Berryfast, Inc. *and* Sequoia District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Petitioner. Case 32-RC-1418

October 12, 1982

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered a determinative challenge and objections to an election held on September 11, 1981,[1] and the Hearing Officer's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Hearing Officer's findings and recommendations[2] only to the extent they are consistent with the following opinion.

Employee Jeannette Turner began a pregnancy leave of absence in May 1981.[3] She returned to work at the end of October, worked 3 or 4 weeks, and then quit. Larry Gooden, the employer's chief operating officer, composed the *Excelsior* list[4] for the September 11 election from the August 7 payroll list. Due to her leave of absence, Jeannette Turner's name was not on the August 7 payroll and, consequently, her name did not appear on the *Excelsior* list.

During the weeks prior to the election, Turner discussed the question of her eligibility to vote with her husband, David, who was a Berryfast employee and who ultimately voted in the election. Jeannette and David Turner's uncertainty about Jeannette's eligibility to vote resulted in David Turner approaching Larry Gooden on the election day, about 15 minutes prior to the opening of the polls. He asked Gooden whether his wife was eligible to vote. Gooden replied that her name was not on the list and she was therefore ineligible.

The Hearing Officer found that, as an employee on a leave of absence with an expectation of return, Jeannette Turner was eligible to vote in the September 11 election. He recommended that the election be set aside because the Employer's mistaken statement that Turner was ineligible prevented her from voting. The Petitioner excepts to the Hearing Officer's recommendation. We find merit in this exception.

The Hearing Officer correctly noted in his decision that, although a party is generally estopped from profiting from its own misconduct, we have in the past overlooked this principle in circumstances where employees have been disenfranchised through no fault of their own. For example, in both *Glen McClendon Trucking Co., Inc.*, 255 NLRB 1304 (1981), and *Cal Gas Redding, Inc.*, 241 NLRB 290 (1979), we set aside elections based on employer's objections where employees were unable to vote because they were away from the polling place in the normal course of their duties for the employer. Our primary concern in these cases was with the disenfranchisement of the employees involved, not with any separate employer claim of reliance upon orderly Board proceedings.

The Hearing Officer also relied on *Kansas City Bifocal Company*, 236 NLRB 1663 (1978), where the Board—on the basis of the union's objection—set aside an election because the employer incorrectly told an employee on sick leave that he was ineligible to vote. The Board found that the employer, by usurping the Board's authority to determine election eligibility, had interfered with our orderly election processes. Here, unlike *Kansas City Bifocal*, the Employer is objecting to its own conduct, and therefore it cannot reasonably claim reliance on the Board's processes. Where a party to an election, through its own action, negligence, or good-faith mistake, has prevented an eligible employee from voting, only the other, non-acting party has any foundation for an objection based on a breakdown in the Board's processes. To hold otherwise would invite abuse of both the Board's election procedures and the postelection objection process. Since the Employer attempts to rely on its own actions, and its conduct has not prejudiced the other party to the election, the proper focus in this case is solely on the disenfranchisement of an eligible voter. Accordingly, we must examine Jeannette Turner's conduct to determine whether she took sufficient reasonable steps in attempting to exercise her right to vote.

In *Versail Manufacturing, Inc., Subsidiary of Philips Industries, Inc.*, 212 NLRB 592 (1974), we rejected an employer's attempt to set aside an election because of an employee's inability to reach the polling place based on our determination that the employee's failure to vote resulted from his behavior in going off on a frolic of his own. Similarly here, Turner's own conduct was instrumental in her not voting. Even though she lived nearby, she did not show up at the plant in person and attempt

[1] The Regional Director conducted the election pursuant to a Stipulation for Certification Upon Consent Election. The tally was 18 for, and 17 against, the Petitioner; there was 1 challenged ballot, a sufficient number to affect the results.

[2] In the absence of exceptions, we adopt, *pro forma*, the Hearing Officer's recommendations that the challenge to Anthony Gunn's ballot be sustained and that the Employer's Objections 2, 3, 4, and 5 be overruled.

[3] All dates, unless otherwise indicated are in calendar year 1981.

[4] *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966).

to vote. Instead, she sent her husband to determine her eligibility. Her husband did not follow the instructions on the Board's "Notice of Election" that directed him to communicate any questions concerning eligibility rules to the Regional Director or the agent in charge of the election.[5] Rather, he relied on the statement of the Employer's representative, Larry Gooden, and did not pursue the matter any further. Based on these specific facts, we find Jeannette Turner did not take sufficient reasonable steps to vote and therefore we will not set aside the election based on her failure to case a ballot. Moreover, we note that Turner's failure to vote is the only possible wrong before us. Since she has quit her job and would be ineligible to vote in a second election, we could not remedy her failure to vote by running another election.

[5] The notice of election provides, *inter alia*, that "any employee who desires to obtain any further information concerning the terms and conditions under which this election is to be held or who desires to raise any questions concerning the holding of an election, the voting unit, or eligibility rules may do so by communicating with the Regional Director or agent in charge of the election."

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that the majority of the valid ballots have been cast for Sequoia District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All full-time and regular part-time production and maintenance employees including employees in the following departments: Production, Tool Assembly and Parts, Engineering, Machine Shop, Quality Control, Shipping, Receiving and Warehouse, Maintenance and employees in the following job classifications: leadmen, Numerical Control (N/C) operators, draftsmen and truck drivers employed by the Employer at its 1648 W. Tulare Avenue, Tulare, California facility; excluding office clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.