Business Aviation, Inc. *and* Laborers' Local 352, Laborers' International Union of North America, AFL–CIO, Petitioner. Case 18–RC–9286

April 10, 1973

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN MILLER AND MEMBERS FANNING AND PENELLO

Pursuant to a Stipulation for Certification Upon Consent Election executed on October 30, 1972, an election by secret ballot was conducted under the supervision of the Regional Director for Region 18 among the employees in the appropriate unit on November 28, 1972. At the conclusion of the election, the parties were furnished a tally of ballots which showed that of approximately two eligible voters, two cast ballots, of which two were for and none against the Petitioner. Thereafter the Employer filed timely objections to the election.

In accordance with the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the Regional Director conducted an investigation of the issues raised by the objections and a further ground brought to his attention during the course thereof for which an objection might exist, and, on January 4, 1973, issued and served on the parties his report on objections attached hereto in pertinent part. In his report, the Regional Director recommended that the objections be overruled and that an appropriate certification be issued. Thereafter, the Employer filed timely exceptions, and a brief in support thereof, to the Regional Director's report.

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 this proceeding to a three-member panel.

Upon the entire record in this case the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

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

4. The following employees, as stipulated by the parties, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All drivers and fuelers employed at the Employer's facility at Sioux Falls, South Dakota, excluding all professional and office clerical employees, guards and supervisors, as defined in the Act.

5. The Board has considered the Regional Director's report, the Employer's exceptions thereto, and its brief in support thereof, and the entire record in this case, and hereby adopts the Regional Director's findings, conclusions, and recommendations.[1]

We cannot agree with our dissenting colleague that a casual solicitation of three employees, only one of whom was eligible to vote, the night before the election by a union agent can be characterized as a "speech" to a "massed assembly of employees" under the Board's *Peerless Plywood* rule. That rule was not intended to nor, in our opinion, does it prohibit every minor conversation between a few employees and a union agent or supervisor for a 24-hour period before an election.

Accordingly, as the tally shows that as the Petitioner has obtained a majority of the valid ballots cast, we shall certify it as the exclusive bargaining representative of the employees in the appropriate unit.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Laborers' Local 352, Laborers' International Union of North America, AFL–CIO, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit found appropriate herein for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

CHAIRMAN MILLER, dissenting:

Contrary to my colleagues, I would sustain the Employer's objection that the Petitioner violated the rule against speeches to employees on company time within 24 hours of the election, based on *Peerless Plywood.*[2]

The record indicates that the Petitioner's business agent entered the Employer's premises within 24 hours of the election for the announced purpose of soliciting cards from two employees. Of the three employees, one was eligible to vote and comprised 50 percent of the then eligible employees, since of the original five-man unit, only two remained on the payroll. The other two had been hired after the eligibility "cut-off" date. While engaged in this solicitation, which occurred on the employees' working time, he addressed the three employees then on duty about the benefits they would receive if they

[1] The Employer's exceptions, in our opinion, raise no material or substantial issues of fact or law which would warrant reversal of the Regional Director's recommendation.

[2] *Peerless Plywood Company,* 107 NLRB 427.

voted for the Union the next day, and reminded the eligible employee to vote. The "conversation" lasted at least 10 or 15 minutes. No supervisory or management personnel were present.

In *Peerless Plywood, supra,* the Board set out a simple rule that *employers and unions alike* will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election. The Board emphasized that it was attempting to achieve equality in electioneering by eliminating last minute speeches on company time that because of their unsettling effect on the employees tend to interfere with the sober and thoughtful choice which a free election is designed to reflect.

Here a substantial portion of the work force, though the raw numbers are small, were addressed by one of the parties on company time within 24 hours of the election. That was a clear violation of the principles announced in *Peerless Plywood,* and, without passing on the Employer's other objection, I would therefore set the election aside and direct a second election.

APPENDIX

The Objections

The objections allege and raise the following issues:

1. Since the number of eligible employees was reduced by voluntary termination and termination for cause from five at the time of the Direction of Election to two at the time of the election and since including replacements the employee complement remained at five, whether the tally of the balloting of the only two eligible voters was representative of the entire unit.

2. Whether by entering the Employer's premises and speaking to several employees, the Union business representative violated the rule against speeches to employees within 24 hours of the election.

The Investigation and Findings

Objection No. 1

The Stipulation for Certification Upon Consent Election was signed by the parties on October 27, 1972, and approved by the Regional Director on October 30, 1972. The specific payroll period for eligibility agreed upon was October 24, 1972. At that date, five employees were unit members and were thus listed on the *Excelsior* list:

David Lee Van Ningen
Larry Wayne Quick
John Alexander Shaver
Michael F. Harbin
Kenneth Charles Wallin

Of this group David Lee Van Ningen was terminated for cause on October 30, 1972; Larry Wayne Quick voluntarily terminated his employment effective November 11, 1972; John Alexander Shaver voluntarily terminated his employment effective November 15, 1972; and Michael F. Harbin voluntarily terminated his employment effective November 28, 1972, the day of the election. The substance of the Employer's first objection is that because of the above terminations, none of which have been alleged as discriminatory by either party, only one of the original five employees on the *Excelsior* list had not terminated or given notice of termination and thus the vote could not have been representative. It is my conclusion, however, that the votes of both Harbin and Wallin were valid, that the result of the vote was representative and that Certification of Representative should issue.

As to the validity of Harbin's ballot, the Board has consistently held that there are two requirements for eligibility to vote in a Board administered election: employment on the eligibility date and upon the date of the election.[4] Harbin satisfied both of those tests, and the fact that he terminated his employment effective the day of the election does not invalidate its reliability in determining representation.[5]

In determining whether the results of an election are representative of the entire unit, the Board has chosen to avoid mechanical application of percentage rules and has examined and evaluated each case on its own merits. In approaching the issue of the representative nature of a given vote, the presumption of validity has been recognized and thus in most cases the election is overturned only when it was conducted in the presence of various commonly recognized extenuating circumstances. None of these are present in the case at hand, however. Here there was no expansion or contraction of the unit, nor is the business a seasonal one with recognizable peaks of employment. There was no destruction of the unit by transferral of relocation of the business. No improprieties in the ballot or the actual mechanics of the Board's administration of the election were alleged or are evident. No eligible voters were prevented from casting ballots. The election was held at the place and time agreed upon and employees Harbin and Wallin both satisfied, as noted above, the eligibility requirements agreed upon by the

[4] *Choc-ola Bottlers, Inc.,* 192 NLRB No. 182; *Plymouth Towing Company, Inc.,* 178 NLRB 651.

[5] *Orleans Storage Company, Inc.,* 123 NLRB 1757.

parties. Moreover, the question does not involve a simple issue of representative voting in a two-men unit, but rather whether a vote of the only two eligible voters in a five-man unit may be taken as representative. The obscuring factor, and one which, although fully aware of it, neither party saw fit to raise before the election is the pre-election turnover of three of the original five eligible voters.

Based on the lack of any other accompanying unforseen or otherwise extenuating elements, I find that the pre-election turnover in the voting unit is not sufficient in the case at hand to invalidate the results of the election and render them unrepresentative. Given the size of the unit involved, the fact that no change in the nature of the unit took place, and that both eligible voters cast ballots, I find the results to be representative of the unit and thus recommend that the Board find the Employer's first objection without merit and overrule it.

Objection No. 2

The substance of the Employer's second objection is that Ray Grimes, the Union Business Agent, made an election speech to a massed assembly of employees on Company property and time within the 24-hour period immediately preceding the election, and by doing so violated the Board rule against such conduct announced in *Peerless Plywood Co.,* 107 NLRB 427. I do not find the alleged conduct of the Business Agent in violation of that rule.

The election in question was held from 11:30 a.m. to 12:00 noon on November 28, 1972. By way of support for this objection, the Employer furnished affidavits which allege that at approximately 8:30 or 9:00 p.m. on November 27, 1972, Grimes entered the Employer's premises with the announced purpose of soliciting union cards from two employees who had not yet signed cards. Both of the non-signers from whom Grimes solicited signatures were hired after the date of the Regional Director's approval of the Stipulation for Certification Upon Consent Election and thus were not eligible voters, and in fact one employee terminated his employment on November 27, and so was not employed on the day of the election. It is undisputed that there were no supervisory or management personnel present. According to the Employer, Grimes then began a conversation with Kenneth Wallin, one of the two eligible voters; Randy Schleuter, the above-mentioned ineligible voter whose employment ran from November 16 to November 27, 1972; and Ronald Reyelts, another voter ineligible by the reason of his late employment. During the course of that conversation, which by the Employer's admission lasted no more than 10 or 15 minutes, the Business Agent apparently solicited union card signatures from Schleuter and Reyelts, addressed all three about the benefits which would come to them if they voted for the Union the next day, and reminded Wallin to vote. Grimes then exited.

The case upon which the Employer seems to rely for support of this objection is, as noted above, *Peerless Plywood Co., supra.* The rule there was stated to be that, "employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." It is my view, however, the factual framework of the instant case does not fall within the prohibitions of that rule. The Employer notes that only one eligible voter was present during the meeting in question and that the Union Business Agent entered the premises with the express purpose of obtaining authorizations from the two non-eligible voters. The Union Business Agent was obviously not allied with the Employer to the extent that his mere presence or his requests to talk to individual employees would have created a "captive audience." His conversation with the employees was not part of a monologue type presentation.

I find that the conversation here was not the kind of election speech to a captive massed audience envisioned by the Board as "tending to create a mass psychology which overrides arguments made through other campaign media."[6] Accordingly, I recommend that the Board find the Employer's second objection without merit.

[6] *Peerless Plywood Co., supra,* at 429; *Eagle-Picher Industries, Inc.,* 171 NLRB 293; and *Buddies Supermarkets, Inc.,* 192 NLRB No. 143.