

Meadow Valley Contractors, Inc.¹ and Operating Engineers Local No. 3, International Union of Operating Engineers, AFL-CIO, Petitioner.
Case 27-RC-7408

June 30, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND DEVANEY

The National Labor Relations Board has considered determinative challenges and objections to an election held October 5 and 6, 1993,² and the Acting Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows six for and five against the Petitioner, with three challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the Employer's exceptions and brief. We adopt the Acting Regional Director's findings and recommendations only to the extent consistent with this Decision and Order.³

We affirm the Acting Regional Director's recommendation that the challenge to the ballot of employee Casey Rowley be sustained. Rowley was hired on June 24 as a laborer, an excluded unit classification, and performed bargaining unit work only intermittently before the election eligibility cutoff date of September 4, having worked as an equipment operator during the weeks ending July 17, August 28, and September 4 for 50 hours⁴ out of a total of approximately 400 hours worked from his hire through September 4. He continued to perform nonbargaining unit work during all or most of the first 2 weeks after the eligibility cutoff date, only thereafter beginning to perform equipment operator work on a regular basis. On these facts, the

¹ The case caption has been revised to reflect the Employer's correct name.

² All dates are 1993 unless otherwise indicated.

³ In the absence of exceptions we adopt pro forma the Acting Regional Director's recommendations to sustain the challenge to the ballot of Glen Hafen and to overrule the Petitioner's Objection 1.

We adopt the Acting Regional Director's recommendation to set aside the election if the revised tally of ballots discloses that a majority of the valid votes has not been cast for the Petitioner. We note that *Thrifty Auto Parts*, 295 NLRB 1118 (1989), the case cited in support of his conclusion that the omission of 8.3 percent of the eligible voters from the eligibility list did not constitute substantial compliance by the Employer with its obligations under *Excelsior Underwear*, 156 NLRB 532 (1970), does not, as contended by the Employer, establish a threshold omission rate of 9.5 percent as a minimum prerequisite for finding lack of compliance. Although that was the omission rate in *Thrifty Auto*, the Board relied on *Chemical Technology*, 214 NLRB 590 fn. 3 (1974), as precedent for its finding that Thrifty failed to meet its *Excelsior* list obligations. In *Chemical Technology*, the omission rate was 8.3 percent.

⁴ The Acting Regional Director incorrectly stated that Rowley worked only 40 hours as an equipment operator during this period.

Acting Regional Director appropriately applied a dual-function employee analysis in determining that Rowley had not performed bargaining unit work for a sufficiently substantial amount of time by the eligibility cutoff date to be eligible to vote in the ensuing election.

Contrary to the recommendation of the Acting Regional Director, however, we overrule the challenge to the ballot of Kevin Smith. Smith commenced employment on August 6, and performed only nonbargaining unit work during his first 3 weeks of employment. Smith first began performing unit work 2 weeks prior to the election eligibility cutoff date, initially on a trial basis the first week and then without interruption the following week.⁵ After the eligibility cutoff date, and through the date of the election, Smith performed only bargaining unit work, with one disputed exception.⁶ Thus the record supports the Employer's contention that Smith, although initially hired to perform nonunit work, in fact had transferred to performing unit work before the election eligibility cutoff date, and continued performing bargaining unit work on a continuous basis through the date of the election.⁷ Consequently, we find that the Acting Regional Director erred in applying a dual-function employee analysis to Smith. We find that he effectively transferred into the bargaining unit before the eligibility cutoff date and was therefore eligible to cast a ballot in the election.

ORDER

It is ordered that this case be remanded to the Regional Director for Region 27, who shall, pursuant to the Board's Rules and Regulations, within 10 days from the date of this Decision and Order, open and count the ballot of Kevin Smith. The Regional Director shall then prepare and cause to be served on the parties a revised tally of ballots. If the revised tally of ballots shows that a majority of the valid votes has been cast for the Petitioner, the Petitioner's Objection 2 will be moot and the Regional Director shall issue an appropriate Certification of Representative. If, however, the revised ballot tally shows that the Petitioner has not received a majority of the valid votes cast, IT IS FUR-

⁵ The evidence shows that Smith spent 2.5 hours the first day of this second week doing nonbargaining unit work, but performed only bargaining unit work the remainder of the week.

⁶ According to an affidavit Smith submitted, he performed unit work for 10 hours on October 2, although listed on the Employer's certified payroll as performing nonunit work. The Employer submitted with its exceptions a related timesheet which it claims corroborates Smith's statement. Assuming arguendo that Smith had performed nonunit work on that date, we would not find that this assignment would negate the appropriateness of our analysis here.

⁷ In reaching this finding, we find it unnecessary to rely on statements assertedly made to Smith prior to the actual change in work assignments.

THE ORDERED that the election conducted on October 5 and 6, 1993, be set aside. The Regional Director shall then conduct a new election at a time he deems appropriate.