

Dyncorp/Dynair Services, Inc. and Miscellaneous Warehousemen, Drivers and Helpers, Local 986, International Brotherhood of Teamsters, AFL-CIO, Petitioner. Case 31-RC-7270

December 18, 1995

DECISION AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held on April 14, 1995¹ and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 13 for and 13 against the Petitioner, with 2 determinative challenged ballots.

The Board has reviewed the record in light of the exceptions² and briefs and has decided to adopt the hearing officer's recommendations only to the extent consistent with this Decision and Direction.

The Petitioner has excepted, inter alia, to the hearing officer's recommendation that the challenge to the ballot of Arturo Heras be sustained. For the reasons set forth below, we find merit in this exception.

Heras was hired on August 25, 1994, as a ramp agent, a job classification specifically excluded from the bargaining unit.³ Thereafter, Heras asked Aircraft Maintenance Manager Aref Rteimeh for a transfer to an A & P mechanic position, because Heras had attended A & P mechanic school and had obtained his A & P license, a prerequisite for working as an A & P mechanic.

On the evening of March 6, Rteimeh authorized Heras to work as an A & P mechanic on the Mexicana Airline (Mexicana) account and receive on-the-job training. Mexicana requires all A & P mechanics to have prior training on Mexicana equipment before it will approve the mechanic's regular assignment to work on its airplanes. Heras worked as an A & P mechanic on March 6 and 7, which is during the payroll eligibility period.⁴ On those dates, he received a total of 14 hours of on-the-job training in the engine run procedure, radio communication, and aircraft taxi for 727 and A320 aircraft, which are the two main types of aircraft used by Mexicana.

During the period of March 9 to 11, Mexicana approved Heras' promotion to A & P mechanic on the condition that he not work by himself, because he did

not have sufficient experience. Since March 13, Heras has worked as an A & P mechanic.

Essentially on these facts, the hearing officer found that Heras was not an eligible voter, because he participated in training during the payroll eligibility period ending March 9 and did not engage in actual unit work until March 13. We disagree.

As the hearing officer recognized, "[i]t is well settled that, in order to be eligible to vote, an individual must be employed and working on the established eligibility date, unless absent for one of the reasons set out in the Direction of Election." *Ra-Rich Mfg. Corp.*, 120 NLRB 1444, 1447 (1958).

A subsidiary Board rule defines "working" as the actual performance of bargaining unit work. For example, in *F. & M. Importing Co.*, 237 NLRB 628, 632-633 (1978), a case cited by the hearing officer, the Board sustained the challenges to the ballots of two employees who were hired on the last day of the eligibility period, were paid for 1 hour's "orientation," but did not actually perform unit work that day.

Similarly, in *Emro Marketing Co.*, 269 NLRB 926 fn. 1 (1984), another case cited by the hearing officer, the Board sustained the challenge to the ballot of an employee who reported for work on the last day of the eligibility period, was paid for 2 hours of "orientation and training," but "did not perform unit work until after the end of the eligibility period."

A different result was reached in *CWM, Inc.*, 306 NLRB 495 (1992), the most recent case cited by the hearing officer. *CWM* involved five challenged voters who were hired as permanent employees and participated in a comprehensive week-long training program. By Friday afternoon, the final workday before the end of the eligibility period, they had successfully completed the training and were assigned by their supervisor to begin their jobs. The necessary protective equipment was missing, however, so they were released from work with instructions to report back the following Monday. The Board, in disagreement with the hearing officer, held that the five employees were both "employed" and "working" prior to the payroll eligibility cutoff date and overruled the challenges to their ballots.

CWM is an important decision for several reasons. First, the Board explained the two purposes underlying what it termed its "prework rule," supra at 495-496:

[I]t operates as a prophylactic against an employer's manipulation of an election by hiring employees favorable to its position just prior to the election, and it provides a simple and fair means of determining whether newly hired employees are part of the bargaining unit.

In addition, the Board distinguished the comprehensive 5-day training program the challenged voters com-

¹ All dates are in 1995, unless stated otherwise.

² In the absence of exceptions, we adopt pro forma the hearing officer's recommendation that Objection 1 be overruled.

³ The bargaining unit consists of Airframe and Power Plant (A & P) mechanics employed by the Employer at the Los Angeles International Airport.

⁴ The payroll eligibility period ended on March 9.

pleted in *CWM* from the “mere orientation and preliminaries” at issue in *Emro Marketing* and *F. & M. Importing*, supra. Finally, in *CWM*, the Board held that the employees were “working in the unit” and eligible to vote “no later than” the time they were assigned to their jobs on Friday afternoon.

An examination of the cases reveals that the Board has consistently held that in order to be “employed during the payroll period” and be eligible to vote, an employee must perform unit work during the payroll period, unless, of course, the employee is absent for certain specified reasons.⁵ Here, Heras’ on-the-job training on March 6 and 7 consisted of his actually performing the duties of an A & P mechanic, thus distinguishing this case from *F. & M. Importing* and *Emro Marketing*, in which the challenged voters’ training consisted of “mere orientation and preliminaries” and they performed no unit work.⁶ Under the cir-

⁵*Emro Marketing*, supra at fn. 1; *F. & M. Importing Co.*, supra at 632–633; see also *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517, 517–518 (1973).

⁶The fact that as of March 9, Mexicana had not yet approved the Employer’s permanent assignment of Heras to the Mexicana account is not relevant to his eligibility. As explained above, we are applying here the Board’s Rule that an eligible employee actually perform unit work during the eligibility period. Similarly, we accord no weight to the fact that Heras may have been classified as a ramp agent (an excluded classification) during the eligibility period. The record evidence, considered as a whole, does not indicate that Heras worked as a ramp agent for a significant period of time once he began performing A & P mechanic duties during the eligibility period.

cumstances, Board precedent leads us to conclude that Heras is eligible to vote in the unit of A & P mechanics.

We emphasize that the result reached in this case is in harmony with one of the underlying purposes of the “prework rule”: simplifying the process of identifying eligible voters, while at the same time, establishing a certain degree of stability in the election process. An employee’s performance of unit work is an objective fact that can be easily ascertained. Thus, we will not speculate whether an employee performing unit work is or is not receiving “training.” Such an inquiry could provide uncertainty and delay and would not effectuate the policies of the Act, which “favor prompt completion of representation proceedings.” *Versail Mfg. Co.*, 212 NLRB 592, 593 (1974).

Accordingly, for all these reasons, we find, contrary to the hearing officer, that Heras was employed and working during the eligibility period. Therefore, we overrule the challenge to his ballot, and we shall direct that it be opened and counted.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 31 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Arturo Heras, prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.