

Freund Baking Co. and Bakery, Confectionery and Tobacco Workers International Union, Local Union 119, AFL-CIO, CLC, Petitioner. Cases 32-CA-16293 and 32-RC-4221

November 16, 1999

SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On November 7, 1997, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, and ordered that the Respondent cease and desist and take certain affirmative action to remedy the unfair labor practices.¹

Thereafter, the Respondent petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Board's Order and the Board filed a cross-application for enforcement. The court, in its decision issued on January 22, 1999, granted the Respondent's petition for review and denied enforcement of the Board's Order.² The court found that the Union impermissibly interfered with the election by filing, at its own expense and during the critical period, a class action lawsuit seeking overtime and breaktime pay allegedly due unit employees. Accordingly, the court concluded that the Board erred in not setting aside the election held on January 30, 1997, and won by the Union.

By letter dated August 19, 1999, the Board notified the parties that it would not seek certiorari but would consider position statements as to what further processing may or should be undertaken in light of the court's decision. The Respondent filed a position statement.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The court has not remanded Case 32-CA-16293 to the Board. Therefore, the sole issue before the Board is whether to direct a second election in the underlying representation proceeding, Case 32-RC-4221. The Board has reviewed the entire record, including the Respondent's statement of position, in light of the court's decision, and has decided to reopen Case 32-RC-4221, set aside the election, revoke the certification of representative, and direct a second election.³

¹ 324 NLRB No. 175 (1997) (not reported in Board volumes).

² *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999).

³ We find no merit to the Respondent's contention that, in the absence of a remand, the Board no longer has jurisdiction over the representation case. Sec. 9(d) of the Act does not give the court general authority over the representation proceeding, but authorizes review of the Board's actions in the representation proceeding for the limited purpose of deciding whether to "enforc[e], modify[] or set[] aside in whole or in part the [unfair labor practice] order of the Board." The

ORDER

The National Labor Relations Board orders that the Decision and Order in Case 32-CA-16293 is vacated.

IT IS FURTHER ORDERED that Case 32-RC-4221 is reopened, the election is set aside, and the certification of representative is revoked.

IT IS FURTHER ORDERED that Case 32-RC-4221 is remanded to the Regional Director for the purpose of conducting a second election as directed below.

[Direction of Second Election omitted from publication.]

MEMBER HURTGEN, dissenting.

I would not direct a second election at this juncture. For the reasons set forth below, I would first return to the court.

In this regard, I note that the court, in the 8(a)(5) case (Case 32-CA-16293), was essentially reviewing the representation case (Case 32-RC-4221). That is, the 8(a)(5) case was a "test-of-certification" case to determine whether the certification in the representation case was valid. In these circumstances, there is at least a question as to whether the court would agree that it never had jurisdiction over Case 32-RC-4221. Certainly, the Fourth Circuit in a "test-of-certification" case, concluded that it had jurisdiction over the underlying representation case.¹

In these circumstances, I think it prudent for the Board to advise the court of the Board's intention to resume processing of Case 32-RC-4221. In that way, there will be no danger of a misunderstanding between the Board and the court.

I recognize that the Board's brief to the court in Case 32-CA-16293 said that: "The Board retains authority under Section 9(c) of the Act . . . to resume processing the representation case in a manner consistent with the ruling of the court." However, there is no indication as to whether the court agreed or disagreed with this posi-

Board retains authority under Sec. 9(c) of the Act to resume processing the representation case in a manner consistent with the rulings of the court. *River Walk Manor, Inc.*, 293 NLRB 383, 383 (1989); *Deming Division, Crane Co.*, 225 NLRB 657 fn. 3 (1976); *Medina County Publications, Inc.*, 274 NLRB 873, 873 (1985).

Citing *Lundy Packing Co.*, 81 F.3d 25 (4th Cir. 1996), our dissenting colleague suggests that there is a question as to whether the D.C. Circuit would agree that it never had jurisdiction over the representation case. However, as he concedes, the Board informed the court in its brief in Case 32-CA-16293 that it retained jurisdiction over Case 32-RC-4221 to resume processing it in a manner consistent with the ruling of the court and the direction of a second election is consistent with the court's decision. Accordingly, in the absence of a statement to the contrary from the court, we see no reason to delay the processing of the representation case by once again advising the court of the Board's intention.

We also reject the Respondent's contention that a second election is inappropriate since the showing of interest is stale. It is the Board's established policy not to require a current showing of interest when an election is set aside due to a meritorious objection. *Provincial House, Inc.*, 236 NLRB 926 (1978).

¹ See *NLRB v. Lundy Packing Co.*, 81 F.3d 25 (1996).

tion. Further, even if the court agreed with it, there could at least be a question as to whether a direction of a second election is “consistent with the ruling of the court.” Concededly, I agree with my colleagues that direction of a second election would be consistent with the court’s decision. However, I think it prudent to gain the court’s

concurrence with that view. Thus, in an abundance of caution, I would return to the court.²

² I recognize that the court may choose not to rule on the propriety of second election, reserving that for a new 8(a)(5) case if the Union wins the election. However, the court would at least be aware of our intentions, and a misunderstanding would be avoided.