

CWM, Inc.—Port Arthur and International Brotherhood of Electrical Workers, Local 479, AFL-CIO, Petitioner. Case 16-RC-9397

February 28, 1992

DECISION AND DIRECTION

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held on July 3, 1991,¹ and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots was seven votes for and two votes against the Union, with five challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief and has determined, for the following reasons, that the challenges to the five ballots should be overruled.

The Petitioner challenged the ballots of five employees—David Austin, Jerry Boling, Joseph Cormier, Jeff Cullum, and Glen Graham—on the ground that they were not employed in the unit performing bargaining unit work as of the June 15 payroll eligibility date and, thus, were ineligible to vote in the election. The hearing officer found that the challenged voters—new employees at the Employer's Port Arthur facility—spent their first 5 days of employment, June 10 through 14, in an orientation/training program during which they performed no actual bargaining unit work. The hearing officer concluded that the challenged voters had not begun to perform bargaining unit work on the eligibility date and recommended that the challenges to their ballots be sustained. For the reasons that follow, we do not adopt the hearing officer's recommendation.

The Employer operates several waste treatment facilities, among them an organic waste treatment facility at Port Arthur, where the challenged voters were hired as permanent employees. In accordance with Federal and state regulations covering the licensing and operation of waste treatment plants,² the Employer requires all new employees to complete successfully a 5-day orientation and training program and associated tests before beginning hands-on work at the facility. The challenged voters were new employees at Port Arthur and attended an orientation and training program from

June 10 to 15.³ The training was comprehensive, including site safety and accident procedures, identification and handling of hazardous waste, emergency response and reporting procedures, contingency plans, use of personal protective equipment, regulatory coverage and compliance requirements, substance abuse, confined space entry procedures, lockout/tagout procedures, heat stress, and a variety of other work-related matters.⁴ Part of the first day was devoted to completing various employment forms and learning about Employer policies.⁵

On Friday morning, June 14, the final day of orientation and training and the day before the June 15 payroll eligibility date, the challenged voters took a bus tour of the Employer's 3600-acre facility. In the early afternoon, around 1 or 2 p.m., they were released to their supervisor, Dale Young, to begin their assigned jobs. The challenged voters, however, did not have all the protective clothing and equipment required for working in the waste processing areas of the plant.⁶ After consulting his supervisor, Maintenance Superintendent Dave Matthews, Young released the challenged voters for the balance of the day with instructions to report back on Monday, June 17.

It is settled that, to be eligible to vote in a Board-conducted election, the employee must be employed and working on the eligibility date, unless the employee is absent for one of the reasons set out in the Direction of Election. *Ra-Rich Mfg. Corp.*, 120 NLRB 1444, 1447 (1958); *Tom Wood Datsun*, supra. The Board defines "working" under this "hired and working" requirement as meaning "actual performance of bargaining unit work," excluding "participation in training, orientation or other preliminaries." *Emro Marketing Co.*, supra at 926 fn. 1 (1984); *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517 (1973). The Board's so-called prework rule has two purposes: it operates as a prophylactic against an employer's manipulation of an election by hiring employees favorable to its position just prior to the election, and it provides a simple and fair means of determining whether newly

³ There were about 15 other new employees, in addition to the challenged voters, who attended the week-long training. They were not members of the unit.

⁴ Thus, the training undergone by the challenged voters in this case is distinguishable from the mere orientation and "preliminaries" at issue in *Tom Wood Datsun*, 767 F.2d 350 (7th Cir. 1985), enfg. 270 NLRB No. 162 (June 8, 1984) (not included in bound volumes), *Emro Marketing Co.*, 269 NLRB 926 (1984), and *F. & M. Importing Co.*, 237 NLRB 628 (1978), cited by the hearing officer.

⁵ Three of the challenged voters were transfers from other waste processing facilities operated by the Employer. The record indicates that at least some of the transfers were not required to attend a portion of the first day's orientation program.

⁶ The uncontradicted testimony was that the challenged voters were instructed to bring their Employer-provided, steel-toed shoes on Friday, June 14. They were not, however, wearing the shoes on Friday.

¹ All dates are 1991 unless otherwise indicated.

² The Occupational Safety and Health Administration (OSHA) requires 24 hours of initial training and an annual 8-hour refresher course in workplace safety and health. The Environmental Protection Agency mandates certain types of training within the first 6 months of employment. Pursuant to its licensing authority, the State of Texas also requires detailed training and orientation of all new employees.

hired employees are part of the bargaining unit. *Tom Wood Datsun*, supra at 352.

In this case, it is clear that the challenged voters were employed on the June 15 payroll eligibility date—they were in pay status and had attended the Employer's required training program beginning on June 10. Thus, the issue is whether they were "working" and eligible to vote or merely engaged in "preliminaries."

We find that the challenged voters were working in the unit and eligible to vote no later than the time they were released to their supervisor to begin working at their assigned jobs on Friday, June 14.⁷ The challenged voters were hired as permanent employees. They began their employment at Port Arthur by attending a week-long training program. Training was required by Federal and state laws, and the Employer's training program was comprehensive and substantive in nature, as opposed to merely involving orientation or "preliminaries." By Friday afternoon the challenged voters had successfully completed the training and were released to their duties in the processing areas of the facility. At that point they were "working" on the job. They

⁷See *Saint Jean Des Pres Restaurant*, 279 NLRB 109 (1986), in which the Board overruled a challenge to the ballot of an employee who was in training during part of the week prior to the eligibility cutoff date but was performing unit work the last 2 days of that week.

would have physically begun their job duties had it not been for their failure to have adequate protective equipment.⁸ Under these circumstances, the Employer's decision to release the challenged voters from work on Friday afternoon, when they would otherwise have been working at their assigned duties, does not negate their "hired and working" status.

Based on all these factors, we find that David Austin, Jerry Boling, Joseph Cormier, Jeff Cullum, and Glen Graham were eligible to vote. Accordingly, we overrule the challenges to their ballots and order that their ballots be opened and counted.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 16 shall open and count the ballots of David Austin, Jerry Boling, Joseph Cormier, Jeff Cullum, and Glen Graham within 10 days of the date of this decision; prepare and serve on the parties a revised tally of ballots; and thereafter issue the appropriate certification.

⁸Thus, unlike the challenged voters in cases like *Tom Wood Datsun*, supra, *Emro Marketing Co.*, supra, and *F. & M. Importing Co.*, supra, relied on by the hearing officer, the newly trained employees here had been expected to physically perform, and would have physically performed, bargaining unit work but for the special circumstances described above.