

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 26**

**OMNOVA SOLUTIONS, INC.**  
**Employer**

**and**

**HADEN SELF**  
**Petitioner**

**and**

**Case 26-RD-1182**

**UNITED STEELWORKERS,  
AFL-CIO-CLC, on behalf of its  
LOCAL UNION No. 748-L**

**Union**

**REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

The Employer, OMNOVA Solutions, Inc., manufactures vinyl wall coverings and upholstery at its production facility in Columbus, Mississippi. The Union, United Steelworkers, AFL-CIO-CLC, on behalf of its Local Union No. 748-L, represents a unit of production and maintenance employees employed at the Columbus facility. The Petitioner, Haden Self, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, seeking to decertify the Union. Following a hearing before a hearing officer of the Board, the Employer and the Union filed briefs with me.

The primary issue raised at the hearing is whether striking employees and replacement employees are eligible to vote. The Union argues that the unit should include the strikers but exclude all replacement employees. Contrary to the Union, the Employer contends that the replacement employees are eligible to

vote and the strikers are ineligible. The Petitioner did not state a position regarding this issue at the hearing.

In addition to the voter eligibility issue, two other issues were raised at the hearing. The Union moved to dismiss the petition on the basis that the Petitioner is not an employee under Section 2(3) of the Act. Citing concerns for the safety of the replacement employees and a desire to protect the integrity of the election process, the Employer requested that I consider an alternative to requiring it to produce an eligibility list that includes the names and addresses of eligible voters.

I have considered the arguments made by the parties at the hearing and, as will be explained in detail below, have: (1) concluded that the eligibility of the strikers and replacement employees must be determined through the challenge ballot procedure; (2) denied the Union's motion to dismiss the petition; and (3) required the Employer to produce an eligibility list that includes the names and addresses of all potentially eligible striking employees and replacement employees. Both groups of employees will be allowed to vote by challenge ballot in order to preserve the eligibility issue raised in this matter.

## **I. BACKGROUND**

The Employer operates a facility in Columbus, Mississippi where it manufactures vinyl wall coverings and upholstery. The Union has represented a unit of all full-time and regular part-time production and maintenance employees at the facility since November 1964. The most recent collective-bargaining

agreement between the Union and the Employer expired on May 15, 2010 and there have been no extensions to the agreement.

On May 21, 2010, approximately 174 employees went on strike. Soon thereafter, the Employer started hiring replacement workers. The Employer estimates that it hired approximately 140 replacement employees since the start of the strike but the Union claims that only 100 have been hired. The strike was still in progress as of the date of the hearing.

## **II. THE VOTER ELIGIBILITY ISSUE**

As noted above, an issue was raised by the Union at the hearing regarding the voting eligibility of the strikers and the replacement employees. The Union claims that the strikers are eligible to vote and replacement employees are not entitled to vote. Conversely, the Employer asserts that the strikers are ineligible and the replacement employees are eligible to vote.

At the hearing, the Union sought to litigate the eligibility issue but the hearing officer precluded the Union from doing so. I affirm the hearing officer's decision. The Board has a well-established, consistent policy which provides that striker and replacement employee eligibility issues are to be resolved by post-election challenge procedure. *The Pipe Machinery Co.*, 76 NLRB 247 (1948); *Bright Foods*, 126 NLRB 553 (1960). Since the eligibility of the strikers and the replacement employees cannot be determined at this time, I shall direct an election permitting all striking employees and replacement employees who were employed during the payroll period ending immediately before the date of

this Decision to vote by challenge ballot to preserve the issue of which employee group is eligible.

### **III. THE UNION'S MOTION TO DISMISS THE PETITION**

At the hearing, the Union moved to dismiss the petition on the ground that the Petitioner lacks standing to file the petition because he is not an employee within the meaning of the Act. The hearing officer referred the Union's motion to me for a ruling.

Contrary to the Union's claim, I find that the Petitioner is qualified to file the petition in this matter. Section 9(c)(1)(A)(ii) provides that a decertification petition can be filed by "an employee or group of employees or any individual or labor organization acting in their behalf." Thus, the Act does not require that an individual petitioner seeking the decertification of a labor organization be an employee within the meaning of the Act. Here, the Petitioner, at a minimum, is an individual acting in behalf of employees who are currently employed at the Employer's facility. Therefore, the Union's motion to dismiss the petition is denied. *Standard Oil Co.*, 80 NLRB 1022, 1023 fn. 1 (1948).

### **IV. THE EXCELSIOR LIST ISSUE**

At the hearing, the Employer requested that I consider an alternative to requiring it to produce an eligibility list that includes the names and addresses of eligible voters since replacement employees have allegedly been subjected to repeated instances of harassment, assault and property damage. While no alternatives were proposed at the hearing, the Employer claims in its post-hearing brief that in lieu of producing the customary eligibility list, I should

consider two alternatives: (1) permitting the Employer to submit the names and addresses of the replacement employees to an independent third party; or (2) allowing the Employer to post Union communications on bulletin boards in the plant and use an independent third party to distribute union literature in non-working areas of the plant.

The lead case regarding the production of an eligibility list is *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966). The Board has consistently held that compliance with the mandates of *Excelsior Underwear* requires that an employer provide a list of the names and addresses of all eligible voters so that interested parties may have the opportunity to contact or communicate with voters prior to the scheduled election and to facilitate resolution of disputes over voting eligibility. *Id.* The Board has found that the failure to substantially comply with the eligibility list requirements, such as withholding first names of voters or failing to provide addresses, is a basis to set aside an election. See *Rite-Care Poultry Company, Inc.*, 185 NLRB 41 (1970).

The Employer has not cited any cases in its post-hearing brief where the Board has permitted a regional director to relieve an employer of its obligation to provide an eligibility list or adopt the alternatives that the Employer has proposed here. Instead, the Employer relies on several circuit court and Board cases that examine the circumstances under which an employer may withhold information regarding replacement workers pursuant to an information request. In those cases, the refusal to furnish either the names and addresses or payroll records of replacement employees in response to information requests did not violate

Section 8(a)(5) of the Act since the replacement employees had been subjected to threats, violence or intimidation by strikers.

The Employer's cases fail to address the eligibility list issue under consideration here. In fact, the Employer acknowledges in its brief that there is no Board authority directly addressing the issue. Moreover, the issue of what a union is entitled to receive in the election process is distinguishable from what a union is entitled to receive in response to an information request in an 8(a)(5) context. Whereas the production of relevant information in an 8(a)(5) context enables a union to perform its duties as the statutory representative of employees, the production of an eligibility list ensures that unions have access to all eligible voters and employees are fully informed about the arguments concerning representation. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435 (1967); *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994) (failure to provide complete and accurate eligibility list is an injury to employees, not just petitioners).

Given the absence of Board case law supporting the Employer's position, I decline to adopt the Employer's proposed alternatives. Accordingly, I will require the Employer to furnish a complete eligibility list to the Regional Office.

## **V. CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Union claims to represent certain employees of the Employer.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

**INCLUDED:** All full-time and regular part-time hourly production and maintenance employees employed by the Employer at its Columbus, Mississippi plant.

**EXCLUDED** All other employees, office employees, timekeepers, clerks, quality control, production control, management trainees, confidential salaried employees, professional employees, guards and supervisors as defined in the Act.

## **VI. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Steelworkers, AFL-CIO-CLC, on behalf of its Local Union No. 748-L. The date, time, and place of the election will be specified in the notice

of election that the Board's Regional Office will issue subsequent to this Decision.

**A. Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

**B. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the

election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **June 17, 2011**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website [www.nlr.gov](http://www.nlr.gov),<sup>1</sup> by mail, by hand or courier delivery, or by facsimile transmission at 901-544-0008. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

---

<sup>1</sup> To file the eligibility list electronically, go to the Board's website at [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **C. Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

## **VII. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington, DC by 5 p.m. EDT **June 24, 2011**. The request may be filed electronically through the Agency's web site, [www.nlr.gov](http://www.nlr.gov),<sup>2</sup> but may not

---

<sup>2</sup> To file the request for review electronically, go to the Board's website at [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

be filed by facsimile.

**DATED:** June 10, 2011

A handwritten signature in cursive script, reading "Ronald K. Hooks". The signature is written in black ink and is positioned above a horizontal line.

---

Ronald K. Hooks, Regional Director  
National Labor Relations Board  
Region 26  
80 Monroe Avenue - Suite 350  
Memphis, TN 38103-2416