Mono-Trade Co., Inc. *and* Thomas Danielson, Petitioner and Graphic Communications International (GCIU) Local 1-B, Twin Cities. Case 18–RD–2159

March 24, 1997

DECISION

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The National Labor Relations Board has considered a determinative challenge in an election held through the U.S. mail beginning on January 14, 1997, and the Regional Director's report recommending its disposition.[1] The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 2 votes for and 2 against the Union, with 1 determinative challenge.

The Board has reviewed the record in light of the exceptions and brief and adopts the Regional Director's findings, conclusions, and recommendations. Accordingly, this proceeding is remanded to the Regional Director for further action as set forth in the Regional Director's report.[2]

MEMBER FOX, dissenting.

I would remand the case to the Regional Director to determine whether Anita Roberts had a reasonable expectancy of recall. In my view, this issue is separate from the issue that is the subject of the grievance, i.e., whether the Employer's layoff/refusal to recall employee Roberts violated the contract.

[1] Pertinent portions of the Regional Director's report are attached as an appendix.

[2] Member Higgins notes that an arbitral decision could shed light on the propriety and permanence of the layoff. In deference to the grievance-arbitration process, he agrees to wait a reasonable period of time for such a decision.

APPENDIX

Pursuant to a petition filed on December 10, 1996, and the provisions of a Stipulated Election Agreement approved by me on January 3, 1997, an election by secret ballot was conducted through the U.S. mail beginning on January 14, 1997, among certain employees of the Employer.[1] The results of the election are set forth in the tally of ballots which issued on January 24, 1997.[2] The challenged ballot is sufficient to affect the results of the election. No party filed objections in this matter.

Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, I have caused an investigation to be conducted on the issues raised by the challenged ballot and hereby report and recommend as follows:

The Challenged Ballot

The ballot of Anita Roberts was challenged by the Employer on the basis that she is no longer employed. The Employer's position is that Roberts was permanently laid off, her job was eliminated, and the grievance filed on her behalf is neither meritorious nor subject to arbitration. The Union takes the position that the Board should defer ruling on the challenge to Roberts' ballot pending the outcome of a yet-to-be filed Section 301 suit and the possible arbitration should the Union prevail in its actions to compel arbitration. The Petitioner took no position with regard to Roberts.

The Investigation

The Employer and the Union have been parties to a series of collective-bargaining agreements, the most recent of which covered the time period from November 1, 1992, to October 31, 1995. The Union contends that the contract was extended by mutual agreement pending negotiation of a successor contract. The most recent contract included a grievance and arbitration article, providing for final and binding arbitration.

Anita Roberts began her employment with the Employer as a receptionist/bookkeeper, a nonbargaining unit position. In about June 1994 she was removed from that position and placed in a unit bindery position. On April 29, 1996, Roberts was laid off. According to the Employer, the layoff was due to lack of work and Roberts' position was eliminated. It is unclear that the Employer informed Roberts that the layoff was permanent. According to the Union, at the time of her layoff Roberts was told she would be called back when the workload picked up. On about June 17, 1996, the Union filed a grievance claiming the layoff/refusal to recall Roberts (and two other employees) violated the contract, processed that grievance up to arbitration, but the Employer declined union requests to arbitrate. Concurrently with the filing and processing of the layoff grievance, the Union was also processing an April 1, 1996 grievance claiming Roberts had not been paid in accordance with the contract. In July 1996 the Union filed a Section 301 suit in Federal district court to compel arbitration on the pay grievance, and on October 2, 1996, the court issued its order compelling arbitration. Following the court's order on the pay grievance, the Union again requested that the Employer arbitrate the layoff grievance and the Employer again declined.

On about January 3, 1997, the Union received the list of eligible voters and their addresses for use in the instant case, noted that Roberts' name was not on the list, and objected to her exclusion as an eligible voter.

The Employer contends it has no obligation to arbitrate the layoff grievance as there was no contract in effect at the time of the layoff. The Union contends the contract was in effect at the time of Roberts' layoff and that it will be promptly

[1] All full-time and regular part-time employees engaged in bindery production work, including shipping room employees; but excluding managerial employees, guards and supervisors, and all other employees.

[2] The tally of ballots is set out below:

Approximate number of eligible voters	4
Number of void ballots	0
Number of votes cast for GCIU Local 1-B, Twin Cities	2
Number of votes cast against participating labor organization	2
Number of valid votes counted	4
Number of challenged ballots	1
Number of valid votes counted plus challenged ballots	5

filing a Section 301 suit in which it will be seeking a court order to compel arbitration.

Conclusions and Recommendations

If the Union's litigation is successful and if an arbitrator determines that Roberts was not properly laid off or should have been recalled to work prior to the election, she would be an eligible voter.[3] On the other hand, if an arbitrator determines that Roberts was properly laid off and not recalled to work, I will then need to determine whether Roberts had a reasonable expectancy of recall to her former position. It appears that the Union, once it learned the Employer's position that Roberts was not an eligible voter, has been diligently pursuing the grievance and it further appears that the question of arbitrability should be resolved with reasonable promptness.[4] I will therefore recommend that the Board defer ruling on the challenge to Roberts' ballot pending resolution of the grievance. If the Union fails to promptly seek to compel arbitration of Roberts' grievance, this matter is subject to further review upon application of a party.[5]

[3] *Pacific Tile & Porcelain*, 137 NLRB 1358 (1968).

[4] *Curtis Industries*, 310 NLRB 1212 (1993).

[5] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington, D.C. by February 28, 1997. Under the provisions of Sec. 102.69(g) of the Board's Rules and Regulations, documentary evidence, including affidavits which a party has timely submitted to the Regional Director in support of its objections and which are not included in the report, are not a part of the record before the Board unless appended to the exceptions or opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in this report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.