

**BHY Concrete Finishing, Inc. and Local #846, Laborers' International Union of North America, Petitioner.** Case 10-RC-14630

April 21, 1997

**DECISION AND DIRECTION OF RUNOFF ELECTION**

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The National Labor Relations Board has considered the determinative challenges and objections in an election held September 15, 1995, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 8 for the Petitioner, 6 for the Intervenor, United Brotherhood of Carpenters and Joiners of America, and 13 votes for neither. There were two challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings and recommendations,<sup>1</sup> and find that because none of the choices on the ballot received a majority of the valid ballots cast, we shall direct a runoff election.<sup>2</sup>

The Employer contends that the Petitioner interfered with the election when, at its own expense, it filed an action against the Employer on behalf of the unit employees under the Fair Labor Standards Act (FLSA). The Petitioner admits that it sponsored the lawsuit.

The Employer's contention that the Petitioner's conduct is grounds for setting the election aside is based on the Sixth Circuit Court of Appeals' decision in *Nes-*

*tle Dairy Systems v. NLRB*.<sup>3</sup> In *Nestle* the court reversed the Board's finding that the filing of a \$20 million class action lawsuit 3 days before a representation election did not constitute an unlawful benefit which would reasonably tend to interfere with the employees' free choice in the election.

The hearing officer distinguished *Nestle* and also found that the lawsuit here was not objectionable under the four-factor test set forth in *B & D Plastics*, 302 NLRB 245 (1991).

We agree with the hearing officer's findings and his conclusion. We note, however, that his report issued before the Board's decision in *Novotel*.<sup>4</sup> *Novotel* involved a union that provided free legal services to unit employees, during the critical period, to investigate, prepare, and file a lawsuit asserting their wage claims under the FLSA. The Board, after acknowledging the historical role of unions in vindicating the rights of workers,<sup>5</sup> found that a union's assisting workers in the exercise of their Section 7 rights to better their working conditions is fundamental to the statutory scheme of the Act.<sup>6</sup>

The identical analysis and conclusion is applicable to this case. *Novotel* drew a distinction between union conduct in the granting of a benefit which has no connection to the employer-employee relationship (e.g., paying employees to vote for the union) and union conduct that assists employees in improving their terms and conditions of employment.<sup>7</sup> The conduct here falls within the latter category and is not objectionable.

Accordingly, we find that the Petitioner's conduct of assisting unit employees by sponsoring and filing a FLSA lawsuit on behalf of those employees is not objectionable. Because the result of the election is inconclusive, we shall direct a runoff election.

**DIRECTION OF RUNOFF ELECTION**

IT IS DIRECTED that the Regional Director shall conduct a runoff election at a time and place to be determined by him, among those employed during the payroll period used in the prior election, to determine whether they desire to be represented for collective bargaining by Local #846, Laborers' International Union of North America, or remain unrepresented.

<sup>1</sup> We adopt the hearing officer's recommendation to sustain the challenge to the ballot of Lance Dobson. In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation that the challenge to the ballot of Thomas Vaughn be overruled. However, because his ballot will not change the choices receiving the two highest numbers of votes, it will not be opened.

<sup>2</sup> See Sec. 102.70 of the Board's Rules and Regulations. NLRB Casehandling Manual (Pt. Two) Representation Proceedings, Sec. 11350.1 provides that:

Where . . . there are three or more choices on the ballot, an election in which (after any determinative challenges have been resolved) none of the choices receives a majority of the valid votes cast is considered an *inconclusive* election. In such case, the Regional Director should conduct a runoff election between the choices on the original ballot that received the highest and the next highest number of votes.

Also see Casehandling Manual (Pt. Two) Representation Proceedings, Sec. 11350.2.

<sup>3</sup> 46 F.3d 578 (1995), revg. 311 NLRB 987 (1993).

<sup>4</sup> *Novotel New York*, 321 NLRB 624 (1996).

<sup>5</sup> *Id.* at 629.

<sup>6</sup> *Id.* at 633.

<sup>7</sup> *Id.* at 634-635.

MEMBER HIGGINS, dissenting.

The evidence in this case indicates that the Petitioner provided a substantial benefit to unit employees during the critical period. That is, the Petitioner filed a lawsuit on their behalf and provided free legal services in connection therewith. In my view, this grant of benefit interfered with the laboratory conditions that

are necessary for a valid election.<sup>1</sup> Accordingly, I would set the election aside.

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<sup>1</sup>*Nestle Dairy Systems v. NLRB*, 46 F.3d 578 (6th Cir. 1995); *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); and *Novotel New York*, 321 NLRB 624, 641 (1996) (Board Member Cohen, dissenting in part).