

A & J Cartage, Inc. and International Union of Operating Engineers, AFL-CIO, Local 139, Petitioner. Case 30-RC-5270

October 23, 1992

SUPPLEMENTAL DECISION AND
CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held July 12, 1991, and the hearing officer's revised report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 12 for and 9 against the Petitioner with 6 challenged ballots, a number sufficient to affect the results of the election.¹

The Board has reviewed the record in light of the exceptions and brief,² and has adopted the hearing officer's findings and recommendations.³

¹ In our previous decision in this matter, *A & J Cartage*, Case 30-RC-5270 (Apr. 29, 1992) (not reported in Board volumes), we noted that the parties stipulated at the hearing that the ballots of James Casson and Mike Johnson should not be opened or counted. In addition, in the absence of exceptions, we adopted pro forma the hearing officer's recommendation to overrule the challenges to the ballots of Desco Salaam and Bradley Lundgren. We did not, however, order these ballots opened or counted, but held them pending resolution of the challenge to Jeffrey Flores' ballot, decided here. Finally, we held in abeyance the challenge to the ballot of William Spang, which we resolve here, see fn. 3, *infra*.

² The Employer has renewed its motion, pending before the hearing officer, to reopen the record in this matter. The Board's Rules and Regulations Sec. 102.65(e)(1) provides that "No motion . . . to reopen the record will be entertained by the Board . . . with respect to any matter which *could have been but was not raised* pursuant to any other section of these rules." In addition, the Rules require that, "A motion . . . to reopen the record shall specify briefly . . . the additional evidence sought to be adduced [and] *why it was not presented previously*." Finally, the Rules state that "*Only newly discovered evidence*—evidence which has become available only since the close of the hearing . . . will be taken at any further hearing." (Emphasis added.)

In the absence of any showing by the Employer that the evidence that it seeks to admit was newly discovered or previously unavailable, we deny its motion to reopen the record. Additionally, we note that evidence of postelection, posthearing events, evidence which the Employer now seeks to admit, does not provide a basis for reopening the record and would not affect the determination of an employee's eligibility at the time of the election.

Finally, the Employer argued that in our decision remanding the instant matter to the hearing officer, we implicitly directed the reopening of the record for the purpose of taking additional evidence. We note that our decision remanding this matter to the hearing officer did not provide for such a direction, but merely ordered the review of the "entire record."

³ We adopt the hearing officer's initial findings and recommendation to sustain the challenge to the ballot of William Spang, which we held in abeyance pending resolution of the challenge to Flores' ballot.

The ballot of Jeffrey Flores was challenged by the Petitioner on the basis that Flores was not a unit employee.⁴ The Employer maintained that Flores was a unit employee who was out of work due to a work-related injury. The hearing officer, in his initial report on challenged ballots, found that Flores was ineligible to vote in the election because there was "no evidence that Flores ever performed any work related to the Employer's fly ash hauling contracts [unit work]." The Employer filed exceptions to this finding, citing record testimony that Flores performed unit work during the relevant time period. Based on that testimony, we remanded the case to the hearing officer to review the entire record and to make any necessary revisions to his initial report.

In his revised report on the challenged ballot, the hearing officer, citing relevant testimony relating to Flores and his job functions, found that Flores may have performed unit work on 2 possible days over a 1-1/2-year period but that this was de minimis and not sufficient to find that Flores was engaged in unit work.⁵ Accordingly, he concluded that Flores was ineligible to vote in the election and renewed his recommendation that the challenge to Flores' ballot be sustained.

The Employer has excepted to this finding, arguing that the hearing officer failed to consider allegedly uncontradicted testimony that Flores was engaged in unit work prior to his injury.⁶ Based on our review of the entire record, including the testimony cited by the Employer, we adopt the hearing officer's recommendation to sustain the challenge to Flores' ballot.

It is well settled that "an employee on sick leave is presumed to be part of the unit absent evidence that

⁴ The unit description expressly includes only employees engaged in the Employer's fly ash removal operation. The Petitioner argued that Flores worked in the Employer's sludge removal/injection operation as a sludge injector/operator, a nonunit position.

⁵ The work performed by Flores was driving a snowplow at the Oak Creek Power Plant in the winter of 1990 in order to facilitate fly ash removal.

⁶ In his revised report, the hearing officer cited testimony related to Flores, stating that this was "all [the] testimony related to Flores and his job functions contained within the transcript." In its brief, the Employer pointed to additional testimony by its witness, the Employer's owner Jalovec, not cited by the hearing officer, which indicates that prior to his injury, Flores performed fly ash removal (unit) work.

Based on our review of the record, we find this omission to be harmless error. In so finding, we note that the hearing officer stated that he had "reviewed the entire record and considered all evidence." We further note that the hearing officer also failed to include in his report a cite to other relevant testimony—testimony which supports his findings and recommendations and would serve to rebut the testimony cited by the Employer. In these circumstances, the hearing officer's failure to cite every specific reference to Flores is not fatal to his findings and recommendations.

the employee has been terminated or has resigned.’’⁷ Thus, the relevant question with regard to Flores’ eligibility to vote in the election is whether he performed unit work prior to his work-related injury; if he performed unit work, he remains eligible to vote in any representation election, notwithstanding that he is on sick leave.⁸ If, however, he did not engage in unit work prior to his sick leave, he is not considered a unit employee for voter eligibility purposes, notwithstanding the Employer’s intent to place him in the unit after his return to work.⁹

Our review of the relevant evidence as it relates to the question of the work performed by Flores prior to his injury convinces us that Flores was a nonunit sludge injector/operator. The Employer’s owner Jalovec testified that Flores was initially hired in 1984 as a sludge injector/driver. In addition, he testified that at the time of Flores’ injury in May 1989, Flores was performing sludge removal/injection work. Jalovec further testified that although some employees perform both fly ash removal and sludge removal/injection work, some employees are engaged solely in sludge removal/injection. Finally, Jalovec testified that sludge removal/injection is seasonal work performed only in the spring and fall of the year and that Flores was injured in the spring while doing sludge removal/-injection work.

In addition to Jalovec’s testimony, the credited testimony of the Petitioner’s witness, Rayeske, discloses that Flores was a sludge injector/operator in 1984. Rayeske also credibly testified that sludge injector/operators work exclusively with sludge removal/injection and do not engage in fly ash removal work. Further, the testimony of the Petitioner’s witness, Mamerow, discloses that Mamerow worked for the Employer for the past 6 years (the relevant time before and after Flores’ injury) and that Flores was a sludge injector/operator during that time. Mamerow also corroborated Rayeske’s testimony that sludge injector/operators are not involved in fly ash removal work. This point was also supported by Jalovec’s testimony that some employees perform only sludge removal/injection work. Mamerow further testified that he witnessed Flores performing sludge removal/-injection work in 1989 just prior to his injury.

The only evidence which arguably contradicts the above testimony is the testimony of Owner Jalovec in

⁷ *Custom Bent Glass Co.*, 304 NLRB 373 (1991); see *Red Arrow Freight Lines*, 278 NLRB 965 (1986).

⁸ We note that the parties have not argued that Flores has been terminated or has resigned.

⁹ Because the Employer has not argued that Flores is a dual-function employee engaged in both sludge removal/injection work and fly ash removal work, but rather that Flores is solely a fly ash removal employee, our analysis here is to determine whether Flores was either a sludge injector/operator or a fly ash removal employee.

which Jalovec had the following exchange with the Employer’s counsel:

Q. What job if any will Mr. Flores return to at A & J Cartage when he is released by his physician?

A. Well, initially when he comes back from the wrist surgery I imagine he is going to be put on some light duty, but eventually he will be back to his normal functions.

Q. Okay, what would his normal functions be?

A. His primary normal function, up until the time he got hurt, was working at the Oak Creek Power Plant.

Q. Okay, and when you say working at the Oak Creek Power Plant what type of work would he be doing at the Oak Creek Power Plant?

A. I believe he did some driving, operating equipment.

Q. What type of equipment?

A. Front end loader, compactor, driving truck.

Q. Would this be fly ash removal work?

A. Yes.

This testimony, although not directly cited by the hearing officer, was discredited by implication. In his revised report, he stated, “I thus do not credit Jalovec whenever conflicts in testimony exist with that of the Union witnesses.” Therefore, in light of the credited testimony of Mamerow (that Flores was a sludge injector/operator at the time of his injury and that sludge injector/operators do not perform fly ash removal work) and Rayeske (that sludge injector/operators do not perform fly ash removal work), we find that the hearing officer discredited Jalovec’s conclusory and contradictory comments regarding Flores’ “normal functions.”¹⁰

Based on the weight of the foregoing testimony and relevant evidence as it relates to Flores’ work prior to his injury, we find that Flores was a sludge injector/operator prior to his injury and thus ineligible to vote in the election. Accordingly, we sustain the challenge to his ballot.

Based on our decision here, the ballots of Desco Saalam and Bradley Lundgren are no longer determinative. Accordingly, we will not order those ballots opened or counted, but rather will issue the appropriate Certification of Representative.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Union of Operating Engineers, AFL-CIO, Local 139 and that it is the ex-

¹⁰ Indeed, we also note that Jalovec’s previous testimony is not inconsistent with the testimony of Mamerow and Rayeske; Jalovec admitted that Flores was hired as a sludge injector and was performing sludge removal/injection work at the time of his injury.

clusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time equipment operators, mechanic/welders, laborers, and truck-

drivers employed at or out of the Employer's Oak Creek, Pleasant Prairie and Port Washington, Wisconsin facilities engaged in fly ash removal; but excluding all office clerical employees, guards and supervisors as defined in the Act.