Nate Ben's Reliable, Inc. *and* Carmen Rosavona, Petitioner, and Teamsters Local No. 115, affliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.[1] Case 4–RD–586

July 30, 1975

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Pursuant to a Decision and Direction of Election issued by the Regional Director for Region 4 on February 12, 1974, an election by secret ballot was conducted on March 12, 1974, under the direction and supervision of the Regional Director for Region 4, among the employees in the unit found appropriate. The tally of ballots showed that 13 ballots were cast, of which 5 were for the Union, 5 were against the Union, and 3 were challenged. The challenges are determinative.

Thereafter, the Employer filed timely objections to conduct affecting the results of the election. On March 29, 1974, the Regional Director issued a Supplemental Decision on Objection, Order Directing Hearing on Challenges in which he dismissed the objections [2] and ordered a hearing on the three determinative challenges. Pursuant to the Regional Director's order, a hearing was held on June 7, 1974, before Hearing Officer Joan F. Homer. On August 22, 1974, the Hearing Officer issued a Report and Recommendations on Challenged Ballots in which she recommended that the challenges to all three ballots be sustained. Thereafter, the Union filed exceptions to the Hearing Officer's report and a supporting brief; and the Employer filed a brief in support of the report. On October 4, 1974, the Regional Director transferred the case to the Board.

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 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 asserts 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.

4. The following employees constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All drivers, warehousemen, and helpers of the Employer at its 2116 to 2120 Mardet Street, Phila., Pa. location, excluding office clerical employees, all other employees, guards and supervisors as defined in the Act.

5. On April 5, 1973, the Employer voluntarily recognized the Union as bargaining representative of employees in the appropriate unit. Thereafter, the Employer and the Union bargained over the terms of an initial collective-bargaining contract, but were unable to reach agreement. The Union began an economic strike on May 12, 1973. The strike has continued. On January 7, 1974, the decertification petition was filed and the election was held on March 12, 1974. The Employer challenged the eligibility of three strikers—Arthur Fowlkes, Donald Fowlkes, and Clarence Randolph, Jr.—upon the ground that on the day of the election they were permanently employed elsewhere and had disavowed any intention of returning to work for the Employer. The facts as to these challenged voters found by the Hearing Officer are as follows:

Arthur Fowlkes was employed 4 years by the Employer as truckdriver and furniture carrier and at the time of the strike was earning $175 to $180 per week. On October 17, 1973, he was hired as a helper by a nonunion employer, which knew of his status as a striker, at a salary of $211 per week. Two weeks later he was promoted to the position of driver at a salary of $249 per week. At the time of the election and the hearing he was still so employed. He testified that he liked the work at his new employer "a lot better" than the work at the Employer and that he would return to work for the Employer only if the settlement of the strike resulted in wages equal to what he was then earning.

Donald Fowlkes was employed for about 1-1/2 years by the Employer as a warehouseman and truckdriver's helper. At the onset of the strike he was earning $2.25 per hour or $90 per week. On December 21, 1973, he was employed by the same employer which had employed Arthur Fowlkes as a full-time warehouseman. He continued in this employment through the date of the election and the hearing. On the date of the election he was earning $3.50 per hour or $140 per week. He testified that he would return to work for the Employer only if a contract was obtained which provided wages and benefits equal to what he was then receiving.

[1] Herein called the Union.

[2] The Board denied the Employer's subsequent Motion for Reconsideration as well as its Motion for Reconsideration of Board's Denial.

Clarence Randolph, Jr., worked about 2 years for the Employer before going out on strike. He was employed as a truckdriver's helper and was earning $2.40 per hour when the strike began. On September 3, 1973, he was hired by another employer as a regular full-time production helper at a starting rate of $3.94 per hour. He was employed at the time of the election and the hearing. On election day he was earning $4.32 per hour. Although Randolph, Jr., testified that he would go back to work for the Employer if the strike were settled, he indicated that this was because he believed that a new contract would give him the benefits he was then enjoying.

Applying the standards of *Pacific Tile and Porcelain Company,* 137 NLRB 1358 (1962), the Hearing Officer concluded that the three strikers had set such conditions on their return to work for the Employer as to lead to the conclusion that they had abandoned interest in the struck job.

In *Pacific Tile,* the Board said that a striker may lose his eligibility to vote "by some action of the striker himself, such as accepting other permanent employment, by which he has evinced an intention to abandon his interest in his struck job regardless of the outcome of the strike." However, the Board added that "to facilitate the investigation" of challenges to a striker's eligibility to vote, the Board will "presume that an economic striker continues in such status and, hence, is eligible to vote under Section 9(c)(3). To rebut the presumption, the party challenging his vote must affirmatively show by objective evidence that he has abandoned his interest in the struck job. The nature of the evidence which may rebut the presumption will be determined on a case-by-case basis." Here, the Employer introduced evidence that the three challenged voters had obtained employment elsewhere at salary increases which ranged from 38 to 80 percent more than they had received when working for the Employer. They also testified that they would not return to work for the Employer at less than they were then receiving. That the Employer would agree to increase its wage rates and other benefits to match those which the strikers were receiving at the time of the election is so highly improbable as to justify the conclusion of the Hearing Officer that they had in fact abandoned their positions with the Employer.[3] The dissent attacks the reasoning of the Hearing Officer as "speculative" and "subjective." It seems to us, however, that the reasoning is the reverse of these characterizations. When a striking employee testifies that he will not return to work unless he receives a wage increase of 80 percent, the reasonable conclusion of a reasonable man is that the striker does not intend to return to work for the struck employer. It is hard to imagine more objective evidence to support a reasonable conclusion. The fact that the strikers continued to support the strike is objective evidence only that they desired to help their former fellow employees win the strike, not that they intended to return to work for the Employer. Accordingly, we affirm the rulings of the Hearing Officer that Arthur Fowlkes, Donald Fowlkes, and Clarence Randolph, Jr., were not eligible to vote in the election.[4]

As the Union has not secured a majority of the valid votes cast, we shall certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for Teamsters Local No. 115, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and that said labor organization is not the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

MEMBERS FANNING and JENKINS, dissenting:

Our colleagues have determined that Arthur Fowlkes, Donald Fowlkes, and Clarence Randolph, Jr., abandoned all interest in their struck jobs and were not eligible to vote in the election. We disagree. In our view such findings are contrary to long held Board precedent.

In *Pacific Tile and Porcelain Company* (137 NLRB 1358 (1962)), we held that an economic striker is presumed to continue in that status, and, therefore, is eligible to vote under Section 9(c)(3), and "[t]o rebut the presumption, the party challenging his vote must affirmatively show by objective evidence that he has abandoned his interest in his struck job." *Id.* Evidence that the striker has obtained more remunerative employment in a permanent job elsewhere is not sufficient to rebut the presumption of 9(c)(3) eligibility. *Pacific Tile, supra* at 1362 (employee Kuhlmey); *Akron Engraving Company, Inc.,* 170 NLRB 232, 233–234 (1968); *Roylyn, Inc.,* 178 NLRB 197, 202 (1969) (employee Keith). Finally, this presumption is not rebutted although the striker has conditioned a return to his struck job on a satisfactory settlement agreement, which may include a union contract. *Akron Engraving, supra* at 234.

[3] See *Roylyn, Inc.,* 178 NLRB 197, 200–202 (1970) (Hager, Knapp, and Van Wagner).

[4] Contrary to the interpretation by our dissenting colleagues, we are not hereby modifying the test of *Pacific Tile and Porcelain Co., supra,* but base our conclusion on our application of that test to the facts of this case.

In her report, the Hearing Officer found that each of the three strikers had so conditioned his reinstatement as to lead to the conclusion that he had abandoned interest in reinstatement to his job even though each had expressed a desire to return and, in the intervening 10 months since the strike, had retained membership in the Union, attended union meetings, participated in picketing at various times, taken part in the election, and appeared at the hearing. At the time of the election each striker was earning substantially more at his new employer than he was earning at Nate Ben's at the time of the strike, and two strikers (Arthur and Donald Fowlkes) stated they would return on the condition that a strike settlement would result in wages equal to what they were receiving at their present employer. For Arthur Fowlkes that meant a 38-percent wage increase, and for Donald Fowlkes that meant a 55-percent wage increase. The third striker, Randolph, stated simply that he would return if the Union had a contract, even if he did not earn as much as he was making at his new job at the time of the election. However, the Hearing Officer inferred that Randolph, who was now earning 80 percent more than when he was at Nate Ben's, would not return.

To us, this approach is erroneous and represents the kind of speculative, subjective reasoning we had abandoned in *Pacific Tile,* for it opens the door to a myriad of other equally important factors (i.e., seniority, pensions, hours, working conditions) which are all irrelevant to the determination whether by "objective evidence" the challenging party has affirmatively shown that the striker has abandoned interest in his old job. To be sure, there are limits to conditions a striker may place on his reinstatement: For example, the unlawful condition that "all scabs be fired," or that the incompatibility between a striker and his supervisors which culminated in the striker's heart attack be somehow removed, or that a strike settlement provide that a striker may retire with a pension after only 6 months after his reinstatement. See *Roylyn, Inc., supra* at 200–201 (employees Hager, Knapp, and Van Wagner). This is poles apart from the instant case where the strikers' expectations are neither unlawful nor patently impossible. In any event, we feel that the three strikers' poststrike conduct is sufficient objective indicia of their continuing interest in their old jobs, their lofty hopes for wage increases notwithstanding, to warrant overturning the Hearing Officer's recommendations and counting their ballots.

Our colleagues' refusal to do so overlooks the following succinct statement of the statutory policy which the presumption of continuing job status of economic strikers is designed to effectuate:

> In resolving the issue of striker eligibility, we have sought to ascertain whether or not the economic striker has retained his status as such for voting purposes. We have held that such status may be lost, *inter alia,* by some action of the striker himself, such as accepting other permanent employment, by which he has evinced an intention to abandon his interest in his struck job regardless of the outcome of the strike. [Citation omitted.] We adhere to this approach because, in our opinion, it implements the intent of Congress in its amendment of Section 9(c)(3) and it best effectuates the policies of the Act. [*Pacific Tile and Porcelain Co., supra* at 1359.]

Here the strikers in question all posed outcomes of the strike under which they would return to work, which is to say, they continued in their strike in order to achieve certain economic ends, and they cannot be said to have abandoned interest in their jobs "regardless of the outcome of the strike." They may or may not be successful in this endeavor; their goals may indeed appear to our colleagues as unrealistic, but our colleagues' ruling in this case converts the test from one of abandoning interest in the job regardless of the outcome of the strike to one of abandoning interest in the job if under any one possible outcome of the strike no matter how unfavorable to his interests the striker would be unlikely to come back. This we submit turns the test of *Pacific Tile* on its head, and severely trenches upon employees' right to strike, for no employee who goes on strike can say with certainty that he would go back to work for the struck employer under any and all possible outcomes of the strike.