Sitka Sound Seafoods, Inc., a Division of North Pacific Processors, Inc. *and* International Longshoremen's and Warehousemen's Union, Local 200, AFL–CIO, Petitioner. Case 19–RC–13479

April 29, 1998

ORDER DENYING REVIEW

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

The National Labor Relations Board, by a three-member panel, has considered the Employer's request for review of the Regional Director's Supplemental Decision and Certification of Representative (pertinent parts of which are attached as an appendix). The request for review is denied as it raises no substantial issues warranting review.[1] The Employer's Motion for Reconsideration is denied as untimely, and as lacking in merit.

[1] The Employer contends that the Regional Director's decision to send mail ballots to employees on ''layoff status'' without first obtaining the agreement of the parties fails to comply with Sec. 11336.1 of the Casehandling Manual. Even were we to consider the cyclical employees as ''laid-off,'' we would find that the Regional Director did not abuse his discretion in light of the fact that many of the employees in question were widely scattered at the time of the election and would otherwise have been unable to vote.

APPENDIX

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a petition filed on August 26, 1997, and a Decision and Direction of Election issued by the Regional Director on October 6, 1997, an election was conducted by secret ballot[1] among the employees in the following unit:

> All full-time, regular part-time, and seasonal production and maintenance employees employed by the Employer at its Sitka, Alaska, facility; but excluding all office clerical employees and guards and supervisors as defined by the Act.

The official tally of ballots served upon the parties on December 4, 1997, sets forth the following results:

Approximate number of eligible voters	92
Void ballots	0
Votes cast for Petitioner	36
Votes case against participating labor organization	28
Valid votes counted	64
Challenged ballots	2
Valid votes counted plus challenged ballots	66

[1] The manual portion of the election was conducted in Sitka, Alaska, on November 4, 1997, and the mail-ballot portion was conducted between November 5 and December 3, 1997.

The challenged ballots are not sufficient in number to affect the outcome of the election.

On December 11, 1997, the Employer filed timely objections to the election, a copy of which was duly served upon the Petitioner. A copy is attached hereto.

Acting pursuant to Section 102.69(c) of the Board's Rules and Regulations, Series 8, as amended, the undersigned has caused an investigation to be undertaken and makes the following findings:

The Objections

The Employer's numerous objections, attached hereto, are somewhat unfocussed and repetitive, but can be summarized as follows: (a) the use of an eligibility formula in an election among the employees of this employer, an assertedly ''seasonal'' and not ''cyclical'' operation; (b) conducting the election at other than the summer employment peak; (c) use of mail ballots for some voters was improper; (d) insufficient voter turnout. The result of these four factors, argues the Employer, was the disenfranchisement of many voters and a resulting lack of a representative complement of voters participating in the election.

Preliminary Observations

While this facility processes salmon, the record is clear that it is not solely a salmon cannery. While the facility has a peak employment in the summer, it employs a crew year round, i.e., the crew on the ''seniority list,'' albeit not full time. The exact frequency of that employment is not spelled out in detail in the *record*, although the Employer had ample opportunity to make its record. (Certain additional material was appended to its request for review, which material is neither part of the record nor ''newly discovered.'' The same can be said for much of the material offered in support of the objections, i.e., it is a belated attempt to make the unmade record.)

Work is performed throughout the year by a significant group of employees (about 50–60 on the seniority list, who must work at least 1200 hours per year to be on the list. A daily *average* of 24 persons worked in November 1997 according to the Employer's Objections submissions). When work is performed cyclically throughout the year, but with a core group of ''permanent'' employees, the Board will not hold up the election until the employment peak, but will conduct it as soon as possible.

When an employer employs a category of ''regular'' or ''full-time'' or ''seniority'' employees, and a category of ''sporadic'' or ''on-call'' or ''periodic'' employees, the Board will utilize a formula to distinguish those employees with a concrete, continuing interest in the employer from those who just happen to have worked there briefly or who do so extremely intermittently.

In the instant case, the Regional Director established two categories, ''full-time, regular part-time'' (i.e., the ''seniority list'') and ''seasonal'' (i.e., employees with more sporadic employment). He then devised a formula for the latter group, the Employer offering no suggested formula of its own.

The formula states that ''seasonals'' who meet particular work history criteria are eligible to vote. The Employer attorney asserts that the Employer agent who prepared the *Excelsior* list wrongly interpreted the eligibility criteria and failed to include on the list, seasonals who did not meet the prior

work history criteria but who were in fact then working for the Employer. We need not discuss whose ''fault'' this was, since in fact, the Employer agent made no error—he complied with the eligibility criteria. It is obvious that employees who were not on the seniority list, and who did not meet the work history criteria, were *not* eligible. To do otherwise, would be to permit new hires with very few hours who just happen to be working on the eligibility/election dates, to vote, while denying that right to laid-off employees who worked a similar number of hours, but who happen *not* to be working on the eligibility/election dates. That, of course, would defeat the very purpose of the eligibility formula, i.e., to distinguish those individuals with substantial continuing work ties to the Employer from those with only a minimal, casual interest.

In summation, what the Employer is doing by its objections regarding the seasonal/cyclical issues and the formula is simply relitigating the Direction of Election, as to which review has already been denied. Thus, I will overrule all objections pertaining to those issues.

Use of Mail Ballots

The Employer also contends that utilization of mail ballot arrangements was improper. Thus, while it argues that the *Excelsior* addresses it provided were accurate, it asserts that an undetermined number of seasonal employees leave the Sitka area when not working and would be deprived of their right to vote. The manual portion of the election was conducted in Sitka on November 4 and the following day mail ballots were sent to all those on the *Excelsior* list who did not appear in person at the polls. Of the 41 ballots that were mailed, only 4 were returned by the Postal Service as undeliverable. The Regional Office quickly obtained updated addresses for all four and remailed the ballots in sufficient time for their use by the employees. No other evidence was presented to show that any other similarly situated voters did not, in fact, receive their ballots, whether at their Sitka addresses or forwarded to other addresses not in the possession of the Employer.

Thus, I will overrule the objections insofar as they pertain to the use of mail ballots.

Representative Complement

A common theme running through all the Empioyer's objections is the question of whether a representative complement of voters has participated.[2] The underlying rule to which the Board adheres is that ''where adequate opportunity to participate in the balloting is provided all those eligible to vote, the decision of the majority actually voting is binding on all.'' *S.W. Evans & Son*, 75 NLRB 811, 813 (1948). Through the years various situations have arisen which have caused the Board to explore the question of whether a representative complement of voters has cast ballots. The guiding standard is that enunciated by the Board in *Lemco Construction, Inc.*, 283 NLRB 459 (1987). In *Lemco* the Board declared it will not depend upon a percentage test of eligibles voting. Rather, it will find a representative complement to have voted if (1) all employees have received adequate notice of the election; (2) all employees have been given adequate opportunity to vote; and (3) employees are not prevented from voting by the conduct of one of the parties or by unfairness in the scheduling or mechanics of the election. The Board addressed this standard in a later case, *The Glass Depot, Inc.*, 318 NLRB 766 (1995), a case involving a determinative number of voters who were unable to vote owing to a snowstorm. While a similar act beyond the control of the parties is not involved herein, *Glass Depot* offers guidance. In *Glass Depot* the Board declared that when faced with having to decide whether an act or unexpected event constitutes ''extraordinary circumstances'' justifying a new election, it would examine both the event itself and whether it resulted in less than a representative complement of voters casting ballots. It declined to give a precise percentage figure, stating that the representative complement test represents a balance between the value of employee opportunity to vote and the values of finality and economy. Nevertheless, it stated that if the participation rate dropped below 50 percent, a ''substantial cause of concern'' would exist, if there were an ''event'' that restricted voting. There is no such ''event'' here. In *Glass Depot*, since only 4 of the 19 voters had been prevented from voting, the Board upheld the election results, even though the 4 were determinative. In the instant case, 64 out of a unit of 92, or 70 percent, voted. Every employee had an *opportunity* to vote, first in person, then by mail. That 30 percent chose not to vote is no grounds to set aside the election.

Accordingly, I shall overrule the objections insofar as they raise ''turnout'' issues.

Conclusions

Having found that the Board has already ruled on the issues of seasonal/cyclical, and eligibility formulas, and having rejected the objections pertaining to use of mail ballots and insufficient turnout, I hereby overrule the Employer's objections in their entirety and shall issue a Certification of Representative.

Certification of Representative

IT IS HEREBY CERTIFIED that a majority of valid ballots have been cast for International Longshoremen's and Warehousemen's Union, Local 200, AFL–CIO and that pursuant to Section 9(a) of the National Labor Relations Act, as amended, the labor organization is the exclusive representative of all employees in the unit set forth below found to be appropriate for purposes of collective bargaining with respect to pay, wages, hours of employment, and other conditions of employment:

> All full-time, regular part-time, and seasonal production and maintenance employees employed by the Employer at its Sitka, Alaska, facility; but excluding all office clerical employees and guards and supervisors as defined by the Act.

[2] Of the 92 on the *Excelsior* list, 64 voted, and of the 64 a majority voted in favor of the Petitioner.