Curtis Industries, Inc. *and* Michael Heidenreich, Petitioner and International Union, UAW and its Local 70. Case 8–RD–1605

April 30, 1993

DECISION ON REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Union's request for review of the Regional Director's Decision and Direction of Election. The request for review is granted as it raises a substantial issue with respect to the Regional Director's finding that approximately 69 permanently replaced economic strikers are not eligible to vote under *Wahl Clipper*,[1] as the election in the instant case will be conducted more than 12 months after the commencement of the economic strike.[2] The Regional Director rejected the Union's argument that pending Federal litigation alleging that the 69 disputed individuals had been illegally replaced rendered these individuals eligible to vote. Having carefully considered the matter at issue, we find, contrary to the Regional Director, that the pending litigation in which the disputed individuals claim discriminatory termination under other statutes and seek, inter alia, reinstatement, places their employee status into question, and thus entitles them to cast a challenged ballot.

The undisputed facts as set forth in the Regional Director's decision show that on April 5, 1990, an economic strike commenced and subsequently the Employer hired 60 permanent replacements. The instant decertification petition was filed on April 2, 1992. A class action complaint filed by 69 strikers in the United States District Court, Northern District of Ohio, Eastern Division alleges that their permanent replacement by the Employer was a pretext for the illegal termination of these individuals based on their age and eligibility for fringe benefits.[3]

The Regional Director found that the pending litigation could not stay the operation of Section 9(c)(3) of the Act[4] and that, based on *Wahl Clipper*, the disputed individuals are ineligible to vote as they are permanently replaced economic strikers who engaged in a strike which commenced more than 12 months prior to the scheduled election. We find, in agreement with the Union, that *Wahl Clipper* is inapposite. There, the Board found that although the permanently replaced economic strikers had been put on a preferential hiring list pursuant to a strike settlement, they remained ineligible to vote because they had not, in fact, returned to work by the eligibility dates. In doing so, the Board rejected the contention that the language in Section 9(c)(3) ''Employees engaged in an economic strike who are not entitled to reinstatement'' was intended to refer to a particular classification of replaced economic strikers to whom Section 9(c)(3) would apply, finding instead that the phrase was more probably intended merely as a description of all replaced economic strikers to distinguish them from unfair labor practice strikers. Thus, the Board in *Wahl Clipper* found it immaterial that the former strikers were on a preferential hiring list and were to be reinstated at some point in the future; instead, it found that only those economic strikers who had actually been reinstated were entitled to vote.

Here, the strikers are not claiming simply that they are entitled to be reinstated in the future. Instead, they argue that they were never, legally, permanently replaced as their Employer's action in replacing them while they were on strike was in violation of unrelated Federal law and have filed a class action suit claiming such. If they are successful in the pending litigation, they would be entitled to vote under *Gulf States*[5] as they would no longer be in the category of permanently replaced strikers.

The Regional Director also erred in concluding that the cases cited by the Union, *Machinists*, 159 NLRB 137 (1966); *Advance Industrial Security*, 217 NLRB 17 (1975); and *Pacific Tile & Porcelain*, 137 NLRB 1358 (1968), are inapposite because (1) those cases, unlike the instant case, did not involve the eligibility of individuals who had engaged in an economic strike beginning more than 12 months prior to the election, and (2) those cases ''reflect the Board's policy of allowing discharged employees to cast challenged ballots in situations in which their status as employees is being contested in litigation ancillary to the Board's unfair labor practices mechanism.'' We disagree.

In *Advance*, the disputed individuals had been discharged by their employer and had filed a complaint with the United States Department of Labor, charging the employer with violating the Age Discrimination in Employment Act of 1967. The Board directed that they vote a challenged ballot because it is well established that individuals may vote by challenged ballot when

[1] 195 NLRB 634 (1972).

[2] The election was originally scheduled for December 3, 1992, but is currently blocked by unfair labor practice charges which are under investigation.

[3] The complaint asserts that jurisdiction arises under Sec. 301 of the LMRA and Secs. 502 and 510 of ERISA and pendent jurisdiction is invoked pursuant to the Ohio Revised Code Sec. 4112.99.

[4] Eligibility of replaced economic strikers to vote in a Board-conducted election is governed by Sec. 9(c)(3) which states in pertinent part: ''Employees in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within 12 months after the commencement of the strike.''

[5] 219 NLRB 806 (1975).

their eligibility cannot be determined on the existing record.

Similarly, in *Machinists*, supra, discharged employees were allowed to cast challenged ballots because they were seeking reinstatement from a United States District Court under the Labor-Management Reporting and Disclosure Act. The Board noted that a verdict in the disputed individuals' favor would establish that their employee status had never been lawfully terminated. And see *Pacific Tile* where the Board permitted two employees to vote subject to challenge, as they were awaiting determination regarding their discharge grievances which were pending in arbitration.

Those cases clearly establish that when an individual's status with respect to his employment situation is currently unresolved due to pending Federal court litigation or arbitration proceedings, the Board allows that individual to cast a challenged ballot.

Moreover, the Regional Director's finding that the Board permits employees to cast challenged ballots in those situations only if their contested litigation is ancillary to an unfair labor practice proceeding is directly contradicted by *Advance*. There, the Board specifically stated ''[t]he fact that eligibility of individuals may turn on some question other than an employer's alleged unfair labor practice is irrelevant. The only issue is whether the individuals were employees within the unit on the critical dates.'' *Advance*, supra at 18.

It is true that the above-cited cases involved employees who were discharged, as opposed to economic strikers who were replaced on an allegedly permanent basis—the situation here. However, this distinction is immaterial. An employer cannot wrongfully sever the employment rights of the disputed individuals, either by illegal discharge or improper replacement, and then invoke Section 9(c)(3) to disenfranchise them. The proper course is to vote the affected employees under challenge pending resolution of the employees' claim for reinstatement.

Accordingly, the Decision and Direction of Election is amended to permit the 69 disputed individuals to vote in the election and their ballots shall be challenged by the Board agent. If the votes of these individuals are determinative and their claims regarding their employment status are still unresolved, the Regional Director, at that time, shall make a further investigation to determine whether the claims are likely to be resolved within a reasonable period of time. Based on that investigation, if the Regional Director determines that the Federal lawsuit will not be resolved with reasonable promptness, he should sustain the challenges to the ballots of the disputed individuals in the interest of prompt resolution of the question concerning representation. If the Regional Director determines from his investigation that the claims regarding those individuals' employment status will likely be resolved within a reasonable period of time, the ballots shall remain unopened and the Regional Director shall periodically thereafter review the status of the individuals in question.