

**Perdue Farms, Inc. and United Food and Commercial Workers Union, Local 204, a/w United Food and Commercial Workers International Union, AFL-CIO, Petitioner.** Case 11-RC-6094

June 30, 1999

DECISION AND DIRECTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held April 4, 1996, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Second Election issued by the Board on February 2, 1996, reported at 320 NLRB 805 (1996). The tally of ballots shows 755 for and 947 against the Petitioner, with 53 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings<sup>1</sup> and recommendations, and finds that the election must be set aside and the case remanded to the Regional Director for further appropriate action consistent with this decision.<sup>2</sup>

*A. Hearing Officer's Report and Recommendations*

We adopt the hearing officer's findings that the Employer committed objectionable conduct prior to the second election among employees at Perdue's chicken processing plant in Lewiston, North Carolina, by the following conduct:

- During a new employee orientation meeting in December 1995 or January 1996, the Employer's human resources clerk, Barbara Artis,<sup>3</sup> told the employees that if the Union

<sup>1</sup> 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.

The Employer also contends that the Regional Director's rulings and the hearing officer's rulings, findings and conclusions displayed bias against the Employer. On careful examination of the entire record, we are satisfied that the Employer's contentions are without merit.

In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Petitioner's Objections 4, 8, 10, and 12.

<sup>2</sup> In view of the procedural history of this case, which has resulted in unusually long delays in the resolution of the question concerning representation, we deny the Employer's request to postpone ruling on the merits of the Union's objections.

Member Hurtgen would not rule on the objections at this time. In his view, there is a threshold question concerning the validity of the showing of interest. If that showing was tainted, the original representation petition was unsupported and invalid. Thus, he would resolve that issue before ruling on union objections.

<sup>3</sup> Based on Artis' acknowledgement that she was responsible for communicating the Employer's rules, policies, and procedures to new

got in Perdue would close the plant and put in an airport, that employees would be fired if they were caught wearing union T-shirts, hats, or other union paraphernalia, and that if they went on strike they would be fired and lose benefits and would be unable to file for unemployment.

- During December 1995 meetings with employees to introduce a new seniority pay program, the Employer indicated that eligibility in the program was limited to nonunion employees and threatened loss of the benefit if the Union were selected to represent the employees. Thereafter, during captive audience meetings in March 1997, various supervisors told employees that they would lose their eligibility for seniority pay if they selected the Union and that the Employer had refused requests for the benefit made by unions at represented plants.

- During captive audience meetings in March 1996, the Employer's vice president, Larry Winslow, threatened employees with loss of benefits, loss of employment, and plant closure by telling them that before the Union came in he would close the plant down and move it to South Carolina and that employees would lose their benefits.

- In March 1996, Supervisor Jim Melvin asked an employee what she would do if the plant closed down.

- In January 1996, Human Resources Manager Bob Bullock announced a new job bid system and a management training program, which were implemented in February 1996, in order to discourage support for the Union.

Based on this conduct, we find, for the reasons set forth by the hearing officer, that the Employer engaged in objectionable conduct and that the second election must be set aside.

*B. The Forgery Allegations*

The Employer has excepted to the hearing officer's Report and Recommendations on Objections on the ground, among others, that the Petitioner's showing of interest submitted in support of the petition contained forged authorization cards and that the petition should be dismissed.

1. The first election

The Union filed its petition in this case on June 2, 1995, seeking to represent a unit of approximately 2200 production and maintenance employees at the Employer's facility in Lewiston, North Carolina.<sup>4</sup> An elec-

employees, the hearing officer found that she was an agent of the employer. See *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB No. 36 (1998); *Great America Products*, 312 NLRB 962 (1993); and *Southern Bag Corp.*, 315 NLRB 725 (1994).

<sup>4</sup> The Employer challenged the showing of interest underlying the petition in a letter to the Regional Director dated June 9, 1995. In that letter, the Employer contended that the authorization cards did not clearly indicate "which plant the signing employee works in," leading to potential confusion of the cards with those solicited at another Perdue plant by a different union. In response to the Employer's request, the Region matched the authorization cards against payroll lists furnished by the Employer and concluded that a sufficient 30-percent showing of interest had been made.

tion pursuant to a Stipulated Election Agreement was conducted on June 28, 1995, which the Union lost 851 to 952, with 53 nondeterminative challenged ballots. The Union filed timely objections to the first election, which culminated in the Board's Decision and Direction of Second Election on February 2, 1996.<sup>5</sup> The Regional Director scheduled the second election for April 4, 1996.

Less than 2 weeks before the scheduled date for the second election, the Employer became aware that two former organizers for the Union were alleging that they and others had forged some 400 signatures on authorization cards intended to support the Union's petition, and that the forgeries had occurred at the direction of the Union's local president and with full knowledge of International officials. On March 27, 1996, the Employer forwarded affidavits from the two former organizers to the Regional Director, along with a request that the allegations be investigated. At the same time the Employer notified the Regional Director that it had alerted the Federal Bureau of Investigation and the Department of Labor's Division of Labor Racketeering of the forgery allegations. The Employer asked that the April 4 election be held as scheduled but that the ballots be impounded pending a decision on the fraud allegations.

In response to the Employer's request, the Regional Director asked the Employer to furnish employment records that could serve as handwriting exemplars for comparison with the authorization card signatures. After conducting an examination of the handwriting samples furnished by the Employer, the Regional Director stated that he found no evidence of the widespread forgery alleged by the former organizers. He indicated that although he had some doubts about the authenticity of some authorization cards it did not appear that the questionable cards were sufficient in number to affect the Union's showing of interest. Accordingly, the Regional Director proceeded with the second election on April 4.

## 2. The second election

The Union lost the second election by a vote of 947 to 755, with 53 nondeterminative challenged ballots, and the Union filed the instant objections. A hearing on the objections was scheduled for May 21, 1996.

On May 9, 1996, based on the former organizers' allegations of forgery, the Employer filed with the Regional Director a motion to dismiss the petition or certify results of the *first* election, or, in the alternative, to hold in abeyance the hearing on the Union's objections to the second election. A few days later, on May 14, 1996, the Employer filed another motion to postpone the May 21 hearing on the Union's objections to the second election. The Acting Regional Director denied the Employer's motions on May 15, 1996, relying on the previous investigation of the petition, including the Regional Director's

comparison of signatures on the authorization cards to the handwriting exemplars provided by the Employer.

On May 16, 1996, the Employer filed with the Board a request for review of the Acting Regional Director's denial of its motions,<sup>6</sup> raising the allegations of forgery. By order dated May 20, 1996, the Board denied the Employer's request for review "without prejudice to the employer's right to raise these issues in any appropriately filed exceptions to the Hearing Officer's report that ultimately issues."

## 3. The proceedings in Federal court

Meanwhile, on May 17, 1996, while the Employer's request for review was pending before the Board, the Employer filed a complaint in the Eastern District Court of North Carolina, Northern Division, seeking, *inter alia*, to compel the Board to conduct a further investigation into the fraud allegations. After a hearing, on May 29, 1996, the district court granted the Employer's motion for a temporary restraining order, enjoining the Board from conducting further proceedings or issuing any further orders relating to the Union's objections to the April 4 election until such time as the Board investigated the forgery allegations.<sup>7</sup> The temporary injunction expired June 8, 1996. Thereafter, on July 23, the court issued a preliminary injunction prohibiting the Board from further proceedings on the Union's petition until the court was satisfied that the Board had conducted a thorough investigation into the forgery allegations.<sup>8</sup> Between the expiration of the temporary restraining order on June 8 and the issuance of the preliminary injunction on July 23, the Region completed its hearing on the Union's objections to the second election but the court's injunction prohibited the hearing officer from issuing a report.

The United States Court of Appeals for the Fourth Circuit vacated and dismissed the district court's injunction on March 14, 1997.<sup>9</sup> The court of appeals ruled specifically that the district court's injunction was premature in that the Board had promised in its May 20, 1996 decision on the Employer's request for review, that the Employer would be permitted to raise the fraud and forgery allegations in "appropriately filed exceptions to the hearing officer's report" issued in this case.<sup>10</sup>

On June 17, 1997, the hearing officer issued his report and recommendations on the objections to the second election. In this report, he found, as noted above, that the

<sup>6</sup> In addition to the May 9 motion to dismiss the petition and certify the results of the first election or hold the hearing in abeyance and the May 14 motion to postpone the hearing on objections to the second election, the Employer had filed a motion for a more definite statement on May 6, which the Regional Director also denied.

<sup>7</sup> *Perdue Farms, Inc. v. NLRB*, 927 F.Supp. 897 (E.D.N.C. 1996).

<sup>8</sup> 935 F.Supp. 713 (E.D.N.C. 1996).

<sup>9</sup> *Perdue Farms, Inc. v. NLRB*, 108 F.3d 519 (4th Cir. 1997).

<sup>10</sup> *Id.* at 520-521. At oral argument, the Board's attorney assured the court that the Board would fully consider the Employer's contention that forgeries had occurred and that the representation petition should be dismissed because of those forgeries.

<sup>5</sup> 320 NLRB 805 (1996).

Employer had made various threats of unspecified reprisals, plant closure, loss of benefits and loss of employment, and promised and granted benefits during the campaign.

#### 4. The Department of Justice investigation

As noted above, at the same time as the Employer notified the Region of the forgery allegations, it also provided notice of the allegations to criminal law enforcement authorities, namely, the Federal Bureau of Investigation and the Department of Labor's Division of Labor Racketeering. Soon thereafter, the Regional Director was informed by the United States Attorney for the Western District of North Carolina that the fraud and forgery allegations were the subject of a criminal investigation.

The Region cooperated fully in the criminal investigation. At the outset, the assistant U.S. Attorney handling the investigation asked that the Region not do anything to interfere with his investigation, including disclosing even that the matter was under investigation.<sup>11</sup> To avoid interfering with the investigation, the Regional Director refrained from conducting his own further investigation of the fraud allegations.<sup>12</sup> By letter dated March 5, 1999, the United States Attorney informed the Board that it had concluded its investigation into the allegations that union officials had engaged in election fraud and found no "sufficient credible and admissible evidence to warrant criminal prosecution."

#### 5. Analysis

The Board has long held that the showing of interest is a matter for administrative determination and is not litigable by the parties. See, e.g., *Gaylor Bag Co.*, 313 NLRB 306 (1993); *Globe Iron Foundry*, 112 NLRB 1200 (1955). Once presented with evidence that gives the Regional Director reasonable cause to believe that the showing of interest may have been invalidated by fraud or other means, however, further administrative investigation should be made,<sup>13</sup> provided the allegations of in-

<sup>11</sup> The Board was instructed not to reveal the existence of the Department of Justice investigation even to the District Court during the hearings for the temporary restraining order and the preliminary injunction. Eventually, because the existence of the investigation had apparently been disclosed by other sources, the Board was informed by the U.S. Attorney's Office that it could reveal this information in its appeal of the district court's order.

<sup>12</sup> At the time, the Board had been informed that the criminal investigation was expected to be completed sometime in the fall of 1997.

<sup>13</sup> Secs. 11028.1 and 11028.2 of the Board's Casehandling Manual provide, in pertinent part,

11028.1 *Possible Forgeries; Investigation*: If it appears that signatures are in the same handwriting, or if a party alleges and furnishes evidence that there are forgeries, such investigation should be made as is necessary and suitable action taken, including possible referral to other law enforcement agencies.

The investigation should include, but not be limited to, attempts to obtain affidavits from the person or persons re-

validity are accompanied by supporting evidence. Compare *Globe Iron Foundry*, supra, with *Goldblatt Bros.*, 118 NLRB 643 fn. 1 (1957).

In this case, the Regional Director did perform a signature comparison in accordance with the manual. However, he felt constrained from conducting a full investigation of the fraud allegations by the simultaneous investigation of the United States Attorney and his desire to avoid doing anything that would interfere with that criminal investigation. Now that the criminal investigation has concluded in a finding that no criminal prosecution is warranted, the Region may fully inquire into the Employer's allegations, in accordance with the appropriate sections of the casehandling manual and with the Board's commitment to the court of appeals that the forgery allegations would be fully considered. Accordingly, we remand the case to the Regional Director for such further inquiry regarding the allegations of fraud and we direct the Regional Director to issue a supplemental decision on his findings.<sup>14</sup>

#### C. Conclusion

Based on our adoption of the hearing officer's report and recommendation sustaining the Petitioner's Objections 1, 2, 3, 5, 6, 7, 9, 11, and 13, we find that the second election must be set aside. We further find that a third election should be held if the Regional Director finds, upon further inquiry, that the Union's petition was supported by a valid showing of interest.

[Direction of Third Election omitted from publication.]

sponsible for procuring and submitting the cards. A signature comparison should be made preferably against the employer's records. Persons purporting to have been signatories should be questioned.

11028.2 *Showing Believed To Be Fraudulent; Procedure*: If it is established that reasonable grounds exist for believing any part of the showing to be fraudulent, suitable action should be taken, including possible referral to other law enforcement agencies.

a. If the remaining valid showing falls below the required amount (30 percent, 10 percent, etc.), the petition or intervention based on the showing should be dismissed or denied, as the case may be, in the absence of withdrawal or disclaimer. The stated ground should be that the evidence of interest submitted "was of questionable authenticity."

b. If the remaining valid showing satisfies the interest requirement, but if an officer or responsible agent of the union was responsible for or had knowledge of and condoned submission of the fraudulent cards, casehandling advice should be requested of the Board through the Office of the Executive Secretary.

<sup>14</sup> In view of our remand, we grant the Petitioner's motion to strike the Employer's exhibits to its exceptions to the hearing officer's report and recommendations. This evidence, if relevant, may be made part of the record in the inquiry into the showing of interest.