

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

PRINTPACK, INC.
Employer

and

Case 25-UD-067434

GRAPHIC COMMUNICATIONS CONFERENCE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL 761-S OF THE DISTRICT COUNCIL 3

and

MICHAEL BAKER
Petitioner

HEARING OFFICER'S REPORT ON CHALLENGED BALLOTS
AND RECOMMENDATIONS TO THE BOARD

At the election which was conducted on December 1, 2011,¹ the Employer challenged the ballots of employees Bruce Huntington, Teresa Green, and Michael Ruble.² Following an

¹ The appropriate unit ("Unit") as set forth in Item 13 of the Stipulated Election Agreement is as follows:

All production and maintenance employees of Printpack, Inc., in its Greensburg, Indiana plant; BUT EXCLUDING all office employees, clerical employees, watchmen (guards), research employees, sales personnel, administrative employees, professional employees, or supervisory employees.

² The Tally of Ballots made available to the parties at the conclusion of the election shows the following results:

Approximate number of eligible voters	42
Number of void ballots	0
Number of votes in favor of withdrawing the authority of the bargaining representative to require, under its agreement with the Employer, that employees make certain lawful payments to the Union in order to retain their jobs	19
Number of votes cast against the above proposition	1
Number of valid votes counted	20
Number of challenged ballots	3
Number of valid votes counted plus challenged ballots	23

investigation of the issues raised by the challenged ballots, the Regional Director of Region Twenty-five issued his Report on Challenged Ballots, Order Directing Hearing and Notice of Hearing (“Regional Director’s Report”). In his Report, the Regional Director ordered that a hearing be conducted before a hearing officer to resolve the issues of fact and credibility raised by the challenged ballots. Pursuant to this order, a hearing was conducted on January 25, 2012, in Indianapolis, Indiana. The Petitioner and the Union were present at this hearing and, with representatives of their choosing, were afforded the opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues.³

The findings, conclusions, and recommendations herein are based upon the undersigned's consideration of the record as a whole and observation of the demeanor of the witness.⁴

For the reasons discussed more fully below, I find that employees Bruce Huntington, Teresa Green, and Michael Ruble are not eligible voters.

I. CHALLENGED BALLOTS

The Employer’s observer at the election challenged the ballots of employees Bruce Huntington, Teresa Green, and Michael Ruble, whose names were on the *Excelsior* List, because they were no longer employed at the time of the election. According to the Regional Director’s Report, at some point during the investigation of the challenged ballots, the Employer changed its position with regards to the challenges and requested to withdraw its challenges to all three employees’ ballots. The Petitioner agreed that the challenges should be withdrawn. The Union contended that the Employer’s challenges were appropriate and the Employer’s request to withdraw the challenges should not be granted. As noted above, the Employer chose not to

³ The Employer failed to appear at the hearing and its intent to not participate was confirmed by the Region prior to the opening of the hearing. The Petitioner declined to cross examine the Union’s witness and declined to present evidence or witnesses during the hearing. The Petitioner did express his position on the matter at the beginning of the hearing and made a closing statement at the end of the hearing.

⁴ While I have addressed the credibility of the witness with regard to certain matters more fully herein, the absence of a statement of resolution of a conflict in specific testimony, or the absence of an analysis of such testimony, does not mean that such did not occur. See, ABC Specialty Foods, Inc., 234 NLRB 475 (1978); Bishop and Malco., Inc. d/b/a Walker’s, 159 NLRB 1159 (1966); Trumbull Asphalt Company of Delaware v. NLRB, 314 F.2d 382, 383 (CA 7 1963), cert. den. 374 U.S. 808 (1963), citing as authority U.S. v. Pierce Auto Lines, 327 U.S. 515, 529 (1946). The Board has long held that the failure of the trier of fact to detail completely all conflicts in the evidence does not mean that this conflicting evidence was not considered and he is not compelled to annotate each such finding. Borman, Inc., 273 NLRB 312 (1984); Walker’s, supra. To the extent that the particular testimony of a witness does not conform to the facts recounted herein, that testimony is discredited and found unreliable.

participate in the hearing. Thus, at the hearing it was the Union who sought to sustain the challenges and the Petitioner who sought to overrule them.

Bruce Huntington, Teresa Green, and Michael Ruble

1. Issues

The Union contends that the challenges to the ballots of Bruce Huntington, Teresa Green, and Michael Ruble should be sustained even though they were properly included in the *Excelsior* List because they were laid off before the date of the election with no reasonable expectation of recall.

The Petitioner contends that the challenges should be overruled because Bruce Huntington, Teresa Green and Michael Ruble were employed in Unit positions, as defined in the Stipulated Election Agreement, during the payroll period ending Sunday, November 6, 2011, (“the stipulated payroll period”). The Petitioner relies upon the language in the Stipulated UD Election Agreement, Paragraph 5, Unit and Eligible Votes which states: “Those eligible to vote in the election are employees in the above unit who were employed during the payroll period ending Sunday, November 6, 2011, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.” Petitioner contends that because these three employees met the requirements to vote contained within this language of the Stipulated Election Agreement, the challenges to their ballots should be overruled.

2. Findings and Conclusions

It is uncontested that Bruce Huntington, Teresa Green, and Michael Ruble were employed in Unit positions during the stipulated payroll period and properly included on the *Excelsior* List. It is also uncontested that before the date of the election all three of these employees were laid off with other employees as part of a reduction of force in preparation for the closure of the Greensburg plant by the Employer. The weight of the evidence shows that Bruce Huntington, Teresa Green and Michael Ruble had no reasonable expectation of recall in this situation where the Employer has laid off 84% of its workforce in preparation for plant closure. Therefore, I recommend that the challenges to the ballots of Bruce Huntington, Teresa Green and Michael Ruble be sustained.

3. Statement of Facts

The Employer and the Union have a long term collective-bargaining relationship concerning Unit employees. The current collective-bargaining agreement between the Employer and the Union is effective by its terms from June 11, 2009, until June 11, 2012.⁵ In addition to the Union security clause that the Petitioner sought to remove through his petition in this matter,

⁵ The only witness called to testify in this matter was Mike Wohlhueter, a Union Staff Representative. Wohlhueter testified in a straightforward, consistent manner and much of his testimony is corroborated by documents admitted into the record. Therefore, I credit his testimony.

the collective-bargaining agreement contains a seniority provision which governs Unit employees' rights with regard to layoff and recall by seniority.

On November 16, 2010, the Employer announced to the Union its intent to close the Greensburg, Indiana plant and to issue a WARN notice to employees. The Employer's Human Resource Manager stated that the Employer was closing its plants in Greensburg and Bloomington, Indiana and transferring the work to a newly built state of the art facility near Bloomington, Indiana. On November 17, 2010, the Employer issued a WARN Notice to the employees informing them of its intent to close the Greensburg plant within eight or nine months. The Employer also held employee meetings to inform them of its plans to close the Greensburg plant and transfer the work from that facility to its newly constructed facility near Bloomington, Indiana.

The Union requested bargaining and the parties reached a Plant Closing Agreement on December 22, 2010 for the approximately 210 Unit employees still working when the November 17, 2010, WARN Notice was issued.⁶ The Plant Closing Agreement established a severance package for employees in exchange for the relinquishment of their seniority rights, including recall rights, under the collective-bargaining agreement. Under the Plant Closing Agreement employees were eligible to receive the severance package under either one of two circumstances: (1) they continued their employment until the Employer laid them off, or (2) they gave two weeks notice of their intent to end their employment and assisted the Employer in finding an experienced person to replace themselves. If former employees were re-hired to replace employees who left before being laid off, under the Plant Closing Agreement, they were to be hired as new employees with a new seniority date.

The Employer laid off 45 of the 210 employees in January 2011 and continued to sporadically lay off employees throughout 2011. The vast majority of the employees continued to work for the Employer until they were laid off and received their severance package at that time. The record is unclear as to the total number of employees who utilized the second option to receive their severance package and left employment before being laid off but only after a replacement employee could be hired. The evidence indicates that as of August 16, 2011, there were 107 employees in the Unit with 8 of those employees being "newly" re-hired former employees (i.e. hired with a new seniority date of March 31, 2011 or after). One of those employees was Teresa Green, who was originally laid off in one of the first rounds of labor force reductions. Because another employee left his employment with the Employer prior to being laid off, Teresa Green was re-employed as a new-hire employee with a new seniority date of April 11, 2011, only to be laid off again in November 2011.

By September 2011, most of the remaining employees were long term employees with 20 to 30 years of service. The Union negotiated with the Employer to allow all remaining eligible employees to be paid their severance package under the Plant Closing Agreement by October 1, 2011. The Union successfully argued that these loyal employees did not need to be enticed to

⁶ The Plant Closing Agreement was modified on January 4, 2011, to provide benefits to employees who were laid off in October 2010 before the WARN Notice was issued, but the provisions of the Plant Closing Agreement for employees still employed remained unchanged.

stay until the facility closed by the Employer's promise of a severance package at that time if they stayed. During these meetings with the Employer, the Union learned the startup of the new plant was taking longer than expected and the full shut down of the Greensburg plant would not likely occur until May 2012.

By the November 6, 2011 stipulated payroll period, there were only 42 employees remaining in the Unit. All of these employees had already received their severance packages with the understanding that they would eventually be laid off as the plant closure progressed. Bruce Huntington, who had been listed for layoff prior to November 6, 2011, continued to work for a short period longer because another employee was on medical leave. The record does not reflect the exact date of Bruce Huntington's last day of work, but the Petitioner and the Union stipulated that it was prior to the December 1, 2011 election. On November 18, 2011, additional employees were laid off, including Teresa Green and Michael Ruble. The layoff of these three employees prompted the Employer to challenge their ballots at the election.

As of January 23, 2012, the Unit consisted of 34 employees, including two employees who were on sick leave and two former employees who had been rehired as new employees. The two new hires, one of whom was Teresa Green, were replacing employees who left their employment before being laid off by the Employer. Apparently Teresa Green, who was trained in two particular types of positions, replaced one of these employees. Teresa Green was re-hired with a new seniority date of January 3, 2012.

4. Analysis

The Board's test for determining whether laid-off employees are eligible to vote is whether, based on objective factors, they have a reasonable expectancy of reemployment in the near future. The objective factors considered by the Board are: (1) the employer's future plans, (2) the circumstances surrounding the layoff, (3) what employees were told about the likelihood of recall; and (4) the employer's past practice of layoff and recall. MJM Studios of New York, Inc. 338 NLRB 980 (2003); Apex Paper Box Company, 302 NLRB 67, 68 (1991). The determination of eligibility is based on circumstances extant at the time of the payroll eligibility date and the date of the election. *Id.*

The first three factors in this case are controlled by the Employer's plans to close the Greensburg plant. Like the more than 170 other employees who were laid off by the Employer by the time of the election, Bruce Huntington, Teresa Green, and Michael Ruble were laid off in preparation for plant closure. The Employer issued two WARN notices and held an employee meeting informing all the employees in the Unit of its intent to close the Greensburg plant and end their employment. Prior to their lay off in November 2011, Bruce Huntington, Teresa Green, and Michael Ruble had been given severance packages in anticipation of their permanent severance from employment with the Employer. Although the record contains no evidence of specific conversations with these employees about their lay offs, based upon the overwhelming evidence that the Employer is following through with its stated plans to close the Greensburg plant, it is unlikely that any employee was told they were likely to be rehired.

With regard to the fourth factor, the Employer's past practice of layoff and recall was suspended when it entered into the Plant Closing Agreement. Therefore, the employees did not have an expectation of recall under the established practice of the Employer based on the terms of the collective-bargaining agreement. Arguably there was some chance of re-hire for employees who were permanently laid off under the Plant Closing Agreement, but that chance of being re-hired was based upon unpredictable circumstances. First, an employee must seek to leave his employment before the Employer intended to lay him off. Second, the employee looking to be re-hired must be trained in the position that the departing employee held.⁷ Finally, because the Plant Closing Agreement set no procedure for selecting employees to be re-hired except that the departing employee was charged with assisting the Employer with finding a qualified replacement, the departing employee or the Employer could choose to contact any employee with training in the position to be filled. With so many variables and the lack of guidelines for re-hiring employees, the employees did not have a reasonable expectation of re-hire.

In August 2011, only 8 employees or approximately 8% of the laid off employees had been re-hired. As of January 23, 2012, only 2 or approximately 1% of the laid off employees were working as re-hires. Despite the fact that Teresa Green was re-hired twice, the unpredictable practice of re-hiring employees under the Plant Closing Agreement did not give Teresa Green or any other employee a reasonable expectation of reemployment at the time of the election. "The test for determining expectancy of recall is the situation as it existed at the time of the election rather than subsequent developments." Thomas Engine Corp., 196 NLRB 706 (1972). There is no evidence that, on the date of the election, Teresa Green had any expectation of replacing another employee on January 3, 2012.

Although Bruce Huntington, Teresa Green, and Michael Ruble were employed during the stipulated payroll period, they had been laid off and did not have a reasonable expectation of reemployment on the date of the election. Therefore, the challenges to their ballots should be sustained.

II. RECOMMENDATIONS TO THE BOARD

Based upon the above findings and conclusions, I recommend to the Board that:

- 1) the challenges to the ballots of employees Bruce Huntington, Teresa Green, and Michael Ruble be sustained, and that their ballots neither be opened nor counted; and
- 2) an appropriate certification issue.

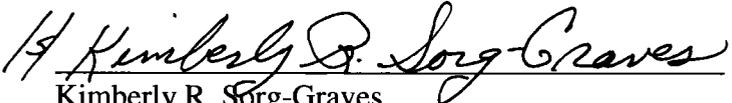
⁷ The record reflects that there were at least 16 different unit positions for which employees were trained.

III. APPEAL PROCEDURE

Right to File Exceptions: Pursuant to the provisions of Sections 102.69 and 102.67 of the National Labor Relations Board's Rules and Regulations, series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W, Washington, D.C. 20570-001.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on March 14, 2012, at 5:00 pm (ET), unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically. If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 pm Eastern Time on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Signed at Indianapolis Indiana this 29th day of February 2012.



Kimberly R. Sorg-Graves
Hearing Officer
National Labor Relations Board
Region Twenty-five
Room 238, Minton-Capehart Federal Building
575 North Pennsylvania Street
Indianapolis, IN 46204-1577