

Peter E. O'Dovero, d/b/a Associated Constructors and International Union of Operating Engineers, Local 324, A, B, C, & D, AFL-CIO, Petitioner. Case 30-RC-5522

January 9, 1995

DECISION, DIRECTION, AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held December 3, 1993, and the hearing officer's report recommending disposition of them. The tally of ballots shows 2 for and 4 against the Petitioner, with 1 void ballot and 15 challenged ballots, a number sufficient to affect the results.

The Board has reviewed the record in light of the exceptions and brief and has adopted the hearing officer's findings¹ and recommendations.²

DIRECTION

IT IS DIRECTED that the Regional Director for Region 30 shall, within 14 days of this Decision, Direction, and Order, open and count the ballots of Russ Williams, Dale Currie,³ Kurt Spodeck, and Dale Car-

rier and thereafter prepare and serve on the parties a revised tally of ballots. The Regional Director shall then issue the appropriate certification.

ORDER

IT IS ORDERED that this proceeding is remanded to the Regional Director for Region 30 for further appropriate action.

Member Cohen finds that Currie did not have a reasonable expectancy of return as of the election date of December 3, 1993. See Member Cohen's dissent in *Vanalco, Inc.*, 315 NLRB 618 (1994).

Member Cohen respectfully disagrees with Members Browning and Truesdale (see below) that this type of eligibility issue will necessarily involve difficult evaluations of conflicting medical evidence. In any event, he notes that their test would permit an individual to vote even where, as here, the medical evidence is clear and uncontradicted. Finally, even in cases where there is a conflict in the medical evidence, Member Cohen would prefer to resolve that conflict rather than have the results of an election turn on the vote of an employee who has no reasonable expectancy of returning to the unit.

For the reasons set forth in the majority opinion in *Vanalco, Inc.*, supra, Members Browning and Truesdale subscribe to the fundamental rule governing the eligibility of an employee on sick or maternity leave to vote in an election, as adopted by the majority in *Red Arrow Freight Lines*, 278 NLRB 965 (1986), that there is a presumption of continuing employee status and eligibility to vote, unless rebutted by an affirmative showing that the employee has been discharged or has resigned. They further note that the test proposed by Member Cohen would inevitably involve the Board and its Regions in the evaluation of medical evidence, and would open a new avenue of litigation, possibly involving paid expert testimony, which is beyond the traditional expertise of the agency and inimical to the efficient and expeditious resolution of questions concerning representation. Indeed, they suggest that the reason why the medical evidence in this case is, as Member Cohen points out, uncontradicted is because under the straightforward *Red Arrow* rule, such medical evidence is not relevant, is therefore not dispositive, and is therefore not likely to be countered by equally irrelevant contrary medical evidence. They further suggest, however, that under the "reasonable expectancy of return to the unit" standard espoused by Member Cohen, such medical evidence would become dispositive, and would therefore likely be countered by contrary medical evidence or opinion in almost all cases involving dispositive challenges to the ballots of employees on sick leave at the time of an election. In any event, they affirm the hearing officer's application of the *Red Arrow* rule in this case and adopt his recommendation to overrule the challenge to Currie's ballot.

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 recommendations to overrule the Employer's objection, to sustain the challenge to the ballot of Ray Troumbly, and to overrule the challenge to the ballot of Dale Carrier.

³Member Cohen would sustain the challenge to Dale Currie's ballot. Currie is a construction equipment operator who had been on sick leave 18 months as of the hearing. His last day of work for the Employer was in late July or early August 1992. On August 5, 1992, he had a heart attack and subsequent angioplasty surgery. Although Currie has indicated a desire to return to work for the Employer, his doctor has not released him to return to work and has given him no projected date for such return. In these circumstances,