

Toto Industries (Atlanta), Inc. and Teamsters Local 528, International Brotherhood of Teamsters, AFL-CIO, Petitioner. Case 10-RC-14780

May 6, 1997

ORDER DENYING REVIEW

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The National Labor Relations Board has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent parts of which are attached as an appendix). The request for review is denied as it raises no substantial issues warranting review.¹

¹ The only issue raised in the request for review is whether the Regional Director erred in not dismissing the petition as premature, and in directing an immediate election.

APPENDIX

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

6. The Petitioner and the Employer are in agreement as to the scope and composition of the appropriate unit. The Employer, however, seeks to have the petition dismissed as premature in view of its proposed expansion plans, which expansion the Employer asserts will be completed by July 1997. According to the Employer, as of July 1997, the unit will have doubled in size. The Petitioner, on the other hand, contends that the current employee complement constitutes a substantial and representative segment of the ultimate employee complement thereby warranting an immediate election. Accordingly, the only issue presented, herein, is whether the Employer's current employee complement is sufficiently substantial and representative, so as to warrant holding an immediate election.

The Board's expanding unit principle has two objectives, both premised on employees' rights to select a bargaining representative, if they so desire, and to ensure employee participation therein. Therefore, current employees should not be deprived of the right to select or reject a bargaining representative simply because the Employer plans an expansion in the near future. The Board, however, does not desire to impose a bargaining representative on a number of employees hired in the immediate future, based upon the vote of a few currently employed individuals. To determine this issue, the Board adopted its "substantial and representative" test. In determining whether an employee complement is "substantial and representative" so as to warrant holding an immediate election, the Board has avoided any hard and fast rules. Instead a case-by-case approach is utilized, analyzing the relevant factors of each case.³ Factors used to determine whether the employee complement is sufficiently substantial and representative to order an immediate election in an expanding unit include: (1) the size of the present work force

at the time of the representation hearing; (2) the size of the employee complement who are eligible to vote; (3) the size of the expected ultimate employee complement; (4) the time expected to elapse before a full work force is present; (5) the rate of expansion, including the timing and size of projected interim hiring increases prior to reaching a full complement; (6) the certainty of the expansion; (7) the number of job classifications requiring different skills which are currently filled; (8) the number of job classifications requiring different skills which are expected to be filled when the ultimate employee complement is reached; and (9) the nature of the industry.⁴

In applying these factors to the instant case, I conclude that the Employer's present complement of employees is substantial and representative. At the time of the hearing, the Employer's facility, which has been in operation since June, 1996, had a total employee complement of 134 employees. These employees were principally assigned to two 12-hour day shifts. The employees do not have specific job classifications. However, for pay purposes, the Employer classified the employees as production employees, leadpersons, or technicians. By July 1997, the Employer expects to operate its entire facility on a 24-hour basis. Currently, the Employer operates for 24 hours only in the kiln and maintenance departments. The 24-hour operation will result in the Employer adding two fully functioning night shifts. According to the Employer, the addition of the two shifts will result in the Employer hiring approximately 107 employees by July 1997.⁵ The additional hiring will raise the total employee complement to approximately 261. The Employer expected to hire an additional 20 employees by the end of March, with the remaining employees being hired in relatively equal increments beginning in April and ending in July. The record evidence established that even after the Employer reaches its full employee complement, there will be no additional job skills or separate and distinct job classifications added. Indeed, the Employer will continue to produce the same product and use the same equipment. Accordingly, the skills and functions required of the night-shift employees are identical to those of day-shift employees. While the night-shift employees will receive a 25-cent shift differential, all employees will otherwise enjoy the same rate of pay. Similarly, the employees will enjoy the same benefits, work the same number of hours, and will be supervised according to the same supervisory hierarchy. Employees on the day shift will be afforded the opportunity to transfer to the night shift.

Based on the facts here, I do not find that conducting an immediate election would unreasonably disenfranchise a substantial number of employees. On the contrary, at the time of the hearing, the present complement of employees represented in excess 50 percent of the Employer's intended total employee complement. The record testimony indicates

⁴ *General Cable Corp.*, 173 NLRB 251 (1968); *Endicott Johnson de Puerto Rico, Inc.*, 172 NLRB 1676 (1969); *Libbey Glass Division*, 211 NLRB 939 (1974).

⁵ In its brief, the Employer argued that replacement employees, who will be hired to fill vacancies due to normal employee turnover, should be considered in assessing the total employee complement. This argument has no basis in fact or law. The record is completely void of any evidence showing that the total employee complement will exceed the estimated 261 employees. Accordingly, the number of replacement employees hired is neither in keeping with the evidence presented nor dispositive of the issue.

³ *Clement-Blythe Co.*, 182 NLRB 502 (1970), *enfd.* 77 LRRM 2373 (4th Cir. 1971).

that the anticipated hiring during March will increase the total employee complement to 154 employees, approximately 60 percent of the prospective total complement. Accordingly, the present complement achieves the desired balance between the objective of insuring the goal of maximum employee par-

ticipation in the selection of a bargaining agent, while not depriving current employees of immediate representation. Based on the foregoing, I find that the present complement of employees is sufficiently representative and substantial to warrant holding an immediate election.