

**Ethyl Products Company and International Union of
Electrical, Radio and Machine Workers, AFL-
CIO-CLC, Petitioner. Case 6-RC-8588**

17 August 1983

DECISION AND DIRECTION

**BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER**

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered determinative challenges in and objections to a Second Election¹ held on 18 August 1980 and the Hearing Officer's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs² and hereby adopts the Hearing Officer's findings and recommendations³ only to the extent consistent herewith.

The Petitioner has excepted, *inter alia*, to the Hearing Officer's recommendation that Employer's Objection 2 be sustained. For the reasons set forth below, we find merit in this exception.

In its Objection 2, the Employer alleges that the Petitioner interfered with the conduct of the

¹ The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 77 for, and 64 against, the Petitioner; there were 19 challenged ballots, a sufficient number to affect the results.

² On 16 April 1981 the Petitioner filed exceptions to the Hearing Officer's report and a brief in support of its exceptions. Thereafter, the Employer filed a brief in opposition to the Petitioner's exceptions and the Petitioner filed a motion to strike the Employer's brief. In its motion to strike, the Petitioner argues that the Employer's brief should be stricken as untimely filed exceptions. Inasmuch as we view the Employer's brief to be a timely filed answering brief, we hereby deny the Petitioner's motion to strike.

On 15 November 1982 the Employer filed a motion to file supplemental briefs. In its motion, the Employer argued that the Board should allow the parties to submit supplemental briefs to set forth their positions as to the impact on the issues herein of the Board's decision in *Riveredge Hospital*, 264 NLRB 1094 (1982). On 30 November 1982 the Board granted the Employer's motion to file supplemental briefs. Thereafter, the Petitioner and the Employer filed supplemental briefs.

³ In finding that the Mounting Cup Department employees were eligible to vote in the second election herein, the Hearing Officer relied on the fact that the Employer's intention to sell its Mounting Cup Department following the election allegedly was "too indefinite" to deprive the Mounting Cup Department employees of their eligibility to vote. Although we agree that the Mounting Cup Department employees were eligible to vote in the second election herein, we do not rely upon the alleged indefiniteness of the Employer's post-election plans. It is well settled that an employee is eligible to vote in a Board election if he is employed in the appropriate unit both on the eligibility payroll date and on the date of the election. In this regard, we note that the Mounting Cup Department employees are specifically included in the stipulated unit and that, prior to the second election herein, no party had attempted to withdraw from the Stipulation for Certification Upon Consent Election. Accordingly, since the record establishes that the Mounting Cup Department employees were employed in the stipulated unit both on the eligibility payroll date and on the date of the second election, we find that they were eligible to vote regardless of the Employer's post-election plans. Accordingly, we adopt the Hearing Officer's recommendation that the Petitioner's challenges to the ballots cast by the Mounting Cup Department employees be overruled.

second election herein by mailing to its employees a leaflet which contained false and misleading statements of fact and law, including the statement that the National Labor Relations Board had found the Employer guilty of unfair labor practices. With regard to this objection, the Hearing Officer found that the leaflet in question did state that the Board had found the Employer guilty of unfair labor practices when, in fact, the Board had found only that the Employer had engaged in conduct interfering with the first election involving these parties. Relying, *inter alia*, upon the Board's decision in *Formco, Inc.*, 233 NLRB 61 (1977), the Hearing Officer concluded that this misstatement of the Board's findings interfered with the second election herein and, accordingly, he recommended that the Employer's Objection 2 be sustained.

In *Riveredge Hospital, supra*, the Board overruled *Formco, Inc., supra*, and held that mischaracterizations of Board actions should be treated in the same manner as other misrepresentations. Accordingly, the Employer's Objection 2 must be analyzed under the standards set forth in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), which overruled *General Knit of California, Inc.*, 239 NLRB 619 (1978), and *Hollywood Ceramics Co.*, 140 NLRB 221 (1962), and returned to the rule of *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), that misrepresentations made during an election campaign are not grounds for setting aside the election.

In its supplemental brief, the Employer argues that the leaflet in question herein is more than a mere misrepresentation of Board actions; the Employer argues that since the leaflet appears to quote from a Board document, it is tantamount to a forgery of an official Board document. We find no merit in this argument. As the Hearing Officer found, the only misrepresentation contained in the leaflet is that the Board had found the Employer guilty of unfair labor practices when, in fact, the Board had found only that the Employer had engaged in conduct interfering with the first election in this matter. In this regard, we note that the acts described as "unfair labor practices" in the leaflet and attributed to the Employer are the objectionable acts which the Board found that the Employer had, in fact, committed. Accordingly, we find that the leaflet is, at most, a misstatement of the Board's findings⁴ and, therefore, we hereby overrule the Employer's Objection 2.

⁴ Member Jenkins does not rely on *Riveredge Hospital, supra*, for the reasons expressed in his dissent therein. However, in Member Jenkins' view, even under the principles expressed in *Formco, supra*, the leaflet would not rise to the level of objectionable conduct. Accordingly, for this reason, Member Jenkins joins in the determination reached by his colleagues.

DIRECTION

It is hereby directed that the Regional Director for Region 6, pursuant to the Board's Rules and Regulations, Series 8, as amended, within 10 days of the date of this Decision, open and count the ballots of Nicholas Danko, Don Duska, Jack Elliott, Ray English, Alice Grabowy, Jim Hall, Dwayne Hartle, Carol Hastings, Susan Hawley, Eileen Hayes, Rebecca Loomis, Theodore Lata, Jennine McAdams, Charlotte Murphy, Harry Reichel, Jerry Sabrowski, Loretta Vogel, and Jeff Wall and, thereafter, prepare and cause to be served on the parties a revised tally of ballots, including therein the count of said ballots. In the event that the revised tally of ballots shows that Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. In the event that the revised tally of ballots shows that Petitioner has not received a majority of the valid ballots cast, the following will be applicable.

A third election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate. The Regional Director for Region 6 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of issuance of the Notice of Third Election, including employees who did not work during that period because they were ill, on

vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁵ Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC.

⁵ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 6, within 7 days after the date of issuance of the Notice of Third Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.