

Speakman Electric Co., Inc. and International Brotherhood of Electrical Workers, AFL-CIO, Petitioner. Case 26-RC-7390

July 21, 1992

**DECISION, DIRECTION, AND ORDER
REMANDING FOR HEARING**

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered challenges to an election held August 9, 1991, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows four for and four against the petitioner, with four challenged ballots, a number sufficient to affect the results of the election.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the Regional Director's findings and recommendations only to the extent consistent herewith.¹

¹ No exceptions were filed to the Regional Director's recommendation sustaining the challenges to the ballots of Wesley V. Milliken and Charles "Randy" Thompson. We adopt those recommendations pro forma.

The sole issue before the Board now concerns the Regional Director's recommendation to sustain the challenges to the ballots of William Garfield Arnold and Timothy Andrew Raymer. A question exists concerning whether Arnold and Raymer were temporarily laid off or discharged, including the circumstances surrounding any notice of such alleged discharges. These factual issues must be resolved before determining whether the presumption in *Texas Meat Packers*, 130 NLRB 279 (1961), and its progeny should be applied here. Our dissenting colleague acknowledges that there are credibility issues as to the events of July 3, 1991. He finds, nonetheless, that the Employer had no intention of recalling Arnold and Raymer because on August 7, 2 days before the election, the Employer told the Union that the Employer had fired these two individuals prior to July 25, the eligibility date. The Union, however, was not the agent or representative of the two employees, and there is no evidence even that the Employer wanted the Union to communicate this information to the two employees. The only *undisputed* communications to Arnold and Raymer from the Employer concerning their employment status were the July 3 layoff letters which advised each of them that the layoff was "only . . . temporary" and that the Employer would be calling back the "entire workforce." Particularly where the Employer has advised employees in writing that their layoff is temporary, and there is no undisputed evidence that the Employer later advised the employees to the contrary, we cannot without a hearing fairly rely on the Employer's statement to a third party—the Union—more than a month after the layoff to establish as an incontrovertible *fact* that the Employer had discharged the employees prior to the election.

DIRECTION

It is directed that a hearing be held for the purpose of receiving evidence to resolve the issues raised by the challenges to the ballots of William Garfield Arnold and Timothy Andrew Raymer.

IT IS FURTHER DIRECTED that the hearing officer designated for the purpose of conducting the hearing shall prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the issues. Within 14 days from the issuance of the report, any party may file with the Board in Washington, D.C., an original and seven copies of exceptions. Immediately on the filing of exceptions, the party filing them shall serve a copy on the other party, and shall file a copy with the Regional Director. If no exceptions are filed, the Board will adopt the recommendations of the hearing officer.

ORDER

IT IS ORDERED that the proceeding be remanded to the Regional Director for Region 26 who shall arrange and issue notice of the hearing.

MEMBER RAUDABAUGH, dissenting.

I see no need for a hearing on the challenges to ballots cast by Arnold and Raymer. Although there may well be credibility issues as to the events of July 3, 1991, it is clear that, as of August 7 (2 days before the election), the Employer had no intention of ever recalling these two employees. It is undisputed that the Employer told the Union on that day that it had fired those individuals. Accordingly, as of the election date, they had no reasonable expectancy of recall to work. They were therefore ineligible to vote.

Where, as here, the Employer makes it clear, 2 days prior to the election, that he has no intention of recalling the employees, and there is no dispute as to his intentions as of that date, I would find that the two employees have no reasonable expectancy of recall as of the election date.¹

¹ See, e.g., *Sol-Jack Co.*, 286 NLRB 1173 (1987). The majority suggests that the test of whether a laid-off employee has a reasonable expectation of recall turns critically on what the employer directly communicated to the employees whose status is in dispute. To the contrary, what an employer tells employees about the likelihood of recall is only one of the objective factors which the Board reviews in resolving the eligibility issue. See *Higgins, Inc.*, 111 NLRB 797 (1955). In this case, the Employer unequivocally expressed to the Union its intention of not recalling Arnold and Raymer. The fact that the Union did not relay the message to the two employees does not refute the clear, undisputed, and objective evidence of employer intent.