

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Milwaukee, Wisconsin

PALERMO VILLA, INC.

Employer

and

Case 30-RC-081963

PALERMO WORKERS UNION

Petitioner

and

**UNITED FOOD & COMMERCIAL WORKERS
UNION, LOCAL 1473**

Intervenor

DECISION AND DIRECTION OF ELECTION¹

INTRODUCTION²

On May 29, 2012, the Palermo Workers Union (“Petitioner”) filed a petition to be the collective-bargaining representative of a unit of employees working for Palermo Villa, Inc. (“Employer”) within the meaning of Section 9(a) of the Act. The parties

¹ Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. The parties stipulated that the Employer, a Wisconsin corporation, is engaged in pizza manufacturing, and during the past 12 months, a representative period, the Employer purchased and received goods, products, and services at its 3301 West Canal Street, Milwaukee, Wisconsin location valued in excess of \$50,000 from points located directly outside the State of Wisconsin. The Employer therefore is engaged in commerce within the meaning of Section 2(6) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein. The parties further stipulated that the Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act. Finally, the parties stipulated the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time bakery, production, packing, warehouse, sanitation, and maintenance employees employed by the Employer at the Milwaukee, Wisconsin, location; excluding quality assurance employees, office employees, clerical employees, temporary employees, seasonal employees, research and development employees, guards, professional employees, and supervisors as defined in the Act.

² The Employer and the Petitioner have filed post-hearing briefs, which have been duly considered.

entered into several stipulations. As a result of those stipulations, the sole issue is the voter eligibility date for the election.³ Based upon a review of the stipulated facts and applicable Board law, the undersigned concludes that the voter eligibility date should be the payroll period ending date immediately preceding the date of this Decision and Direction of Election.

FACTUAL SUMMARY⁴

The Employer and the Petitioner stipulated to the following facts. On June 7, 2012, the Employer and Palermo Workers Union entered into a Stipulated Election Agreement which set a July 6, 2012 election date and stipulated that voter eligibility includes employees in the agreed-upon unit who were employed during the payroll period ending June 2, 2012. On June 8, 2012, seventy-five employees were terminated by the Employer. On June 13, 2012, the Intervenor sought to intervene. On June 15, 2012, the Regional Director issued an Order which: a) approved the Intervenor's request to intervene; b) revoked approval of the June 7, 2012 Stipulation; c) set a hearing date for June 22, 2012; and d) cancelled the July 6, 2012 election date. Since June 2, 2012, the Employer has hired 82 new employees. The employee census for employees in the appropriate unit was 194 on June 2, 2012, and is 191 as of June 21, 2012. The Casehandling Manual Part II, Representation Proceedings, Section 11312.1, states, "... If

³ In its brief, Petitioner objects to my June 15, 2012 Order revoking the June 7, 2012 Stipulated Election Agreement between the Petitioner and the Employer. As was previously explained to counsel for Petitioner, my decision to revoke the June 7, 2012 Stipulation was the result of the Employer refusing to amend the Stipulation to include the Intervenor on the ballot and not a result of the Intervenor "blocking" the agreement. I cannot unilaterally amend a substantive portion of the agreement entered into by the Petitioner and the Employer, nor can I exclude a Participating Intervenor from appearing on the ballot (see Casehandling Manual Part II, Representation Proceedings, Section 11023.4). This left me no option but to revoke the previously approved Stipulated Election Agreement, conduct a hearing, and direct an election.

⁴ The Factual Summary is based upon the Stipulation reached between the Employer and the Petitioner. No additional facts and/or witnesses were presented by any party prior to the close of the hearing. The Intervenor's role was limited to that of a participating intervenor.

there is an issue as to an unusual eligibility date, i.e., the use of a date other than the payroll period ending before the approval of the agreement or the Direction of Election, because of a current labor dispute, seasonality of operations, the pending of the petition because of unfair labor practices, etc., the Board Agent making the election arrangements [...] or conducting the hearing [...] should obtain the information necessary for a resolution of this issue. ...” The Petitioner contends that since June 1, 2012, at least 80 employees have been on strike and that many of such strikers were terminated on June 8, 2012. The Employer disputes that all of these employees and/or former employees are on strike.

ANALYSIS

The issue is whether to use the original voter eligibility date of June 2, 2012, or the first payroll period ending date immediately preceding the issuance of this Decision and Direction of Election as the voter eligibility date. The stated goal in making decisions related to elections is to avoid disenfranchising voters. See generally, *Aesthetic Designs, LLC*, 339 NLRB 395 (2003); *Pea Ridge Iron Ore Co.*, 335 NLRB 161 (2001); *Wolverine Dispatch, Inc.*, 321 NLRB 796 (1996); and *Midwest Canvas Corp.*, 326 NLRB 58 (1998). In this case, there is a dispute as to whether certain employees are on strike and as to whether certain employees were hired as replacement workers.

These disputes affect eligibility. Strikers are presumed to be “economic strikers” unless they are found by the Board to be on strike because of unfair labor practices on the part of the employer. See *Bright Foods*, 126 NLRB 553 (1960); see also *Times Square Stores Corp.*, 79 NLRB 361 (1948). Economic strikers are presumed to continue in that status and thus are eligible to vote under Section 9(c)(3) of the Act. To rebut the

presumption of eligibility, the party challenging must affirmatively show by objective evidence that the economic strikers have abandoned their interest in their struck jobs. See *Pacific Tile & Porcelain Co.*, 137 NLRB 1358 (1962). Replaced former economic strikers are eligible to vote in an election conducted within 12 months of the commencement of the strike whether or not the strike has terminated. *Tractor Supply Co.*, 235 NLRB 269 (1978). The Board presumes that replacements hired for strikers are temporary employees in all Board cases—representation and unfair labor practice. See *O.E. Butterfield, Inc.*, 319 NLRB 1004 (1995). Employees hired subsequent to a strike and who are told by the employer when hired that his/her job is “permanent” are permanent replacements unless the presumption of permanence is rebutted. *Pacific Tile & Porcelain Co.*, *supra*. Temporary replacements are not eligible to vote. See *Harter Equipment*, 293 NLRB 647 (1989). Issues as to the voting eligibility of strikers and replacements are normally deferred until the election for disposition by way of challenges. See *Bright Foods*, *supra*.

If I were to use the original eligibility date of June 2, 2012, then the employees hired after that date may be replacement workers, and further, may be permanent replacement workers, who would be disenfranchised because they would be ineligible to vote. If I were to use the later eligibility date, then the employees who purportedly went out on strike still would be able to vote, even if possibly subject to challenge. Thus, any employees hired after June 2, 2012 who choose to vote may do so possibly subject to challenge; if their votes are challenged and the challenges are subsequently sustained, there will have been no impact on the rights of other employees to vote. As a result, in

evaluating the evidence and applicable case law, I conclude that the risk of disenfranchisement is less if I select the later eligibility date.

CONCLUSION

I, therefore, conclude that the eligibility date shall be the first payroll period ending date immediately preceding the date of this Decision and Direction of Election.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding 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. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been

permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the Petitioner, the Intervenor, or neither.

LIST OF VOTERS

In order 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 the 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*, 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer shall file with the undersigned, **two** copies of an election eligibility list, containing the **full** names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized. **In order to be timely filed, such list must be received in the Regional Office, 310 West Wisconsin Avenue, Suite 700W, Milwaukee, Wisconsin 53203 on or before July 9, 2012.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

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, Franklin Court, 1099 14th Street, N.W.,

Washington, D.C. 20570. **This request must be received by the Board in Washington, D.C. by July 16, 2012.**

OTHER ELECTRONIC FILINGS

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlr.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

Signed at Milwaukee, Wisconsin on July 2, 2012.



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