Diamond Walnut Growers, Inc. *and* Cannery Workers, Processors, Warehousemen & Helpers Local 601, International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 32–RC–3553

September 22, 1992

DECISION ON REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Acting Regional Director's Decision and Direction of Election. The request for review is granted solely on the issue of the bifurcated election directed by the Acting Regional Director.[1] The Board has carefully considered, on review, the issue presented, and decided to affirm the Acting Regional Director's conclusion.

We reject the Employer's contention that the Acting Regional Director abused his discretion under Section 9(c)(3) by directing an election with two separate polling sessions, one prior to the anniversary date of an ongoing economic strike to enfranchise the strikers, and the other during the seasonal peak of employment 2 months later.

The Employer operates a seasonal business receiving, processing, and marketing walnuts. The Employer adds approximately 500 seasonal employees to its 300-employee year-round complement during its peak season in September and October. Peak employment occurs about the second week of October. The Petitioner struck the Employer's seasonal business on September 4, 1991. The Employer continued operations by hiring both core and seasonal permanent replacement employees. The Union filed an RC petition seeking a *General Box*[2] election in an historically recognized unit of full-time, regular part-time, and seasonal maintenance, production and warehouse employees at the Employer's Stockton, California facility on April 27, 1992, 5 months prior to the anniversary date of the strike.

The Acting Regional Director noted that if the election is not held prior to September 4, 1992, permanently replaced economic strikers will be ineligible to vote under Section 9(c)(3).[3] If the election is held before September 4, 1992, however, a large number of seasonal striker replacement employees will be ineligible because the bulk of seasonal hiring occurs after that date. We believe that the Acting Regional Director, faced with this administrative difficulty, and in accord with Board policy to enfranchise the largest number of possible voters, struck a reasonable accommodation between the rights of economic strikers under Section 9(c)(3) and the interest of replacement seasonal workers to express their preferences regarding representation. Consistent with Section 9(c)(3)'s directive, the Acting Regional Director formulated an election plan that fostered the Act's policy of enfranchising the largest number of possible eligible voters, while concomitantly effectuating the Congressional objective of protecting the fundamental right of strikers to vote on union representation in any election conducted within 12 months from the inception of the strike.

In order to implement Congressional intent to enfranchise replaced strikers during the first 12 months of an economic strike, the Board will, as appropriate, expedite an election to permit economic strikers to vote. *Kingsport Press*, 146 NLRB 260, 264 (1964). In addition, the Board has recognized that the 12-month eligibility period of Section 9(c)(3) must not be given an unnaturally wooden interpretation. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118, 121 (1987). Accordingly, the Board interprets Section 9(c)(3) as ''requiring that replaced economic strikers be empowered to affect the results of an election for at least 12 months after the commencement of a strike.'' 285 NLRB at 120. The bifurcated polling of strikers within the 12-month eligibility period, and where it is necessary for unrelated reasons, to poll other employees later, is consistent with this precedent and falls within the clear spirit and intent of Section 9(c)(3) and its regulatory directive. In addition, as in *Jeld-Wen*, significant equities rest with the replaced strikers. The petition was filed, and the striker votes will be cast, well within the 12-month period. The disputed election starts, and for the strikers will conclude in all important respects, within the 12-month period, and the fact that the election continues later results from a special peak-of-season eligibility rule which is outside the union's control.[4]

Board elections are, of course, normally held on a unitary basis: a single election, processed continuously to a conclusion. There are exceptions for good reasons,

[1] The Employer's request for review also raises a substantial issue concerning the unit placement of the gardener, whom we shall permit to cast a challenged ballot. Thus, the request for review is denied in this and all other respects, except for the one discussed below. The Employer's motions for a stay of election and for oral argument are also denied.

[2] 82 NLRB 678 (1949).

[3] Sec. 9(c)(3) states in pertinent part:

> Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.

[4] Note that most of the Board's *Kingsport Press* elections have been conducted very near the expiration of the 12-month period. Assuming there were three choices on the ballot because another union intervened, it would seem clear that the Board would consider a runoff conducted after expiration of the 12-month period to be simply another phase of the election commenced within the 12-month period. We do not think Sec. 9(c)(3) is so wooden as to preclude such a common sense result.

such as progressive election dates when a number of far-separated sites are involved, or, as noted, runoffs which are required when no choice among three or more receives a majority. The somewhat creative resolution decided on by the Acting Regional Director here is another such exception, designed to meet a specific need which arose when the Union's petition was filed well in advance of the 12-month statutory period for striker eligibility, but further delay would be required to preserve the eligibility of the seasonal employees, a delay which would have had the effect of unfairly disenfranchising the strikers. Thus, the compromise here, to meet a specific need to reconcile conflicting equities, is one which the Board will use very sparingly, and only when it believes the particular circumstances dictate such deviation from normal procedures.

Finally, we are unpersuaded by the Employer's arguments that the direction of a bifurcated election would greatly undercut the integrity of the Board's election processes. First, it is unlikely that our application of Section 9(c)(3) will swallow the rule. We foresee few cases like this where an economic strike occurs in a seasonal industry just prior to the peak of seasonal hiring and the union files a petition seeking a *General Box* election that raises competing eligibility issues straddling Section 9(c)(3)'s 12-month eligibility date.

Second, the Employer's suppositions regarding a 6-month gap between polling periods and intervening union threats, violence, and statements concerning the futility of voting in October are entirely speculative. The critical period in Board elections frequently encompasses a period in excess of 6 months (from filing of the petition to the date of election). If voting strikers apply and are hired as seasonal employees, it is obvious they cannot cast a second ballot; however, that will more appropriately be dealt with, if it arises, during challenged ballot proceedings after the election. Further, we note that the Employer exercises nondiscriminatory control over the hiring process it complains about.

With respect to campaign issues, objections, and challenges, we note that both parties have the same timeframe to reach polled voters during the campaigns. There will be no tally of striker ballots until the end of the second polling session, as in an election held for different shifts, or one conducted at different polling sites. The ballot box is sealed. No one will know the results of the first or second polling until the final tally. Once the final tally issues, objections are timely. No objections or challenges are resolved until after the final tally. Thus, neither the objections process nor the challenge process is impaired.

We also reject the Employer's argument that the bifurcated election procedure chills free speech. In this regard, the Employer asserts that it is unclear whether the *Peerless Plywood*[5] 24-hour rule would prohibit a captive-audience speech to the Employer's current work force, i.e., the replacements on the date of the first polling. That rule is limited to polled employees, and the only polled employees in the first polling are the strikers. See, e.g., *Shop Rite Foods*, 195 NLRB 133 (1972) (*Peerless Plywood* rule not violated where employer made captive-audience speeches to employees in a unit comprised of 26 retail stores, where some speeches occurred within 24 hours of the time the election was to start at other stores, but none of the employees spoken to were scheduled to vote within 24 hours of the employer's speech). We also do not find persuasive the Employer's contention that any delay in counting ballots may lead some strikers to needlessly prolong the strike while waiting to determine whether the Union still represents them.

In sum, we find that the direction of a bifurcated election is a permissible and reasonable method of accommodating competing eligibility concerns and enfranchising the greatest number of eligible voters.

[5] 107 NLRB 427 (1953).