

Eck Miller Transportation Corporation and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Local No. 215, Chauffeurs, Teamsters, Warehousemen and Helpers of America, Petitioner. Case 25-RC-5432

June 10, 1974

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND
PENELLO

Pursuant to a Stipulation for Certification Upon Consent Election, an election by secret mail ballot was conducted 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 with a tally of ballots which showed that of approximately 135 eligible voters, 116 cast ballots, of which 39 were for, and 45 against, the Petitioner, and 32 ballots were challenged. The challenged ballots are sufficient in number to affect the results of the election. Thereafter, the Petitioner and the Employer filed timely objections to conduct affecting the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director for Region 25 conducted an investigation and, on January 9, 1974, issued and duly served on the parties his Report on Challenged Ballots and Objections to Conduct Affecting the Results of Election, Recommendations to the Board, Order Directing Hearing, Notice of Hearing and Order Consolidating Cases. In his report, the Regional Director recommended that the Employer's Objection 5 and Petitioner's Objections 1 (except as it relates to Charles Smith), 2, 3, and 4 be overruled. He further recommended that the challenges to the ballots of Cecil Huddleston, Alvie Brooks, Marvin Schoalff, James Smiley, Doyle West, Joe Durbin, Claude Avery, Walter Johnson, James Moore, and Harrell Freeman be sustained. He further recommended that the challenges to the ballots of Herbert Doms, William Bricker, A. D. Paine, Dennis Westmoreland, Paul Conley, Danny Eddings, and Richard Riley be overruled and that their ballots be opened and counted. The Regional Director, in his report, ordered that a hearing be conducted to resolve the issues raised by Petitioner's Objection 1 (as it relates to Charles Smith), the "Additional Alleged Objectionable Conduct," and Employer's

Objections 1, 2, 3, and 4. He further ordered that a hearing be conducted to resolve the issues raised by the challenges to the ballots of Edwin Hamlet, Louis (Tony) Salmela, Bobby Lee, Joe Scott, Bobby Haston, James Vance, Jeff Jackson, Melvin Hoopinger, Maureen Beatty, Howard Greene, Charles Wells, Glen Hagen, Dean Dunn, Randall Stratton, and Charles Smith. He further ordered that Case 25-RC-5432 and Case 25-CA-5817 be consolidated for the purposes of hearing, ruling, and decision by an Administrative Law Judge. Thereafter, the Petitioner and Employer filed timely exceptions to the Regional Director's report and briefs in support thereof; the Employer also filed a brief in answer to 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 owner-operator drivers and nonowner-drivers of equipment leased to Eck Miller Transportation Corporation operating on its authority, all mechanics, all garage laborers, and all local or city drivers (except local or city drivers who are covered by an existing valid collective-bargaining agreement) who are direct employees of Eck Miller Transportation Corporation at the Employer's Owensboro, Kentucky, facilities; but excluding all other Eck Miller employees, all nondriver owners of equipment leased to Eck Miller, all office clerical employees, all managerial employees, all joint employers,¹ all guards, and supervisors as defined in the Act.

5. The Board has considered the Regional Director's report, the Petitioner's² and Employer's excep-

¹ No exception has been taken to the Regional Director's finding that the Employer and the fleet owners are joint employers of nonowner drivers in this unit.

² We find no merit in the Petitioner's contention, in regard to the challenges to the ballots of A. D. Paine, Dennis Westmoreland, and Paul Conley, that we should reconsider the holding of *Plymouth Towing* (Continued)

tions thereto, and the Employer's brief in answer to Petitioner's exceptions, and hereby adopts³ the Regional Director's findings,⁴ conclusions, and recommendations⁵ with the following modifications:

(a) We find merit in the Employer's exception to the Regional Director's finding, insofar as it is based on an informal investigation, that owner-operator truckdrivers and nonowner-drivers employed by fleet owners who have leases with Eck Miller are employees and not independent contractors of Eck Miller. The investigation herein did not include a formal hearing and hence was insufficient for a conclusive determination by the Regional Director. Nevertheless, even though the issue of the drivers' status was not raised by the parties, the Regional Director properly relied on the terms of the stipulated appropriate unit agreed upon by the parties in the election agreement, as well as the provisions of the contemporaneous strike settlement agreement in which the Employer waived its right to assert any legal claim before the Board predicated on the proposition that owner-operators or nonowner-drivers are "independent contractors" and not "employees" within the meaning of Section 2(3) of the Act.⁶ Such an agreement must constitute a concession that those drivers are "employees" within the meaning of the Act in order for the Board's jurisdiction to be asserted lawfully.

Our dissenting colleague would direct a hearing on the issue as to whether the owner-operator truckdrivers and nonowner-drivers are independent contractors. We do not agree.

Although the facts in this case are such that the problems created in *Barwood, Inc.*, 209 NLRB No. 8, could conceivably recur, the chances of such a circumstance occurring again are quite remote. In

Barwood a union was certified after a stipulated election to represent a unit consisting mainly of cabdrivers. The employer refused to bargain and in a subsequent proceeding, under Section 8(a)(5) of the Act, introduced evidence, without objection from the General Counsel, to establish that the cabdrivers were in fact independent contractors. The Board was therefore constrained to find that the cabdrivers were not employees within the meaning of the Act and dismissed the complaint. It appears to be the rare case indeed where the General Counsel would not object to the admission of such evidence in view of the prior stipulated election.

In the case herein, the parties agreed to a Stipulation for Certification Upon Consent Election which included a unit description consisting of truckdrivers. Furthermore, the Employer, in a contemporaneous strike settlement agreement signed prior to the election, agreed not to assert a legal claim before the Board predicated upon the proposition that single owner-operators and nonowner-drivers of equipment leased to the Employer are "independent contractors" or are not "employees" within the meaning of Section 2(3) of the Act. Although the dissenting opinion correctly indicates that the Employer has excepted to the Regional Director's conclusion that these individuals are not independent contractors, the Employer does not now ask the Board to decide the issue (it in fact emphasizes that it is not now asserting that these individuals are not employees under the Act) and does not indicate that it will seek a Board determination in the future. Instead, it states that it merely seeks to have the Regional Director's conclusion

Company, Inc., 178 NLRB 651, that in a mail ballot election the voter must be employed on the eligibility date and on the date he casts (mails) his ballot. We agree with the Regional Director (who recommended overruling the challenges) that their ballots should be counted in spite of the possibility that they had terminated their employment with the Employer between the dates on which the ballots were cast and they were counted. Also, in the absence of exceptions thereto, we adopt, *pro forma*, the Regional Director's recommendation that the challenges to the ballots of Herbert Doods, Danny Eddings, and Richard Riley be overruled. Although we agree with the Regional Director that the ballots of the above six individuals should be opened and counted, since they, as a group, could not be determinative of the outcome of the election, they are not to be opened and counted until we have ruled upon the other challenges upon which a hearing will be held.

³ In the absence of exceptions thereto, the Board adopts, *pro forma*, the Regional Director's recommendations that the Employer's Objection 5 and Petitioner's Objections 1 (except as it relates to Charles Smith), 2, 3, and 4 be overruled; that the challenges to the ballots of Cecil Huddleston, Alvie Brooks, Marvin Schoalff, James Smiley, Doyle West, Joe Durbin, Claude Avery, James Moore, and Harrell Freeman be sustained; that a hearing be conducted to resolve issues raised by Petitioner's Objection 1 (as it relates to Charles Smith), Employer's Objections 1, 2, 3, and 4, and the challenges to the ballots of Jeff Jackson, Melvin Hoopingarner, Maureen Beatty, Howard Greene, Charles Wells, Glen Hagen, Dean Dunn, and Charles Smith; and that Case 25-RC-5432 and Case 25-CA-5817 be consolidated for the purposes of hearing, ruling, and decision by an Administrative Law Judge.

Contrary to the Employer's contention, the Board agrees with the Regional Director that a hearing is necessary to determine whether James Vance was an employee of the Employer on the eligibility and election dates.

⁴ Although the Employer's exception to the Regional Director's statement that it lacks any formal contractual arrangement with its directly employed truckdrivers may be correct, we need not consider this exception as this fact is immaterial to the resolution of any of the issues presented herein.

⁵ The Employer, in an exception, contends that issues arising out of additional alleged objectionable conduct cited by the Regional Director should not be the subject of a hearing since such allegations were neither the subject of nor related to Petitioner's objections. Members Kennedy and Penello agree that the hearing should include these issues, since they are also the subject of an unfair labor practice proceeding consolidated with the case herein for the purpose of hearing, but affirm the Regional Director's direction of a hearing without prejudice to the Employer's right to reassert this exception after the hearing. Member Jenkins would find no merit in the Employer's contention.

⁶ The Employer, in its brief, asserts that in the strike settlement agreement it only agreed not to raise the issue before the Board and therefore is not prohibited from raising the issue before any court. It is the general rule, pursuant to Sec. 10(e) of the Act, that a party may not, absent extraordinary circumstances, raise before a court an issue that has not been urged before the Board.

stricken as irrelevant because neither party has raised the issue.⁷

Contrary to the dissent, merely remanding for a hearing on this issue appears inadequate. It seems to us that the only way that we could now reach the issue would be to reject the stipulation, set the election aside, and remand for processing *de novo*. We see no utility in compelling the parties to litigate the employee/independent contractor status of the drivers. Such an approach would be contrary to our policy of encouraging the settlement of disputes by the parties themselves without resort to litigation. Furthermore, if we ordered a hearing on this issue under the above circumstances, we would be establishing a policy which would preclude a consent election and would require conducting a hearing whenever an independent contractor issue could possibly exist regardless of the position taken by the parties. Such a procedure is even more inappropriate when one considers that independent contractor issues present close factual questions which are clearly susceptible to stipulation of the parties. In fact, such cases submitted to the Board for decision have frequently resulted in divided opinions.⁸

(b) The Employer excepts to the recommendations that the challenge to the ballot of Walter Johnson be sustained and that of William Bricker be overruled. The Regional Director concluded that, because owner-operator Walter Johnson never hauled a load for the Employer after signing a lease during the strike, he did not meet the tests for eligibility. However, the current record is insufficient to determine whether in fact he became an economic striker and, if so, whether he retained his status as such on the eligibility and the election dates.⁹ Accordingly, we are of the opinion that a hearing concerning the voting eligibility of Walter Johnson should be conducted.

On the other hand, the Regional Director concluded that owner-operator William Bricker was an employee on the July 24, 1973, eligibility date and on the date he cast his ballot. The Employer contends that Bricker had terminated his employment before he mailed his ballot. Since the record is incomplete as to whether Bricker was an economic striker and, if so, whether he retained his status as such on the

pertinent dates, we are of the opinion that a hearing should also be conducted regarding Bricker.

(c) Although we affirm the Regional Director's order directing a hearing regarding the challenges to the ballots of Edwin Hamlet, Louis Salmela, Bobby Lee, Joe Scott, and Bobby Haston, we do so for reasons other than those set forth by the Regional Director. Hamlet, Salmela, Lee, and Scott lost access to a tractor, a *sine qua non* of employment with the Employer, when the fleet owners by whom they were directly employed terminated their leases with Eck Miller during the economic strike conducted against Eck Miller. Bobby Haston, an owner-operator, had his tractor repossessed by a lien holder during the strike. The Regional Director found that, since the Employer, along with the fleet owners, was a joint employer of the nonowner-driver employees of the fleet owners at the commencement of the strike, it was arguably obliged to reinstate economic strikers when openings occurred among the Employer's directly employed local city drivers. He therefore concluded that those drivers might be eligible to vote as unreinstated strikers and ordered a hearing to determine if they were strikers; if so, whether they had preserved or abandoned their rights to reinstatement on the eligibility and election dates; and whether they were or were not entitled to reinstatement as direct employees of the Employer when vacancies occurred under the *Laidlaw* rule.¹⁰ Finding Haston's situation analogous to that of the others, the Regional Director also ordered a hearing on the same issues regarding the challenge to his ballot.

The *Laidlaw* rule is inapplicable here in that it arose in an unfair labor practice context and deals with the entitlement of economic strikers to jobs when they become available; it is not concerned with the voting eligibility of economic strikers, which is governed by Section 9(c)(3) of the Act.¹¹ In order to determine the voting eligibility of the above individuals, the appropriate issues to be decided after a hearing are whether they were economic strikers, and, if so, whether the facts and circumstances show such affirmative action prior to the dates of casting their respective ballots¹² as would bring their status as such to an end.¹³ If such action occurred, e.g., by termination for valid economic reasons, it is irrele-

⁷ *MacAllister Machinery Co., Inc.*, 194 NLRB 928, cited by our dissenting colleague, is distinguishable on its facts. There the Board held that the leadmen could not be part of the unit because of their supervisory status in spite of the Stipulation for Certification Upon Consent Election which included them in the unit. But in that case the question was timely raised on challenges by a party seeking disposition of the issue, whereas here no party has challenged any of the ballots cast on the ground that the voter was an independent contractor. *N.L.R.B. v. A. J. Tower Company*, 329 U.S. 324.

⁸ See, e.g., *George Transfer & Rigging Co., Inc.*, 208 NLRB No. 25 (Members Fanning and Jenkins dissenting); *Contractor Members of the Associated General Contractors of California, Inc.*, 201 NLRB No. 36 (Member Kennedy dissenting).

⁹ *W. Wilton Wood, Inc.*, 127 NLRB 1675; *Pacific Tile and Porcelain Company*, 137 NLRB 1358.

¹⁰ *The Laidlaw Corporation*, 171 NLRB 1366

¹¹ See *Wahl Clipper Corporation*, 195 NLRB 634, where the Board rejected the analogous contention that replaced economic strikers should be eligible to vote in an election held more than 12 months after the commencement of an economic strike if they could be shown to have a reasonable expectancy of reemployment.

¹² *Plymouth Towing Company*, *supra*.

¹³ *W. Wilton Wood, Inc.*, *supra* at 1677; *Pacific Tile and Porcelain Company*, *supra*.

vant whether they were economic strikers, because they would then not be eligible to vote in any event.

ORDER

It is hereby ordered that a hearing be held for the purpose of receiving evidence to resolve the issues raised by the challenges to the ballots of William Bricker and Walter Johnson, as well as Maureen Beatty, Dean Dunn, Howard Greene, Glen Hagen, Edwin Hamlet, Bobby Haston, Melvin Hoopingartner, Jeff Jackson, Bobby Lee, Louis (Tony) Salmela, Joe Scott, Charles Smith, Randall Stratton, James Vance, and Charles Wells; by Petitioner's Objection 1 (as it relates to Charles Smith); by Employer's Objections 1, 2, 3, and 4; and by the "Additional Alleged Objectionable Conduct," in conjunction with the hearing in Case 25-CA-5817, in accordance with the Regional Director's order consolidating these cases for purposes of hearing. As directed by the Regional Director, such hearing shall be held before an Administrative Law Judge to be designated by the Chief Administrative Law Judge. In the event the unfair labor practice proceeding is disposed of prior to the hearing, a Hearing Officer will be duly designated to hear the representation matter.

IT IS FURTHER ORDERED that the Administrative Law Judge, or Hearing Officer, designated for the purpose of conducting such hearing shall prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said challenges and objections. Within the time prescribed by the Board's Rules and Regulations, any 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 each of the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Administrative Law Judge or Hearing Officer.

IT IS FURTHER ORDERED that the above-entitled matter be, and it hereby is, referred to the Regional Director for Region 25 for the purpose of arranging such hearing and that the said Regional Director be, and he hereby is, authorized to issue notice thereof.

MEMBER KENNEDY, concurring in part and dissenting in part:

I agree with my colleagues that a hearing is necessary to resolve the various issues as to the status and eligibility of William Bricker, Walter Johnson, Maureen Beatty, Dean Dunn, Howard Greene, Glen Hagen, Edwin Hamlet, Bobby Haston, Melvin Hoopingartner, Jeff Jackson, Bobby Lee, Louis

(Tony) Salmela, Joe Scott, Charles Smith, Randall Stratton, James Vance, and Charles Wells. I also agree with my colleagues that a hearing is necessary to resolve Petitioner's Objection 1 and Employer's Objections 1, 2, 3, and 4, as well as the "Additional Alleged Objectionable Conduct."

Unlike my colleagues, I would also direct a hearing on the issue as to whether the owner-operator truckdrivers and nonowner-drivers are independent contractors. The Employer has excepted to the Regional Director's conclusion that these individuals are not independent contractors. In my view, this issue has neither been investigated nor litigated and there is no basis for the Regional Director's finding. My colleagues are unwilling to inquire as to whether these individuals are independent contractors even though these drivers constitute a majority of the persons in the unit. In my view, such inquiry is mandatory since under our Act there can be no obligation to bargain by this Employer if, in fact, the drivers are not employees within the meaning of Section 2(3) of the Act. The language of this Board in *MacAllister Machinery Co., Inc.*, 194 NLRB 928, with respect to supervisors is equally applicable to the drivers here if they, in fact, are independent contractors. We said in the *MacAllister Machinery* case:

Contrary to the Respondent's contention, and in agreement with the General Counsel, the intent of the parties to the stipulation is not relevant here since the parties cannot stipulate that supervisors be included in the unit when they are expressly excluded by the Act. Whether certain individuals are employees or supervisors is determined by the application of the facts to the statutory criteria contained in Section 2(11) of the Act and not by any agreement between the parties. *Tribune Co.*, 190 NLRB No. 65 (1971), is inapposite since it involved the inclusion or exclusion of employees and not individuals, as here found by the Board to be supervisors.

I cannot understand the refusal of my colleagues to include the independent contractor issue within the scope of the hearing they are directing. If they would do so, it would avoid a likelihood of a repetition of the debacle presented to this Board in *Barwood, Inc.*, 209 NLRB No. 8. A Board majority held that we were obliged to dismiss an 8(a)(5) complaint because the Board had issued its certification in a unit of cabdrivers who were found to be independent contractors. Member Fanning dissented and would have reopened the representation case in which the certification had issued and would have directed a further hearing on the issue as to whether the

cabdrivers were employees. It seems to me that the orderly way to proceed in this case is to resolve the status of the individuals in the instant case before issuing any certification.

In my view, the Employer's agreement, as part of the strike settlement, that it would not assert any legal claim before the Board that owner-operators or

nonowner-drivers are independent contractors is insufficient to support a finding that the individuals are employees. Such agreement is no more binding upon this Board than the agreement in the *MacAllister Machinery* case. This is particularly true where it appears that the bulk of the unit may well be independent contractors.