

Case Egg & Poultry Co, Inc and Russell H Lute and United Food and Commercial Workers International Union, AFL-CIO-CLC, Local Union 880 Case 8-RD-1451

May 8, 1989

DECISION AND DIRECTION

**BY CHAIRMAN STEPHENS AND MEMBERS
JOHANSEN AND CRACRAFT**

The National Labor Relations Board, by a three-member panel, has considered an objection to and determinative challenges in an election held August 17, 1988, and the attached Regional Director's report and supplemental report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 28 for and 23 against the Union, with 14 challenged ballots, a number sufficient to affect the results of the election.

The Board has reviewed the record in light of the exceptions¹ and brief and adopts the Regional Director's findings² and recommendations, except that it finds the Employer's Objection 1 raises substantial and material issues of fact³ that may best be resolved by a hearing.

DIRECTION

It is directed that a hearing be held before a designated hearing officer to receive evidence to resolve the issues raised by the Employer's Objection

¹ The Union excepted to the Regional Director's report sustaining the challenge to Mceuen's ballot. It is undisputed that Mceuen was discharged 2 days before the election. The Union's only objection to the Regional Director's report was that the Regional Director erred in stating that no unfair labor practice charge had been filed respecting the discharge. In a supplemental report issued December 6, 1988, the Regional Director noted that such a charge had been filed but that it was withdrawn by the Union on October 31, 1988. The Union has not excepted to this supplemental report or otherwise contended that the charge has not been withdrawn.

² Absent exceptions we adopt pro forma the Regional Director's recommendation that the challenges to the ballots of Gravis Mceuen and Strittmatter be sustained and that a hearing be held to resolve the challenges to the ballots of Ash, Burson, Habick, Lucas, McGhee, Millirons, Parson, Sapsford, Smith, Taylor, and Waske.

³ The Employer objected to the conduct of the election because the Board agent failed to supply a voting booth as promised, resulting in a compromise of the secrecy of the ballot. The Regional Director found merit in the objection and recommended setting aside the election and ordering a second election be held. The Union's exceptions to the Regional Director's findings raise substantial issues of fact, including whether the Region interviewed the Union's election observer and whether other employees were permitted in the polling area while each employee was voting. We note among other things that the Union quotes the sentence from the Regional Director's report stating that several voters were in the voting room at the same time and saw how other voters voted and that the Union states it will present evidence which refutes this evidence. The affidavit of the Union's business representative, who was at the Employer's facility on the day of the election, states that it was reported to him that employees remained outside the room until each employee who was voting had marked his ballot. Under these circumstances we believe the better course is to hold a hearing before ruling on the merits of the objection.

1 and the challenged ballots of Ash, Burson, Habick, Lucas, McGhee, Millirons, Parson, Sapsford, Smith, Taylor, and Waske.

IT IS FURTHER DIRECTED that the hearing officer designated to conduct the hearing shall prepare and serve on the parties a report containing credibility resolutions, findings of fact, and recommendations to the Board as to the disposition of the objection and challenges. Within 14 days from the date the report issues, any party may file with the Board in Washington, D.C., eight copies of exceptions. Immediately upon the filing of such exceptions, the filing party shall serve a copy on the other parties and file a copy with the Regional Director. If no exceptions are filed, the Board will adopt the recommendations of the hearing officer.

IT IS FURTHER DIRECTED that this proceeding is remanded to the Regional Director for Region 8 to issue notice of the hearing.

MEMBER JOHANSEN, dissenting

Unlike my colleagues, I would find merit in the Employer's Objection 1, alleging a breach of voter secrecy because of the manner in which the election was supervised, and find that the Union has raised in its exceptions no substantial and material issue of fact warranting a hearing. First, I note that the Union's exceptions do not contradict the Regional Director's finding that employees were permitted in the polling area as other employees voted, but state only that the parties had reached an agreement on a procedure designed to prevent such irregularities. Second, there is no showing here of any abuse of discretion by the Regional Director in his investigation into the objection.¹ Accordingly, for reasons stated by the Regional Director, I would direct that the election be set aside based on the Employer's Objection 1 and a second election ordered.

¹ Had the Region neglected to request to interview the union observer and had the testimony that individual would give contradicted the testimony of other employee witnesses on which the Regional Director relies, one would have expected the substance of that testimony to be conveyed in the Union's exceptions, which it is not. Thus, the Union does not claim that its observer's testimony disputes the finding of objectionable conduct. Because it is the Union's position that voter secrecy was safeguarded by permitting no more than one voter in the polling area at a time, its observer is its only potential witness having sufficient knowledge of the facts to refute conclusively the evidence in support of the objection. As there is no contention that anyone continuously monitored the entrance to the polling area to establish that no two employees were admitted at any one time, neither the union business agent's statement in his affidavit that nothing was reported to [him] which would be inconsistent with the pre-election agreement [to safeguard voter secrecy] nor his further assertion that he had received reports of employees found outside the polling area while others were casting their ballots is a refutation of the specific allegations supporting the objection that were relied on by the Regional Director.

REPORT ON OBJECTIONS AND CHALLENGED BALLOTS

Pursuant to a Stipulated Election Agreement approved by me on August 4 1988, an election was conducted August 17, 1988, among the employees in the following described unit

All full time and regular part time employees employed at the Employer's 1330 Austin Avenue, Akron, Ohio facility, including production, ware house, shipping, drivers, packing, and plant maintenance employees but excluding all managerial, executive, office clerical, sales guards and supervisors as defined in the Act

The Amended Tally of Ballots issued after the election shows that of the approximately 66 eligible voters, 66 cast ballots, of which 28 were cast for and 23 against the Union. There was one void ballot. There were 14 challenged ballots, a number sufficient to affect the results of the election.

On August 24, 1988, the Employer filed timely objections to the election, duly serving a copy thereof on the Petitioner and Union. A copy of the Employer's Objections is attached hereto and incorporated herein.

Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, an investigation of the Objections and Challenged Ballots has been made, and I hereby make the following findings, conclusions, and recommendations.

THE OBJECTIONS

During the course of the investigation, the Employer requested in writing to withdraw its Objections Nos 2, 3, and 4. That request is hereby approved.

OBJECTION NO 1

In this objection, the Employer contends that because the Board Agent failed to provide a voting booth, it was impossible to maintain the secrecy of the ballot or the appearance of privacy for voting.

The election was conducted on August 17, 1988, from 6 a.m. to 7 a.m. and from 2 p.m. to 3 p.m.

The investigation disclosed that the Board Agent arrived at the election site at approximately 5:45 a.m. on the day of the election. Based upon discussions during telephone conferences to obtain the election agreement, the parties expected the Board Agent to provide a voting booth. However, the Board Agent was unable to secure a booth and consequently one was not used during the election.

The election took place in the lunchroom at the Employer's facility. This room, which is approximately 15 feet by 30 feet, contained four long tables positioned parallel to each other from the front of the room to the back. The voters entered the room through a doorway located at the front of the room and approached the observers who were seated behind the second table facing the door. The Board Agent positioned herself at the end of and in front of the observer table. As noted, no booth was provided. Instead, after a voter received a ballot, he or she proceeded to the rear of the room and marked the

ballot on the fourth table with his or her back to the observers.

In support of its Objection, the Employer presented evidence that during the election there were times when one or two employees were standing in line in front of the observer's table waiting to vote while another employee was marking his or her ballot on the back table. A number of employees testified that while awaiting their turn to vote, they saw how the voter in front of them marked his or her ballot. Moreover, employees testified that they had expected a booth to be present at the election and felt that since there was none, the secrecy of the voting process was compromised and they were uncomfortable with the arrangements. Investigation revealed that, during the election campaign, Employer Representatives Larry Saywell and Mike Popowicz had advised employees that a voting booth would be used at the election.

The investigation further disclosed that during both the morning and afternoon preelection conferences the Employer's attorney had expressed concern to the Board Agent that she had not provided a booth. His objection was noted by the Employer's observer who wrote "no voting booth next to his name on the Certification on Conduct of Elections form."

The Board's Notice of Election states "an agent of the Board will hand a ballot to each eligible voter at the voting place. Mark your ballot in secret *in the voting booth provided*." (Emphasis Added.) The *National Labor Relations Board Case Handling Manual (Part II) Representation Proceedings* at Section 11304.3, "Voting Booths," describes a voting booth as "a compartment or a cubicle which not only provides privacy but which also demonstrates the appearance of providing privacy."

The Board is responsible for assuring properly conducted elections and consequently its role in the conduct of elections must not be open to question. *New York Telephone Co.* 109 NLRB 788, 790 (1954). In order to maintain its high standards for election procedures, the Board has further adopted the policy of invalidating elections on the basis of evidence which raises merely a doubt as to the complete secrecy of the balloting process. *Royal Lumber Co.*, 118 NLRB 1015 (1957), see also *Sewell Plastics Inc.* 241 NLRB 887, fn. 4 (1979).

While I am not unmindful of the fact that in many elections Board Agents do not furnish booths because the Employer has agreed in advance to provide one or more boothlike structures, such was not the case in the instant matter. Here, the improvised voting arrangements, specifically the absence of a booth or boothlike apparatus, were entirely too open and too subject to observation to ensure the secrecy of the ballot. *Imperial Reed & Rattan Furniture Co.*, 118 NLRB 911 (1957).

Accordingly, I conclude the Employer's Objection No. 1 has merit and, consequently, I recommend that it be sustained and the election be set aside.

THE CHALLENGES

As noted, there were 14 challenged ballots, a number sufficient to affect the results of the election. At the elec

tion, the Union challenged the ballot of *G Gravis* based on its uncertainty as to the date he began his employment. The following ballots were challenged by the Board Agent inasmuch as their names did not appear on the list of eligible voters: *P Ash F Burson V Habick D Mceuen Jr J Strittmatter R Waske M McGhee J Sapsford R Taylor E Parson H Lucas C Millirons*, and *D Smith*.

By letter dated August 25, 1988, I requested that each of the parties to the election submit their respective positions regarding the validity of the challenged ballots.

The evidence submitted by the parties established that *G Gravis* and *J Strittmatter* commenced their employment with the Employer on July 18, 1988. Inasmuch as the payroll period for eligibility date in this matter was July 16, 1988, I conclude that the above named individuals were ineligible to vote in this election, and in the event that a second election is not ordered in this case, I would recommend that the challenges to their ballots be sustained. *D Mceuen Jr*.

The investigation disclosed that *D Mceuen, Jr* was separated from his employment with the Employer effective August 15, 1988. In order to be eligible to vote in a Board election, an employee must be in the appropriate unit during the payroll period of eligibility and in employee status on the date of the election. *Plymouth Towing Company Inc*, 178 NLRB 651 (1969), *Greenspan Engraving Corp*, 137 NLRB 1308, 1309 (1962). The employee seeking to vote must be employed and working on the established eligibility date, unless he was absent for one of the reasons specified in Stipulated Election Agreement, i.e., vacation, temporary layoff status, or military service. *Roy N Lotspeich Publishing Co*, 204 NLRB 517 (1973). None of these circumstances apply to *Mceuen*.

Inasmuch as *Mceuen* does not meet the eligibility requirements outlined above and there are no pending unfair labor practice charges alleging that his discharge was unlawful, I shall recommend that the challenge to his ballot be sustained.

*P Ash F Burson V Habick, H Lucas,
M McGhee C Millirons, E Parson, J Sapsford,
D Smith*

R Taylor and R Waske

The ballots of the above named individuals were challenged by the Board Agent inasmuch as their names did not appear on the list of eligible voters. The investigation disclosed that these persons were laid off shortly before the conduct of the election.

The Union, contrary to the Employer, takes the position that the layoff is temporary in nature and that these persons have a reasonable expectancy of recall in the near future.

Inasmuch as the challenges to the ballots of *Ash Burson Habrick Lucas McGhee Millirons Parson Sapsford Smith Taylor and Waske* raise issues of fact and credibility which cannot be resolved in an *ex parte* proceeding, I shall recommend that, in the event my recommendation concerning Objection No 1 is not adopted, the challenges to the above ballots be resolved following a hearing before a duly designated hearing officer. However, if a second election is ordered, I recommend that challenges remain uncounted without dispositive ruling as to their ultimate eligibility to vote in the second election.

CONCLUSIONS AND RECOMMENDATIONS

The Employer's request to withdraw Objections Nos 2, 3, and 4 is hereby approved.

I conclude that the Employer's Objection No 1 is meritorious and consequently recommend that it be sustained, that the election be set aside and that a second election be ordered.

I further conclude that the *G Gravis D Mceuen Jr*, and *J Strittmatter* were ineligible to vote in this election and in the event that a second election is not ordered in this matter I would recommend that the challenges to their ballots be sustained.

Finally, I conclude that the challenges to the ballots of *P Ash F Burson V Habick H Lucas M McGhee C Millirons E Parson J Sapsford D Smith R Taylor and R Waske* raise issues of fact and credibility which cannot be resolved *ex parte* and therefore recommend that if a second election is not ordered in this matter, these challenges be resolved following a hearing before a duly designated hearing officer.