Harter Equipment, Inc *and* George M Zatrinski, Petitioner and Local 825, International Union of Operating Engineers, AFL-CIO Case 22-RD-754

April 12, 1989

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held on November 12, 1986, before Hearing Officer Gregory M Burke Pursuant to Section 102 67 of the National Labor Relations Board Rules and Regulations, and by direction of the Regional Director for Region 22, this case was transferred to the National Labor Relations Board for decision Thereafter, the Employer filed a brief in support of its position

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel

The Board has reviewed the rulings of the hearing officer made at the hearing and finds that they are free from prejudicial error They are affirmed

On the entire record in this case, the Board finds

The Employer[1] and the Union, Local 825, International Union of Operating Engineers, have been parties to a series of collective-bargaining agreements [2] In October 1981 the Employer and the Union commenced negotiations for a new contract to succeed the one scheduled to expire on December 1, 1981 The Union refused to agree to the Em ployer's proposal for reductions in wages and changes in the union-security clause and offered to extend the expiring contract for 6 months so that negotiations could continue The Employer refused to extend the contract and stated that it would not allow employees to work without a contract

On December 3, 1981, the Employer locked out its employees in order to put pressure on the Union to agree to terms favorable to the Employer In mid-January 1982 the Employer commenced hiring temporary employees so that it could resume operations On June 24, 1986, the Board found that because no specific proof of antiunion motivation was presented, the Employer did not violate Section 8(a)(3) and (1) by hiring temporary replacements in order to engage in business operations during the lockout [3]

A decertification petition was filed on November 15, 1983, by George Zatrinski, a replacement employee who later became a supervisor [4] A hearing was held on November 12, 1986, to determine whether an election should be held in this case and if so, which employees are eligible to vote—the locked-out employees and/or the current work force At the time the petition was filed the locked-out bargaining unit was replaced by 12 persons On November 12, 1986, the number of persons working in bargaining unit positions had increased to 17 Zatrinski, who hired employees in 1985, testified that many applicants knew of the Employer's ongoing labor dispute and, because of it, he told new hires that they would be temporary employees There was no testimony that any replacements were told that they were permanent

The Employer's position is that the locked out employees should not be able to vote Specifically, the Employer's president stated

> The only employees that I recognize now are those employees that are there, that are working at the company nobody from five years ago

The Union's position at the hearing was that the petition should be dismissed because there was no adequate showing of interest and that the current employees have been determined to be temporary and thus are not eligible to vote The Regional Director has not made any determination on the adequacy of the showing of interest because he could not determine who is eligible to vote

For the following reasons, we have determined that only the five locked-out employees are eligible to vote Although 5 years have elapsed since the decertification petition was filed, there is no evi dence or even an allegation that any of these five employees has abandoned his job Moreover, it would be inconsistent with the Act and the deci-

[1] The Employer a New Jersey corporation with its principal office and place of business at RD 2 Box 115A Englishtown New Jersey is engaged in the sale distribution and service of construction and lawn maintenance equipment and related products It annually purchases and receives construction equipment and other goods and materials valued in excess of $50 000 directly from suppliers located outside New Jersey Based on the foregoing we find that the Employer is engaged in com merce within the meaning of the Act and that it will effectuate the poli cies of the Act to assert jurisdiction herein The Union is a labor organi zation within the meaning of the Act

[2] On January 16 1974 the Regional Director for Region 22 certified the Union as the exclusive collective bargaining representative of all pro duction and maintenance employees including truckdrivers welders me chanics helpers equipment dismantlers and erectors machine shop and parts department employees employed by the Employer at its English town location but excluding all office and professional employees guards and supervisors as defined in the Act

[3] *Harter Equipment* 280 NLRB 597 (1986) review denied sub nom *Operating Engineers Local 825 v NLRB* 829 F 2d 458 (3d Cir 1987)

[4] The parties stipulated that the Petitioner George Zatrinski was a su pervisor within the meaning of Sec 2(11) of the Act at the time of the hearing but that he possessed no supervisory indicia at the time of the filing of the petition We agree with the hearing officer that where the petitioner becomes a supervisor after the filing of the petition the pro ceedings are not abated

sion in *Harter* to disenfranchise these employees Had they been permanently replaced after they called an economic strike, their right to vote would have ended 1 year later or upon an affirmative act by them to end their employment However, these employees are not strikers Rather, the Employer locked out the bargaining unit in support of its bargaining demands and they were not, and could not lawfully be, permanently replaced Indeed, the finding that the replacements were temporary was essential to the dismissal of the complaint in *Harter* The Board held "that the use of temporary employees here had only a comparatively slight effect on [locked out] employee rights" *Harter*, supra at 599

We also find that the 17 employees who were hired to "replace" the locked-out employees are ineligible to vote An essential aspect of the *Harter* finding was that the Employer locked out the *bargaining unit* for its failure to agree to the Employer's offer The lockout was therefore not merely directed to the particular employees who happen to have made up the unit at the time It follows then that regardless of their number, those hired into the unit jobs during the lockout are necessarily temporary replacements for the locked-out bargaining unit

Thus, we find that the only employees who are eligible to vote or support a decertification petition are those five employees who were employed in the bargaining unit at the time of the lockout We are therefore remanding this case to the Regional Director to determine if the showing of interest submitted in support of the petition indicates adequate support for the petition among the eligible voters If so, he shall conduct an election If the Regional Director determines that there is not an adequate showing of interest among the eligible voters, he shall dismiss the petition

ORDER

The National Labor Relations Board remands this case to the Regional Director for Region 22 to determine from the showing of interest submitted in support of the petition whether there is an adequate showing of interest for the petition among the eligible voters If so, he shall conduct an election If not, he shall dismiss the petition