rules. Certainly, not serving a copy of the objections on the Employer until some 27 days later is not substantial compliance with the requirement that a copy of the objections be served on the Employer "immediately." At the same time, there is nothing in the record that would establish a valid and compelling reason why compliance with the service requirements of the Rules could not have been effected. Accordingly, we conclude that the Petitioner's objections were not properly filed and served pursuant to Section 102.69 of our Rules and Regulations and that the Employer's motion to dismiss the objections should be granted.

As to the Employer's objections to conduct affecting the results of the election, the Board, having duly considered the matter, hereby adopts the findings, conclusions, and recommendations of the Regional Director.

It is hereby ordered that Petitioner's Objections to Conduct Affecting the Results of the Election be, and they hereby are, dismissed in their entirety.

DIRECTION

It is hereby directed that the Regional Director for Region 8 shall, pursuant to the Rules and Regulations of the Board, within 10 days from the date of this Decision, Order, and Direction, open and count the ballot of Ralph E. Roser and prepare and cause to be served on the parties a revised tally of ballots, including therein the count of the above-mentioned ballot and thereafter issue the appropriate certification.