

Escapade Fashions, Inc. and District 65, Distributive Workers of America, Petitioner. Case 22-RC-7311

September 26, 1978

DECISION AND DIRECTION

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND MURPHY

Pursuant to a Stipulation for Certification Upon Consent Election, a secret-ballot election was conducted on January 18, 1978. At the conclusion of the election, the parties¹ were furnished a tally of ballots which showed that, of approximately 22 eligible voters, 22 cast ballots, of which 6 were for Petitioner, 4 were for Intervenor, and 13 were challenged.² The challenged ballots were sufficient in number to affect the election's results. On January 26, 1978, Petitioner filed timely objections to the election.

On March 22, 1978, the Regional Director issued and duly served upon the parties his Report on Objections and Challenged Ballots.³ On April 6, 1978, Petitioner filed timely exceptions to the Regional Director's recommendation that the challenges to the

¹ Office and Professional Employees International Union, Local 413, AFL-CIO, CLC, hereafter called the Intervenor, was permitted to intervene in this proceeding on the basis of its recently expired collective-bargaining agreement with the Employer covering certain of the employees in the stipulated unit.

² The ballot of Sonia Lee, one of eight office clerical employees specifically excluded from the unit and challenged by the Board agent, was mistakenly placed directly into the ballot box without first being placed in the challenged ballot envelope. Her ballot, therefore, is reflected in the tally as a valid vote for Petitioner or Intervenor.

³ Regarding Petitioner's objections, the Regional Director recommended that the portion of Objection 2 alleging unlawful employer interrogation be sustained. In accordance with this recommendation, the Regional Director further recommended that the election be set aside if the revised tally shows that the Intervenor receives a majority of votes cast.

ballots of Gilda Marino, Lydia Perez, and Ana Salgado be overruled.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in connection with this proceeding to a three-member panel.

The Board has reviewed the entire record in this case including the Regional Director's report and Petitioner's exceptions and brief and hereby adopts the Regional Director's findings⁴ and recommendations.

DIRECTION

The Regional Director is hereby directed to open and count the ballots cast by Leon Daniel, Lydia Perez, Ana Salgado, and Gilda Marino and to issue a revised tally of ballots. If the results show either that Sonia Lee's ballot is determinative⁵ or that the Intervenor receives a majority of the votes cast, it is hereby directed that the election be set aside. If, however, Sonia Lee's ballot is not determinative and Petitioner receives a majority of the votes cast, the Regional Director is hereby directed to issue a certification of representative.

⁴ Contrary to the Regional Director, Member Murphy would sustain the challenge to the ballot of Gilda Marino in accordance with the parties' stipulation that Marino "is a casual employee, and does not share a community of interest and is, therefore, ineligible to vote in the election." Inasmuch as the stipulation of the parties evinces an unequivocal intent to exclude Marino from the unit and does not on its face contravene any statutory proscription or established Board policy, Member Murphy concludes that the Regional Director acted improperly in rejecting the stipulation and overruling the challenge to Marino's ballot. See *The Tribune Company*, 190 NLRB 398 (1971); *Apple Tree Chevrolet, Inc.*, 237 NLRB No. 103 (1978).

⁵ As Sonia Lee was an ineligible voter the election will be set aside if one vote is determinative. See *Thermco Products Corporation*, 209 NLRB 1149, 1150 (1974).