

P.B.R. Company, Employer-Petitioner, and Local 441, International Brotherhood of Electrical Workers, AFL-CIO. Case 21-RM-1636

February 14, 1975

DECISION AND ORDER DIRECTING REGIONAL DIRECTOR TO OPEN AND COUNT BALLOTS

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

Pursuant to a Stipulation for Certification Upon Consent Election executed by the parties and approved by the Regional Director for Region 21 of the National Labor Relations Board on February 22, 1974, an election by secret ballot was conducted in the above-entitled proceeding on March 21, 1974, under the direction and supervision of the said Regional Director.

Upon the conclusion of the election, a tally of ballots was furnished the parties which showed that there were approximately 15 eligible voters and that 12 ballots were cast, of which 2 were for the Union, 2 were against the Union, and 8 were challenged. The challenged ballots are sufficient in number to affect the results of the election. No objections to conduct affecting the results of the election were filed by either party.

In accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director conducted an investigation of the issues raised by the challenged ballots and, on April 18, 1974, issued and duly served on the parties his Report on Challenged Ballots in which he recommended that the challenges to the ballots of Fred Foltz, Lewis Mackowski, and Ronald Wright be sustained and that the challenges to the ballots of Hoss Ensey, Neil Gumm, Huey Hardman, Donn Riffle, and Sostenes Vegara be overruled. Thereafter, the Employer-Petitioner filed timely exceptions to the Regional Director's Report on Challenged Ballots requesting that he be reversed as to his conclusion that the challenges to the ballots of Hoss Ensey, Neil Gumm, Huey Hardman, and Sostenes Vegara be overruled.

The Board duly considered the matter and on June 26, 1974, issued an Order Directing Hearing in which it ordered that a hearing be held before a duly designated Hearing Officer for the purpose of receiving evidence to resolve the issues raised with respect to the challenge to the ballots of Neil Gumm, Huey Hardman, and Sostenes Vegara. The Board further ordered that the Hearing Officer designated

for the purpose of conducting such hearing prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said challenges. At that time, the Board deferred ruling on the challenge to the ballot of Hoss Ensey pending disposition of the other challenges.

Pursuant to said order, a Notice of Hearing on Challenged Ballots issued by the Regional Director for Region 21 was duly served on the parties. A hearing was held on August 21, 1974, before Hearing Officer Roberto G. Chavarry. On November 11, 1974, the Hearing Officer issued and duly served on the parties his report and recommendations in which he recommended that the challenges to the ballots of Neil Gumm, Huey Hardman, and Sostenes Vegara be overruled and that their ballots be opened and counted. Thereafter, the Employer-Petitioner filed timely exceptions to the Hearing Officer's report and a supporting brief.

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 employees employed by the Employer at its facility located at 1020 East Vermont Avenue, Anaheim, California, excluding all sales employees, office clerical employees, guards, watchmen, and supervisors as defined in the Act.

5. The Board has considered the Regional Director's report and the exceptions thereto, the Hearing Officer's report¹ and the exceptions thereto, and the entire record in this case and hereby adopts the findings and recommendations of the Regional

Appendix A hereto.

¹ The Hearing Officer's Report and Recommendations is attached as

Director² and the Hearing Officer only to the extent consistent herewith.

The Hearing Officer concluded that Neil Gumm, Huey Hardman, and Sostenes Vegara had not terminated their employment prior to the beginning of the payroll period for eligibility set forth in the election agreement and therefore found them eligible to vote in the election. The Employer-Petitioner contends that these employees had given objective indications that they were no longer interested in their struck jobs. We find merit in this contention insofar as Gumm and Hardman are concerned, but not as to Vegara.

Gumm, who had worked for the Employer since 1961, joined the strike when it commenced on or about December 28, 1973, and on January 3, 1974, he picketed in front of the Employer's facility. On January 8, 1974, Gumm, according to his own testimony, entered the plant and said to the payroll clerk, Alma Campbell, "Would you please terminate me and give me the money I am due?" Campbell testified that he asked for his termination pay,³ that he said he wanted to terminate his employment, but that he did not give her a specific reason as to why he wanted to terminate. Campbell thereupon, pursuant to company procedure, made out a termination notice, marked it "self-termination," and had Gumm sign it. Gumm testified that, although he did not subsequently picket anymore, he returned to the Company on numerous occasions "just to visit" and kept in contact with the Union as to the progress of the contract negotiations. He contended that it was his intention to return to work if a contract was negotiated between the Union and the Employer. He currently holds another job.

Hardman, who began work for the Employer in 1964, was on picket line duty on January 3, 4, and 5. On or about January 11, 1974, he telephoned Campbell and told her that he wanted to terminate and to receive his accrued pay. This followed a telephone conversation between Hardman and Don Flodine, identified as a coordinating supervisor at the Employer's plant and a friend of Hardman, in which Flodine told him that the Company was not going to sign a contract and that he, Hardman, might as well quit. When Hardman went down to Campbell's office to pick up his check, he again told her he was terminating. Campbell had made an error in the calculation of Hardman's tax deductions and consequently informed him that she would refigure the amount he was entitled to receive and mail him the

check. In the confusion over the tax error, she neglected to have him sign the termination form which had been marked "self-termination." She mailed the slip to him along with the corrected check. Hardman has held a number of jobs since the election including his present position. He testified that it was his intention to return to work once the strike ended.

It is presumed that an economic striker continues in such status and, hence, is eligible to vote under Section 9(c)(3) of the act.⁴ To rebut the presumption, the party challenging his vote must affirmatively show by objective evidence that he has abandoned his interest in his struck job.⁵ The nature of the evidence which may rebut the presumption will be determined on a case-by-case basis. In *Roylyn, Inc.*,⁶ the Board held that the employer had not affirmatively shown by objective evidence that economic strikers had abandoned their interest in their struck jobs. The employees entered the struck plant with the sole intention of obtaining their vacation pay, clearly requested such payment, and signed the termination slips only after being instructed that such an act was a condition precedent to obtaining the money. That is not the case here. Both Gumm and Hardman initiated their conversations with Campbell by stating that they wanted to terminate their employment. It was only thereafter that they requested their vacation or termination pay. Whereas, in *Roylyn*, the decisions to sign the termination slips were clearly predicated on the desire to receive the vacation pay, here it appears from the plain meaning of the conversations that the opposite was true and that the requests for the vacation or termination pay were predicated on the initial decision to terminate their employment. There is nothing in the record other than their own testimony to indicate or suggest that Gumm and Hardman had even the undisclosed intention only to obtain vacation pay at the time they signed the termination slips; nor is there evidence that they actually qualified or intended to qualify their requests to terminate with an expression of desire to return to P.B.R. once the strike was settled. Under the circumstances present herein, the plain meaning of the words used by both Gumm and Hardman can lead to but one conclusion, that they voluntarily terminated their employment with the Employer and for that reason signed the quit slips, thereby abandoning their status as economic strikers. We conclude that the Employer has affirmatively shown with objective evidence that Gumm and

² In the absence of exceptions thereto, the Board adopts, *pro forma*, the Regional Director's recommendation that the challenges to the ballots of Fred Foltz, Lewis Mackowski, and Ronald Wright be sustained and that the challenge to the ballot of Donn Riffle be overruled. For the reasons set forth in the Regional Director's report, the relevant portion of which is attached as Appendix B hereto, the Board adopts the Regional Director's recommen-

ation that the challenge to the ballot of Hoss Ensey be overruled.

³ Termination pay and accrued vacation pay are one and the same and the two terms were used interchangeably by the witnesses at the hearing.

⁴ *Pacific Tile and Porcelain Company*, 137 NLRB 1358, 1359 (1962).

⁵ *Id.*

⁶ 178 NLRB 197 (1969).

Hardman have abandoned their interest in their struck jobs, and that the Employer has thereby rebutted the presumption of continued status as economic strikers. Accordingly, the challenges to the ballots of Gumm and Hardman are hereby sustained.⁷

The facts concerning Sostenes Vegara are totally different. He had been an assembler at P.B.R. for 6 years and engaged in picket line duty on either January 3 or 4. On January 16, 1974, he entered Campbell's office and stated that he was looking for his pay, whereupon she told him that in order to receive his pay he had to sign a termination form, which he then signed.⁸ Vegara did not know that, in order to obtain his vacation pay, he had to terminate his employment. This finding is supported by the fact that 2 weeks after receiving his check Vegara returned to the plant looking for work. Furthermore, during his conversation with Campbell, Vegara told her that he was taking a job temporarily and waiting for the strike to end, and that he hoped to work for the Company after the strike was over. Under these circumstances, we conclude that Vegara had not abandoned his interest in his struck job, and that the Employer failed to rebut the presumption of Vegara's continued eligibility. Accordingly, we hereby overrule the challenge to the ballot of Vegara.

ORDER

It is hereby ordered that the Regional Director for Region 21 shall, pursuant to the Board's Rules and Regulations, within 10 days from the date of this Order, open and count the ballots of Donn Riffle, Hoss Ensey, and Sostenes Vegara and thereafter prepare and cause to be served on the parties a revised tally of ballots, upon the basis of which he shall issue the appropriate certification.

⁷ For the reasons stated by the Hearing Officer in his report, attached hereto, Member Jenkins would find that the Employer failed to rebut the presumption that Gumm and Hardman remained economic strikers with a continuing interest in their struck jobs. Member Jenkins also considers it significant that Campbell, the individual who prepared the termination slips for Gumm and Hardman, procured a termination slip from another striker, Vegara, with the representation that such action was necessary in order for Vegara to receive the money due him. Accordingly, Member Jenkins would overrule the challenges to the ballots of Gumm and Hardman and count their ballots.

⁸ Whereas Campbell told Vegara that he had to sign the quit slip in order to get his termination pay, it does not appear from the record that she made such a statement to either Gumm or Hardman.

APPENDIX A HEARING OFFICER'S REPORT AND RECOMMENDATIONS

Pursuant to a Stipulation for Certification upon Consent Election, executed by the parties, and approved by the Regional Director for Region 21 on February 22, 1974,¹ an election by secret ballot was conducted on March 21, among the employees of the Employer in the unit found appropriate,² under the direction and supervision of said Regional Director.

At the conclusion of the election, each party was furnished with a tally of ballots which showed that, of approximately 15 eligible voters, 12 ballots were cast, of which 2 were for the Union, 2 were against the Union, and 8 were challenged. The challenged ballots are sufficient in number to affect the results of the election.

The Regional Director conducted an investigation of the issues raised by the challenged ballots and, on April 18, issued and duly served on the parties his Report on Challenged Ballots. In his Report, the Regional Director recommended that the challenges to the ballots of three employees be sustained and that the challenges to the remaining five ballots be overruled. On April 25, 1974, Employer-Petitioner filed timely exceptions to the Regional Director's Report on Challenged Ballots.

The Board considered the Regional Director's Report on Challenged Ballots and the Employer-Petitioner's exceptions thereto and found that the exceptions with respect to the challenges to the ballots of Neil Gumm, Huey Hardman, and Sostenes Vegara raised issues which would best be resolved by a hearing.

Accordingly, the Board directed, by Order dated June 26, that the Regional Director for Region 21 conduct a hearing for the purpose of receiving evidence to resolve the issues raised with respect to the challenges to the ballots of Neil Gumm, Huey Hardman, and Sostenes Vegara.

Copies of the Board Order were duly served upon the parties, and pursuant to a Notice of Hearing on Challenged Ballots issued by the Regional Director for Region 21, a hearing was held on August 21.

The undersigned served as Hearing Officer. Upon the entire record of the hearing and from my observation of the witnesses, I make the following:

¹ All dates hereinafter are 1974 unless otherwise specifically stated.

² All employees employed by the Employer at its facility located at 1020 East Vermont Avenue, Anaheim, California; excluding all sales employees, office clerical employees, guards, watchmen, and supervisors as defined in the Act.

Findings of Facts and Conclusions

The ballots of Gumm, Hardman, and Vegara were challenged by the Employer-Petitioner (hereinafter Employer) on the ground that these individuals had voluntarily quit and thereby had abandoned their interest in the strike and in employment at P.B.R.

Initially it should be noted that an economic striker is presumed to continue in that status and thus is eligible to vote under Section 9(c)(3) of the Act. The Board has held that such status may be lost by some action of the striker himself, by which he has shown an intention to abandon his interest in his struck job regardless of the outcome of the strike.³ The Board further stated that, in order to rebut the presumption of eligibility, the party challenging the voter must ostensibly show by objective evidence that the striking employee has abandoned his interest in the struck job.⁴ The Board noted that the nature of the evidence which might rebut the presumption would be determined on a case-by-case basis.⁵ It is with these considerations in mind that the undersigned now turns to the evidence concerning the status of these three individuals on the date of the election.

Neil Gumm has worked for Employer since 1961. He joined the strike which commenced on or about December 28, 1973 and on January 3, 1974, he pulled picketline duty. On January 8, 1974, Gumm went into the plant and told the payroll clerk, Alma Campbell, to give him his termination check. It is uncontradicted that, when Gumm asked for his paycheck, Campbell made out a termination notice, marked it "self-termination," and had Gumm sign it.⁶ Gumm further credibly testified that, subsequent to January 8, he returned to the Company on numerous occasions "just to visit" and that, although he did not pull any more picketline duty after this date, he still kept in contact with the Union as to the progress of the contract negotiation between it and Employer, and that it was his intention to return to work if a contract was negotiated between the Union and the Company. Gumm testified that he thought it was necessary to quit working at P.B.R. in order for him to get a job someplace else. He testified that he has been working for another company, Woody's Electric, "right at four months."

Under cross-examination, Campbell related the following conversation with Gumm:

³ *Pacific Tile and Porcelain Co.*, 137 NLRB 1358, *Dalton Sheet Metal Company, Inc.*, 207 NLRB 188.

⁴ *Pacific Tile and Porcelain Co.*, *supra*; *Dalton Sheet Metal Company, Inc.*, *supra*.

⁵ *Id.*

⁶ According to testimony by Campbell, if any employee desired to get his accrued vacation pay, management would have to approve it, but that, if an employee states that he's terminating, then she can go ahead and make out the final paycheck without management's approval. She further testified

Q. (Union's Counsel) Did he explain to you why he wanted to terminate?

A. No.

Q. He didn't mention the strike at all in that conversation?

A. Well, he may have—he may have mentioned the strike. I'm sure that it was due to the strike that he wanted to terminate.

Q. Well, do you recall what it was that he said to you with regard to that strike that [sic] that time?

A. I believe he said that it looks like it would be continuing a long time.

Campbell further testified that Gumm had not given her any specific reason as to why he wanted to terminate.

On the evidence before me, I do not find that the Employer has rebutted the presumption of Gumm's continued eligibility to vote at the election. The Employer's assertion that Gumm has abandoned interest in his struck job rests entirely on Gumm's request for his termination check on January 7. But the mere fact that Gumm requested his termination pay should not be construed as proof that he desired to permanently sever his employment relationship with the Employer, especially in view of the fact that "termination pay" and "vacation pay" are considered one and the same. The mere signing of a termination slip does not of itself establish that a striker is abandoning interest in his struck job,⁷ nor do statements made to the Employer declaring such an abandonment.⁸ It must be noted that Gumm requested his termination pay because he felt that this was necessary in order for him to obtain other employment. Also, the testimony by Campbell that Gumm stated that the strike would continue for a long time gives credence to Gumm's testimony that, at the time he requested his termination pay, he planned to return to work once the strike was over and a contract was signed. Moreover, the fact that Gumm may be presently employed at an equivalent or higher paying job is irrelevant, since it appears that he obtained his present job subsequent to the election and, under Board law, changes in status after an election are immaterial.⁹

Therefore, I find that at the time of the election, Gumm was an economic striker and eligible to vote.

that vacation pay and termination pay are one and the same. Thus, it is apparent to the Hearing Officer that the terms "termination pay" and "vacation pay" are used interchangeably and that a loose interpretation of the term "termination pay" is necessitated in this case.

⁷ *Roylyn, Inc.*, 178 NLRB 197; *Guyan Machinery Company*, 155 NLRB 591, 594.

⁸ *Roylyn, Inc.*, *supra*; *Dalton Sheet Metal Company, Inc.*, *supra*.

⁹ *T. E. Mercer Trucking Co.*, 138 NLRB 192, 193 fn. 4.

Huey Hardman began to work for Employer in March 1964. Hardman testified that, around January 2, he arrived at the plant around 7:45 in the morning not aware that a strike had taken place. At the plant he spoke with Don Flodine, coordinating supervisor. According to Hardman, Flodine asked him if he was on strike, and Hardman replied, "Not to my knowledge." Hardman further testified that Flodine told him to wait a minute and then went upstairs. Flodine came back a few minutes later and told Hardman that he, Flodine, had spoken to Mike Rathbun, the Employer's vice-president. Hardman further testified that Flodine told him, "It's better hat you leave; Get off the premises."

Flodine's testimony concerning the above conversation conflicts with Hardman's testimony. Flodine testified that he remembered seeing Hardman coming in on or about January 2. Under cross-examination Mr. Flodine related the following:

Q. (Union Counsel) Mr. Flodine, do you recall a conversation you had on or about January 2nd with Mr. Hardman?

A. In regards to what?

Q. Well, when perhaps Mr. Hardman reported to work and you had a conversation with him regarding the possibility of there being a strike that day?

A. I remember him coming in and leaving.

Q. Do you remember talking to him when he came in?

A. I don't believe I did that day.

Q. You don't remember asking Mr. Hardman if he was on strike?

A. There could have been this conversation. I mean he was in and I saw him walking out. I could have made the remark to him. I do not recall it.

Q. Do you remember going to check with Mr. Mike Rathbun to see if the employees were in fact out on strike?

A. Yes I do.

Q. And do you remember coming back and talking to Mr. Hardman after that and telling him "Yes you are on strike, or you're supposed to be out on strike; get out"?

A. No. He was gone at that time.

Q. In other words, you went out to check with Mr. Rathbun to see if the employees were on strike, and when you returned Mr. Hardman was gone?

A. Yes, sir.

* * * * *

Q. Do you know whether your conversation with Mr. Rathbun was in response to an earlier conversation with Mr. Hardman?

A. I don't believe I had a conversation with him. I seen [sic] him in there. Knowing that there was a strike, I went up to verify this through Mr. Rathbun, to come back down to say something; but Mr. Hardman had left at that time.

It is clear that Flodine's recollection of the events on January 2, conflict with that of Hardman's. In comparing both versions, the undersigned notes that it would have been impossible for Hardman to have known that Flodine had spoken to Rathbun about the strike unless Flodine had been the one to tell him so. Thus, based on the plausibility of the alleged conversation, I credit Hardman and find that Flodine told Hardman that, "It is better that you leave; get off the premises."

Hardman further testified that, after he left the premises of P.B.R. on January 2, he went outside and met with Gumm and other employees. Hardman pulled picketline duty on January 3, 4, and 5. On or about January 11 during the day, he received a phone call from Mr. Flodine. According to Hardman, Flodine informed him during this telephone conversation that the Company was not going to sign a contract and that he, Hardman, might as well quit. To a question as to how he had taken that advice, Hardman replied, "Well, I took that as meaning that, in other words, if it is to be like it is now, a long period of time, what's the point of waiting, is the way I took it." Hardman also stated that he thought that Flodine was a friend of his and that he was doing this on his own. It is undisputed that during this same telephone conversation Flodine asked Hardman if he knew of other people he could hire to take the place of the strikers, since, as Hardman put it, he was familiar with many men that had worked over the past few years at P.B.R.

Flodine's testimony with respect to the telephone conversation conflicts with that of Hardman. When asked by Union's Counsel if he had advised Hardman to quit his employment at P.B.R., Flodine replied, "This will be questionable right now." Upon being pressed for an answer, Flodine then replied, "I'd say no." When asked to relate the conversation that he had with Hardman over the telephone as best as he could remember, Flodine replied,

The thing I remember is asking, "Do you know where I can get some sign hangers, because I have work to be done." And, of course, he tells me, "no." And what else went on in that conversation, I don't know. It probably was a short one,

because that was my main interest; because I was in a little bit of a spot.

To the extent that Flodine's version of this telephone conversation conflicts with that of Hardman, I credit Hardman's version.

Subsequent to this telephone conversation with Flodine, Hardman called Alma Campbell and told her that he wanted to terminate and to receive his accrued pay. Campbell testified that Hardman had mentioned to her the fact that he was terminating was because of the strike.¹⁰ Testimony adduced at the hearing also established that, when Hardman went down to Campbell's office in January to pick up his paycheck, he again told her he was terminating. Because Campbell had made an error in the calculation of his tax deductions, Hardman informed Campbell to refigure the tax deductions and to mail him his paycheck. Although Campbell had, as a result of Hardman's previous conversation, prepared a termination form for Hardman to sign, in the confusion of the tax error, she forgot to have Hardman sign such a document. It is her credited testimony that she mailed such a form, together with Hardman's paycheck, to him.

When pressed by the Employer's counsel if he knew the difference between asking for vacation pay versus informing the Company that he was quitting, Hardman replied that,

Well, you see, there isn't really any difference. It depends upon the eyes of how you want to interpret it. Now, you notice on the piece of paper it says self-termination. That doesn't necessarily mean, see, that you are quitting. To get your vacation pay, which rightfully belongs to you anyway, normally you fill out a termination, as Alma [Campbell] said previously, see, of self-discontinuance here. That doesn't necessarily mean you are quitting. It can be done in leave of absence and you do the same thing.

Hardman further testified of his intention to return to work once the strike ended. He testified that the employees, prior to the strike, had been working for 6 months without a contract, and that it was because of the absence of a settlement that the employees had gone on strike.

Although it is unclear how long Hardman has been employed at his present job, it is apparent from the affidavit which Hardman gave an agent of Region 21 on March 27, 1974, and which was introduced by the

¹⁰ Although Hardman testified that he had told Campbell that he wanted his vacation pay, based on Campbell's testimony as well as an affidavit which Hardman gave the agent for Region 21 on March 27, 1974, I find that Hardman stated that he wanted to terminate.

¹¹ *T. E. Mercer Trucking Co., supra.*

Employer as an exhibit, that Hardman has held a number of jobs since the election, and that he obtained his present job only after the election.

The only tangible evidence to support a finding that Hardman severed his employment relationship with the Employer is based upon his conversation with Campbell when he asked for his termination pay. I find this to be insufficient proof that Hardman intended to permanently sever his employment relationship with the Employer. Hardman's testimony, with respect to the terms "termination pay" and "vacation pay" like that of Campbell's, tends to completely dissipate, whatever reliance anyone may place on the term "termination pay," as a true indication of the employee's intent. Thus, Flodine's statement to Hardman, that the Employer would never sign a contract with the Union, and his inquiry as to whether Hardman knew other people that the Employer could hire to replace the strikers, can reasonably lead one to the conclusion that Hardman's statement to Campbell, that he wanted to terminate and to receive his accrued pay, was based on his assumption that the strike would be a long one and that he might as well get whatever money he had coming.

As in the case of Gumm, I find the Employer's assertion that Hardman presently occupies the equivalent or a higher paying job to be irrelevant. From the evidence presented at the hearing, it is apparent that he was employed in his present position subsequent to the date of the election, and thus his change of status subsequent to the election is immaterial.¹¹

Under the circumstances which surrounded Hardman's statement to Campbell that he was terminating, I find that Hardman was and remained, an economic striker who had not permanently abandoned his interest in his employment with the Employer, and was thus an eligible voter at the time of the election.¹²

Sostenes Vegara credibly testified that, prior to the strike, he had been employed at P.B.R. as an assembler for about 6 years. During the strike he pulled picketline duty either on January 3 or 4. On January 16, Vegara went into the plant and met Howard Pendleton, the corporate secretary-treasurer of the Employer. The most that Vegara remembers clearly is that Pendleton said, "hello." Vegara denies stating to Pendleton that he wanted to terminate his employment with P.B.R.¹³ In fact, Vegara testified that he had gone there that day to pick up money

¹² See *Q-T Tool Company, Inc.*, 199 NLRB 500.

¹³ Pendleton testified that Vegara shook hands with him, and told him that he was there to terminate. Pendleton admitted that he is not the person with whom Vegara would discuss the day-to-day working conditions, and that it would be unusual for Vegara to tell him he was there to terminate

that he felt the Company owed him. According to Vegara, after saying "hello" to Pendleton, he went into the office and spoke to Campbell. Vegara stated that he told her that he was there looking for his pay and that, according to her, in order for him to get his pay, he had to sign a termination form. It was at this time that Campbell handed Vegara a termination form and he signed it. According to Vegara, he did not know that in order to get his vacation pay he had to terminate. Vegara then signed the termination form and picked up his check.

About 2 weeks later, Vegara uncontradictedly testified that he returned to the plant and spoke with Rathbun. Vegara asked Rathbun if there was any work to be done and, according to his testimony, Rathbun replied that everything was too slow at that time, but that he should check again. Rathbun was not called as a witness.

Alma Campbell's version of her conversation with Vegara on January 16 is slightly different than his, but worth examining. It is her testimony that, when Vegara came in on January 16, he requested to be terminated.¹⁴ The following exchange took place between Union's counsel and Alma Campbell:

Q. In the course of your conversation with Mr. Vegara on the 16th, did Mr. Vegara tell you that his termination was related to the strike?

A. I—I don't remember.

Q. Do you recall Mr. Vegara saying in effect that he was taking a job temporarily and waiting for the strike to end?

A. Yes. Yes, he was. He had apparently been working on the side for somebody.

Q. Do you recall him saying that to you in that conversation?

A. Yes. Uh huh.

Q. I see. Do you recall precisely what it was he said?

A. I believe he was working for a company or for someone; he was doing a job for someone either at a house or at a—I don't remember. But he was doing wiring, and he had a certain length of time he was doing this for.

Q. Well, what I'm trying to get you to do is relate what it was he said to you and what you said to him in this context.

A. I say I believe he told me at that time he was working doing wiring of homes. It was not

through anybody, I don't believe; it was just like a private type of job.

Q. And he did indicate that he was going to come back to work for the Company after the strike was over, or he hoped to?

A. I believe so.

Q. Can you tell me why there was no notation made to that effect upon his termination notice?

A. As to what?

Q. That he intended to return to work at some day in the future.

A. This would be something we wouldn't normally put down. Usually we just put down self-termination when they do terminate, because that is something that you can't—you don't really know in the future.

Q. In other words, you would treat your termination notice somewhat differently when there is a self-termination than you would a termination where an employee was fired—

A. Yes.

Vegara further testified that, subsequent to the strike, he has been employed for approximately 4 months by the same company.

Since I have found that Vegara never told Pendleton that he was terminating, and I have further found that Vegara went into the plant looking for the money he felt he had coming, and not with the intention of permanently terminating his employment relationship with the Employer, I am persuaded by the testimony presented before me that Vegara signed his termination form because Campbell represented to him that this was the only manner in which he could get his money, and thus should not be construed as proof that Vegara desired to permanently sever his employment. Vegara's continued interest in his struck position was evident from his conversation with Campbell, in which he expressed his hope to come back to work for the Employer after the termination of the strike, and also from his visit to Rathbun 2 weeks later. As to his present employment, again I find it immaterial inasmuch as the evidence tends to show that Vegara acquired this job subsequent to the date of the election. In any event, the mere acceptance of a job with better benefits does not establish that a striker has forfeited his eligibility.¹⁵ Thus, I find that the Employer has failed to rebut the presumption of Vegara's continued eligibility.

Vegara impressed me as a witness honestly attempting to reconstruct his meeting with Pendleton. I find based on my observations of his manner of testimony that he never told Pendleton he was there to terminate.

¹⁴ The question to be resolved in this instance is whether Vegara went to the office looking for his pay or for his termination pay, as Campbell stated. After carefully weighing the testimony of both Vegara and Campbell, and considering the likely probabilities, I am persuaded that Vegara told

Campbell he was there looking for his pay. As noted earlier, Campbell testified that management would have to approve an employee's request for "vacation pay," whereas she can give an employee "termination pay," if the employee terminates. This gives credence to Vegara's testimony that Campbell told him to sign a termination form if he wanted the money due him.

¹⁵ *Akron Engraving Company, Inc.*, 170 NLRB 232, 234

Recommendations

Having made the above findings of fact and conclusions, I recommend that the challenges to the ballots of Neil Gumm, Huey Hardman, and Sostenes Vegara be overruled that their ballots be opened and counted.¹⁶

¹⁶ Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received in Washington by November 25, 1974.

APPENDIX B

Hoss Ensey:

The ballot of Hoss Ensey was challenged by the Employer on the ground that he is engaged in substantially equivalent self-employment and has, therefore, abandoned his interest in the strike and in employment at P.B.R. as an employee on the regular P.B.R. payroll.

The evidence reveals that Ensey took part in the strike and picketed to the extent that was possible in the rain. In mid-January, Ensey was advised by the Employer that he could come to work "tomorrow" if he wanted to, but not as a striker inasmuch as that

would tend to complicate matters with the Union. He was told by the Employer that he could work on a purchasing order or subcontracting basis at 41 cents less an hour than what he had been making as a regular P.B.R. employee. Ensey contacted the Union and was cleared to work for P.B.R. on this basis. Ensey insisted that he would do this only until the Union found him union employment. Ensey began to work for P.B.R. on this basis on or about January 20 and is still so employed. He has expressed his continuing interest in the strike and in returning to work for P.B.R. as a regular employee. In his present position P.B.R. provides him with no benefits and does not make any payroll deductions for him. Ensey has never been terminated by P.B.R. and has never received his "final" pay. It is concluded that Ensey has not at any time abandoned his interest in returning to his former employment at P.B.R. merely by engaging in "substantially, equivalent employment."⁴ In the absence of other objective evidence, the undersigned concludes that Ensey is an eligible voter and it is recommended that the challenge to his ballot be overruled.

⁴ *Q-T Tool Co.*, 199 NLRB No. 79. See also *Pacific Tile and Porcelain Company*, 137 NLRB 1358, 1362 (specifically employee Key who engaged in subcontracting).