Paul J. Monohon d/b/a Paul J. Monohon Associates *and* William E. McClellan, Petitioner, and Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 7–RD–1086

August 30, 1974

DECISION AND DIRECTION

BY MEMBERS FANNING, KENNEDY, AND PENELLO

Pursuant to a Stipulation to Set Aside the Election, approved by the Regional Director for Region 7, on October 15, 1973, a rerun election was conducted by secret ballot on February 1, 1974, under the direction and supervision of the Regional Director, among the employees in the appropriate collective-bargaining unit described below. At the conclusion of the election, the Regional Director served on the parties a tally of ballots which showed that of approximately eight eligible voters seven cast ballots, of which three were for, and two were against, the participating labor organization, with two ballots challenged. The challenged ballots are sufficient in number to affect the results of the election.

In accordance with the National Labor Relations Board's Rules and Regulations and Statements of Procedures, Series 8, as amended, the Regional Director conducted an investigation. As the investigation established the existence of substantial and material issues of fact best resolved by a hearing, the Regional Director issued a notice of hearing on February 20, 1974. Thereafter, on March 14, 1974, a hearing was held before Hearing Officer Charles W. Slavin for the purpose of resolving issues raised by the challenged ballots of Thomas Hannon and William McClellan.

On March 27, 1974, the Hearing Officer issued his Report and Recommendation on Challenged Ballots in which he recommended that both ballots be opened and counted and the results incorporated in a revised tally of ballots.

Thereafter, the Employer filed timely exceptions to the Hearing Officer's recommendation that the ballot of Thomas Hannon be opened and counted.

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 labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that the following employees constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All engineers and/or survey aids, draftsmen and inspectors employed by the Employer at its facility located at 17100 W. Seven Mile Road, Detroit, Michigan; but excluding registered professional engineers, registered land surveyors, temporary employees, co-op students, guards and supervisors as defined in the Act and all other employees.

5. The Board has considered the Hearing Officer's report, the exceptions, and the entire record in this case, and hereby adopts the Hearing Officer's findings and recommendations. In our opinion, the Employer's exceptions raise no material or substantial issues of fact or law which warrant reversal of the Hearing Officer's findings and recommendations.

We agree fully with our dissenting colleague that no *eligibility* issue concerning the first election is now before the Board for decision. In effect the first election was never resolved but consolidated with a complaint case that was ultimately settled. The parties agreed to a rerun; the Employer does not contend that the agreement specifically excluded Hannon as a voter. We conclude that Hannon was eligible to vote in the rerun and that his ballot should be counted. He was ordered reinstated under the bargaining contract by unanimous vote of a union-management committee. Although this occurred before the first election, it was still unimplemented at the time of the rerun because—without adequate reason here appearing—the Employer had declined to reinstate Hannon. We see no reason to ignore that arbitration determination, still not acted upon, in this still pending decertification proceeding. We have no quarrel with the Hearing Officer's analogy to *Pacific Tile and Porcelain Company,* 137 NLRB 1358, 1365–67 (1962).[1] The length of

[1] The Board there modified the rule that a pending charge, not yet acted upon by the General Counsel, is necessary to permit discharged persons to vote by challanged ballot, and found a pending grievance to be equally effective as a prerequisite, saying "any interpretation of the contract will be made by someone whose function it is to do so." The contract interpretation favorable to Hannon was made during processing of *this* case. We view it as current and applicable. The Board also (*id.* at 1359)—on the job abandonment issue posed by ballots of economic strikers—decided to require "an affirmative showing by objective evidence" that an economic striker had abandoned his job before disenfranchising him. We think this salutary princi-

Continued

Hannon's unemployment at the time of the rerun election—which disturbs our colleague—is no fault of Hannon. The time was largely consumed by the processing and settlement of the complaint proceeding.[2] Lastly, the decision of the Union and Hannon not to seek court enforcement of the award up to this point in time is a frail basis for disenfranchising this voter.

Accordingly, we shall direct the Regional Director to open and count the challenged ballots of Thomas Hannon and William McClellan.

DIRECTION

The Regional Director is hereby directed to open and count the ballots of Thomas Hannon and William McClellan, prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

MEMBER KENNEDY, dissenting in part:

The question presented here is how long an individual who has been refused reinstatement by an employer, after a reinstatement order by an arbitration panel, remains eligible to vote in a representation election. The majority would extend this period indefinitely and open and count the ballot of Hannon. I do not agree with this decision.

The majority relies on *Pacific Tile and Porcelain Company,* 137 NLRB 1358, which involved challenges to ballots of economic strikers who had grievances pending. We are not here concerned with the challenge to the ballot of a striker. Hannon was not on strike and his grievance had been decided nearly 9 months prior to the election on February 1, 1974.

Hannon was discharged on April 5, 1973. He immediately filed a grievance which resulted in arbitration. The arbitration board ordered reinstatement, but without backpay, on May 14, 1973. Hannon, accompanied by his union steward, promptly requested reinstatement, but the Employer refused. Hannon attempted to vote in the original election on June 18, 1973, and his ballot was challenged by the Employer. This challenge was never resolved because the parties agreed in September 1973 to a rerun election. At the time the parties agreed to the rerun election, they settled the charge in Case 7–CA–1043 with provision for reinstatement of dischargee William Webb. The settlement made no provision for reinstatement of Hannon. Section 10(b) of the Act forecloses any action on our part to order Hannon reinstated. I reject the conclusion of the majority that Hannon's casting a challenge ballot at the June 18, 1973, election and his appearance at the settlement discussions in September 1973 evidence a "continuing interest" by Hannon in his job.

I am satisfied that Hannon has abandoned any expectation of reemployment by this Employer. Hannon entered into a partnership in a health foods store shortly after Employer's refusal to reinstate him. He works in that store 3 days a week and has also engaged in part-time employment with a private investigator and a painting contractor.

I recognize that acceptance of another job does not necessarily evidence abandonment of employment. But the record herein establishes that the Union and Hannon were well aware that the Company had replaced him with another employee soon after the arbitration award. No attempt was made by the Union or Hannon to obtain court enforcement of the arbitration award during the 8-1/2 months that elapsed between that award and Hannon's attempt to vote in the rerun election.[3] Hannon and the Union have had ample time to initiate such a suit, but they have not done so. It is also significant that there is no unfair labor practice charge relating to Hannon pending with the Agency.

The eligibility to vote in the first election is not in issue here. What we are concerned with is the eligibility of Hannon to vote in the second election held on February 1, 1974. No eligibility issue concerning the first election is before the Board for decision.

The majority emphasizes that the second election was a rerun election as if that fact had special significance with respect to Hannon's eligibility to vote in the second election. Plainly, the only eligible voters in the second election on February 1, 1974, were those employed during the payroll period ending January 11, 1974, and not those listed on the payroll preceding the first election. Hannon had not worked for the Employer for over 9 months at the time of the second election. The majority assumes that Hannon's time between the first election and the second election was "largely consumed" by the complaint case which was settled. This assumption conflicts with the fact that the complaint case was settled almost 5 months before the second election was held.

The majority further contends that "the first election was never resolved." The first election was finalized after the parties agreed in September 1973 to set aside that election and conduct a new one. Thus, the first election was invalidated by the Regional Director based on the agreement of the parties. Indeed, if the first election had not been invalidated and finally set aside, the Board would have been precluded from

ple is equally applicable to Hannon and that no such showing has been made.

[2] The Regional Director approved the settlement on October 15; the posting period expired December 19, 1973.

[3] The Employer urges that the arbitration proceeding was irregular and unfair. I express no opinion as to these contentions of the Employer, but I note that the Union has not sought enforcement of the award.

conducting another election within 12 months of the first election by Section 9(c)(3) of the Act.

In my view, Hannon's possible reemployment is too remote to justify treating him as an eligible voter. Hannon has abandoned his status as an employee and I, therefore, would sustain the challenge to his ballot.