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**CHS, Inc. and Daniel Peterson and Local 638 and
120, International Brotherhood of Teamsters.**
Case 18–RD–2722

August 12, 2011

DECISION AND DIRECTION

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in a mail ballot election held between December 6 and 20, 2010,¹ and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 29 for and 27 against the Union, with 4 challenged ballots, a number sufficient to affect the results of the election.²

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings and recommendations³ only to the extent consistent with this Decision and Direction.

I.

The Employer is engaged in retail agricultural sales from several U.S. facilities, including facilities in Grand Forks and Minot, North Dakota. The Union represents a bargaining unit of the Employer's tank/truckdrivers and mechanics employed at its North Dakota facilities. The parties' most recent collective-bargaining agreement expired on November 10. On November 8, the Petitioner filed this election petition.

Following the mail ballot election, the tally was scheduled for December 21. Prior to the opening of the mail ballots, the Union timely challenged Wesley Soper's

¹ All dates are in 2010, unless otherwise indicated.

² During the hearing, the Union withdrew its challenges to the ballots of Craig Sager and Patrick Klein. Thus, the hearing officer directed that their ballots should be opened and counted.

³ In adopting the hearing officer's recommendation to overrule the challenge to Craig Shalesky's ballot, we find that the Union failed to meet its burden of showing supervisory status as the record testimony was too vague and general to establish that he exercised independent judgment in assigning work. In addition, because Shalesky recently had trained most of the mechanics to whom he assigned work, and made assignments after being advised of the day's priorities, his assignments were based on "common knowledge, present in any small workplace, of which employees have certain skills," and did not involve independent judgment. See *Armstrong Machine Co.*, 343 NLRB 1149, 1150 (2004). Member Hayes did not participate in *Armstrong Machine* and expresses no view on the Board's application of the law to the facts there.

ballot on the basis that Soper was not on the payroll at the time of the election. On December 21, the Regional Director requested all parties to submit written statements of their positions as to each challenged ballot no later than December 28. On December 24, the Employer emailed a Board agent stating that it had changed its position and now agreed with the Union that Soper was not eligible to vote because he was not employed on the date the ballots were to be returned to the Region. Thereafter, by letter dated December 28, the Union withdrew its challenge to Soper's ballot.

On January 3, 2011, in his report on challenges, order directing hearing, and notice of hearing, the Regional Director approved the Union's withdrawal request and ordered that Soper's ballot be opened and counted in the event the ballot remained determinative following the resolution of the remaining three challenged ballots. After issuance of the Report on Challenges, the Employer telephoned the Region on January 4, objected to the Regional Director's approval of the Union's withdrawal and raised its own challenge to Soper's eligibility. In view of this, the Regional Director issued a Supplement to Report on Challenges directing that the hearing officer first resolve whether the Employer had challenged and could challenge Soper's eligibility to vote after the election and, if so, determine whether Soper was an eligible voter.

The hearing officer found that the Employer filed an untimely postelection challenge to Soper's eligibility because it was raised after the ballot count and that, given the Union's withdrawal of its timely challenge, Soper's ballot should be opened and counted.⁴ The Employer, in its exceptions, contends that the hearing officer erred by concluding that its challenge to Soper's vote was untimely. The Employer asserts that, in response to the Regional Director's request for its statement of position, it timely submitted written support for the Union's challenge to Soper's eligibility, and it did so prior to the opening of the challenged mail ballots.

II.

We find, contrary to the hearing officer, that the Employer's challenge to Soper's ballot raises no postelection challenge issue at odds with the Board's timeliness rules.

In order to promote election finality, the Board has long required that challenges to voter eligibility be made before the ballots are cast and commingled with other uncontested ballots. *Lakewood Engineering & Mfg. Co.*,

⁴ Although the hearing officer heard evidence on Soper's eligibility to vote, he did not resolve this issue because he concluded that the Employer's challenge was untimely.

341 NLRB 699, 700 (2004). The Board generally will not entertain a postelection challenge unless the party that would benefit from the Board's refusal to consider such a challenge knows that a voter is ineligible and conceals that ineligibility. See, e.g., *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 333 (1946); *Solvent Services*, 313 NLRB 645 (1994).

However, the Board has held that a party may raise and litigate at a hearing an alternative ground for a properly challenged ballot, even if that alternative ground was not raised in a timely challenge. In *Coca-Cola Bottling Co. of Miami*, 237 NLRB 936 (1978), the Board agent challenged the ballot of striker replacement D. W. Davis on the ground that Davis was not included on the *Excelsior* list. The union, which had challenged the ballots of all other striker replacements on the ground that the strike was an unfair labor practice strike, did not similarly challenge Davis' ballot, presumably because it considered such a challenge superfluous in light of the Board agent's challenge. At the hearing, it was determined that the Board agent had mistakenly challenged Davis' ballot, as his name *was* on the *Excelsior* list. The union then stated that it wanted to challenge Davis' ballot on the same basis as its challenge to the other striker replacements. The Board adopted the judge's findings that the union's challenge to Davis' eligibility properly could be considered because no postelection challenge issue was presented "so long as Davis' ballot remains sealed" and because "the Board is free to sustain the challenge to his ballot on any valid litigated ground." *Id.* at 952.

This case is unlike those cases where ballots have already been commingled and a party then files a late challenge. Here, as in *Coca-Cola*, a timely initial challenge was filed, and Soper's ballot has been segregated. Notwithstanding that the Union and the Employer changed their positions on Soper's eligibility after the initial tally of ballots, his ballot remained sealed, and the issue of his eligibility (contested at different times by both these parties on the same basis) was litigated at the hearing pursu-

ant to the Regional Director's instructions in his Supplement to Report on Challenges. Under these circumstances, we see no impediment to resolving the challenge to Soper's ballot on the merits.

Because the hearing officer found that Soper's ballot should be opened and counted based solely on the untimeliness of the Employer's postelection challenge, we will remand this proceeding with instructions to address the merits of Soper's eligibility if his ballot remains determinative.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 18 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Craig Sager, Patrick Klein, and Craig Shalesky.

IT IS FURTHER ORDERED that the Regional Director shall hold in abeyance the ballot of Wesley Soper until the ballots of the voters listed above are opened and counted. If the ballot of Soper becomes determinative to the outcome of the election, then the Regional Director shall take further action consistent with this Decision and Direction. If his ballot is not determinative, it shall remain sealed, and the Regional Director shall prepare and serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. August 12, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD