

**Agar Supply Company, Inc. and Teamsters, Local 25,
a/w International Brotherhood of Teamsters,
AFL-CIO.** Case 1-RC-21417

November 15, 2002

ORDER GRANTING MOTION

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On September 6, 2002, the National Labor Relations Board issued a Decision and Order¹ in this proceeding adopting the Regional Director's findings and recommendations, overruling the challenge to Robert Koch's ballot, and directing that the ballot be opened and counted.

On September 26, 2002, the Employer filed an Emergency Motion to Stay the Opening of Koch's Ballot, to Reopen the Record, and for Reconsideration of the Board's Decision and Order. The Employer asserts that new evidence makes clear that (1) Koch was not in the bargaining unit at the time of the election and (2) he will never be able to work in a bargaining unit position due to his injury; thus, there is no reasonable expectation that he will ever return to the unit. The Petitioner filed an opposition to the Employer's motion.

We have decided to grant the Employer's motion.² Accordingly, the Board having duly considered the matter,

¹ 337 NLRB 1267.

² Contrary to the dissent, Member Bartlett does not agree that the evidence presented in the Employer's motion for reconsideration regarding Koch's status is irrelevant because it only addresses Koch's status on August 23, 2002, approximately 10 months after the election. That evidence may tend to support the Employer's contention that, in fact, Koch had been removed from, or was no longer employed in, the unit at the time of the election. In any event, even without considering the Employer's new evidence, Member Bartlett believes that a hearing should have been held in this proceeding. Although he previously voted to adopt the Regional Director's findings in the absence of a hearing, he has reconsidered his position. In the words of Justice Frankfurter, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (dissenting). See also *Reichhold Chemicals*, 288 NLRB 69 (1988) (granting motion for reconsideration and modifying prior decision), *enfd.* in part 906 F.2d 719 (D.C. Cir. 1990), *cert. denied* 498 U.S. 1053 (1991).

Member Cowen dissented from the Board's prior order and would have sustained the challenge to Koch's ballot. However, he agrees that, at a minimum, the Regional Director should have held a hearing regarding Koch's status. Accordingly, he joins Member Bartlett in remanding for such a hearing.

IT IS ORDERED that the Employer's motion is granted and the proceeding is remanded to the Regional Director to conduct a hearing on the issue of Koch's eligibility. Thereafter, the Regional Director shall issue a Supplemental Report on Challenged Ballots.

MEMBER LIEBMAN, dissenting.

I would deny the Employer's motion for reconsideration of our September 6, 2002 Decision and Order and for reopening of the record. Section 102.48(d)(1) of the Board's Rules and Regulations requires a party to show "extraordinary circumstances" to justify reconsideration of a Board decision, and also requires a party to show that any new evidence it seeks to introduce "would require a different result," in order to justify reopening the record. My colleagues have identified no "extraordinary circumstances" that would justify reconsideration. In fact, the only new circumstances set forth in the Employer's motion is evidence of the challenged voter's status on August 23, 2002, nearly 10 months after the election. An employee's eligibility, however, is judged as of the date of the election, and thus this evidence is completely irrelevant under any standard. As such, it does not constitute an "extraordinary circumstance" justifying reconsideration, or evidence that "would require a different result," justifying reopening the record in this proceeding. Accordingly, I would deny the Employer's motion.