

**Safeway Trails, Inc , Employer-Petitioner, and United  
Transportation Union and its Local #1699, AFL-  
CIO Case 5-RM-777**

June 18, 1976

DECISION ON REVIEW

BY MEMBERS FANNING, JENKINS, AND WALTHER

On January 14, 1976, the Regional Director for Region 5 issued his Decision and Direction of Election in the above-entitled proceeding, wherein he found, *inter alia*, with respect to the eligibility of un-replaced economic strikers, that the 21 most senior strikers on the Employer's list of strikers with reinstatement rights were eligible to vote in the election. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Union filed a timely request for review of the Regional Director's decision on the grounds, *inter alia*, that in reaching the above determination he made erroneous findings of fact and departed from precedent.

On March 8, 1976, the National Labor Relations Board by telegraphic order granted the request for review only with respect to issues raised as to the voting eligibility of the economic strikers and stayed the election pending decision on review. Thereafter, both the Employer and the Union filed briefs on review.

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 considered the entire record in this case with respect to the issues under review, including the briefs on review, and makes the following findings.<sup>1</sup>

The Employer is engaged in the interstate motor coach transportation business at terminals in various cities of the northeastern corridor of the United States. The Union has represented the Employer's busdrivers for a number of years. On April 2, 1972, the Union commenced an economic strike against the Employer. There were about 306 operators employed when the strike began. Although the Employer ceased all operations at the outset of the strike, it resumed service on January 13, 1973, with superviso-

ry personnel performing the work of unit employees. Thereafter, it started hiring permanent replacements for the striking drivers.

The Union advised the Employer on March 12, 1975, that it was terminating the strike action and made an unconditional offer to return to work on behalf of the striking operators. Approximately 214 busdrivers were working for the Employer as of May 30, 1975. Of this complement, it appears that 131 operators were replacements hired during the strike, 51 operators were former striking employees who returned to work prior to March 12, 1975, and the remaining 32 operators were strikers who were reinstated subsequent to March 12, 1975.

Following the Union's offer on behalf of the striking employees, the Employer sent a letter to all such individuals, excepting several who had engaged in strike misconduct,<sup>2</sup> requesting that they advise the Employer of their intention and/or desire to return to work. After receiving affirmative responses from about 184 former striking operators, it then mailed offers of reinstatement to 39 individuals, 32 of whom accepted reemployment, as indicated above.

The Regional Director held that those strikers who declined to respond to the Employer's letter must be deemed to have found permanent employment elsewhere and/or to have abandoned any interest in returning to work for the Employer. Thus, starting from the proposition that only the 184 strikers who made affirmative responses to the Employer's letter were interested in reinstatement, he reduced that number by the 32 who were subsequently reinstated and by the 131 permanent replacements hired during the strike, to arrive at the figure of 21 unreplaced strikers with rights of reinstatement, and he concluded that those 21 strikers on the list of 184 who had the greatest seniority would be eligible to vote.

The Union contends, first, that the Regional Director erred in accepting the Employer's canvass of strikers as determinative of their interest in reinstatement. The Union argues that those who did not respond should not have been eliminated from consideration as eligible voters because some may not have received the Employer's letter by reason of insufficient address and others, particularly those at the bottom of the seniority list, may have despaired of ever being recalled and elected to rely on the Union's unconditional offer made on their behalf. In its brief on review, the Union asserts that since the hearing the Employer has reinstated an additional 19 operators, another 11 strikers have declined notices, 15 strikers have died or retired, and no more than 100 of

<sup>1</sup> On May 14, 1976, the Employer sought leave to withdraw its petition. The Union has filed a letter in opposition. In light of the Union's opposition to the unrest caused by the lengthy strike and the fact that the Employer formerly recognized the Union as the bargaining representative of its employees for over 30 years, we have decided not to permit the petition to be withdrawn. See sec. 1111.42 of the Board's Casehandling Manual (Part Two) Representation Proceedings.

<sup>2</sup> According to the Union's brief, the Employer concluded that six of the former strikers were disqualified by reason of alleged strike misconduct and did not send applications to them.

the 131 replacements hired during the strike are currently employed by the Employer. It also asserts that the Employer's traffic volume should increase substantially in 1976 as a result of the tourism generated by the bicentennial year celebrations, and that the reduction in the number of drivers from the prestrike level was brought about largely by an expansion in the work week rather than a reduction in operating schedules. The Union urges, therefore, that the Board defer the issues as to the eligibility of strikers by permitting all unrecalled strikers to vote subject to challenge.

At the hearing, the Hearing Officer rejected all evidence with respect to the strikers' eligibility, stating that the issue would be resolved on the basis of challenged ballots. However, thereafter, without taking into account the Hearing Officer's ruling, the Regional Director proceeded to make a determination as to which of the unreplaced economic strikers would be eligible to vote in the election. In these circumstances, we agree with the Union that the questions raised as to which, if any, of the unreplaced former strikers may be eligible to vote can best be resolved through the challenge procedure.<sup>3</sup> We shall therefore make no present determination relative to the issues raised. Rather, in view of the fact that the parties were precluded from presenting evidence at the hearing regarding the eligibility of the unreplaced strikers, we shall permit all strikers who have not been reinstated prior to the eligibility date to cast challenged ballots in the election. Issues as to their eligibility, if determinative of the election results,

shall be resolved through the Board's postelection procedures.<sup>4</sup>

In this connection, of the unreplaced strikers who are deemed not to have abandoned their jobs with the Employer, we find that the most who may be found eligible in any event will be the difference between the number of employees employed before the strike (306) and the number employed on the eligibility date.<sup>5</sup> If this number, whatever it turns out to be, is determinative of the election results, the Regional Director is instructed to resolve the challenges. In the event that this number is not determinative of the election results, the Regional Director shall so find and issue the appropriate certification.

Accordingly, the case is hereby remanded to the Regional Director for Region 5 for the purpose of conducting an election pursuant to his Decision and Direction of Election, as modified herein, except that the eligibility date for the election shall be that immediately preceding the date of issuance of this Decision [*Excelsior* footnote omitted from publication].

<sup>4</sup> Even assuming the Regional Director was procedurally correct in resolving the challenges on the basis of the record before him, we note that important questions are raised concerning the substantive rulings. For example, he found ineligible those former strikers who failed to respond to the Employer's letter. However, in view of the Union's offer to return to work made on behalf of all the strikers, there is a question raised as to whether the letters sent to the strikers by the Employer should serve to disenfranchise those who failed to indicate their intentions to return. Further, even if such letters could be given this effect in some circumstances, we observe that the Employer in this case apparently required individual applications for reinstatement, action which the strikers arguably did not need to take to preserve their rights to reinstatement. See *NLRB v. Fleetwood Trailer Company Inc.*, 389 U.S. 375 (1967). Moreover, even under the Regional Director's view that the strikers who did not respond to the Employer's canvass had forfeited their rights to reinstatement, he erred in reducing the list of 184 responders still further by the total number of 131 striker replacements inasmuch as the jobs of some of the nonresponding strikers, those with relatively low seniority, had very likely been filled by replacements. Thus, some replaced strikers may have been deducted twice from the total of those eligible, i.e., the 131 who were replaced plus those of the nonresponders who may also have been among the 131 replaced.

<sup>5</sup> *Akron Engraving Company Inc. supra*.

<sup>3</sup> See e.g., *Universal Manufacturing Company*, 197 NLRB 618 (1972); also see *Milwaukee Independent Meat Packers Association*, 223 NLRB 922 (1976); *Akron Engraving Company Inc.*, 170 NLRB 232 (1969).