St. Joe Minerals Corporation *and* David LaPlatney, Petitioner and United Steelworkers of America, AFL-CIO-CLC and Local Union 3701. Case 3-RD-903

June 15, 1989

DECISION AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND HIGGINS

The National Labor Relations Board, by a three-member panel, has considered an objection and determinative challenges in an election held on July 17, 1986, and the attached decision and report of Administrative Law Judge David L. Evans recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election issued by the Regional Director for Region 3. All of the 317 ballots cast in the election were challenged.

The Board has reviewed the record in light of the exceptions[1] and briefs, and has adopted the judge's findings[2] and recommendations to the extent consistent with this decision.

The judge found, and we agree, that during an economic strike that the Union conducted against the Employer, a reorganization of the Employer's mining operations resulted in the elimination of over 200 unit positions. We further agree that the elimination of these jobs was predicated on valid economic reasons that were unrelated to the strike and permanently contracted the bargaining unit to 70 positions. Consequently, the number of strikers who retained their voting eligibility in the contracted unit is limited to a maximum of 70.[3]

By stipulation of the parties at the hearing, it was agreed that in the election conducted 1 week before the anniversary date of the strike, the 35 former strikers who crossed the picket line to return to work (crossovers) and the 21 employees transferred from outside the unit as permanent replacements for striking employees (transferees) were eligible to vote. There are no exceptions to the judge's finding that, insofar as 14 positions in the contracted unit remained unfilled at the time of the election, 14 senior strikers whose ballots were challenged were eligible to vote. There are also no exceptions to the judge's finding that 21 additional senior strikers who had effectively been permanently replaced by the 21 transferees were eligible to vote.[4]

An issue to be decided in this case is whether under Section 9(c)(3) of the Act, the presence of the 35 crossovers who abandoned the strike and returned to work extinguished the voting rights of a corresponding number of the next senior employees who remained on strike. The judge held that it did, stating that the guaranty of voting rights to replaced strikers in Section 9(c)(3) "has only been held to apply to the circumstances where employees hired during a strike as permanent replacements were not bargaining unit members at the beginning of the strike involved." He rejected, therefore, the Union's position that the existence of the crossovers preserved voting rights, on a one-for-one basis, in those who remained on strike. We disagree with the judge's rationale on this issue.

Section 9(c)(3) states in relevant part that "employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote . . . in any election conducted within 12 months after the commencement of the strike." By its own terms, the provision preserves full voting rights to strikers who are not entitled to reinstatement. As the judge correctly noted, the Board has construed this section and its legislative history to mean that permanently replaced strikers generally retain their right to vote in an election conducted within 12 months after the commencement of an economic strike.[5] We find nothing in the language or legislative history of this section, and the judge cites no authority, to support his conclusion that this right is forfeited when replacement is accomplished with

[1] There are no exceptions to the judge's recommendation to overrule the Union's objection to the results of the election.

On May 7, 1987, the Union filed a motion for leave to file a supplemental brief in support of its exceptions and requested the Board to take administrative notice of published reports that the Respondent may be sold, as well as pending Federal trade legislation that the Union alleges is relevant to the unit contraction issue On August 21, 1987, the Union moved to file a second supplemental brief to inform the Board that the sale of the Respondent was imminent, and requested that the Board delay its decision until the consummation of the sale in order to permit the effects of the sale to be taken fully into account. We deny the Union's motions as the evidence proffered would not affect our determination of the eligibility of unit employees at the time of the election.

[2] The Union has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd 188 F.2d 362 (3d Cir 1951) We have carefully examined the record and find no basis for reversing the findings.

The judge mistakenly stated that the price of slab zinc at the time of the hearing was 51 cents per pound rather then 45 cents per pound He also mistakenly stated that the number of surface employees in the prestrike work force was 20 rather than 65. These errors do not affect our decision

[3] See, e.g., *Lamb-Grays Harbor Co.*, 295 NLRB No. 40 (June 15, 1989).

[4] See the discussion in fn. 8 below. Based on the seniority list of striking employees, the judge should have included Paul F Burns as a member of this group, even though Burns did not cast a vote in the election. Robert E Church, the striker with the least seniority in the group of 21 replaced strikers listed in fn 8 of the judge's Decision, should therefore not have been included. He remains eligible and his ballot shall be opened and counted, however, as a result of our finding below that 16 additional strikers were eligible to vote.

[5] *W. Wilton Wood, Inc.*, 127 NLRB 1675, 1677 (1960).

bargaining unit personnel. Accordingly, we hold that all replaced strikers, regardless of whether they were replaced by unit or nonunit employees, remain eligible to vote for 1 year after the strike begins.

A secondary issue raised by this case is whether a continuing striker is "replaced" for voting eligibility purposes under Section 9(c)(3) when a crossover striker returns to his or her former job. The parties stipulated at the hearing that 19 of the 35 crossovers returned to the same or substantially similar job that they held prior to the strike.[6] In our view, those employees who returned to *their former or substantially similar* jobs did not replace any of the employees who remained on strike. Their status is most closely comparable to those 14 senior striking employees who "fill" for voting eligibility purposes the 14 vacant positions in the contracted unit. No other strikers can maintain a continuing claim to voting eligibility vis-a-vis those positions.[7] On the other hand, the status of the remaining 16 crossovers who returned to jobs *different* from those they held before the strike is similar to that of a new hire or nonunit transferee specifically hired as a permanent replacement to fill the position left open by a continuing striker. As such, 16 additional senior strikers replaced by the crossovers retained their voting eligibility. Accordingly, we shall order that the ballots cast by any of these eligible striking employees be opened and counted.[8]

[6] These employees are George E. Allen, Kenneth E. Allen; Donald W. Bigelow; Walter J. Clement; Herbert C. Finley Jr.; Lauren A. Finley; Larry J. Folsom; Peter L. George; Robert P. Morehouse; Albert P. Melisko; Michael S. Otto; Michael I. Porter; Alton P. Stowell, Douglas F. Walroth; David W. Whitford; William P. Whitaker; Chris W Weller; William E. Vatter Jr.; and Algie R. Youngs.

[7] We emphasize that economic strikers' voting eligibility rights are governed by the Board's interpretation of Sec. 9(c)(3) and are independent of reinstatement rights as defined by *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd 414 F.2d 99 (7th Cir 1969). E g, *Eck Miller Transportation Corp.*, 211 NLRB 251, 253 (1974)

Moreover, we note that our holding here with respect to the voting eligibility rights of crossovers and strikers does not conflict with the Supreme Court's discussion of the relative job retention rights of those two groups under both the Railway Labor Act and the National Labor Relations Act in *TWA, Inc. v. Flight Attendants*, 109 S.Ct. 1225 (1989).

[8] We note that the parties stipulated to the names of 19 strikers who would *not* be eligible to have their votes opened and counted if the Board found, as we have, that there was no corresponding striker eligibility with respect to the 19 crossovers returning to the same or substantially the same jobs This stipulation does not, however, follow the seniority list elsewhere urged by the Union and relied on by the judge without subsequent exception as the appropriate determinant of the order of striker eligibility. Further, the stipulation of 19 possibly ineligible strikers includes the names of 8 individuals who the judge found, again without subsequent exception, were eligible to vote on the basis of seniority in the group of 21 permanently replaced strikers. Accordingly, in determining those additional strikers eligible to vote as a result of our decision, we shall disregard the aforementioned stipulation and follow the seniority list.

The 16 additional strikers eligible to vote are Robert E. Church, David A. Doiron; Thomas J. Sullivan Sr.; William J. Finnie; Alan H. Durham; Charles D. Given; Lane G. Weaver; Robert D. Hendrick; Richard A. Soto; Robert W. Ford; Ronald K. Woodard; Robert B. Curtis, James L Waugh, Robert D. Allen; Ray L. Parker; and Harold C Durham. Doiron, Hendrick, and Soto did not vote.

[9] In listing the names of eligible voters, the judge mistakenly identified junior strikers Kenneth A. Richards and Jerry A. LaRock. The seniority list indicates that the correct names of eligible senior strikers are Kenneth B. Richards and Donald V. LaRock.

DIRECTION

The case is remanded to the Regional Director for Region 3 who shall, within 10 days from the date of this Decision and Direction, open and count the ballots of 91 employees as recommended by the administrative law judge in his decision and report.[9] In addition to the aforesaid 91 ballots, the Regional Director shall open and count the ballots of Robert E. Church; Thomas J. Sullivan Sr.; William J. Finnie; Alan H. Durham; Charles D. Given; Lane G. Weaver; Robert W. Ford; Ronald K. Woodard; Robert B. Curtis; James L. Waugh; Robert D. Allen; Ray L. Parker; and Harold C. Durham. The Regional Director shall thereafter prepare a revised tally of ballots and, based on the tally, issue an appropriate certification.

Paul J. Schrader, Jr., Esq. (Bryan Cave, McPheeters & McRoberts), of St. Louis, Missouri, for the Employer.
E. Joseph Giroux, Esq., of Buffalo, New York, for the Union.

DECISION AND REPORT ON OBJECTIONS TO ELECTION AND CHALLENGES

DAVID L. EVANS, Administrative Law Judge. On 27 June 1986, pursuant to a Decision and Direction of Election issued by the Regional Director, National Labor Relations Board, Region 3, an election by secret ballot was conducted on 17 July in the following appropriate collective-bargaining unit:

> All production and maintenance employees employed by the Employer at its Balmat and Pierrepont, New York, mines, excluding all salaried employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

The Tally of Ballots served upon the parties on 19 August reflected the following results:

> Approximate number of eligible voters—364
> Void ballots—0
> Votes cast for United Steelworkers of America, AFL-CIO, CLC and its Local Union 3701—0
> Votes cast against participating labor organization—0
> Challenged ballots—317
> Valid votes counted plus challenged ballots—317

Therefore, the challenges were sufficient in number to affect the results of the election.

At the conclusion of the election all ballots were impounded pursuant to a specific provision of the Decision and Direction of Election which allowed time for the final disposition of a then-pending related unfair labor practice charge and which further allowed time for review of the Decision and Direction of Election if requested and granted. The impoundage was lifted by order dated 13 August.

On 25 August the Union timely filed an objection to the conduct of the election and to conduct affecting the results of the election.

Thereafter, on 26 September, the Regional Director for Region 3, on behalf of the Board, issued an order directing hearing and notice of hearing. Attached thereto was a copy of the Union's objection. Also attached as appendices were listings, by categories, of employees whose ballots were challenged.

Pursuant to the direction, I conducted a hearing in Syracuse, New York, on 15, 16, 23, and 24 October 1986. Appearances were made by the Employer and the Union, but not by the Petitioner. The Union filed a brief; the Employer filed a brief and reply brief as permitted by order issued at hearing. These briefs have been duly considered.

The Objection

The objection filed by the Union states:

> The designated observers of the Employer, St. Joe Minerals Corporation, were management employees with supervisory authority within the meaning of the National Labor Relation Act whose presence at the polling place during voting and in the official capacity as an observer was designed to have an undue influence on voters and had an undue influence on voters.

The Employer's observers were Charles Bridge and Norman Young. In its brief the Union argues that Bridge was a supervisor within Section 2(11) of the Act. No such contention is made as to Young, but the Union argues that both Young and Bridge "are closely identified with the Employer." Section 2(11) of the Act provides as follows:

> 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 responsibly 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.

As for Young, a safety engineer in the Employer's underground zinc mines, the Union argues that he has the authority "to settle grievances and discipline employees in the safety area." (Br. at 22–23.) None of the other indicia of supervisory status enumerated by Section 2(11) are referred to by the Union.

The Union called only Lester Simmons to testify in support of the objections. Simmons, at the time of the hearing, was an organizer for the Union and had been employed as such since March 1985. For the 3 years preceding that month he was employed by the Employer as a miner and was president of the Local Union. Simmons testified that, in his capacity as the Local's president, he also functioned as the Union's safety representative. As such he performed mine inspections with Bridge at monthly and yearly intervals and further exercised "walk-around" inspection rights with Bridge pursuant to provisions of the Mine Safety and Health Act of 1977. Simmons testified that he treated Bridge as a supervisor and, on one occasion:

> I asked him, could he reprimand someone for a safety infraction, and he said he could, he had the authority to do that.

On cross-examination, Simmons could give no further details of this exchange with Bridge, such as a date or other circumstances. Simmons further testified that two personnel directors, who are no longer employed by the Employer, told him that Bridge "had full authority as supervisor." Again, Simmons could give no date or other meaningful particulars as to the circumstances of these statements.

Finally, Simmons testified that in one grievance meeting Bridge stated that a certain employee "deserved some discipline for his actions." There is no evidence of what the grievance was about, or that the employee received any discipline, or that the Employer ever considered discipline of the employee for the "actions" to which Simmons generally referred, or that the Employer, or anyone else, considered Bridge's statement to be a recommendation upon which the Employer could possibily have acted.

Bridge's job description was entered into evidence. The Union argues that the description "indicates indirect supervision of bargaining unit employees." (Br. at 23.) The Union cites no provision of the job description which would lead to that conclusion and there is no other support in the record for this contention. Specifically, the job description does not relate that any employees report to Bridge for any aspect of the employment relationship, and there is no other record evidence that any employees reported to Bridge.

There is no evidence that Young has ever performed any functions within the ambit of Section 2(11) of the Act. The only testimony offered in support of the Union's objections based on Young's serving as an observer was, again, that of Simmons. Simmons, again, testified that a former personnel director had once told him that Young was a "supervisor." Again, however, Simmons could give no meaningful details of the statement, such as a date.

Simmons' testimony of what prior personnel directors had said was presented as admissions against interest by the Employer. The statements by the prior personnel directors were necessarily made in the 3-year period prior to Simmons' quitting in March 1985. Therefore, they were made at least 1 year and 4 months, and as much as

4 years and 4 months, before the election. Assuming that the statements were binding and conclusive admissions against interest at that time, there is no evidence that the authority on which the alleged admissions were premised were still possessed by Bridge and Young at the time of the election. Moreover, the "discussions" were presented in a nearly perfect logical vacuum, almost totally devoid of any element upon which credibility could be examined. Therefore, I find that the Employer has made no binding admission that either Bridge or Young were supervisors within the meaning of Section 2(11) of the Act.

Since there has been presented no other evidence that either Young or Bridge were ever invested with any of the authorities enumerated in Section 2(11) of the Act, and no evidence that either is so closely identified with the Employer that the employees would believe that they functioned as an arm of management,[1] I find and conclude that the Union has failed to support its Objection, and I recommend that the objection be overruled.

The Challenges

For many years the Union has represented the surface and underground employees employed by the Employer at its Balmat and Pirrepont mines in upper New York State. (These mines are commonly referred to, collectively, as the Balmat mines.) Negotiations for a renewal contract began in May 1985. When no agreement was reached by 22 July 1985 the employees began an economic strike which has continued through the dates of the 17 July 1986 election and the October 1986, hearing herein. During the strike the Employer has hired no new personnel. In October 1985, the Employer began changing the status of certain supervisors and other nonunit personnel; they were given certain jobs which had been held by bargaining unit personnel before the strike began. These individuals, of whom there were 21 still employed at the time of the election, were told that they were being permanently transferred to the unit and, at the hearing, the Union agreed that the "transferees" were permanent replacements who were entitled to vote.[2]

In January 1986, some striking unit employees began to cross the picket lines and return to work to the same job or to jobs substantially equivalent to those they held before the strike; there were 35 of these "returnees" still employed at the time of the election, and the parties are in agreement that these employees are entitled to vote.[3]

At the hearing the Employer contended that the bargaining unit has permanently contracted to a complement of 70 employees, and further contended that all but 14 of the 70 jobs for these employees been filled by permanent replacements. The Union disputes the assertion that the unit has contracted to 70 employees. Alternatively, the Union asserts that, even if the unit has so permanently contracted, the 14 senior employees who had continued striking were entitled to vote because the Employer admits that it had replaced only 56 strikers by the election date. (A stipulated seniority list was received in evidence.) The Employer agrees that 14 additional employees were eligible to vote, but it disputes that the determination of which employees properly compose this group should be made on the basis of seniority. The Employer contends that the group entitled to vote because the Employer had not filled 14 of the 70 jobs remaining (under its theory of a contracted unit) should be held to be composed of 2 employees who returned to work between the election eligibility date and the date of the election and 10 employees who returned to work between the date of the election and date of the hearing herein, and the final 2 employees in this group should be selected from the stipulated seniority list. Further, the Employer argues that the determination of which employees compose this group of 14 eligible employees should be made on the basis of status alone, regardless of whether the employees included attempted to vote. These contentions of the Employer have been considered seriously, but they may be rejected without benefit of protracted discussion. The Employer cites no authority for its position except a case dealing with recall rights after an offer to return to work from strike has been made, a circumstance far removed from anything involved herein. The Board law, as approved repeatedly by the courts, is that unreplaced strikers who appear to vote and are challenged are eligible to vote on the basis of seniority;[4] the fact that a former striker has returned to work after the election eligibility date has never been held to be a relevant consideration. Therefore, I conclude that the 14 senior striking employees whose ballots were challenged were eligible to vote.[5]

Appendix A to the notice of hearing contains the names of 261 employees who were challenged by the Board agent conducting the election because their names were not included on the election eligibility list submitted by the Employer. Apparently the Employer did not include their names on the eligibility list because they had not returned from strike by the eligibility date or because their jobs had been abolished, as the Employer contends herein. The 14 employees named in footnote 5

---

[1] Cf. *River Manor Health Facility*, 224 NLRB 227 (1976), enfd. 559 F.2d 1204 (2d Cir 1977).

[2] These eligible employees are. Robert G Baderman; Charles H. Fuller; Richard Lumley, William M. Baker; Robert W Gonyea, Rosalie D. Munger, David W. Bigelow; Barbara Halladay; David R Nace; Ralph M. Demel; Ricky L Hance; David C. Roberts; Wayne I Denesha, James P. Hanratty; Leland D. Ryan; William A Farr; Cynthia H. June; James P. Wranesh; Karl E. French, Jon W. Kennedy, Laurel L. Finley

[3] These eligible employees are. Darrell E Allen; Larry J. Folsom; Thomas H. Sleeman, George E. Allen; Peter L. George, Roy K Smith; Kenneth E. Allen, Ivan C Gordon, Roy C Stone; Donald A Baker; Daniel L. House; Alton P. Stowell; David B Bancroft, Royal J. Ingram; William E. Vatter; Donald W. Bigelow, James J. Lasher; Douglas F. Walroth; Cortland J. Bridge; Daniel L. Losey; Chris W. Weller; Walter J. Clement, Robert P. Morehouse; Robert Whitaker, Carl B Creighton, Albert J. Melisko; William P. Whitaker; Herbert C. Finley, Jr; Michael S. Otto, David W. Whitford; Herbert C. Finley, Sr; Howard L Paige, Algie R. Youngs; Lauren A. Finley, Michael I. Porter.

[4] *Pipe Machinery Co*, 76 NLRB 247 (1948) (striker and replacement eligibility questions are to be determined through the challenged ballot procedure); *K & W Trucking Co.*, 267 NLRB 68, 69 (1983) ("most senior striking . employees" were eligible).

[5] These eligible employees are. William D. Bowman; Richard F. Shampine; Edward W. Hooper, Cyrus W Weller, Bernard A. Stevens; Casmir R. Roe; Holis E. Cornell; Ernest K. Brown, Percy J. Woods; Raymond V. Card; Gerald D Thornton; Lloyd W. Walrath; Alton D Gibson; Kenneth A. Richards

above are included in this list; their eligibility has been determined above; therefore, the eligibility of the remaining 247 employees listed on Appendix A are to be further determined herein.[6]

Section 9(c)(3) of the Act provides, in relevant part, that:

> Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within 12 months after the commencement of the strike.

This section has been consistently interpreted to mean that, in elections conducted within 12 months of the inception of an economic strike (as here) striking employees retain their right to vote, even if they had been permanently replaced by the Employer involved.[7]

It is undisputed that the Employer permanently replaced 21 employees with former supervisors or other nonbargaining unit personnel, the transferees. Therefore, a right to vote was held for 1 year from the inception of the strike by the 21 senior striking employees who were immediately junior to those listed in footnote 5, and their ballots should be opened and counted.[8]

The Union contends that the 35 strikers who returned to work by the eligibility date (the "returnees") should be treated as permanent replacements, the existence of whom, under Section 9(c)(3) of the Act, creates voting rights, on a one-for-one basis, in the strikers who had not returned. Section 9(c)(3) has never been so interpreted. Although citing no authority for its position, the Union argues, at its brief, page 20:

> The dispute centers upon the 35 striking employees who returned to work. The Employer has characterized those employees as permanent replacements. At least seventeen (17) of these employees returned to jobs other than those they held at the start of the strike. Each of these employees was promised that he would be treated as a permanent replacement and would not be laid off in the event of a strike settlement even if there were more senior employees who had previously filled those jobs.
>
> Under the circumstances of this case, the thirty-five (35) returning employees should be treated, for purposes of Section 9(c)(3), as permanent replacements. Such a decision would indeed effectuate the purposes of the Act since there are striking employees who were replaced by those employees. Indeed striking employees, upon a strike settlement, may, depending upon the terms of that settlement, return to those jobs.
>
> Congress, the Board and the Courts have indicated that the purpose of Section 9(c)(3) is to avoid "union busting," which would occur by disenfranchising strikers whose jobs have been filled by others. Permitting striking employees to vote where their jobs have been filled by less senior employees or employees from other jobs who have returned to work would effectuate this purpose of the Act.

It is true that upon their return from strike the Employer told the returnees that they were considered "permanent replacements." The Employer told the returnees this because it was then promising that it would not bargain away their rights to the jobs in which they were then being placed in the event of a later strike settlement agreement, even if those who returned pursuant to a strike settlement agreement had greater seniority. However, as the quoted Union argument recognizes, despite the assurances given to the employees, future strike settlement agreements may well displace the returnees from their current jobs. Additionally, although the Employer did use the term "permanent replacement" in describing to the returnees their new status this is not the same use of the term as envisioned by the statute or discussed in any Board or court cases on the topic. Section 9(c)(3) has only been held to apply to the circumstance where employees hired during a strike as permanent replacements were not bargaining unit members at the beginning of the strike involved.

Therefore, I reject the position of the Union that the existence of returnees created voting rights in those who were still striking at the election eligibility date.

The above findings establish the eligibility of 56 employees who were working at the time of the election (transferees and returnees), 14 senior striking employees (whose eligibility existed because at least that many jobs existed for which there had been no permanent replacements hired), and 21 employees for whom eligibility existed by operation of Section 9(c)(3) because, at their time of the election, there had been 21 permanent replacement employees (the transferees) employed the Employer. The Employer contends that no more than these 91 voters are eligible because the jobs of all remaining strikers had been abolished. The Union denies that any jobs have been permanently abolished; alternatively it contends that, even if some jobs have been abolished, it is not the great number argued by the Employer.

At the time the strike began on 22 July 1985, approximately 310 employees were employed at the Balmat mines. These mines are composed of the Pierrepont mine and the Balmat mines which are called Nos. 2, 3, and 4. The Pierrepont mine contains a higher grade ore than that of the Balmat mines. The mouths of the Balmat mines are within 3 miles of each other and 10 miles away from the Pierrepont mine. There were 10 over-the-road truckdrivers employed to transport ore mined at Pierre-

---

[6] Also attached to the notice of hearing were Appendices B and C. The 56 employees listed thereupon were challenged by the Union on the stated bases that they were either temporary strike replacements or supervisors within Sec. 2(11) of the Act. The Union withdrew these challenges at the hearing. This fact does not affect the number of challenges yet to be determined herein as all employees listed on Appendices B and C fall into the categories discussed, and found eligible, in fn. 2, 3, or 5, above.

[7] *W. Wilton Wood Inc.*, 127 NLRB 1675 (1960); *Kingsport Press, Inc.*, 146 NLRB 1111 (1964), see also 105 Cong. Rec 6396 (1959)

[8] These eligible employees are: Francis J. Mousaw, Jr; Howard A. Newcombe; Robert R. Hooper, Russell P. Clintsman; Everett A Fleming; Charles H. Reynolds; Jerry A. LaRock; Raymond O. Moon; William E. Isereau; Henry N McCready; Richard J. Hartle; Joel E. Reynolds; Gordon H. Hamilton, Dwight A. Knowlton; Gerald E. McIntosh; Lawrence E. Woodrow; Charles A. Shampine; Kenneth W. Denesha; Erwin J. Hamilton; Eugene D. Morrow; Robert E. Church.

pont to the areas of the Balmat mines. At the surface near the Balmat mines' mouths are located a mill, a carpentry shop, and a maintenance shop. The function of the mill is to wash sulfides from the ore which has been mined and crushed. The crushed, washed ore is called zinc concentrate. Depending on the purity, it takes approximately 2 tons of crushed ore to make 1 ton of concentrate. The concentrate is shipped by rail to the Employer's smelter in Monaca, Pennsylvania. The Monaca smelter operation gets 40 percent of the concentrate it uses from the Balmat mines; the remainder is purchased from foreign sources and obtained from domestic "secondary feeds" (recovery from zinc-containing compounds which have no sulphur). The smelting operation involves roasting (heating), sintering (removing of impurities), aglomerating (mixing with other particles), furnacing (reducing the primary product to zinc oxide), and condensing of the oxide vapors to slab (or cast, or ingot) form for sale to customers. It takes about 2 tons of concentrate to make 1 ton of slab zinc.

Before the strike, 28 bargaining unit employees were employed at the Pierrepont mine; 50 at Balmat No. 2; 50 at Balmat No. 3; 160 at Balmat No. 4; 20 on the surface at Balmat; and there were about 10 truckdrivers. At the time of the hearing the Employer employed 13 employees at the Pierrepont mine; none at Balmat No. 2; none at Balmat No. 3; 35 at Balmat No. 4; and no truckdrivers, the truckdriving operation having been subcontracted during the strike. The Employer contends that the reduction of the employee complement is not a result of the strike but a result of unrelated economic forces. The Employer further contends that the unit reduction, at least to the number of 70, is permanent because it is most improbable that the demand for domestic zinc concentrate will ever rise above present day levels, but, even if it did, the Employer has determined that it can operate most efficiently at an output level which would require no more than 70 employees.

The Employer placed in evidence a series of graphs reflecting that, over the last 20 years, domestic slab zinc consumption has decreased about 40 percent; slab zinc imports, mostly from Canada, have increased 65 percent over the same period; and domestic zinc smelting capacity has been reduced 75 percent (so that the Monaca smelter is 1 of only 4 left in the United States whereas there were 15 such smelters in 1965). During the week before the hearing closed, the price of slab zinc was 51 cents per pound which was also the rate at the time the strike began. Unchallenged documentation introduced by the Employer reflects that, in terms of 1986 dollars,[9] the peak price of zinc since 1918 was 54 cents per pound in 1974, and the low was 31 cents per pound in the spring of 1986.

In 1985, when the unit complement was about 298 employees, the Balmat mines produced 106,000 tons of zinc concentrate. In 1983 and 1984 the Employer employed an average of 448 unit and nonunit employees and supervisors to produce approximately the same amount of concentrate. In the 9-month period of 1986 before the month of the hearing herein opened, the Employer produced 64,000 tons of concentrate, or approximately 7,000 tons per month, or a projected annual output of 85,000 tons of concentrate for 1986. To do this the Employer employed an average of 106 total (unit and nonunit) employees and supervisors.

The Employer called two witnesses in support of its contention that the unit had permanently contracted to 70. The first witness was Robert Sunderman, president of St. Joe Resources which owns St. Joe Minerals, the Employer herein. The Employer's second witness was Larry Allen Straw, general mine superintendent of the Balmat mines.

Sunderman testified that in 1984 the Employer began drafting production scenarios to determine the maximum efficient operation. Factoring in the various variables involved, the Employer concluded in late June or early July 1985 (or just before the strike began on 22 July) that the lowest production cost per ton of zinc concentrate could be achieved if production were limited to 70,000 tons per year. Beyond this limit, the Employer's projections predicted, production costs would rise so fast that it would be cheaper to purchase zinc concentrate on the open world market. Further, the Employer concluded at the same time that it could produce 70,000 tons of concentrate with only 70 unit employees (or about one-quarter of the prestrike work force) because of several capital improvements in the form of labor-saving devices (as described by Straw), and because of the availability of higher grade ores at the Pierrepont mine. (The higher the grade of ore, the less of it that has to be mined to produce a given quanity and quality of zinc concentrate.)

During informal negotiations sessions of April and May 1985, and during formal negotiations in June and, thereafter, the Employer's negotiators told the Union that production costs and the unit complement would have to be reduced. In all such sessions the employer representatives told the Union that the employee reductions could be achieved by normal attrition; the representatives never suggested that permanent layoffs would be necessary; they never told the Union that the Employer had decided that it would limit production to 70,000 tons; and they never told the Union that the Employer could produce that annual tonnage with only 70 unit employees.

On the contrary, in a letter dated 4 September 1985, the Employer told the employees of its position in the strike (which was then 7 weeks old):

> To compete in the world zinc mining market, we must: (a) reduce our energy costs through conservation and lower rates, (b) reduce labor costs through improved productivity, (c) improve mining methods, grade and/or techniques. Also, new mine prospects will be limited to only areas that have high grade and substantial zinc deposits.
>
> . . . .
>
> After reviewing current economic conditions in the zinc industry and how these conditions relate to our operation, it is not economically feasible due to the low grade and high cost of mining most of the ore (with a few limited exceptions) to operate No. 2

[9] The record, p. 24, LL. 11–12, is corrected to change "a constant $86" to "a constant '86 dollar."

and No. 3 Mines. As a result, the Company is combining No. 2, No. 3 and No. 4 Mine into the Balmat Mine Department.

Will there be layoffs? Unfortunately, the answer is yes. But remember, there were one hundred and seventy-eight men layed [sic] off after the 78–79 strike ended. Out of that whole group, only fifteen were never recalled. As you are aware, a lot depends on the economy and the price of zinc.

The letter continued that in negotiations the Employer had proposed a profit-sharing plan which would have netted each Balmat employee $923 had the plan been in effect during 1984. In discussing this proposed profit-sharing plan with the Union during the negotiations, the Employer explained its projections upon the basis of continuing production of 100,000 tons of zinc concentrate annually.

In sum, the evidence is that at least 7 weeks into the strike the Employer had foretold of no layoffs, except temporary ones, had not shared its conclusion that it would be more profitable to cut production by 30 percent (to 70,000 tons), and had not told either the employees or the Union that only one-fourth of the prestrike complement was needed to produce that tonnage. The Union relies on these facts in arguing that the 70,000 ton limitation is nonexistent. In addition, the Union argues that even if production costs per ton were to go up with an increase in production volume (as the Employer argues), the level of production is necessarily a function of price; that is, if the price is high enough production would continue to rise as long as reasonable profits are returned. (Or, as stated in the letter of 4 September 1985, "a lot depends on the economy and the price of zinc.")

The Union's arguments contain much logic in terms of supply-and-demand economic reasoning, and the Employer's representation that production would not rise above 70,000 tons per year (no matter what the market price of zinc may be) is extremely suspect. This is especially true in view of the fact that the Employer at the time of the hearing was producing concentrate at a rate of 85,000 tons per year. Moreover, the Employer's failure to tell the Union of the proposed 70,000 tons per year limit in negotiations casts further suspicion; in negotiations it obviously would have been to the Employer's tactical advantage to tell the Union that reduced output, and a concomitant reduction in employee complement, were in the future if such had been true.

However, even if there had not been a prestrike decision to limit production to 70,000 tons, the fact remains that the Employer has made a great number of changes resulting in a substantial reduction of the operation and a permanent reduction in the employee complement.

There is no dispute by the Union that automated, highly specialized machinery has been introduced into the Balmat mines; this machinery has allowed, and will continue to allow, a reduced level of employment to produce the amount of tonnage that is presently marketable, or appears to marketable, in the foreseeable future. The Union also did not dispute the testimony of Sunderman that the domestic demand for zinc has steadily decreased for the last 20 years, and that, while there was a slight price rebound at the time of the hearing, there is no reasonable prospect that the worldwide demand for zinc will rise any more than 1 percent per year in the foreseeable future. With no more of a rise in demand than this, there is no prospect for any dramatic rise in the price of zinc. There is also no rebuttal by the Union of the Employer's testimony that mines 2 and 3 have been closed; No. 2 has been allowed to flood (by natural seepage) to such a level that the only use of the mine is as a second escape route for mine No. 4. Mine No. 3 is in the process of being flooded completely. It is also undisputed that the cost of reopening a once-flooded mine is prohibitive. Therefore, hereafter, the Balmat operation will include only the No. 4 Balmat mine and the Pierrepont mine. The Union further did not dispute that these mines can produce 70,000, 85,000, or even 100,000 tons per year by employment of only 70 unit employees.

Finally, the Union admits that from the beginning of negotiations (that is to say, long before the strike began) that the Employer proposed to contract out the jobs of ore-trucking, janitorial services, and watchmen. These changes have been implemented with the result of permanent loss of another 11 jobs.

In summary, the Union has produced no countervailing evidence, either expert or otherwise, to rebut the Employer's testimony and documentation that all marketable output can hereafter be achieved with 70 employees, and I find that to be the fact.[10] Therefore, I conclude that the employees heretofore named in footnotes 2, 3, 5 and 8 are the only ones who were entitled to vote.

Accordingly, I recommend that the Regional Director order opened and counted the ballots of the following voters, and that the appropriate certification thereafter be issued:

Darrell E. Allen	Jon W. Kennedy
George E. Allen	Dwight A. Knowlton
Kenneth E. Allen	Jerry A. LaRock
Robert G. Baderman	James J. Lasher
Donald A. Baker	Daniel Losey
William M. Baker	Richard Lumley
David B. Bancroft	Henry N. McCready
David W. Bigelow	Gerald E. McIntosh
Donald W. Bigelow	Albert J. Melisko
Williama D. Bowman	Raymond O. Moon
Cortland J. Bridge	Robert P. Morehouse
Earnest K. Brown	Eugene D. Morrow
Raymond V. Card	Francis J. Mousaw, Jr.
Robert E. Church	Rosalie D. Munger
Walter J. Clement	David E. Nace
Russell P. Clintsman	Howard A. Newcombe
Holis D. Cornell	Michael S. Otto
Carl B. Creighton	Howard L. Paige
Ralph M. Demel	Michael I. Porter
Kenneth W. Denesha	Charles H. Reynolds
Wayne I. Denesha	Joel E. Reynolds
William A. Farr	Kenneth A. Richards
Herbert C. Finley, Jr.	David C. Roberts

[10] This element of proof produced by the Employer distinguishes on the facts all contrary cases cited by the Union in its brief

Herbert C. Finley, Sr.
Laurel L. Finley
Lauren A. Finley
Everett A. Fleming
Larry J. Folsom
Karl E. French
Charles H. Fuller
Peter L. George
Alton D. Gibson
Robert W. Gonyea
Ivan C. Gordon
Barbara Halladay
Erwin J. Hamilton
Gordon H. Hamilton
Ricky L. Hance
James P. Hanratty
Richard J. Hartle
Edward W. Hooper
Robert R. Hooper
Casmir R. Roe
Leland D. Ryan
Charles A. Shampine
Richard F. Shampine
Thomas H. Sleeman
Roy C. Smith
Bernard A. Stevens
Roy C. Stone
Alton P. Stowell
Gerald D. Thornton
William E. Vatter
Lloyd W. Walrath
Douglas F. Walroth
Chris W. Weller
Cyrus W. Weller
Robert Whitaker
William P. Witaker
David W. Whitford
Lawrence E. Woodrow
Daniel L. House
Royal J. Ingram
William E. Isereau
Cynthia H. June
Percy J. Woods
James P. Wranesh
Algie E. Youngs

The remaining challenges should be sustained.

As provided in the order directing hearing and notice of hearing, these recommendations are made to the Board. Either party may, within 10 days from the date of issuance of this report, file with the Board in Washington, D.C., an original and seven copies of exceptions thereto with supporting brief, if desired. Immediately upon filing such exceptions, the party filing the same shall serve a copy thereof on the other parties and the Regional Director for Region 3. The party filing exceptions shall also file a statement of service of such exceptions with the Board. If no exceptions are filed to this report, the Board may adopt my recommendations and issue its decision thereupon.