Gulf States Paper Corporation, EZ Packaging Division *and* Bobby Lowrey, Jr., and James Shelton, Petitioners, and United Paperworkers International [1] Union, AFL–CIO. Case 9–RD–673

July 30, 1975

DECISION AND DIRECTION OF ELECTION

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Robert A. Edison. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, this case was transferred to the National Labor Relations Board for decision. The Employer, the Petitioners, and the Union filed briefs.

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.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the National Labor Relations Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The Petitioners assert that the Union, which is the currently recognized bargaining representative of the employees involved herein, is no longer the representative as defined in Section 9(a) of the Act.

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.

The Union was certified as the collective-bargaining representative of the unit employees on September 10, 1973. Thereafter, the Union and Employer conducted a series of negotiating meetings, but were unable to reach agreement on a contract. The employees went on strike on February 27, 1974, to protest the subsequent breakdown in negotiations between the parties. On March 14, 1975, Petitioners filed a decertification petition requesting that an election be held to determine whether or not the Union should continue to represent the unit employees. The strike was still in effect at the time of the hearing.

At the time the strike began, there were 124 employees in the unit. Eight of these employees never participated in the strike; 27 have abandoned the strike and returned to work at the Employer's plant; and 11 have voluntarily terminated their employment. Of the remaining 78 employees who continue to be on strike, 43 have had their positions filled by permanent replacements.

The only issue raised at the hearing was the eligibility of the 78 employees still on strike to vote in a decertification election conducted more than 12 months after the commencement of the strike. The Employer and Petitioners claim that none of these employees would be eligible to vote by virtue of *Wahl Clipper Corporation.*[2] They claim that *Wahl Clipper* stands for the proposition that economic strikers, regardless of whether they have been replaced or not, do not retain their eligibility to vote in any election conducted more than 12 months after the commencement of the strike. The Union argues that all 78 striking employees should be allowed to vote. In the alternative, the Union contends that the 35 strikers who have not been permanently replaced are eligible to vote, claiming that *Wahl Clipper* does not disenfranchise economic strikers who have not been permanently replaced.

We find merit in the Union's alternative contention. We are dealing here with two separate and clearly identifiable groups of economic strikers—43 who have been replaced and 35 who have not. The eligibility of replaced economic strikers to vote is governed by Section 9(c)(3) of the Act, which reads as follows:

> Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.

The Board in *Wahl Clipper* carefully considered this section and its legislative history in determining its effect upon the voting rights of economic strikers. Upon such consideration, the Board concluded that replaced strikers are not eligible to vote in an election held more than 12 months after the commencement of an economic strike. Clearly, then, the 43 strikers in the present case who have been replaced are not eligible to vote, as any election conducted among unit employees will take place more than 12 months after the strike which began on February 27, 1974.

As for the 35 strikers who have not been replaced, Section 9(c)(3) places no restriction on their voting eligibility similar to that imposed upon replaced

[1] The name of the Union appears as amended at the hearing.

[2] 195 NLRB 634 (1972).

strikers. Nor did the Board in *Wahl Clipper* decide that unreplaced economic strikers lose their voting eligibility in any election held more than a year after the commencement of a strike; that was not an issue in the case.

Section 2(3) of the Act defines an employee as " . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice . . . ." In *Union Manufacturing Company,*[3] the Board held that economic strikers "retain their status as employees during the course of the strike, absent some affirmative action which severs that relationship." In a case decided after the 1959 amendment to Section 9(c)(3),[4] which added the 12-month eligibility period, the Board further stated:

> Although it is a question to be determined on the basis of the facts and circumstances of each case, generally, an economic striker forfeits such status, for voting purposes, where prior to the election he obtains *permanent* employment elsewhere; or the employer eliminates his job for economic reasons, or discharges, or refuses to reinstate him for misconduct rendering him unsuitable for reemployment.

There is no evidence in the present case that the unreplaced strikers have found permanent employment elsewhere, or that the Employer has discharged or refused to reinstate any of the striking employees for misconduct. However, at the hearing the Employer testified that, because of economic conditions, it would have been forced to lay off some of its employees, that it has been operating with approximately 75 production and maintenance employees, down from its usual complement of 130, and that there has been a decrease in the number of orders being placed with the Company. However, this does not suffice to show that the jobs of the unreplaced strikers have been permanently eliminated or abolished so as to terminate the strikers' employment status and render them ineligible to vote in the election.

In *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.,*[5] the Supreme Court recognized that a striker's basic right to a job cannot depend upon job availability as of the moment he applies for reinstatement, but, as a striker, his employee status continues until he has obtained "other regular and substantially equivalent employment." And, with this basic principle in mind, the Board held in *Globe Molded Plastics Company, Inc.*:[6]

> Notwithstanding the alleged depressed conditions in the plastics industry, there is no contention nor any evidence that the work of the strikers has been permanently abolished or that they have abandoned interest in their jobs. The Employer has shown that certain work has been lost and obtaining new customers is difficult, possibly because of the effectiveness of the strike, but this is not the type of permanent abolition of jobs or the elimination of jobs for economic reasons which justifies disenfranchising strikers otherwise eligible to vote.

On the basis of such considerations, we are of the opinion that the 35 economic strikers in this case who have not been replaced continue to remain employees and are eligible to vote in the election we shall order.

Accordingly, in view of the foregoing, we shall direct an election by secret ballot in the following unit of employees, which we find to be appropriate for the purposes of collective bargaining within the meaning of the Act:

> All production and maintenance employees at the Employer's place of business in Nicholasville, Kentucky, including truckdrivers, but excluding all office clerical employees, guards, professional employees, and supervisors as defined in the Act.

[Direction of Election omitted from publication.][7]

MEMBER KENNEDY, dissenting:

I believe that economic strikers who have been on strike for more than 1 year are ineligible to vote in a Board election under Section 9(c)(3) of the Act. While the *Wahl Clipper* decision discussed in the majority opinion involved a situation in which the economic strikers had been permanently replaced, the legislative history upon which *Wahl Clipper* is predicated made no distinction between replaced and unreplaced strikers. For convenience, I am setting forth below portions of our discussion of the legislative

[3] 101 NLRB 1028 (1952).
[4] *W. Wilton Wood, Inc.,* 127 NLRB 1675 (1960).
[5] 389 U.S. 375 (1967).
[6] 200 NLRB 377 (1972).
[7] [*Excelsior* footnote omitted from publication.]

history appearing in the majority opinion in the *Wahl Clipper* case.[8] I think it clear that Congress intended "that economic strikers would not be permitted to vote after 1 year."

[8] 195 NLRB at 634–635:

"Eligibility of replaced economic strikers to vote in a Board-conducted election is governed by Section 9(c)(3), as amended in 1959. The amended provision, which changed the Taft-Hartley total prohibition against eligibility for replaced economic strikers, states as follows:

> Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.

"The legislative history of this provision shows that it was adopted as a compromise measure. Various modifications of the Taft-Hartley total prohibition had been proposed in both Houses. The ultimate compromise was described in various ways by various members of the Congress. Although, as pointed out by our dissenting colleague, Senator Kennedy at one point referred to the compromise as guaranteeing strikers the right to vote "for at least a year after the strike begins," [5] much of the legislative history indicates that his view was not the view of the Congress as a whole.

"For example, the resolution instructing the Senate conferees adopted on August 28, 1959, in the Senate described the compromise as follows (105 Congressional Record 15906):

> The proposal follows the Goldwater bill and the Administration's recommendations, except that economic strikers would not be permitted to vote after 1 year.

"Note the flat 1-year limitation in that statement. Even more specific was Representative Griffin's description of the conference agreement on this compromise, in which he stated (105 Congressional Record, Appendix, September 9 and 10, 1959, p. A7915):

> Section 702 relaxes the present ban on voting by economic strikers in representation elections. Two limitations are imposed: First, economic strikers are not to be eligible to vote after 12 months from the commencement of the strike; and second, they shall be eligible prior to that time only in accordance with regulations established by the Board consistent with the purposes of the act. In other words, a maximum length of time is established but the Board may limit the right by regulations consistent with the purposes of the act.

"Similarly, Representative Barden described the compromise as follows (105 Congressional Record, Appendix, p. A8061):

> It is important to note that section 702 does not give employees engaged in an economic strike who are not entitled to reinstatement an unqualified right to vote. Rather, this section provides that they shall be eligible to vote only under such regulations as the Board shall find are consistent with the purposes and provisions of this act and then only if the election is conducted within 12 months after the commencement of the strike.

"The legislative history, therefore, while not definitive, lends considerable support to the view that the 12-month limitation was established as a maximum period of voting eligibility for economic strikers. Furthermore, while the reference in the provision to employees "who are not entitled to reinstatement" at first blush seems to qualify the limitation (as the Regional Director and our dissenting colleague state), it must be borne in mind that neither the *Laidlaw* Board decision nor the Supreme Court's decision in *N.L.R.B.* v. *Fleetwood Trailer,* 389 U.S. 375 (1967), had been handed down at the time of this 1959 amendment. A review of the congressional debates strongly indicates that Congress at that time was under the impression that a striking employee who had been replaced had no remaining job rights or any entitlement to reinstatement where the strike was economic in character. Thus, the reference to employees "not entitled to reinstatement" was not necessarily intended to qualify the limitation, but more probably was intended only as a further description of economic strikers, to distinguish them from unfair labor practice strikers."

[5] "Senator Douglas, following the lead of Senator Kennedy, also described the compromise as permitting economic strikers to vote "for at least 12 months after the strike begins." (105 Congressional Record, Appendix, p. A8373)"