

**Charlie Rossie Ford, Inc. and Construction, Building Materials, & Miscellaneous Drivers, Local No. 83, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 28-RC-3120**

December 23, 1976

### DECISION AND DIRECTION

BY CHAIRMAN MURPHY AND MEMBERS  
JENKINS AND WALTHER

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director for Region 28 on February 27, 1976, an election by secret ballot was conducted in the above-entitled proceeding on March 26, 1976. At the conclusion of the balloting, the parties were furnished with a tally of ballots which showed that, of approximately 55 eligible voters, 56 valid ballots were cast, of which 27 were for the Petitioner, 27 were against the Petitioner, and 2 were challenged. The challenges were sufficient in number to affect the results of the election. Neither party filed objections to the conduct of the election or to conduct affecting the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations, the Regional Director conducted an investigation and thereafter, on May 4, 1976, issued his Report and Recommendations on Challenged Ballots. In his report, the Regional Director recommended that the Board overrule the challenges to the ballots of Roy Edwards and Carl Greenrock, that these ballots be opened and counted, and that, upon the issuance of a revised tally of ballots, an appropriate certification be issued. Thereafter, the Employer filed exceptions and a supporting 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 reviewed the entire record in this case, including the Regional Director's Report and Recommendations on Challenged Ballots and the Employers' exceptions and brief, and hereby adopts the Regional Director's findings, conclusions, and recommendations.

At the election, the Board agent challenged the ballots of Edwards and Greenrock on the ground that their names did not appear on the eligibility list. The Employer contended before the Regional Director that these employees are ineligible to vote in the election as they are employees of an independent contractor, Larry Hamilton. The Petitioner asserted

that the challenges to the ballots of the disputed employees should be overruled because they are both regular employees of the Employer.

The Regional Director's investigation disclosed that Edwards and Greenrock both work exclusively in a paint shop located on the northeast part of the Employer's premises. Pursuant to an alleged oral agreement with the Employer, Hamilton directs the paint shop operation and supervises the disputed employees, for which he receives 70 percent of the gross revenues. From his share of the proceeds, Hamilton must purchase the necessary paint, shop equipment, and supplies to perform this function. The Employer deducts the wages, taxes, and fringe benefits for Edwards and Greenrock from Hamilton's commission check.

The Employer alleged that Hamilton is the only supervisor who can hire or terminate paint shop employees. However, according to the Employer's president, Hamilton would be expected to take "appropriate action" if other management officials became dissatisfied with a paint shop employee. The Regional Director also found that all paint shop personnel, including Hamilton, earn substantially the same fringe benefits, work identical hours, share the same facilities, and wear the same uniforms as the stipulated employees of the Employer. In addition, the Employer carries workmen's compensation insurance on Edwards and Greenrock. Both employees are paid with checks drawn on the Employer's bank account.

The Regional Director found it unnecessary to determine whether Hamilton is, in fact, an independent contractor. Rather, he found that the Employer and Hamilton are joint employers of Edwards and Greenrock inasmuch as the Employer has retained significant control over the disputed employees and over the manner in which paint shop work was being performed, citing *Clayton B. Metcalf and C. B. Construction Co., Inc.*<sup>1</sup> The Regional Director therefore recommended that the challenges to these ballots be overruled. We agree with his findings in this regard.

The main thrust of the Employer's argument in support of its exceptions is identical to that raised before the Regional Director; i.e., that the disputed voters are employees of an independent contractor. However, the Employers sets forth an additional argument, apparently for the first time, that the challenges should be sustained because the disputed employees were not included in the unit agreed to by the parties. Contrary to our dissenting colleague, we find no merit in this exception.

<sup>1</sup> 223 NLRB 642 (1976).

All parties to this proceeding entered into a stipulation for consent election which described the appropriate unit as follows:

All service employees . . . including new and used car mechanics, body and fender mechanics, service writers, dispatchers, customer courtesy drivers, Get-ready mechanics, shop clericals, parts counter-men, parts drivers or chasers; excluding office clericals, car jockeys, salesmen, watchmen, guards and supervisors as defined in the Act.

Our dissenting colleague finds that the unit agreed upon by the parties is specific and detailed, the two paint shop employees constitute a separate group apart from the specifically included categories of employees, and it is not alleged or found that the two employees fall within the category of "service employees." She therefore would sustain the challenges to the ballots of the disputed employees and certify the results of the election.

We recognize that the Board's function in cases where the parties have stipulated to the appropriate unit is to ascertain the parties' intent and then to determine whether such intent is inconsistent with any statutory provision or Board policy. In this case, our colleague bases her dissent on the erroneous premise that the unit described by the stipulated language is limited to the categories of employees specifically included therein. However, we view the language of "all service employees" as a catchall description which evidences the intent of the parties to provide for the inclusion of any employee performing a service function, such as Edwards and Greenrock. That the parties also so viewed the language of the stipulation is clear from the frank concession in the Employer's brief that, "If Edwards and Greenrock are eligible, it is because they fall within the catchall description 'all service employees employed by the employer [sic] . . .'" Furthermore, the parties' intent to include the disputed employees in the stipulated unit is evident from the fact that Hamilton, who also works exclusively in the paint shop, was on the voting eligibility list and permitted to vote without challenge in the election. Clearly, if the parties intended Hamilton to be an eligible voter, it follows that their intent must also have been to include as eligible voters the other employees working with him in the paint shop.

Accordingly, in light of the clear intention of the parties to include the paint shop employees in the stipulated unit and in view of their community of interest with other service employees and the fact that

the inclusion of these employees would be consistent with Board policy,<sup>2</sup> we hereby overrule the challenges to the ballots of Edwards and Greenrock.

#### DIRECTION

It is hereby directed that the Regional Director for Region 28 shall, pursuant to the Rules and Regulations of the Board, within 10 days from the date of this Decision and Direction, open and count the ballots cast by Roy Edwards and Carl Greenrock, and shall thereafter cause to be served on the parties a revised tally of ballots and an appropriate certification.

CHAIRMAN MURPHY, dissenting:

I cannot agree with my colleagues' adoption of the recommendation that Roy Edwards and Carl Greenrock be found to be within the unit and that their challenged ballots be opened and counted. The stipulated unit here consisted of:

All service employees . . . including new and used car mechanics, body and fender mechanics, service writers, dispatchers, customer courtesy drivers, Get-ready mechanics, shop clericals, parts counter-men, parts drivers or chasers; excluding office clericals, car jockeys, salesmen, watchmen, guards and supervisors as defined in the Act.

Edwards and Greenrock work in the Employer's paint shop and their names were not included on the voting eligibility list. It is thus obvious that paint shop employees were not among the categories agreed to be included in the unit and therefore they were excluded.

It is well established that where the parties *stipulate* to the appropriateness of the unit, and to various inclusions and exclusions, the Board's function is to ascertain the intent of the parties with regard to the disputed employees and then to determine whether such intent is inconsistent with any statutory provision or established Board policy; it is not the function of the Board to apply its own views or make its own findings.<sup>3</sup> Where the unit is specific and unambiguous, the agreement of the parties controls unless inconsistent with statutory requirements or Board policy.<sup>4</sup> Here the unit agreed upon is specific and detailed. Therefore, any category not covered under its terms is excluded. Since the paint shop employees are a separate group from the included categories of

<sup>2</sup> See, e.g., *Austin Ford, Inc.*, 136 NLRB 1398 (1962), *W. R. Shadoff*, 154 NLRB 992 (1965)

<sup>3</sup> *The Tribune Company*, 190 NLRB 398 (1971), and cases cited therein.

<sup>4</sup> *N.L.R.B. v. The Jochin Manufacturing Company*, 314 F.2d 627, 632

(*Ursmi*), (C.A. 2, 1963), rehearing denied 314 F.2d at 635 (March 1, 1963) (exclusion of maintenance employee at separate location from unit of "production and maintenance employees" without geographical restriction held erroneous as a matter of law).

employees and it is not alleged or found that they are within the category of "service employees,"<sup>5</sup> the two challenged employees were excluded from the agreed-upon unit and the challenges to their ballots must be sustained. There is no basis for deciding, as

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<sup>5</sup> Contrary to my colleagues, I do not construe the statement by the Employer as a concession that they do, in fact, fall within the category of "service employees."

my colleagues do, whether they are or are not employees or where their community of interest lies.<sup>6</sup>

Inasmuch as the sustaining of the challenges would result in a vote of 27 for the Petitioner, and 27 against, I would certify the results of the election.

<sup>6</sup> *N.L.R.B. v. The Johns Manufacturing Co*, *supra* at 633-634.