

Courier-Post, a Division of Gannett Satellite Information Network, Inc. and Teamsters Union Local 628, a/w International Brotherhood of Teamsters, AFL-CIO, Petitioner. Case 4-RC-19471

November 30, 1999

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered a determinative challenge in an election held on August 26, 1998,¹ and the Acting Regional Director's December 23 report recommending disposition of the challenge. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 1 for and zero against the Petitioner, with 1 challenged ballot, a sufficient number to affect the outcome.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the Acting Regional Director's findings and recommendations,² and finds that a certification of representative should be issued.

¹ Unless otherwise indicated, all dates are in 1998.

² In the absence of exceptions, we adopt, pro forma, the Acting Regional Director's recommendation to sustain the challenge to the ballot of Robert Walker.

The Petitioner argues that, with the exception of the position statement from the Employer's counsel dated November 23 and the Martin memorandum dated November 20, the documents in the appendix of the Employer's brief in support of its exceptions should be stricken from the record. Sec. 102.69(g)(3) of the Board's Rules and Regulations provides that the parties may supplement the record before the Board with those documents previously submitted to the Acting Regional Director which have not been forwarded to the Board. Since the documents were submitted to the Region not as part of the representation proceeding but in the context of a closely related unfair labor practice investigation in Case 4-CA-27435, we shall deny the motion to strike as to those documents that were submitted to the Region prior to the issuance of the Acting Regional Director's December 23 report. However, several of the appended documents were submitted to the Region after the date of issuance of the Acting Regional Director's report and no motion was filed to reopen the record in the representation proceeding.

Our dissenting colleague argues that the Employer was not given a deadline by which to submit additional evidence in support of its position. In suggesting that the Board consider the material submitted after the issuance of the Acting Regional Director's report, the dissent accepts the Employer's assertion that the Region requested further documentation supporting the Employer's position on December 23, the same date that the Acting Regional Director issued his report. The Employer's letter to the Region dated December 31, more than a week after the issuance of the Acting Regional Director's report, refers only to a telephone conversation with the Board agent "just before Christmas," in which the Board agent indicated that, if the Employer could supply documentary evidence to meet its burden of proof, the Region might reconsider its decision to issue a complaint on the unfair labor practice charge and its recommendation in the Acting Regional Director's report that the unit be certified. The only documented communication, however, between the Region and the Employer is a letter dated December 23, from the Region informing the Employer that the charge in Case 4-CA-27435 has been amended. The complaint in Case 4-

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the Teamsters Union Local 628, a/w International Brotherhood of Teamsters, AFL-CIO, and that it is the exclusive bargaining representative of the employees in the following appropriate unit:

All full time and regular part time single-copy merchandisers employed at the Employer's Cherry Hill facility; excluding office clericals, guards, supervisors and all other employees as defined in the Act.

MEMBER HURTGEN, dissenting in part.

I agree with the majority to deny the Petitioner's request to strike from the record those documents that the Employer submitted to the Region, in the context of a closely related unfair labor practice charge (Case 4-CA-27435), prior to the December 23 issuance of the Acting Regional Director's report on challenged ballot. Contrary to my colleagues, however, I would not strike additional documents tendered by the Employer to the Region on December 31. Rather, I would remand this case to the Regional Director for her to additionally consider the Employer's December 31 position statement, with supporting documents, and determine whether a hearing is warranted on the issue of whether the unit consists of a single employee. In this regard, I note that apparently both the Region and the Employer grouped together the instant representation case and the closely related unfair labor practice charges in Cases 4-CA-27435 and 4-CA-27338 when seeking and providing information.¹ Indeed,

CA-27435 issued on December 24 and, according to the Employer's brief, was received by the Employer on December 30. No motion or petition was filed to reopen the record in the representation proceeding. Further, the Respondent's own correspondence dated November 23 indicates that as early as November 18 it was informed that the Board agent was "within days" of presenting his recommendation to certify the unit to the Acting Regional Director. Even accepting the Employer's version of events, it could not have reasonably believed that it would have an indefinite time in which to satisfy its burden of proof in the representation case. Once the Acting Regional Director's report issued on December 23, any information requested on or after that date must have related to the pending unfair labor practice case. The Region would not have sought information in a case in which it had issued a report. Accordingly, we find that these documents are not part of the record and we have not considered them.

¹ Case 4-CA-27435 involved allegations that the Employer violated Sec. 8(a) (3) by diverting work out of the unit in order to reduce it to a single employee. The Region has issued a complaint on this allegation. Case 4-CA-27338 involved allegations that a unit employee was unlawfully discharged (thereby reducing the unit to a single employee). The Region dismissed this allegation.

The majority argues that, assuming that the Region on December 23 did offer the Employer the opportunity to provide additional evidence, such evidence tendered on December 31 should not be considered because the "Employer could not have reasonably believed it would have an indefinite time in which to satisfy its burden of proof." I disagree. It may be that the time was "indefinite" in the sense that the Region set no precise time deadline. But no one is suggesting that the Employer was given a limitless unreasonable period of time in which to respond. And, clearly, a response within 1 week (a holiday week at

my colleagues accept certain documents in the instant representation case, even though they were submitted in conjunction with the unfair labor practice cases. According to the Employer, the Region informed the Employer on December 23 that its November 23 position statement and the appended November 20 memo were inadequate to show a permanent diminution of the unit to one employee, and requested further documentary evidence. There is no evidence that the Employer was given a deadline by which to submit the additional evidence. In response to this request, the Employer provided the Region with a December 31 position statement, a supporting affidavit from its comptroller, and excerpts from its records purporting to show that the unit has been permanently reduced in size to one employee. However, the Region, on December 23, issued its decision in this case and in Case 4-CA-27435. In these circumstances, it was patently unfair to refuse to consider the submitted materials. The Employer promptly provided the Region with the requested information.

My colleagues suggest that the Employer was given a deadline for the submission of further evidence. However, my colleagues point only to a purported statement by a Board agent to the Employer as early as November 18, that the agent was “within days” of presenting his recommendation to the Acting Regional Director on the unit issue. Of course the making of a recommendation does not establish when a decision would be made. In-

that) was a response within a reasonable period. Finally, in light of this understanding with the Region, there was no need for the Employer to file a motion or petition to reopen the record.

deed, as it turned out the decision was not made until December 23. In this context, the relevant facts are: (1) the Employer provided evidence to the Region on November 23; (2) the Region notified it on December 23 that this submission was insufficient, and requested further documentation; and (3) the Employer promptly provided the solicited documentation on December 31.

My colleagues note that the Acting Regional Director issued his decision on December 23, and thus could not have been receptive, on that date, to further information from the Employer. The answer to this contention is obvious. As the Employer makes clear, the Region told the Employer on December 23 that it had made a decision but that it would reconsider its decision if further information were supplied. As noted above, no deadline was set for such information. The information was promptly supplied on December 31, and yet my colleagues refuse to consider it.²

In response to the above, my colleagues say that the Employer’s assertions, in its letter of December 31, are “self-serving.” I note, however, that the Employer makes specific statements about specific events, *and the Acting Regional Director does not controvert them*. In these circumstances, I would not leap to the conclusion that the Employer’s statements are false.

In these circumstances, the Region should consider the evidence, notwithstanding the receipt thereof after the issuance of the report on challenged ballot.

² The information related to the “R” and the “C” cases. The two were interrelated. The decision in both was made the same day. The Employer’s letter of December 31 is captioned with both cases and discusses both cases.