

Madison Industries, Inc. of Arizona and Sheet Metal Workers' International Association, Local Union No. 359, AFL-CIO, Petitioner.
Case 28-RC-5048

May 28, 1993

DECISION, DIRECTION, AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered determinative challenges and objections to an election held September 11, 1992, 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 11 for and 9 against the Petitioner, with 4 challenged ballots.

The Board has reviewed the record in light of the exceptions and brief and has decided to adopt the hearing officer's findings¹ and recommendations² only to the extent set forth below.

1. In its first objection, the Employer contends that the notice of election posted at the Employer's premises did not meet the requirements of the Board's Rules Section 103.20 which provides, inter alia, that a notice of election be posted for 3 full working days prior to 12:01 a.m. of the day of the election. The term "working day" is defined as an entire 24-hour period excluding Saturdays, Sundays, and holidays. Section 103.20(b).

The facts are not in dispute. The Employer is engaged in fabricating steel and sheet metal modular buildings and canopies at its facility in Phoenix, Arizona. The election was scheduled in a unit consisting of all production and maintenance employees, including leadmen and truck drivers employed at the Phoenix facility. On Thursday, September 3, 1992, prior to the election and in accord with the Board's Rules, a Board agent delivered a notice of election to the Employer. The Employer posted the notice in the appropriate places at the end of the workshift on that day.³ It remained posted and was visible to employees on Friday, September 4. Saturday, September 5, Sunday, September 6, and Monday, September 7 (Labor Day) were nonworking days.

¹ The 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.

² The hearing officer recommended that Employer Objection 2 be overruled. There is no exception.

³ The record shows that the Employer operates one shift, from 6:30 a.m. to 2:30 p.m.

On Tuesday, September 8, at approximately 2:45 p.m., a Board agent visited the Employer and notified Sales Manager Mike Sentell, the senior manager in charge at that time, that there was an error in the initial notice—specifically, that the *Daniel*⁴ eligibility formula inadvertently had been included in the notice. The Board agent handed Sentell copies of a corrected notice (identical to the original except minus the *Daniel* formula). At about 3:30 p.m., after the end of the September 8 shift, Sentell replaced the initial notice with the corrected one. The new notice remained posted for 2 working days, September 9 and 10. The election was conducted at 2 p.m. on September 11.

In its exceptions the Employer contends that the language of Section 103.20 is "mandatory and unequivocal" and "[will not] permit a finding that the posting of the accurate portions of two or more Board notices can be tacked together in order to satisfy the three full working day requirement of Subsection (a)." Thus, it contends that neither the original notice nor the corrected notice was posted for 3 full working days prior to 12:01 a.m. on the day of the election, in violation of the Board's Rules, and that the election must be set aside.

We agree with the hearing officer's finding that the Employer's argument lacks merit. It is uncontested that the notice of election was posted on September 3 and that at all times between September 3 and 11, either the original or the revised notice remained posted. The only difference between the notices was the inclusion of the inapplicable eligibility formula. There is no contention that the notice was in any other way inadequate or not in compliance with the Board's requirements. Moreover, there is no evidence that any employee was in any way prejudiced by the inclusion of the *Daniel* formula in the initial notice or the substitution of the corrected notice.⁵ We find that the election notice was posted for 4 full working days (September 4, 8, 9, and 10) before the day of the election, a period longer than required by the Board's Rules.⁶ Accordingly, we overrule the Employer's objection.

⁴ *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified in *Daniel Construction Co.*, 167 NLRB 1078 (1967). See also *Steiny & Co.*, 308 NLRB 1323 (1992). These cases established the standard for eligibility to vote in the construction industry.

⁵ We also note the hearing officer's finding that, pursuant to the Decision and Direction of Election, the Employer submitted an *Excelsior* voter eligibility list which did not include approximately 10 additional employees who the Employer contends would have been enfranchised under the *Daniel's* formula. See *Excelsior Underwear*, 156 NLRB 1236 (1966), *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

⁶ Thus, as discussed by the hearing officer, this case is distinguishable from *Smith's Food & Drug*, 295 NLRB 983 (1989), in which the Board sustained an objection and set aside an election because the notice had been posted for fewer than 2 days prior to the election.

2. The Petitioner challenged the ballot of Ron Boe and the Employer challenged the ballot of Rudy Hernandez on the same ground—that each employee had been laid off by the Employer prior to the September 11 election and remained on layoff on the election date and had no reasonable expectancy of recall and were ineligible to vote.⁷ The hearing officer recommended that the challenge to Boe's ballot be sustained and that the challenge to Hernandez' ballot be overruled. The Employer has excepted to both recommendations. We have decided to sustain the challenge to Boe's ballot and remand the proceedings to the hearing officer for further findings regarding Hernandez' eligibility.

It is well established that temporarily laid-off employees retain their status as employees and are eligible to vote. Their eligibility depends on whether objective factors support an employee's reasonable expectancy of recall in the near future. The Board looks at several factors to determine whether a laid-off employee has a reasonable expectancy of recall, including the employer's past experience and future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall. See, e.g., *S & H Concrete*, 274 NLRB 895 (1985).

Here the Employer has experienced a pattern of frequent layoffs and recalls for the past 20 years and, during that time, its work force has fluctuated between zero and 50 employees. James Moran, an employee of the Employer for 15 years and a union steward for more than 12 years,⁸ testified without contradiction that during his tenure the Employer has adhered, without exception, to the same seniority-based layoff and recall policy.⁹ Pursuant to that policy, employees hav-

ing more than 3 years' seniority at the time of layoff retain their seniority—hence, their recall rights—for 1 year. Employees laid off with less than 3 years' seniority retain their recall rights for 6 months. Employees are recalled from layoff on the basis of seniority. Moran testified, without contradiction, that if an employee's time period for recall had expired, the Employer would "hire people off the street."

The facts surrounding the layoff of Ron Boe are as follows. The Employer hired Boe on November 3, 1990, primarily to perform electrical work in its modular assembly operation. He was laid off on March 2, 1992.¹⁰ Thus, having worked for less than 2 years before being laid off, Boe retained his seniority for purposes of recall under the Employer's policy for 6 months, until September 2, 1992, 9 days before the election. At the hearing, General Manager John Sentell testified that because of difficult conditions in the oil industry, the focus of the Employer's business had been shifting from production of prefabricated gasoline stations and canopies to fast food restaurants. Sentell estimated that restaurant production would be 90 percent of its business. There is evidence that the Employer had some residual gasoline station business at the time of the events in issue here, but little restaurant work lined up.¹¹ However, at the time of the layoff, Sentell told Ron Boe, "we were bidding [on a contract to produce 17 fast food restaurants] . . . hopefully that we would contract these restaurants, and . . . the minute the contracts were obtained and we did get shop drawings, [Ron Boe] would be back to work."¹²

months; layoff with more than three (3) years seniority: not to exceed one (1) year.

¹⁰The Employer disputes Ron Boe's layoff date. The Employer's records reflect that Ron Boe was laid off on March 2; however, General Manager Mike Sentell contended that Boe was laid off on March 2 conditioned on a side agreement between leadman Hatch and Union Steward Moran that would extend Boe's layoff date for seniority purposes to March 16. Hatch testified similarly. Boe testified that he volunteered to be laid off earlier than warranted by his seniority so that two less senior employees (his son, Sevrin Boe, and Dave Hudgens) could continue working for 2 additional weeks. Union Steward Moran denied having made such an agreement. In fact, it was Moran's uncontroverted testimony that he had no authority to enter into any such agreement that would favor the rights of one employee over those of other employees. The hearing officer credited Moran's testimony over that of Ron Boe, particularly in light of the facts that the alleged side agreement was not reduced to writing and the Employer's records reflected the March 2 date. We adopt the hearing officer's findings that Ron Boe was laid off on March 2 and had been in layoff status for more than 6 months prior to the election.

¹¹The record shows clear evidence of only one restaurant contract for a single Kentucky Fried Chicken restaurant.

¹²The record is unclear regarding whether the Employer intended to employ Boe as an hourly employee or as a subcontractor if it was successful in bidding the restaurant job. In view of our disposition of Boe's ballot, it is not necessary that we resolve this ambiguity. As already discussed, see fn. 7, the Employer had employed Boe as both an hourly employee and as a subcontractor (with sons Steve and Sevrin) doing business as Dakota Electric, Inc. At the hearing,

⁷The Petitioner asserted as an additional ground for the challenge to Ron Boe's ballot that Boe severed his employee relationship by working for the Employer as an electrical subcontractor while he was laid off. The hearing officer disagreed. In the absence of exceptions, we adopt the finding that Boe did not affect his employee status by working as a subcontractor while he was laid off. Also in the absence of exceptions, we adopt the hearing officer's recommendations that the challenge to the ballot of Salvador Tamez be sustained and that the ballot of Sevrin Boe be overruled and his ballot opened and counted. In view of our decision, *infra*, to remand these proceedings for further findings regarding the voting eligibility of Rudy Hernandez we shall direct the Regional Director to hold the ballot of Sevrin Boe in abeyance pending the Board's further consideration and resolution of issues regarding Hernandez' eligibility.

⁸According to Moran's uncontradicted testimony, as union steward he was aware of the dates of hire of employees and their last dates worked.

⁹The parties had embodied the policy in their most recent collective-bargaining agreement, effective from June 19, 1989, through July 18, 1992, as follows:

ARTICLE 8—SENIORITY. (a) The Employer agrees to a policy of recognizing the principle of departmental seniority in the temporary or permanent layoff, transfer, promotion or rehiring of employees; provided, however, that no employee shall suffer loss of seniority due to sickness not to exceed one (1) year; layoff with less than three (3) years seniority: not to exceed six (6)

Sentell further testified that if it won the restaurant contract, it would need to hire electricians. There is no evidence, however, that the Employer had assurances that it would, in fact, be the winning bidder when this conversation occurred. Leadman Hatch testified that he told Boe “[t]he same thing was told to all the employees [laid off at the same time] . . . that when we had work he could return.”

For the following reasons, we agree with the hearing officer that Ron Boe was laid off with no reasonable expectancy of recall at the time of the election and was ineligible to vote. The Employer had a long history of layoffs and sometimes dramatic fluctuations in its work force. For at least 12 years, it invariably had adhered to the same recall policy, filling vacancies by employee seniority, and it had embodied that policy in its collective-bargaining agreement. Given the Employer’s consistent application of the policy, Boe must certainly have been aware of the policy. Pursuant to that policy, Boe lost his seniority for purposes of recall before the election. Thus, he became, in effect, a non-employee member of the general applicant pool, eligible to be rehired, but not to be recalled as a laid-off employee. Although it is clear that the Employer found Boe to be a valuable employee and intended to rehire him if it gained new business, the circumstances at the time of Boe’s layoff were that the Employer had only the hope, but no certainty, that it might obtain the restaurant contract.¹³ Moreover, there is no evidence that it had bid on other jobs in anticipation of the not uncommon event that it would fail to submit the winning bid. Under all these circumstances, Boe could not reasonably have expected to be recalled in the near future. Accordingly, we sustain the challenge to Ron Boe’s ballot.

We remand these proceedings to the hearing officer, however, for additional findings regarding the eligibility of Rudy Hernandez to vote. The Employer advances two grounds for finding Hernandez ineligible. First, it contends that Hernandez abandoned his employment with the Employer by accepting another job

General Manager John Sentell testified that he had obtained an estimate on the electrical portion of the Employer’s bid from Steve Boe “[b]ecause of his expertise.” Earlier in the hearing Sentell had been asked if he would employ Steve, Sevrin, and Ron Boe as subcontractors if the Employer obtained the restaurant job. He replied “I may.” Later that day, after a break in the hearing, Sentell testified that he intended to perform electrical work on the restaurant job using hourly employees, specifically the three Boes.

¹³In Member Oviatt’s view, John Sentell’s statements to Boe at the time of his layoff constituted, at most, an offer of work subject to a condition precedent that it obtain the restaurant contract. Thus the Employer did not succeed in doing by the time of the election. In any case, Member Oviatt finds that such a conditional offer is insufficient to support a reasonable expectancy of recall, particularly in circumstances like those here, where an employer does not present evidence that it reasonably expects to gain new work in the near future and where it maintains a recall policy that limits a laid-off employee’s ability to retain seniority and be recalled.

while on layoff. We adopt the hearing officer’s finding, for the reasons given, that Hernandez did not abandon his employment.

In addition, the Employer contends that Hernandez had no reasonable expectancy of recall in the near future. The hearing officer found that Hernandez was hired as a shear operator in the sheet metal shop on June 10, 1981, and that he was laid off on June 27, 1992, with 11 years’ seniority. Under the Employer’s layoff and recall policy and practice, it is clear that Hernandez retained recall rights for a period of 1 year, until June 27, 1993. The hearing officer concluded, “consistent with the Employer’s past practice, that Hernandez had recall rights for a period of one year and, thus, had a reasonable expectancy of recall and was eligible to vote.” The Employer has excepted to the hearing officer’s relying solely on this single factor, in light of other record evidence, for her recommendation that the challenge to Hernandez’ ballot be overruled.

We agree that the hearing officer did not fully address all the factors necessary to a determination whether Hernandez was eligible to vote.¹⁴ The fact that Hernandez had recall rights at the time of the election is not, by itself, determinative of whether he had a reasonable expectancy of recall. Accordingly, we remand this portion of the case to the hearing officer with instructions to reopen the record, if necessary, and make additional findings and recommendations regarding whether Hernandez had a reasonable expectancy of recall on the date of the election.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 28 shall hold in abeyance the ballot of Sevrin Boe pending the Board’s further consideration and resolution of the issue of Rudy Hernandez’ eligibility to vote.

ORDER

It is ordered that the portion of this proceeding relating to the eligibility of Rudy Hernandez to vote in the election is remanded to the hearing officer for addi-

¹⁴For example, the record contains evidence not discussed by the hearing officer, including testimony about whether the Employer made any representations regarding the possibility of recall to Hernandez when it laid him off. Further, although the Employer generally contended during the hearing that its business was shifting from production of gasoline stations and canopies to fast food restaurants, and that such a shift would reduce its need for sheet metal workers, the record does not contain specific evidence bearing on Hernandez’ reasonable expectancy of recall, such as the Employer’s workload and hiring projections for the period of Hernandez recall eligibility or his position on the Employer’s recall roster.

tional findings and recommendations regarding whether Hernandez had a reasonable expectancy of recall on the date of the election. Following the service of the

supplemental findings and recommendations, the provisions of Section 102.69(e) of the Board's Rules shall apply.