

Advance Products Corporation and District No. 121, International Association of Machinists and Aerospace Workers, AFL-CIO, Petitioner.
Case 30-RC-5087

August 27, 1991

DECISION, DIRECTION, AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in and objections to an election held June 20, 1990, 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 55 for and 48 against the Petitioner, with 21 challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief and adopts the hearing officer's findings and recommendations¹ except as modified herein.

We agree with the hearing officer's conclusion that employee Timothy Frank was not an agent of the Petitioner. In so doing, we find that the present case closely resembles *United Builders Supply Co.*, 287 NLRB 1364 (1988).² In that case, the Board determined that an employee who was asked to solicit cards from other employees, set up some union meetings, and serve as the union's election observer was not a general agent of the union. The Board found that although the employee's activities arguably demonstrated limited ap-

parent or actual authority to act on the union's behalf, they did not constitute the broad manifestation of authority necessary to render him a general agent. Here, similarly, Frank, an active supporter of the Petitioner, served as one of seven members of the In House Organizing Committee (IHOC), which had no designated leader. As a member of the IHOC, Frank solicited support for the Union, although it is not clear whether he actually solicited cards from other employees; discussed the Union with employees, answered their questions and gave them the business card of the union representative involved in the organizing effort; distributed union literature, buttons, hats, and shirts; and kept the union representative informed of events that occurred in the plant, including the Employer's campaign activities. Frank also served as the Petitioner's election observer during one voting session. We find that these activities, like those described in *United Builders*, do not demonstrate general agency.

As the hearing officer found, there is no evidence that Frank had actual authority to speak for the Union or the IHOC. Moreover, the record does not indicate that the Union held Frank or the other IHOC members out to employees as its agents. Instead, three paid union organizers actively conducted the campaign. Although they were not permitted in the Employer's facility, these organizers were prominent and directly accessible to employees through numerous union meetings. Moreover, one organizer, Dessie Harrison, stayed at the Campus Inn near the Employer's facility for approximately 1 month before the election. During that time, she met with the IHOC members on a weekly basis. Hence, the employees would not view the IHOC as the on-scene presence and authority for the Union. The IHOC members informed the union organizers of the concerns expressed by employees, but they did not decide or approve the contents of union literature and had little, if any, input into campaign strategy. Based on these facts, we conclude that Frank was not a general agent of the Petitioner, but rather was only an enthusiastic union supporter and member of the IHOC.³

¹ In agreeing with the hearing officer that the quality assurance employees should be included in the bargaining unit, we do not rely on the Board's decisions in *Dynallectron Corp.*, 231 NLRB 1147 (1977), and *Livingstone Collegen*, 290 NLRB 304 (1988). Unlike the instant case, those cases do not involve units of production and maintenance employees in a production facility.

In the absence of exceptions, we adopt pro forma the hearing officer's recommendations that the challenges to the ballots of Barbara Roraff, Dawn Brown, Randy Kollman, John Cantrell, Paul Reinert, Bonnie Goetz, and Eugene Schmidt be sustained; and that the challenges to the ballots of James Kreuziger, Lee Pattee Sr., Randall (Bill) Nickel, and Melvin Kienast be overruled. We note that the parties agreed to withdraw the challenges to the ballots of Chris Wendt and Gary Gerber. We also adopt pro forma the hearing officer's recommendations, to which no exceptions were filed, to sustain the Petitioner's objections alleging that the Employer engaged in surveillance of employee union activities, called the police to remove from the premises employees engaged in handbilling, and enforced an overly broad no-solicitation rule; to overrule the remaining objections filed by the Petitioner; and to overrule the Employer's objections alleging that the Petitioner engaged in incidents of property damage and threats of property damage.

² We do not rely on the hearing officer's discussion of the test employed in *L & J Equipment Co.*, 278 NLRB 485 (1986). The four-prong test applied in that case for determining the agency status of in-house organizing committee (IHOC) members was prescribed by the Third Circuit Court of Appeals in *NLRB v. L & J Equipment*, 745 F.2d 224 (3d Cir. 1984), rehearing denied 750 F.2d 25 (1984), and accepted by the Board as the law of the case.

Member Cracraft did not participate in the decision in *Bristol Textile Co.*, 277 NLRB 1637 (1986), relied on by the hearing officer. Although she agrees with the finding here that employee Frank was not the Petitioner's agent and with the factors set out by the hearing officer which distinguish the instant case from the situation in *Bristol Textile*, she does not pass on whether she would have found Pirolo to be an agent of the union in *Bristol Textile*.

³ Frank's activities here were actually quite typical of IHOC members generally and most key union activists. Hence, our concurring colleague would, in effect, create a per se rule that such employees have apparent authority to act on behalf of union's conducting their respective campaigns, absent an express and clear statement by the union to employees that only the organizers speak for the union. Under our concurring colleague's view, apparent authority is assumed, and the union must explicitly repudiate it in order to avoid being charged with the actions of IHOC members and, presumably, other key union activists. This extension of Board law on agency is particularly unwarranted where, as here, union organizers were readily accessible to employees and the Union itself was actively orchestrating and conducting the campaign.

For the reasons set out by the hearing officer, we also agree that under the circumstances here Frank's statement warning employee Schultz to "watch your back" does not rise to the level of threat. We would reach this conclusion even if the statement were viewed as conduct by a union agent rather than as conduct by a third party.

DIRECTION

IT IS DIRECTED that the Regional Director, within 14 days of the date of this Decision and Direction, open and count the ballots of James Kreuziger, Helen Hull, Cheryl Belisle, Pete Ross, Mark Cigelske, Doreen Dejager, Kim Welch, Dan Coffman, Lee Pattee Sr., Arthur Schiemtrums, Randall (Bill) Nickel, Melvin Kienast, Chris Wendt, and Gary Gerber; and prepare and serve on the parties a revised tally of ballots. In the event that the revised tally of ballots shows that the Petitioner has received a majority of the valid votes cast, the Regional Director shall issue a certification of representative pursuant to the Board's Rules and Regulations. In the event that the revised tally of ballots shows that the Petitioner has not received a majority of the valid ballots cast, the following will be applicable.

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by District No. 121, International Association of Machinists and Aerospace Workers, AFL-CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election shall have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file

the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

ORDER

It is ordered that the above-entitled matter is referred to the Regional Director for Region 30 for further processing consistent with this Decision, Direction, and Order.

MEMBER OVIATT, concurring.

Like my colleagues I would overrule Employer's Objection 1. I agree with the Employer, as discussed below, that employee Timothy Frank must be deemed a general agent of the Petitioner under the principles of apparent authority. Having found agency, I nonetheless agree with the hearing officer that Frank's remark to fellow employee Sandy Schultz does not warrant setting aside the election.

Frank was one of seven members of the Petitioner's In House Organizing Committee (IHOC) and he actively supported and campaigned on behalf of the Petitioner. The small IHOC worked to organize the Employer's employee complement of over 100 employees. Frank and other IHOC members were specifically authorized to solicit authorization cards and thus were special agents of the Petitioner during the card solicitation. See *Davlan Engineering*, 283 NLRB 803 (1987). Further, in my view, the IHOC members, as the Petitioner's representatives in the plant, were general agents with apparent authority to act and speak on behalf of the Petitioner. Frank's duties included, among other things, answering employee questions and concerns about the Petitioner. He thus served as a conduit between the Petitioner and the employees. The Petitioner failed to assure employees that only its organizers, and not the IHOC, spoke for the Petitioner. In these circumstances, the presence of paid union organizers in the campaign does not preclude a finding that IHOC members had apparent authority to act for the Petitioner. Indeed, where an inplant organizing committee and union organizers work hand in hand—without a clear statement that only the organizers speak for the union—employees will reasonably understand that both are acting and speaking on behalf of the union. Here, as in *Georgetown Dress Corp. v. NLRB*, 537 F.2d 1239 (4th Cir. 1976), a decision with which I agree, the IHOC members in the eyes of other employees would appear to be representatives of the Petitioner and the Petitioner authorized them to occupy that position. Therefore, Frank had apparent authority to act on behalf of the Petitioner.

Frank, in trying—apparently unsuccessfully—to persuade employee Schultz to support the Petitioner, remarked to Schultz that she should “watch her back.” The remark, although hostile, did not explicitly threat-

en any harm, physical or otherwise. Also, and perhaps more significantly, it was not shown that Frank's remark was disseminated widely among the Employer's

employees. In these circumstances, I would not find that Frank's remark warranted setting aside the election.