

West Michigan Dock and Market Corporation, Employer-Petitioner and Local 815, International Longshoremen's Association, AFL-CIO. Case 7-RM-1054

October 5, 1976

DECISION ON REVIEW

BY CHAIRMAN MURPHY AND MEMBERS PENELLO
AND WALTHER

On April 30, 1976, the Regional Director for Region 7 issued a Decision and Direction of Election in the above-entitled proceeding in which he included in the unit of the Employer's employees certain "extra men," as regular part-time employees, if they met the eligibility formula of having worked "a minimum of 15 days or 120 hours in either of the two 3-month periods immediately preceding the date of issuance" of his decision.¹ 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 contending, *inter alia*, that his eligibility formula departed from established Board precedent in that it failed to take into account either the seasonal nature of the Employer's operations or the atypical nature of the 1975 season due to a lengthy strike which deprived the extra men of their usual work opportunities.

On May 24, 1976, the National Labor Relations Board by telegraphic order granted the request for review and stayed the election pending decision on review. The Employer thereafter filed a brief on review. The Union also filed a brief on review, including a motion to strike the Employer's 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.

The Board has considered the entire record in this case, including the briefs of the parties, with respect to the issues under review, and makes the following findings:

The Employer, a wholly owned subsidiary of San Products Corporation, is a Michigan corporation en-

gaged in warehousing and stevedoring operations at its facilities located on the shores of Muskegon Lake. In providing these services the Employer employs 17 full-time employees. During periods of high demand for its services, i.e., the shipping season from April through early December and certain fruit seasons which occur within the period from July through December, the Employer utilizes additional employees, referred to as "extra men," for loading and unloading the ships, among other duties.²

Based on the record evidence, the Regional Director found that the "extra men" shared a sufficient community of interest with the Employer's full-time employees to be included in the unit.³ He also found that there was some recurrence of employment among the extra men and that some had worked a substantial amount of hours while others worked only a minimal number during annual periods since 1970 for which evidence of employment history was submitted.⁴ The Regional Director acknowledged that, in applying the formula he devised, none of the extra men who worked during the year 1975 would qualify for eligibility, as he had found that of the 34 extra men used that year the maximum number of hours worked by any of them was 36 hours. He noted that 1975 was not representative of the Employer's operation due to "a lengthy strike at its facility"⁵ which affected employment opportunities. However, he concluded that under his formula extra men who had worked in calendar year 1976 and/or future years may become eligible for inclusion in the unit.

The Union contends, in essence, that the formula provided by the Regional Director unfairly disenfranchises extra men and fails to take into account the abnormal employment situation occasioned by

²The record evidence discloses that the Employer's full-time employees have been represented by the Union herein since about 1937. The most recent collective-bargaining agreement was effective from January 1, 1973, through January 1, 1975, and for successive years thereafter absent timely notice by either party. The Regional Director found that "there is some indication that the parties may have intended extra-men to be covered by the terms of this contract, although it was unclear to what extent, if at all, they received benefits under the contract or who, from among the extra's [sic], was so covered."

³The Employer's contention in its brief that the extra men should not be included in the unit is untimely as the Employer did not file a request for review of the Regional Director's decision and the only issue as to which review was granted is the propriety of the eligibility formula devised by the Regional Director.

⁴The Regional Director found that the Employer seldom utilizes more than "two gangs" of extra men at a time, each gang consisting of from 6 to 12 men. In the year 1974, during which time the Employer employed approximately 122 extra men, the maximum number of hours worked by any 1 employee was 521-1/2 hours, while the minimum hours were 1 and 2-1/2 hours. These extra men are called by the Employer if their names appear on the Employer's list which it prepares annually listing the prospective extra men in chronological order of the date of their application.

⁵Although the Employer disputes this characterization, it is unnecessary to decide the exact nature of the labor dispute as it is clear that employment opportunities were adversely affected. Note that only four ships docked at Employer's facility during 1975 and these dockings occurred before the labor dispute arose.

¹The unit is described as follows:

All full-time and regular part-time longshoring senior crane operators, junior crane operators, engineers, refrigeration system men, senior maintenance mechanic, junior maintenance mechanic, hilt and fork lift operators, automobile handlers and general dock and warehouse laborers employed by the Employer at its facility located in Muskegon, Michigan, but excluding all office employees, office maintenance employees, casual employees, guards and supervisors as defined in the Act

the labor dispute in 1975 and the effect of the continued presence of a picket thereafter. Further, it points out that the requirement for eligibility in 1976, i.e., 15 days or 120 hours of employment during either of the two quarters immediately preceding the April 30 issuance date of the Regional Director's decision, falls largely within the slack season rather than the April to December shipping season when extra men are primarily employed. The Union asserts that it suggested a formula which looks back to the employment of extra men during the past several years "in order to compensate for the seriously distorting factor of the abnormal 1975 season." In its request for review, the Union proposes a slightly modified formula for eligibility which is as follows: Any extra man who has performed 64 hours of work in each of 2 years during the period 1970 through 1975. However, because of the exceptional character of the 1975 season an adjustment is required, according to the Union, and it suggests that, because no men appear to have worked more than 30 or more hours in 1975, 30 hours in 1975 be deemed the equivalent of 64 hours in another year.

The Employer, while recognizing that the Board has on occasion developed formulas which take into consideration an uncharacteristic seasonal hiring history of an employer, viz *Daniel Construction Company, Inc.*,⁶ urges, *inter alia*, that the Union's suggested formula does not satisfy the criteria of length, regularity, and currency adhered to by the Board, particularly inasmuch as it would allow employees to vote "regardless of their present eligibility." The Employer states that, subsequent to the hearing in this matter, the new annual list of available extra men has been compiled in accordance with past practice. It therefore urges that no extra employee should be eligible to vote whose name does not appear on the new list for the present year. It contends that the most liberal "look back" to previous years by the Board was in *Daniel, supra*, where it went back 1 year beyond the then current year but still required "some" employment during the exceptional year in that case. The Employer suggests the following formula as being consistent with Board precedent:

Any extra man whose name appears on the "1976" availability list *and* whose name also appears on the "1975" availability list who has worked a minimum of thirty (30) hours in 1975, as well as those men whose names appear on both the 1976 and 1975 lists who have had *some* employment in 1975 and a total of 120 hours in the past two years, i.e., 1974, 1975.

The Union urges that the Board not consider any newly compiled annual list allegedly prepared subsequent to the hearing and further argues that the Employer's formula which uses the 1976 list would be equally deficient as the Regional Director's formula.

We agree that, in view of the abnormal situation which existed in the 1975 season due to the labor problems which commenced then and are apparently continuing to some extent to the present, and because of the seasonal nature of the Employer's operations running largely from April to December, a formula should be devised which takes such factors into account.⁷ We have attempted to establish such a formula.

In the circumstances, weighing the evidence of employment history of extra men by the Employer in the light of the factors of length, regularity, and currency of employment, as well as the seasonality of their employment and the probable impact of the labor dispute which commenced in 1975, we shall establish for this case the following formula:

Eligible to vote in the election shall be those extra men who have worked a total of 240 hours for the Employer from April 1, 1974, to the eligibility payroll period immediately preceding the date of issuance of this decision *and* who were listed on either the Employer's 1975 or 1976 extra men lists *and* have worked a total of at least 30 of those hours since the beginning of 1975.

By utilizing a period beginning on April 1, 1974, and extending to the eligibility cutoff date, we are providing more than a 2-year period for the attainment of the 240 hours of employment. Such a period commences with the normal April seasonal period in which extra men would be employed. In addition, by using the more than 2-year period, we are taking into account the abnormally low employment opportunities which existed in 1975 for extra men, who would possibly be disenfranchised if only a 1-year period were considered. Furthermore, a period of more than 2 years' duration will enable those extra men who have had sufficient employment in those past years to achieve eligibility assuming they meet the other requirements of the above formula. This period gives consideration to the factor of length of employment. In requiring that eligible extra men must have been listed *either* on the Employer's 1975 or 1976 lists and have worked at least 30 of the 240 hours since the beginning of 1975, we have provided for the factors of regularity of employment as well as currency. In addition, by requiring that their names have ap-

⁶ 133 NLRB 264 (1961)

⁷ See *C T L Testing Laboratories, Inc.*, 150 NLRB 982 (1965).

peared on either list rather than on both lists, we again have considered the unusual lack of work opportunities which existed in 1975. Considered overall, we are of the view that the formula provided is equitable in extending the franchise to those extra men who share a community of interest with the full-time employees.

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