

S & G Concrete Co. and Chauffeurs, Teamsters, and Helpers Local Union No. 391, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 11-RC-5126

13 March 1985

**DECISION AND DIRECTION OF
SECOND ELECTION**

**By CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

The National Labor Relations Board has considered objections and challenges to an election held 7 April 1983 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 eight for and eight against the Petitioner, with three challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record¹ in light of the exceptions and briefs and has adopted the hearing officer's rulings,² findings,³ and recommendations only to the extent consistent with this decision and finds that the election must be set aside and a new election held.

The hearing officer recommended that the challenges to the ballots of Ben Nelson and Charles Van Dorman be overruled. Specifically, the hearing officer found that both laid-off employees had a reasonable expectancy of recall as of the time of the election and were therefore eligible to vote.

The Employer excepts to the hearing officer's finding that Nelson and Dorman had a reasonable expectation of future employment. The Employer contends that Nelson was hired specifically to work on two special projects and when they were completed his service was no longer needed. It further contends that Dorman's layoff was dictated by

economic reasons resulting from increased competition in the area and a permanent decrease in the available business to the Employer. For the reasons set forth below, we agree with the Employer

The Employer is engaged in the manufacture of concrete and delivers it by truck to jobsites in the vicinity of Wilmington, North Carolina. Its business is seasonal with decreased activity from November through February and upward increases beginning in March. In 1981 the Employer was the only such ready-mix concrete company in the Wilmington area and in that year made a profit of \$37,000 from the delivery of 51,000 yards of concrete. However, during that year and the next, two competitors entered the Wilmington market and the Employer's delivery of concrete was reduced in 1982 to 40,300 yards. In that year the Employer lost \$47,000.

About the same time, commencing in March 1982, the Employer engaged in two special projects to modify its operations. One involved the building of a concrete plant in Castle Hayne, North Carolina⁴—about 15 miles north of Wilmington—and the other entailed consolidating two operations at the Employer's main plant in Wilmington. The projects were completed by mid-January 1983.⁵ The two layoffs occurred during the following month.

Ben Nelson was hired in March 1982 to perform unskilled labor.⁶ His tasks included cleaning up, spraying, sandblasting, and painting equipment including trucks, and assisting welders on the aforementioned special projects.⁷ During the first few weeks of employment, he worked at Castle Hayne and thereafter at Wilmington. According to Nelson, he was told on 20 January by Plant Manger Bob Matheson that due to lack of work he was temporarily laid off and that when work picked up he would be recalled.

Matheson gave a different version as to the circumstances of the layoff. According to him, Nelson was hired solely to work on the special projects and work assignments unrelated to the projects were given merely to complete a day's work. Matheson testified that after the completion of the special projects there no longer was a need for the service of a full-time laborer. Matheson further testified that on 20 January he informed Nelson he had created work just to keep him busy that week,

¹ We find that there is nothing raised in the Employer's exceptions warranting an examination of the investigatory materials compiled by the Regional Director. Therefore, we deny the Employer's motion to compel transfer of the record to the Board. The record on which we have resolved the issues in this proceeding is based exclusively on evidence presented to the hearing officer. Accordingly, the materials earlier presented to the Regional Director and on which he made a limited determination to send the now disputed matters to a hearing before the hearing officer are irrelevant for the purposes of our review of the hearing officer's findings and recommendations.

² At the hearing the Respondent objected to the hearing officer's refusal to sequester witnesses after testifying if they were to be called by the Petitioner as rebuttal witnesses. We find no abuse of discretion here, as the Respondent has not offered to demonstrate the manner in which the ruling prejudiced its case. See *Plumbers Local 633 (B & W Construction)*, 249 NLRB 67 fn 2 (1980).

³ 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 except as expressly modified herein.

⁴ Apparently this plant was being relocated from Riverside, North Carolina.

⁵ All dates are 1983 unless otherwise indicated.

⁶ The Employer's other employees were in the following classifications: mechanic, maintenance welder, batch plant operator, and driver.

⁷ The parties are not in dispute regarding these duties.

that he had run out of work for him, and that he was being laid off.

The other employee in dispute, Charles Van Dorman, worked for the Employer as a truckdriver from May or June 1982 until his layoff on 18 February. Dorman testified that at the end of his shift that day he was called to Matheson's office and was told by Matheson that he was being laid off for a while due to lack of work. Dorman asked Matheson when he could check back with Matheson and the latter indicated in a couple of weeks. Matheson also told him that two other drivers, Sasser and Bass, also were being laid off.

Matheson's testimony conflicts with that of Dorman. Matheson testified that on 18 February he told Dorman the Employer did not have the work to support all the people they had; they were cutting back and he was being laid off due to lack of work. Matheson specifically testified that he told Dorman that there was no reasonable expectation of recall or foreseeable need for his services in the future. Matheson denied telling Dorman to check back with him in a couple of weeks. Matheson further testified that, shortly after the layoffs of Dorman, Sasser, and Bass, he was instructed by the Employer's president to prepare two cement trucks for transfer out of the Wilmington fleet and that they were removed in late February.⁸

The evidence on the Employer's past record regarding recall of laid-off employees indicated that prior to 1983 the Employer laid off six employees and that two of these six were subsequently recalled.

In examining the status of these two laid-off employees, the hearing officer correctly set forth the test for establishing the eligibility of laid-off employees to vote in a representation election, citing *D. H. Farms*, 206 NLRB 111 (1973). Such entitlement depends on objective factors supporting a reasonable expectancy of recall in the near future which include the past experience of the employer, the employer's future plans, the circumstances of the layoff, and what the employee was told about the likelihood of recall. Accord: *Atlas Metal Spinning Co.*, 266 NLRB 180 (1983).

In applying the above test to this case, the hearing officer found that with respect to each employee the controlling factor was the circumstances of the layoff. He relied primarily on the seasonal nature of the Employer's business and the fact that the layoffs occurred shortly before the customary

increase in business in March. With respect to Nelson the hearing officer found that, although Nelson's unskilled duties could be performed by others during the slack period, someone would be needed to do this work as business increased. The hearing officer found that this led Matheson to tell Nelson, whose testimony was credited, that the layoff was temporary and he would be called back when work picked up. The hearing officer also credited the testimony of Dorman over that of Matheson and found that when the workload increased there might be a need to recall Dorman. In summation the hearing officer found that the Employer's operations were in a state of flux which precluded the Employer from knowing its future personnel needs by the date of the election on 7 April. He concluded that Nelson and Dorman had a reasonable expectation of recall at the time of the election and that they were both eligible to vote.

Contrary to the hearing officer, we find that the preponderance of the evidence indicates that Nelson and Dorman had no reasonable expectation of recall in the near future. A review of the record convinces us that the hearing officer erred in concluding that these layoffs merely were a result of the seasonal nature of the Employer's business. Nelson was hired as a laborer to work on the Employer's special projects and there is no evidence that the Employer ever previously employed persons to work solely as laborers. Nelson was laid off soon after the completion of these projects and has not been replaced. Although there is some evidence that he performed duties unconnected to the special projects, it is not in dispute that this was only to supplement his regular duties on the special projects.⁹ At no time during Nelson's employment, even during the height of the Employer's business activity in mid-1982, is there any evidence showing the need for Nelson or any other person to work primarily as a laborer in connection with the Employer's regular business activity. Accordingly, the circumstances of Nelson's layoff indicate it was directly connected to the completion of the Employer's special projects and not seasonal business activity.

Dorman's layoff also may not be attributed to the seasonal nature of the Employer's business.¹⁰ The record is clear that the Employer's economic position in Wilmington deteriorated significantly

⁸ President Holub testified that at the beginning of 1983 the Employer had 12 or 13 trucks in Wilmington. After the three drivers were laid off, he had two or three concrete trucks relocated to another S & G Concrete operation in Edgewood, Maryland. He stated that Dorman's truck was one of those transferred. Dorman admitted in his testimony that he subsequently learned that two trucks had been "sent up north."

⁹ It is apparent from the record that employees in other classifications also performed general cleanup duties and other unskilled work in addition to their normal work assignments.

¹⁰ If the Employer's primary reason for laying off Dorman was a temporary seasonal reduction in work, the hearing officer failed to explain why the Employer waited until almost the end of the 4-month slow period before laying off Dorman.

after two competing ready-mix concrete companies started business in the area. The Employer made a business decision to reduce its cost of operation by laying off three drivers and permanently removing at least two concrete trucks from its fleet, including the one assigned to Dorman. The record further shows that Dorman became aware of the removal of these trucks. Given the removal of Dorman's truck from the Wilmington operation, it is clear that his layoff was directly connected to a permanent reduction in the Employer's need for drivers.

The remaining objective factors used to determine the existence of a reasonable expectancy of recall also provide insufficient basis to support the voting eligibility of Nelson and Dorman. The past experience of the Employer does not indicate any seasonal pattern of layoffs and recalls, and the record shows the Employer has neither a policy nor a practice of recalling laid-off employees.¹¹ The Employer's future plans as detailed above clearly reveal no intent to hire a laborer or additional drivers.

The only evidence which may support a reasonable expectancy of recall for Nelson and Dorman is their testimony that Matheson told them their layoffs were temporary, that Nelson would be recalled when work picked up, and that Dorman should check back in a couple weeks. Matheson effectively denied having made such statements. As set forth above, the hearing officer's analysis of the circumstances of the layoff, which we have herein found are erroneous, caused him to credit Nelson's testimony and apparently that of Dorman.¹² Because the hearing officer made his credibility determinations based on his analysis of the facts, the Board is just as capable as the hearing officer of evaluating the inherent probabilities of the testimony. Given that the circumstances of the layoffs as discussed above do not support any expectancy of recall, we find it inherently unlikely that these employees were given any assurance of recall at the

¹¹ The hearing officer recognized that such evidence "merely show[ed] that it has recalled some employees from layoff and that it has failed to recall some employees from layoff."

¹² Although the hearing office made an introductory reference to demeanor, it is clear that his decision to credit Nelson was not based on demeanor but on "the circumstances of the layoff." The hearing officer provided no additional rationale for crediting Dorman

time of the layoff.¹³ In any event it is clear that, when the other factors involved do not support a laid-off employee's having a reasonable expectancy of recall, verbal statements indicating possible recall will not overcome the totality of the evidence to the contrary.¹⁴ In conclusion, we find that the evidence does not support a finding that at the time of the election either Nelson or Dorman had a reasonable expectancy of recall and we sustain challenges to their ballots.

In view of our disposition of the challenged ballots of Nelson and Dorman, and the uncontested recommendation of the Regional Director that the sole remaining determinative challenged ballot (that of Freddie Foy) be sustained, it is necessary to consider the merits of the Petitioner's objections.¹⁵ The hearing officer recommended that the Petitioner's Objections 3, 4, and 5 be sustained and the Employer has excepted to these recommendations. On review of the record, we adopt the hearing officer's recommendation to sustain Objection 4 based on credited testimony that in a speech to employees prior to the election the Employer's president indicated that it would be futile for employees to select a union as their collective-bargaining agent, that the Employer would not negotiate with the Petitioner, and that a strike would be inevitable.¹⁶ We therefore find it unnecessary to pass on the issues raised by Objections 3 and 5. Accordingly, we shall direct that a second election be conducted.

[Direction of Second Election omitted from publication.]

¹³ Member Dennis does not join in reversing the hearing officer's credibility determinations and relies instead on the rationale of the next sentence

¹⁴ *Precision Tumbling Co.*, 252 NLRB 1014 (1980), *Pasquier Panel Products*, 219 NLRB 71 (1975), *Thomas Engine Corp.*, 196 NLRB 706 (1972)

¹⁵ As indicated at the beginning of this decision, the Petitioner has not received a majority of the valid votes cast in this election

¹⁶ The Employer has excepted, inter alia, to the hearing officer's failure to provide its counsel with all affidavits taken from employee Brown in connection with the Board's investigation of this case. The record reveals that, during the presentation of Brown's testimony at the hearing, the Employer's counsel requested a copy of an affidavit which Brown gave to the Board on 24 February 1983. The hearing officer, who stated that he did not possess a copy of the requested affidavits, nevertheless found that the 24 February 1983 affidavit "could in no way relate to the objections to the election which occurred in April." We reverse the hearing officer's ruling that the 24 February 1983 affidavit was irrelevant as we find that the Employer is entitled to receive a copy of this document. See Sec. 102.118(c) of the Board's Rules and Regulations. Accordingly, in adopting the hearing officer's recommendation that Objection 4 be sustained, we rely solely on the credited testimony of employee Garvin