

**MJM Studios of New York, Inc. and Local 311 of the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists & Allied Crafts of the United States & its Territories, and Canada, AFL-CIO, CLC.** Case 34-RC-1881

April 18, 2003

**SUPPLEMENTAL DECISION AND CERTIFICATION OF RESULTS OF ELECTION**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held May 9, 2001,<sup>1</sup> and the hearing officer's report recommending disposition of them. The election was held pursuant to a Decision and Direction of Election. The tally of ballots shows four for and four against the Petitioner, with nine determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings and recommendations only to the extent consistent with this Supplemental Decision, and finds that a certification of results of the election should be issued.

The issue presented here is whether the hearing officer properly recommended overruling the challenges to the ballots of six employees who were laid off before the election. (These employees are Mathew Miller, Thomas Curtin, Francesco Coppola, Michael Dalton, and Kevin and Brian Baringer.) The hearing officer concluded that each of these six laid-off temporary employees had a reasonable expectation of recall. We disagree.<sup>2</sup>

The Employer is a manufacturer and installer of unique architectural ornaments for commercial and residential properties. It operates on a project-by-project basis. Until April 15, 2001, it performed work on a large-scale project at the John F. Kennedy Airport in New York. Its work force on this project included not only its regular employee complement of carpenters and welders, but also 13 "temporary" carpenters and welders originally supplied by the Petitioner for an earlier project. The 6 laid-off employees at issue are among these 13 "temporary" workers.

In this representation proceeding, the Petitioner sought to represent a unit of the Employer's carpenters and welders. In a February 2001 preelection Board proceed-

ing, the Employer stated that it planned to lay off all 13 temporary employees as well as 8 of its regular welder employees, and to reduce its active work force to 2 carpenters and 4 welders. Because of these planned layoffs and work force contraction, the Employer argued that the representation election should be postponed. The Board rejected this request and affirmed the Regional Director's direction of an immediate election on the basis that a substantial and representative complement of unit employees would remain in the eventual work force after the planned contraction. See *MJM Studios*, 336 NLRB 1255 (2001).

In *MJM Studios*, the Board also affirmed the Regional Director's finding that the eight regular welders scheduled to be laid off had a reasonable expectation of recall and were therefore eligible to vote. It left to this post-election challenge proceeding the question whether any temporary employees laid off before the election were eligible to vote for the same reason. We now address that question in resolving the challenges to ballots cast by four laid-off carpentry department temporary employees (Miller, Curtin, Coppola, and Dalton) and two laid-off welding department temporary employees (K. Baringer and B. Baringer).

The Board's longstanding test for determining whether laid-off employees are eligible to vote is whether, based on objective factors, they have a reasonable expectancy of reemployment in the near future. This determination involves consideration of four objective factors: (1) the employer's past practice of layoff and recall, (2) the employer's future plans, (3) the circumstances surrounding the layoff, and (4) what employees were told about the likelihood of recall. *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). The determination of eligibility is based on circumstances extant at the time of the payroll eligibility date and the date of the election. *Id.* The burden of proof rests on the party seeking to exclude the challenged individuals from voting.

Contrary to the hearing officer, we find from our review of the objective factors that the six laid-off temporary employees had no reasonable expectation of recall.

With respect to the first factor, past practice, the record shows that the Employer has no relevant prior history of seasonal or cyclical layoffs nor any systematic recall policy or practice.<sup>3</sup> There were intermittent layoffs during the summer of 2000 when there was a lack of work or when the Employer was waiting for blueprints and/or materials. The Employer also laid off employees when it shut down its operations for the holiday season from De-

<sup>1</sup> All dates are in 2001, unless otherwise noted.

<sup>2</sup> In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to sustain the challenges to the ballots of three other temporary employees (Edison Montoya, Michael Nielson, and Carl Michaud).

<sup>3</sup> At the preelection hearing in this case, the parties stipulated that "some" laid-off employees had been recalled and "others" have not. *MJM Studios*, supra.

ember 22, 2000, until January 2, 2001. These layoffs, however, are insufficient to establish either an employer practice or policy regarding layoffs. See, e.g., *Sol-Jack Co.*, 286 NLRB 1173, 1174 (1987).

As for the second factor, the Employer's future plans, we find that the record evidence undercuts the expectation of continued employment by these temporary workers. An auditor's report, commissioned by the Employer for fiscal year 2000, showed that the Employer was losing revenue because its overhead was too high. While the Employer continued to solicit new business, it also predicted that its revenues for 2001 would be lower than those for 2000. Accordingly, beginning in December 2000, the Employer cut its administrative overhead and downsized its managerial staff in an effort to reduce costs. As demonstrated at the February 2001 preelection hearing, the Employer also had plans to reduce its work force of carpenters and welders. With respect to the carpenters, since the preceding summer of 2000, the Employer had changed the nature of its carpentry work by introducing the use of computer-assisted design (CAD) files and foam molds instead of wood. This change resulted in the elimination of carpentry work, except for wood to cap the molds. As of the election date, the use of CAD files was routine and the Employer had plans to abolish its formal carpentry department altogether by September 2001. Consistent with these revenue losses, and change in carpentry processes, the Employer laid off, among others, all of the temporary employees prior to the election.

With respect to the third factor, the circumstances surrounding the Employer's decisions to hire and lay off are dictated by the individual contract, as each job is staffed on a project-by-project basis. Because of its fluctuating workload, the Employer informs employees, without warning, that their services are no longer needed.

With respect to the fourth factor, the laid-off temporary employees testified that the Employer's supervisors mentioned the possibility of recall. However, the Board

has held that "vague statements by the employer about the chance or possibility of the employee[s] being hired will not overcome the totality of the evidence to the contrary." See *Sol-Jack Co.*, supra at 1174. Further, the fact that the Employer requested telephone numbers from the laid-off employees does not establish that they had a reasonable expectation of return. See *Osram Sylvania, Inc.*, 325 NLRB 758, 760 (1998).

Applying the four factors discussed above, and considering the record as a whole, we find that the hearing officer failed properly to consider the reasons proffered by the Employer for its decisions to lay off and not recall the temporary carpenters and welders. The evidence shows that the Employer was struggling with a decline in contracts, coupled with diminished revenues, that required downsizing in its administrative and managerial staffs. In addition, the modernization of its form processing through the use of CAD files decreased the need for carpenters and resulted in the abolition of the carpentry department. In these circumstances, and noting the lack of established layoff patterns, we find that the Employer met its burden of proving that the six laid-off workers had no reasonable expectation of recall.

Accordingly, we reverse the hearing officer's findings and sustain the challenges to the six laid-off temporary employees. In so doing, we find it unnecessary to pass on the Employer's alternative argument that some of the six laid-off temporary employees abandoned interest in their former jobs when they obtained other employment.

#### CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Local 311 of the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists & Allied Crafts of the United States & its Territories, and Canada, AFL-CIO, CLC and that it is not the exclusive representative of these bargaining-unit employees.