

Osram Sylvania, Inc. and International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers, AFL-CIO. Case 6-RC-11305

May 14, 1998

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN GOULD AND MEMBERS FOX AND BRAME

The National Labor Relations Board, by a three-member panel, has considered objections to and determinative challenges in an election held June 27, 1996, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 251 votes for and 227 against the Petitioner, with 35 challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings¹ and recommendations² only to the ex-

¹The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

²In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to sustain the challenge to the ballot of Brian F. Robinson. Further, since the Petitioner has withdrawn its challenge to two ballots, Bd. Exhs. 4 and 6, and the parties stipulated at the hearing that these two ballots should be counted as "No" votes, we adopt the hearing officer's recommendation that Bd. Exhs. 4 and 6 should be counted as "No" votes in the final tally of ballots.

Also, in the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule Employer's Objection 4.

In adopting the hearing officer's recommendation to overrule Employer's Objection 1, which alleged that the Board agents conducting the election interfered with the election by allowing an employee, Marjorie Erich, whose name was not on the eligibility list, to cast an unchallenged ballot, we disavow the hearing officer's characterization of the Employer's position in this regard as "disingenuous" merely because the Employer contended at the hearing that Erich was, in fact, eligible to vote in the election. Rather, we agree with the Employer that the thrust of its Objection 1 did not concern Erich's eligibility to vote in the election, but raised the issue of whether the appearance of loss of control of the election procedure was created by the Board agents permitting Erich to cast an unchallenged ballot. We agree, however, with the hearing officer that Employer's Objection 1 lacks merit because the Erich incident was an isolated incident in an orderly and otherwise well-run election which by itself was not sufficient to create doubt in the minds of employees regarding the impartiality of the Board agents, the validity of the election, or the integrity of the election process.

In adopting the hearing officer's recommendation to overrule Employer's Objection 2, we do not agree with the hearing officer that the Employer's reliance on certain court decisions reversing prior Board decisions can be "easily disregarded." Nevertheless, we find that these decisions do not warrant a different result

tent consistent with this Decision, and finds that a certification of representative should be issued.

1. Contrary to the hearing officer, we find that Board's Exhibit 2, a ballot marked with a smudged diagonal line in the "Yes" box and 7 "X"s in the "No" area of the ballot, including a full "X" in the "No" box, clearly expresses the voter's intent to vote "No" in the election. Accordingly, we shall count Board's Exhibit 2 as a "No" vote in the revised tally of ballots set out below.

Relying on the Board's decision in *Bishop Mugavero Center for Geriatric Care*, 322 NLRB 209 (1996), the hearing officer found that the Petitioner's challenge to Board's Exhibit 2 should be sustained because the ballot did not indicate a clear expression of voter intent. In reaching this conclusion, the hearing officer refused "to speculate" as to whether the diagonal line in the "Yes" box was an inadvertent mark and the smudge an attempted erasure. As to the full "X" in the "No" box and the six "X"s accompanying it, the hearing officer reasoned that "the interpretation to be assigned to a double-marked ballot is not a best two out of three, or even six out of seven, counting experience."

As explained by the hearing officer, the issue here is whether Board's Exhibit 2 evidences a clear expression of voter intent. The Board has addressed this issue in several recent cases. Thus, in *Bishop Mugavero Center for Geriatric Care*, supra, a Board majority affirmed the Regional Director's recommendation that a ballot marked with an "X" in the "No" box and a diagonal line in the "Yes" box should be considered void. The majority reasoned that the Regional Director's recommendation was "consistent with well-established Board precedent holding that where a voter marks both boxes on a ballot and the voter's intent cannot be ascertained from other markings on the ballot, the ballot is void." *Id.*, slip op. at 1.

In *Brooks Brothers*, 316 NLRB 176 (1995), and *Mediplex of Connecticut*, 319 NLRB 281 (1995), however, the Board reached a contrary result and found that voter intent was clearly expressed where, although the double-marked ballot at issue in each case contained an "X" in both the "Yes" and "No" boxes, other markings clearly indicated that the voter intended

In adopting the hearing officer's recommendation to overrule Employer's Objection 3, we do not rely on the hearing officer's statements regarding the subjective reactions of certain employees to alleged threats. See, e.g., *Picoma Industries*, 296 NLRB 498, 499 (1989).

In adopting the hearing officer's recommendations to overrule Employer's Objections 2 and 3, Member Brame finds it unnecessary to pass on whether employees Joseph McClain and Christopher Hayes were union agents because he finds that even if their alleged conduct were attributable to the Petitioner, it did not reasonably tend to interfere with the employees' free and uncoerced choice in the election. See *United States Aviex Co.*, 279 NLRB 826, 826 fn. 3 and 846-847 (1986).

to vote “No” in the election. Thus, in *Brooks Brothers*, supra, where the “X” marked in the “Yes” box was scratched out by additional markings, the Board found that the ballot clearly expressed the voter’s intent to vote “No” because the additional markings, which obliterated the “X” in the “Yes” box, left an unmistakable “X” in the “No” box. As to *Mediplex*, there the Board adopted an administrative law judge’s finding that the double-marked ballot at issue clearly expressed the voter’s intent to vote “No” in the election where the “X” in the “No” box was heavy, clear, more intense than the marking in the “Yes” box and contained a double line on one leg of the “X,” while the “X” in the “Yes” box was lightly marked and was “covered by the kind of smudges caused by an inadequate eraser.”³

Contrary to the hearing officer, we find that the facts in the present case are closer to those in *Brooks Brothers* and *Mediplex* than to those in *Bishop Mugavero Center*. In this regard, we find that the smudge mark on the diagonal line in the “Yes” box of Board’s Exhibit 2 indicates an attempted erasure. Further, even assuming that there was no smudge mark in the “Yes” box, we find that the “X” in the “No” box, together with the six additional “X”s in the “No” area of Board’s Exhibit 2, clearly express the voter’s intent to vote “No” in the election. Finally, our conclusion here is consistent with the Board majority’s reasoning in *Bishop Mugavero Center* because the smudge mark and the six additional “X”s in the “No” area of Board’s Exhibit 2 constitute the “other markings” on a double-marked ballot required by the majority in *Bishop Mugavero Center* to evidence a voter’s clear intention in casting a ballot. Accordingly, as noted above, we shall count Board’s Exhibit 2 as a “No” vote in the final tally of ballots.⁴

³ *Mediplex*, supra at 300. The judge in *Mediplex* went on to find that the marking in the “Yes” box was a smudged attempted erasure which was probably caused by the worn eraser head on the voting pencil which the parties had stipulated into evidence. Id. at 300 and 298. In the present case, we find that the hearing officer gave undue weight to the fact that the voting pencil used to mark Bd. Exh. 2 was not in evidence. In an election involving over 500 voters, obviously more than one voting pencil would be used in the election. Consequently, the mere fact that the voting booth pencil used to mark Bd. Exh. 2 was not recovered and submitted into evidence should not prevent an analysis of the smudged marking to determine whether it was an attempted erasure. Such an analysis is required, in our view, under the Board’s policy “to give effect to voter intent whenever possible.” *Horton Automatics*, 286 NLRB 1413 (1987).

⁴ In overruling the hearing officer’s recommendation to sustain the challenge to Bd. Exh. 2, Member Brame relies specifically on the fact that other markings on this double-marked ballot, i.e., the smudged diagonal line in the “Yes” box and the 7 “X”s in the “No” area of the ballot, including a full “X” in the “No” box, clearly express the voter’s intent to vote “No” in the election. Accordingly, Member Brame finds it unnecessary to pass on the Board’s decision in *Bishop Mugavero*, supra, because in that case, unlike here, there were no additional marks on the double-marked ballot.

2. The hearing officer found that 29 employees who were laid off prior to the eligibility cutoff date for the election, but who were recalled prior to the election, had a reasonable expectancy of recall as of the eligibility cutoff date and were therefore eligible to vote in the election. The hearing officer found the facts that the Employer had called back nearly 40 percent of the laid-off employees by the date of the election, that the Employer’s attempts to attract new customers was ongoing, and that it had a past practice of recalling former employees, evidenced that as of the eligibility cutoff date these 29 employees had a reasonable expectancy of recall “in the near or foreseeable future.” In reaching this conclusion, the hearing officer stated that he relied “primarily” on the Board’s decisions in *Nordam, Inc.*, 173 NLRB 1153 (1968), and *Intercontinental Mfg. Co.*, 192 NLRB 590 (1971).

The Petitioner excepts to the hearing officer’s finding that the 29 employees at issue here are eligible to vote on the ground that the hearing officer failed to apply the Board’s eligibility standard for employees on layoff as set out in *Tony’s Trailer Service*, 257 NLRB 878 fn. 3 (1981), and *Apex Paper Box Co.*, 302 NLRB 67 (1991). In this regard, the Petitioner asserts, inter alia, that the hearing officer, by emphasizing the subsequent recall of the employees prior to the election “rather than the expectancy applicable to all similarly situated employees on layoff as of the eligibility date,” simply substituted for the appropriate standard the fact that the employees were recalled.

For the following reasons, we find merit in this exception and therefore find, contrary to the hearing officer, that the 29 employees who were on layoff status as of the eligibility cutoff date, but who were recalled prior to the election, did not have a reasonable expectation of recall as of the eligibility cutoff date and therefore were not eligible to vote in the election. Accordingly, we shall sustain the challenges to their ballots.

Initially, we observe that it is well established that employees laid off prior to the payroll eligibility period must have had a reasonable expectation of recall as of the payroll eligibility period in order to vote in the election, regardless of whether the employees have been recalled prior to the election. *Tony’s Trailer Service*, 257 NLRB 878 fn. 3 (1981).⁵

Thus, to determine if these 29 challenged voters had a reasonable expectancy of recall as of April 28, 1996,⁶ the agreed-upon payroll eligibility cutoff date,⁷ we must limit our analysis to events that occurred on

⁵ *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991) (emphasis added; fn. omitted).

⁶ All dates are in 1996.

⁷ The election was conducted on June 27.

or before that date. As to the analysis, as explained in *Apex Paper Box Co.*, 302 NLRB at 68 (fns. omitted):

[t]he voting eligibility of laid-off employees depends on whether objective factors support a reasonable expectancy of recall in the near future, which establishes the temporary nature of the lay-off. The Board examines several factors in determining voter eligibility, including the employer's past experience and future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall.

Before we apply this analysis here, we shall briefly set out the relevant facts, which are not in dispute.

The Employer instituted two mass layoffs at the St. Marys' plant in early 1996. On February 23, the Employer laid off 56 employees as a result of its decision to eliminate the second shift on the single index line. This decision resulted from the Employer's general decline in sales and the loss of a major contract, as well as its decision to modify its production process to reduce the amount of inventory on hand. On March 29, the Employer laid off another 34 employees because of a continued decline in sales.

At the time of the layoffs, the Employer conducted group meetings with all of the employees to be laid off, at which time the employees were told that their layoffs were for an "indefinite" duration, that the Employer could give them "no firm and realistic" date for their possible return to work, and that their chances for recall "depended" since "things could change." The Employer also explained to these employees their benefits⁸ and recall rights and advised them that they could look for other jobs or apply for unemployment compensation. In addition, several supervisors offered to write letters of recommendation for employees under their supervision. Finally, the Employer advised employees to keep the plant informed regarding any changes in their mailing addresses and home telephone numbers. There were no subsequent communications between the Employer and the laid-off employees until the Employer recalled individual employees on short notice.⁹

Based on these facts, we find, as noted above, that the 29 employees at issue here did not have a reasonable expectation of recall as of April 28, the eligibility cutoff date. In this regard, both the circumstances sur-

rounding the layoffs and what the employees were told regarding the duration of the layoffs clearly establish that the layoffs were for an indefinite duration. As to the former, a general decline in production due both to a decline in sales and a change in the production process, circumstances which had not changed appreciably by the April 28 eligibility cutoff date, led to the mass layoffs in February and March. As to the latter, at the time of the layoffs, the Employer gave these employees no assurances that their layoffs would be of short duration, but, to the contrary, told them that the layoffs were for an "indefinite" period of time. Consistent with this position, the Employer compensated them for their unused vacation and sick leave, and advised them to look for other jobs or to apply for unemployment compensation.¹⁰

Finally, we find that the hearing officer, in reaching a contrary result, erred by relying on the fact that nearly 40 percent of the laid-off employees were recalled prior to the election as evidence that the 29 employees at issue here had a reasonable expectancy of recall as of the eligibility cutoff date. In this regard, since these employees, as explained at footnote nine above, were almost all recalled after the April 28 eligibility cutoff date, their recall cannot be evidence of a reasonable expectancy of recall prior to that date. This is especially true here where, as explained at footnote 10 above, the Employer's business prospects had not improved appreciably prior to April 28. Further, we find the hearing officer's reliance on *Nordam*, supra, and *Intercontinental Mfg. Co.*, supra, misplaced. In this regard, we observe that in *Nordam*, unlike here, the laid-off employees were told that the layoffs were temporary and that they would be recalled in 2 or 3 weeks, and that in *Intercontinental Mfg. Co.*, the Board rejected the employer's assertion that certain employees had been permanently laid off and were therefore ineligible to vote in the election where that assertion

⁸The Employer explained that they would be compensated for their unused vacation and sick days and that their health insurance would continue for 30 days, with the option to extend coverage beyond that time at their own expense.

⁹Prior to the April 28 eligibility cutoff date, the Respondent had recalled only 7 of the 90 employees laid off in February and March. Between the eligibility cutoff date and the election, the Employer recalled an additional 37 employees. Of these 37 employees, 29 voted in the election.

¹⁰We find without merit our dissenting colleague's contention that the Employer's recall of 7 employees laid off in February and March prior to April 28 and its past practice of recalling laid-off employees establish that the 29 employees at issue here had a reasonable expectancy of recall as of the April 28 eligibility cutoff date. The Employer has failed to show that these recalls were due to improvements in the Employer's business rather than to normal attrition. See *Apex Paper Box Co.*, 302 NLRB at 69. Similarly, while the Employer may have had a past practice of recalling laid-off employees, this does not establish that the 29 laid-off employees at issue here had a reasonable expectation of recall as of April 28. In this regard, we note that while the Employer's business did in fact improve after April 28, the Employer has not shown that it predicted, or, indeed, that it could have predicted, this improvement prior to April 28. See *Tony's Trailer Service*, 257 NLRB 878 fn. 3 (1981). Finally, we also find misplaced our dissenting colleague's reliance on the fact that the Employer's attempt to attract new business was ongoing. The fact that the Employer was engaged in an ongoing attempt to attract new customers prior to April 28 is an insufficient basis to establish that as of April 28 the 29 employees at issue here had a reasonable expectancy of recall.

was unsupported by either evidence or a specific offer of proof.

Since we find that the 29 employees who were recalled to work after the April 28 eligibility cutoff date did not have a reasonable expectation of recall as of that date, we sustain the challenges to their ballots and shall not count them in the revised tally of ballots.

The revised tally of ballots thus shows 251 votes for and 230 against the Petitioner, with 2 challenged ballots, an insufficient number to affect the results.¹¹ Since the revised tally of ballots shows that a majority of ballots have been cast for the Petitioner, we shall certify the Petitioner as the bargaining representative of the unit employees.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees employed by the Employer at its Washington Road, St. Marys, Pennsylvania facility, excluding all office clerical employees, salespersons, transport workers and guards, professional employees and supervisors as defined in the Act, and all other employees.

CHAIRMAN GOULD, dissenting in part.

I agree with the hearing officer that the 29 employees who were on layoff as of the April 28, 1996 eligi-

¹¹ Since the challenged ballots of employees Mary Elias and Maria Imhoff are no longer determinative of the election, we adopt the hearing officer's alternate recommendation that they not be opened and counted.

bility cutoff date for the election, but who had been recalled prior to the election, had a reasonable expectation of recall as of the eligibility cutoff date, and therefore were eligible to vote in the election.¹ In reaching this conclusion, I rely on the facts that the Employer had recalled several laid-off employees prior to the eligibility cutoff date and that it had a strong past practice of recalling laid-off employees.² In this regard, I note that the Employer apprises employees undergoing layoff of their extensive recall rights, by order of seniority, to any available open job in the plant, including those job slots created by new customer orders and plant expansion as well as by attrition, and that the Employer does not use temporary workers to perform unit work. Finally, in finding that these 29 laid-off employees had a reasonable expectation of return as of the eligibility cutoff date, I also note that the Employer's attempts to attract new customers was ongoing. Accordingly, I would adopt the hearing officer's recommendation to overrule the challenges to the ballots of these 29 employees and direct that their ballots be opened and counted.

¹ I agree with my colleagues, however, regarding the disposition of the other issues presented in this case. Specifically, as to Bd. Exh. 2, the double-marked ballot, consistent with my dissent in *Bishop Mugavero Center for Geriatric Care*, 322 NLRB 209 (1996), where I explained that I would have found that the voter there clearly indicated an intention to cast a "No" vote because the instructions on the ballot tell the voter to "Mark an 'X' in the square of your choice," and only the "No" box contained such a completed mark, I would still find that Bd. Exh. 2 clearly expressed the voter's intent to vote "No" in the election even if the "X" in the "No" box of Bd. Exh. 2 was not accompanied by six additional "X"s and the diagonal line in the "Yes" box was not smudged by an apparent attempt at erasure.

² I do not rely, however, on the hearing officer's statements that he wanted to elevate the employees' rights in this instance, that it was not the fault of the 29 employees that they were laid off, or that these 29 employees chose to accept a call back to work rather than remain on "inactive" status.