Acme Industrial Company, Subsidiary of Jergens, Inc. *and* Rick R. Vanek, Petitioner, and Industrial Workers Union, Local No. 8, Laborers International Union of North America, AFL–CIO. Case 13–UD–170

December 14, 1976

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN MURPHY AND MEMBERS FANNING AND JENKINS

Pursuant to a petition filed on November 17, 1975, under Section 9(e)(1) of the National Labor Relations Act, as amended, the Regional Director for Region 13 conducted a deauthorization election on January 7, 1976, among the employees in the following appropriate unit:

> All production and maintenance employees employed by the Employer at its facility presently located at 440 Maple Avenue, Carpentersville, Illinois; excluding office clerical employees, plant clerical employees, professional employees, technical employees, outside truck drivers, guards and supervisors as defined in the Act.

Upon the completion of the election, the Regional Director issued and served on the parties a tally of ballots which showed that of approximately 62 eligible voters 31 voted in favor of withdrawing the union-shop authorization of the Union and 23 voted against the deauthorization. There were no challenged ballots. Thereafter, the Employer, the Petitioner, and the Union filed timely objections to conduct affecting the results of the election.

On March 9, 1976, by direction of the Regional Director, a hearing was held before Hearing Officer Paul E. Arola. On May 19, 1976, the Hearing Officer issued and duly served on the parties his Report on Objections in which he found that James Bratten, whose name was on the eligibility list but who did not vote in the election, was not eligible to vote; that Edward Edwardson and Arlene Parish, whose names were on the eligibliity list, but who did not vote, were eligible to vote; and that the names of certain laid-off employees, who did not vote, were properly omitted from the eligibility list. He recommended that a revised tally of ballots issue reducing the number of eligible voters to 61, to reflect Bratten's ineligible status, and, as the 31 ballots favoring deauthorization represented a majority of the eligible voters, that the Board certify the results of the election. Thereafter the Union filed timely exceptions to the Hearing Officer's report contending that Bratten was eligible to vote in the election and that the laid-off employees should have been permitted to vote. The Employer and the Petitioner filed answering 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 duly considered the entire record in this case, including the Hearing Officer's report and the exceptions and briefs, and hereby adopts the findings and recommendations of the Hearing Officer only to the extent consistent herewith.

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 employees in a bargaining unit covered by an agreement between the Employer and the Union, made pursuant to Section 8(a)(3) of the Act, desire that such union-shop authorization be rescinded.

3. We adopt the Hearing Officer's findings that James Bratten was ineligible and that Edward Edwardson and Arlene Parish were eligible to vote in the election.[1] However, we find merit in the Union's contention that the Hearing Officer erred in concluding that the names of the laid-off employees were properly omitted from the eligibility list.

Eligibility of Laid-Off Employees

Of a total work force of 115 to 120 employees, the Employer in 1975 laid off 45 employees, including 36 employees in June, 1 employee in August, 6 employees in September, and 2 employees in October. The laid-off employees received letters advising them as to their health care coverage for the remainder of the month in which they were laid off and that they could continue the coverage thereafter on their own responsibility. They were also given a pamphlet of the Illinois State Division of Unemployment Compensation which provided information on applying for unemployment benefits. In 1975, the Employer recalled 11 laid-off employees, and in 1976, until the hearing date of March 9, it recalled 6 more employees.

John Ellman, the Employer's personnel manager, told the first group of 22 June layoffs that he anticipated their recall in August or September. However, he told the second group of 14 late June layoffs that he did not know how long they would be laid off. He advised subsequently laid-off employees,

[1] No exceptions were filed to Hearing Officer's findings respecting Edwardson and Parish.

who called him during succeeding months as late as December 1975 and January 1976, that his original estimates of recall in September were wrong, so that he did not want to venture a guess as to how long they would be laid off; that he could not recall them yet, but would do so when he could; and that it might be a month or 6 months, depending on whether work picked up. During 1975, the Employer made no changes in production methods, lost no accounts, and was not engaged in seasonal operations.

In *D. H. Farms Co.*, 206 NLRB 111, 113 (1973), relied on by the Union, the Board, noting the traditional rule that the voting eligibility of laid-off employees depends on whether or not they can be said to enjoy a reasonable expectancy of recall, stated that a resolution of that question depends on objective factors, including the past experience of the employer, its future plans, and the circumstances of the layoffs, including what the employees were told as to the likelihood of recall. In that case, the laid-off employees were told that if sufficient work came in they would be recalled; in fact approximately one-third of their number had been recalled before the election; there was no evidence of a continued decline of sales, a phasing out of a line of production, or a termination of part of the business; but there was instead a history of increased production and employment without any prior layoffs of consequence. The Board found that the laid-off employees, as a group, enjoyed a reasonable expectancy of recall.

On the other hand, in *Pasquier Panel Products, Inc.*, 219 NLRB 71 (1975), relied on by the Hearing Officer and the Employer, the Board majority, Member Fanning dissenting, held that, where an employer faced with an industrial slowdown laid off approximately two-thirds of its work force, advised laid-off employees to apply for unemployment insurance, told them that its obligations for medical and life insurance coverage would terminate at the end of the following month, and informed them of no specific date when they might be recalled and that prospects for recall were poor, the laid-off employees did *not* have a reasonable expectancy of recall and were therefore not entitled to vote.

Viewing the instant layoffs in the light of the above cited cases, we conclude that their expectancy of recall is more nearly akin to those in *D. H. Farms, supra*. In so doing, we note that the Employer told half of its laid-off work force that they could anticipate recall in 3 months. Also, as in that case, and unlike *Pasquier*, it also recalled a substantial portion of its work force, did not alter its production or lose accounts during the economic slump, and expressed to all laid-off employees its continued expectation of an early economic upturn at which time recalls would be made.[2] As it is thus evident that the laid-off employees had a reasonable expectancy of recall, we find that their omission from the eligibility list was improper and, as that omission could have affected the outcome of the election, it constituted grounds for setting it aside and directing a second election.[3]

ORDER

It is hereby ordered that the election conducted on January 7, 1976, by the Regional Director in an appropriate unit of the Employer's production and maintenance employees be, and the same hereby is, set aside.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

[2] In *Pasquier, supra*, Member Fanning found that the laid-off employees had a reasonable expectancy of recall due to, *inter alia*, the employer's past growth, its recall list, its seasonal nature, and the absence of a complete phaseout of any plant operation. Since he dissented therein from the majority's decision to disenfranchise the laid-off employees, he finds it unnecessary to distinguish *Pasquier* from *D H Farm, supra*, or the instant case

[3] Although Chairman Murphy agrees with this finding, she would vote subject to challenge those laid-off employees who have not been recalled to work.