

Mid-Continent Spring Company of Kentucky and James Stacy Richardson, Petitioner and Local No. 1993, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW. Case 9-RD-1193

14 December 1985

DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

The National Labor Relations Board, by a three-member panel, has considered objections to an election held 10 May 1984 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 34 for and 85 against the Union, with 16 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief and adopts the hearing officer's findings and recommendations¹ only to the extent consistent with this decision.

On 16 May 1984 the Union filed objections to conduct affecting the results of the election contending, inter alia, that the Employer interfered with the election by selecting Kathy Marsh, its "personnel manager," as its observer. The Union had protested at a preelection conference to the use of Marsh as the Employer's observer. Notwithstanding this protest, the Employer decided it would use her as its observer, contending that Marsh was merely a personnel clerk.

Based on the credited testimony, the hearing officer found that Marsh was "closely identified with management."² Although acknowledging the established Board policy that supervisors and persons closely identified with management may not act as observers, the hearing officer concluded that the election should not be set aside. According to the hearing officer, an exception to this Board policy was warranted because the Employer, including Marsh, did not campaign or take a position during the election, that it was not the first election for unit employees, and that the Union had represented the employees for a number of years. Under these circumstances, the hearing officer concluded that

the employees were "less likely to be swayed by campaign rhetoric or the desires of either the Employer or the Union in making their decisions."

The Union excepts to the hearing officer's recommendation to overrule this objection, contending that the mere presence of an observer closely identified with management is so inherently coercive that it constitutes objectionable conduct without any showing of actual interference. We find merit in the Union's exception. As the hearing officer stated, it is well established that an employer may not select a supervisor or a person closely identified with management to be its election observer. *Worth Food Market Stores*, 103 NLRB 259, 260 (1953); *Watkins Buick Co.*, 107 NLRB 500 (1953); *B-P Custom Building Products*, 251 NLRB 1337, 1338 (1980). Indeed, the Board has held that the use of such observers by an employer warrants setting aside the election since it is a fundamental deviation from the Board's established rules for the conduct of an election. *International Stamping Co.*, 97 NLRB 921, 923 (1951). This is true whether or not there is a demonstration of actual interference or, alternatively, a showing that no interference took place. *International Stamping Co.*, 97 NLRB 921, 923 (1951); *Peabody Engineering Co.*, 95 NLRB 952, 954 (1951).

In recommending that the use of Marsh as an observer was not objectionable, the hearing officer enumerated factors which he believed demonstrated that such conduct did not result in any prejudice to the Union. As stated, the Board has held that the fact that an observer closely identified with management "could not have had a coercive effect on the voters is besides the point." *Peabody*, supra at 954. The use of such an observer is a fundamental deviation from the Board's rules which requires the election to be set aside. Accordingly, we find that the Employer's use of Marsh was an objectionable deviation from the Board's rules for the conduct of an election. Therefore, we find that the election must be set aside and a new election held.³

[Direction of Second Election omitted from publication.]

MEMBER HUNTER dissenting.

Unlike my colleagues, I agree with the hearing officer that in the particular circumstances of this case no prejudice resulted from the use of Marsh as the Employer's election observer.¹ Hence, I find

¹ In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation to overrule Objections 2 and 5

² The hearing officer based his finding on the fact that Marsh is considered by the employees to be "personnel manager" and is a member of the management negotiating team. In addition, Marsh attends supervisory meetings and represents the Employer at the first step of the grievance procedure, advises the Union of the hiring and termination of all employees, advises the employees about personnel policy, and receives employee complaints. No exceptions were filed to the finding that Marsh was "closely identified with management."

³ The Union also excepted to the hearing officer's recommendation to overrule the Union's objection concerning alleged unlawful restrictions placed on the employees' right to solicit union support. In light of our decision, we find it unnecessary to rule on this objection.

¹ Attached is the portion of the hearing officer's report dealing with Objection 6

no merit in Objection 6. As there is no other objectionable conduct I would issue the appropriate certification.

APPENDIX

OBJECTION NO. 6:

In this Objection, the Union asserts that the Employer interfered with the conduct of the election by selecting Kathy Marsh, its "personnel manager," as its observer. In support of its position, the Union presented evidence through witnesses Jack Crofts, an international representative for the UAW; Lewis Wiley, president of the Union; Linda Cox, vice-president of the Union; Imogene White, a trustee of the Union; Jane Mitchell, financial secretary of the Union and its chief steward, and, former employees William Stanley, Brenda Birdsong, Shirley Walker, and Roxey Hale. The Employer presented evidence through Donald Langhi, its chief executive officer; Herbert Lingenfelter, its plant manager; and Kathy Marsh, whose title according to the company is "personnel."

The undisputed and/or uncontradicted facts in this matter are that on the date of the election May 10, 1984, the Union at the pre-election conference objected to the use of Ms. Marsh as the Employer's observer on the ground that she was the Employer's personnel manager. It appears from the record that the Board Agent conducting the election advised the Employer that observers must be nonsupervisory employees. After a lengthy discussion, the employer apparently asserted that Marsh was merely a personnel clerk and decided it would use her as its observer, notwithstanding the Union's objection. The record fails to reveal any evidence of misconduct by Ms. Marsh during the actual election. Therefore, the only issue to be resolved is whether her mere presence as the Employer's observer is grounds for setting aside the election.

The record reveals that prior to 1980 the Employer did not have a personnel manager. In 1980, the Employer hired Ken Barten, a consultant, for the purpose of setting up a personnel department. Barten admittedly had the title of personnel manager and could hire and fire employees. When Barten's contract expired after 1 year, he was terminated and Marsh, then known as Kathy Houchens, took over Barten's job in the personnel office. At the time, the authority that Barten had to hire and fire was allegedly not granted to Marsh. Marsh, who had previously been Donald Langhi's secretary, did not receive any increase in benefits when she took the personnel position and was paid considerably less than Barten. The record does not reveal any evidence that the Union or the employees were ever advised that Marsh unlike Barten did not possess the right to hire or fire employees or she was not the Employer's "personnel manager." On the contrary, there is considerable evidence that the employees continued to believe Marsh was the "personnel manager." In fact, the Employer's own attorney, Milburn Keith, referred to Marsh (Houchens) as the Employer's personnel manager in a letter to Jack Crofts in late September 1983. (Union Ex. 1) It was uncontradicted that the letter was a confirmation of the composition of the Employer's "negotiating team" for the upcoming

1983 contract negotiations. In light of the fact that Keith is also an officer of the corporation who should be well aware of Marsh's position, and in light of the fact that during the actual contract negotiations the Employer¹⁰ and Union tentatively agreed to make the "personnel manager" the Employer's representative during the first step of the grievance procedure (Union Ex. 2), I find that the reference to Marsh as personnel manager was not mere oversight and that she was known to employees as the "personnel manager."

Marsh testified that upon assuming her job, she was advised by Barten that her duties would consist of doing the payroll, accepting job applications, and processing insurance claims. She denied being given any type of supervisory authority. However, she admitted attending 13 out of 19 of the 1983 contract negotiation sessions, admitted sitting in on a majority of 3rd step grievance meetings and sitting in on a majority of supervisory production meetings. However, she asserted the purpose of her attendance was and is simply to take notes or, in the case of grievance meetings, to answer questions asked by management, to type answers to the grievances, or to obtain employee files if necessary. She denied having any input in employee evaluations and denied attending any meetings involving strategy for negotiations or possible changes in personnel policy. (However, with regard to the latter, there haven't been any substantive changes since Barten left and it is possible no such meetings have been held.)

The record reveals that Marsh is the only person who works in the personnel office and that employees go to her for the purpose of getting safety glasses, filing tax forms, processing insurance claims, filing job applications, asking questions about the Employer's personnel policies and, at least, in some cases, for the purpose of making complaints.¹¹ In addition, part of Marsh's duties in the past have been to prepare seniority lists, dues check off lists and notifications of hire or termination of employees for the Union. Employees' vacation requests and medical excuses are eventually given to Marsh, and she maintains employee attendance records. With respect to the hiring of employees, Marsh testified that she merely takes job applications and, that if a supervisor in a particular department needs someone, the supervisor reviews the applications and instructs her who to call. She admitted that most persons hired are hired without any pre-job interview. After calling new employees, Marsh advises them how much they will be paid, what benefits they will receive and tells them that they will be on probation. She also instructs employees how to use the time clock and introduces them to their supervisor. Marsh denied any input in the hire of employees and asserted she does not screen or "weed out" any applications. With respect to her other duties, Marsh contended she only follows guidelines set up before she took the job

¹⁰ Langhi and Lingenfelter were also part of the Employer's negotiating team and could have corrected any mistake concerning Marsh's title if they had so desired.

¹¹ See, for example, the discussion in Objection No. 3 where employees complained to Marsh about allegedly being harassed about joining the Union during working time.

and that her functions do not require the use of any independent judgment. She asserted she takes no independent action with respect to employees with attendance problems.¹²

The record reveals that Marsh's benefits and wages during the critical period¹³ were comparable to various expeditors and bookkeepers in the Employer's office. Her weekly pay of \$300 was less than that of the lowest paid foreman who was paid between \$300 and \$350 weekly. Her benefits, as well as those of other office personnel, excluding executives, appear to be about the same as for those employees in the bargaining unit. Marsh who was on a weekly salary during the entire period, has not punched the time clock for approximately a year. Rather, she keeps her own time and gives it to Herbert Lingenfelter, the plant manager. Marsh, like other office personnel, is eligible for a bonus based on merit and longevity. She uses the same parking lot, restroom, and break area as other office personnel. Finally, it is undisputed that Marsh delivers paychecks to the foreman in the plant in full view of the unit employees.

Several union witnesses attempted to show that Marsh took an active part in their evaluation meetings, in the 3rd step grievance meetings, and during contract negotiations. However, based upon the entire record, including the demeanor of the witnesses, I conclude that one or more management officials attended such meetings and that Marsh's participation was generally limited to responding to questions concerning information contained in personal records and to obtaining files, if necessary.

Notwithstanding the above, Roxie Hale testified without contradiction that during a job evaluation, Marsh, as well as Hale's immediate supervisor, Theron Blankenship, told her that they were pleased with her work and that Marsh told Hale she would get her raise. Because she appeared to be a very credible witness, I credit Hale's testimony that such statements were made. However, I do not believe they are dispositive as to who actually made the decision to grant Hale's raise. I also credit Hale's uncontradicted testimony that Foreman Blankenship once told her to report an employee she had seen urinating in the parking lot to Marsh.

William Stanley testified that in late June or early July 1984, he called Marsh to find out how the Union "meeting" went. (It was apparent from his testimony that he was referring to the election.) During the conversation Stanley, who had been laid off for about 15 months, asked Marsh if he was still required to send a monthly letter indicating he had a continuing interest in employment. According to Stanley, Marsh told him "no, because after the end of the month he would be [de]terminated." Marsh denied making that statement and testified she merely told Stanley to follow the procedures set forth in the contract. Marsh struck me as the more

credible witness. However, even assuming that Marsh made the statement attributed to her, her statement appears to be a simple recitation of the provisions set forth in the collective bargaining agreement concerning employees laid off for more than 15 months. It does not reflect any decision by Marsh.

Finally, union witnesses Crotts and Mitchell both testified that in one of the early contract negotiation sessions, Donald Langhi told them Marsh could hire and fire. Crotts testified that the statement was made after the Union asserted that a Mr. Mike Stanton was hired by mail by Mr. Langhi's brother. According to Crotts, Langhi denied the assertion, claiming that only Marsh (Houchens at the time) did the hiring. Wiley testified that after Crotts raised the issue of Stanton's hire, Langhi replied he did not know anything about it and asked Marsh if she knew anything. She stated Marsh started to reply but was interrupted when the Employer called a recess and went outside. When asked if anything was said as to who had the right to hire during that meeting, Wiley, like Crotts, asserted Langhi said Marsh had such authority. Mitchell¹⁴ when asked about the discussion concerning Stanton's hire could only recall that Langhi disagreed that his brother had hired Stanton and asserted her belief that the Employer had argued that Clifford (Slim) Carroll, the assistant plant manager, had hired Stanton.

Employer witnesses Langhi, Lingenfelter, and Marsh all exhibited poor recollections concerning the conversation about Stanton's hire. Lingenfelter and Marsh could not recall if anything was said about Marsh having the right to hire and fire. Langhi, however, specifically denied saying Marsh had that right.

Of all the conflicts in the evidence, this one is the most difficult for me to resolve. On the one hand, the Employer witnesses do not recall the incident well and only Langhi specifically denied the statement attributed to him. On the other hand, Mitchell's testimony concerning the statement conflicts in part with that of Crotts and Wiley. Moreover, it is particularly troubling that Crotts and Wiley could so clearly recall this conversation but no others in the negotiations in which Marsh participated and allegedly spoke. After due consideration, I must conclude that the Union has failed to establish by a preponderance of the evidence that Langhi stated only Marsh could hire and fire and I credit Langhi's denial of that statement.

It is general Board policy that in the interest of free elections, supervisors and persons closely identified with

¹² I note that the union witnesses are not in a position to know what the actual hiring practices of the Employer are or the extent of Marsh's participation in supervisory meetings or in personal matters. As a result, the Employer's witnesses' testimony was largely uncontradicted. However, I simply cannot believe Marsh's duties are so routine or clerical. If that were the case, I do not believe the Employer would have agreed to make her its representative in the first step of the grievance procedure.

¹³ She received a promotion in June 1984.

¹⁴ Mitchell also testified about statements Marsh allegedly made in meetings on September 27, 1983, November 21, 1983, and November 23, 1983. However, Marsh had 3 handwritten sets of notes concerning the September 27, 1983 meeting. She could not remember which of the statements was initially prepared. Moreover, one of the sets of notes contained changes concerning exactly what was said. In addition, I am convinced from the record that Marsh was not even present at the November 21, 1983, meetings at which Marsh, according to Mitchell, allegedly spoke. Considering the duplicative notes, the changes therein, and Mitchell's demeanor on the stand, I do not credit her testimony concerning the alleged statements by Marsh on September 27, 1983, November 21, 1983 or November 23, 1983. Therefore, I have not set them forth herein.

management may not act as observers.¹⁵ Indeed, the Board has held that the use of such observers is such a material and fundamental deviation from the Board's established rules for the conduct of an election, that it will set aside an election without any showing of actual interference in the way the employees voted in the election. In so holding, the Board stated that "[e]lection rules which are designated to guarantee free choice in the election must be strictly enforced against material breaches in every case, or they may as well be abandoned."¹⁶

Notwithstanding the above, limited exceptions to the prohibition against the use of such observers have developed over the years. Thus the Board has refused to set aside an election contested by two unions wherein the employer used an alleged supervisor as its observer.¹⁷ Similarly, the Board has also refused to set aside an election contested by only one union wherein the petitioner used a supervisor as its observer and majority of its votes cast were for the petitioner.¹⁸ In both cases, the Board noted its prohibition against the use of supervisors as observers was predicated on the likelihood that their presence at the polls might unduly influence voters to cast "no-union" votes and that in the circumstances of those cases the likelihood of such influence was not present. In addition to the above, the Board has also refused to set aside elections where the objecting party failed to object to the use of a supervisor as an observer until after completion of the election rather than during the pre-election conference.¹⁹

To resolve this issue, it is necessary first to decide whether Marsh is a supervisor or in a position which closely identifies her with management. Section 2(11) of the Act states the term supervisor means:

"Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

A review of the record and the credited evidence therein reveals little direct evidence that Marsh has any of the aforementioned authority. Marsh has never hired, fired, laid off, disciplined, or transferred any employees and there is no indication in the record that she has the authority to do so. At most, the record establishes she told Roxy Hale that Hale would get a raise and told Stanley that he would be terminated pursuant to the contract after he was laid off more than 15 months. Howev-

er, those statements do not reflect who made the decision to give Hale her raise and do not establish that Marsh terminated Stanley. Most, if not all, of Marsh's other duties appear to be essentially routine in nature. Finally, while there is some evidence that employees have made complaints to Marsh, there is no evidence that Marsh has actually adjusted any grievance or has the authority to do so. Therefore, I cannot, on the basis of the record before me, find her to be a supervisor within the meaning of the Act.

Notwithstanding the above, however, I do find that Marsh has enhanced responsibilities such that she is in a position which closely identifies her with management. In so holding, I note that Marsh was considered by the employees (and at least by one management official) as the "personnel manager." Marsh attends supervisory meetings, grievance meetings, and was part of the negotiating team for the Employer. She generally is the only person an applicant sees prior to his/her being hired and as such it is reasonable for employees to assume (even erroneously) that she had hired them. In addition, Marsh is the only person in the Employer's personnel office and it is she who advises the Union of the hire and termination of employees—that she is not the one actually making those decisions is of no moment considering the employees do not know that is the case. Marsh advises employees about personnel policy and receives employee complaints. While the record is void of any evidence that she can resolve grievances, it appears employees believe she can or that she will find someone who can (otherwise there would be no purpose in making complaints to her). Finally, I believe the Employer by agreeing, albeit tentatively, that Marsh would be its representative in the first step of the grievance procedure, served notice that Marsh could and did speak on behalf of the Employer. Accordingly, I find her to be closely identified with management.²⁰

Considering my findings, at first blush, it would appear that to effectively maintain the Board's rules concerning observers, the election should be set aside. However, there are factors in this case which I have not seen previously addressed by the Board. It is undisputed, for example, that the Employer including Marsh did not campaign or take a position during the election. Moreover, this is not a first election for the employees of the Employer, it is the third. Because of that and because the union has represented them for several years, I believe the employees of this Employer are less likely to be swayed by campaign rhetoric or the desires of either the Employer or the Union in making their decisions as to whether to vote for or against the Union. In my opinion, they would tend to make their decisions based on their perception of the effectiveness of their representation.²¹

Respectful as I am of the Board's necessity to maintain its election rules, I also am of the opinion that the desires of the employees should not be overlooked in these matters and that election results should not be set aside easily. In the particular circumstances of this case, where

¹⁵ *Peabody Engineering Company*, 95 NLRB 952-954, *International Stamping Co., Inc.*, 97 NLRB 921-923, *Worth Food Market Stores, Inc.*, 103 NLRB 259, 260, *Photo-Sonics, Inc.*, 254 NLRB 567, 569

¹⁶ *International Stamping Co., Inc.*, *id.* *Sound Refining, Inc.*, 267 NLRB 1301

¹⁷ *Owens-Park Lumber Co.*, 107 NLRB 131, 132

¹⁸ *Plant City Welding and Tank Company*, 119 NLRB 131, 132. See also *Howard Cooper Corporation*, 121 NLRB 950, 951

¹⁹ *Howard Cooper Corporation*, *id.*

²⁰ *B-P Custom Building Products, Inc.*, 251 NLRB 1337, 1338

²¹ Assuming there are no unremedied unfair labor practices. The record does not reveal any unlawful conduct by the Employer

the Employer stayed neutral in a contest between those employees who wanted to retain union representation and those who did not, I do not believe any prejudice to

the Union could have resulted from the use of Ms. Marsh as the Employer's election observer.

Accordingly, I recommend that the Union's Objection No. 6 be overruled.