

Pay N' Save Stores, Inc and Mary Williams, Petitioner and United Food and Commercial Workers International Union Local 1001, AFL-CIO
Case 19-UD-441

November 30 1988

DECISION AND ORDER REMANDING PROCEEDING TO THE REGIONAL DIRECTOR

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

The National Labor Relations Board by a three member panel has considered determinative challenges and an objection¹ to an election held July 14 1988 and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated UD Election Agreement. The tally of ballots shows 42 for and 28 against withdrawing the authority of the bargaining representative to require under its agreement with the Employer that membership in the Union be a condition of employment with 5 challenged ballots.² The tally includes one vote cast by an ineligible voter.³

The Board has reviewed the record in the light of the exceptions and supporting brief and has decided to adopt the Regional Director's findings and recommendations only to the extent consistent with this Decision and Order Remanding Proceeding to the Regional Director.

The Regional Director without conducting an investigation into the five determinative challenged

ballots reasoned that the ballot of the ineligible voter would be determinative if three or more of the five challenged ballots were found eligible and were yes votes. He further found that under such circumstances a second election would be required. Reasoning further that a hearing on challenged ballots may not resolve the matter the Regional Director concluded that a rerun election was necessary.

Contrary to the Regional Director we believe the proper procedure is to resolve the status of the challenged ballots before determining whether the election should be set aside and a new election held.⁴ Under the circumstances of the instant case a resolution of the challenged ballots may render a second election unnecessary. Accordingly we shall remand this proceeding to the Regional Director for investigation of the challenged ballots and if necessary a hearing on the eligibility of the challenged voters.

ORDER

IT IS ORDERED that the proceeding is remanded to the Regional Director for Region 19 for investigation of the five challenged ballots and if necessary a hearing on the eligibility of the challenged voters. Thereafter the Regional Director shall take further appropriate action including the preparation of a supplemental report.

The parties to this proceeding may file exceptions to the Regional Director's supplemental report pursuant to Section 102.69 of the Board's Rules and Regulations.

¹ Member Johansen would overrule the Petitioner's objection. He finds that the objection is actually a postelection challenge to the ballot of Caryl Freeberg. The Board does not permit challenges in the form of objections after the election. *Nos Inc* 63 NLRB 502 (1945) *rev'd* on other grounds 162 F.2d 50 (5th Cir. 1947).

The tally showed there were 86 eligible voters.

³ The Petitioner filed an objection alleging that an ineligible voter was allowed to vote in the election without challenge. The Regional Director conducted an administrative investigation of the objection and no party filed exceptions to the following findings that he made: The *Excelsior* list contained first initials and last names of eligible voters. Caryl Freeberg an ineligible individual presented herself to vote at which time the observers marked off C. Freeberg on the *Excelsior* list. Subsequently Cathy Freeberg presented herself to vote at which time it was determined that the former individual was ineligible. Cathy Freeberg as an eligible voter was allowed to vote unchallenged. The ballot box contained however the extra ballot of the ineligible voter Caryl Freeberg.

⁴ We conclude contrary to Member Johansen that the Petitioner's objection should not be overruled as a postelection challenge. Although the prohibition against consideration of postelection challenges is well established the Supreme Court has stated that this restriction is to be applied fairly and equitably in light of the realities involved. *NLRB v A J Tower Co* 329 U.S. 324 333 (1946). This is not a case where a party is attempting to use an objection in place of a challenge; it could have made. Here we have an election irregularity that was not discovered until the improper ballot had been commingled in the ballot box. Under these circumstances the prohibition against postelection challenges should not be applied. *William R Whittaker Co* 94 NLRB 1151 1154 (1951) (policy of not considering postelection challenges based on the assumption that each party has had a reasonable opportunity to exercise the right of challenge). Moreover the excepting party does not contend that the objection is an improper postelection challenge. Rather the Union acknowledges that under certain circumstances Freeberg's ballot could affect the election results and would warrant setting it aside.