Dakota Fire Protection, Inc. ***and*** **Road Sprinkler Fitters Union #669, Petitioner.** Case 18–RC–16847

December 20, 2001

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

The National Labor Relations Board has considered determinative challenges in an election held on September 13, 2001, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 8 for and 6 against the Petitioner, with 3 challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations for the reasons set forth below, and finds that a certification of representative should be issued.[1]

The Petitioner challenged the ballot of Chris Mitzel, a recent high school graduate who worked for the Employer during the summer of 2001[2] before starting college. The hearing officer recommended that the challenge to Mitzel's ballot be sustained on the basis that Mitzel quit his employment and stopped working before the September 13 election. The Employer excepts, arguing that Mitzel did not quit and has worked part time since the election. For the reasons set forth below, we agree with the hearing officer that Mitzel was ineligible to vote.

Mitzel worked for the Employer during July and the first part of August. About August 12, he submitted a resignation letter to Supervisor Dennis Laturnus. The body of the letter stated:

> Thank you for the opportunity to work for Dakota Fire Protection this summer. As we discussed when I started this job, I need to be done on August 17th. I wanted to write to verify this date.
>
> Working in Jamestown has been a rewarding experience and I appreciate the opportunity. I plan on working through August 16th and making that my last day. I will be getting ready to start college at Mayville the following week.
>
> Please keep me in mind for possible employment next summer if you need a part time employee again.

Consistent with the letter, Mitzel did in fact stop working on August 16. He started college on August 28. Sometime before the September 13 election, a representative of the Employer called Mitzel and asked him to vote in the election, which he did. However, there is no evidence that this phone call included any discussion about returning to work. After the election, another representative of the Employer called Mitzel, told him that some employees had quit, and asked Mitzel if he could work.[3] Mitzel testified that September 26, almost 2 weeks after the election, was the first day (and, as of the October 2 hearing date, the only day) he had worked since August 16. The evidence does not show that Mitzel had discussed working during the school year with any representative of the Employer prior to the election, other than during a job interview with Laturnus at the beginning of the summer, when Mitzel said he could "if [he] had time."[4]

The Board has consistently held that an employee's actual status as of the eligibility date and the date of the election governs that employee's eligibility to vote, irrespective of what occurs after the election. See, e.g., *Columbia Steel Casting Co.*, 288 NLRB 306 fn. 4 (1988); *Plymouth Towing Co.*, 178 NLRB 651 (1969). When an employee quits his employment and stops working prior to election day, he is not eligible to vote. See *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517, 518 (1983) (characterizing the test for entering and leaving the unit as "the clear, objective fact of actual work on the eligibility dates").

In this case, we agree with the hearing officer that Mitzel quit his employment and stopped working before the election date. Mitzel submitted a clear and unambiguous resignation letter, in which he said nothing about wanting to continue working during the school year. Rather, the letter stated unequivocally that Mitzel "need[ed] to be done on August 17th" and that August 16 would be his "last day." Mitzel stopped working on August 16, 4 weeks before the September 13 election. Other than Mitzel's job interview, well before the resignation letter, the evidence does not show that he talked to the Employer

[1] In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to sustain the challenge to Dennis Laturnus' ballot and overrule the challenge to Robert Thompson's ballot.

The hearing officer also recommended that Thompson's ballot be opened and counted and a revised tally of ballots issued. Because we sustain the challenge to Chris Mitzel's ballot, Thompson's ballot is not determinative. Therefore, we do not adopt the hearing officer's recommendation that Thompson's ballot be opened and counted and a revised tally issued.

[2] All dates are in 2001 unless otherwise specified.

[3] The precise date of this call is unclear, but Laturnus' testimony regarding the dates on which his other employees quit suggests that the call to Mitzel took place around September 19.

[4] Although Laturnus made a notation at the bottom of Mitzel's resignation letter that Mitzel would "probably" be returning to work part time and the following summer, Laturnus admitted that he made that notation unilaterally and that he never discussed the issue with Mitzel.

ployer before the election about continuing work during the school year. Not until after the election did the Employer call Mitzel and ask him to come back to work. Under these circumstances, we find that Mitzel terminated his employment and stopped working before the election, and therefore was ineligible to vote. See *Orange Blossom Manor, Inc.*, 324 NLRB 846 (1997) (relying in part on resignation letter to find that employee resigned before election and was therefore ineligible to vote, despite employee's testimony that she had an understanding with the employer that she would return); *Columbia Steel Casting Co.*, supra, 288 NLRB 306 (employee in retirement status on day of election was ineligible to vote; determinative factor was his "actual status on the date of the election . . . not his subjective intent to terminate his retirement and attempt to return to work for the Employer at some later date").[5] Accordingly, we sustain the Petitioner's challenge to Mitzel's ballot and issue a certification of representative.[6]

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Road Sprinkler Fitters Union #669 and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time field employees of Dakota Fire Protection, Inc. who install and service fire protection sprinkler and chemical system pipe and are based at the facility at 1710 Washington Street "N," Grand Forks, North Dakota, excluding clerical employees and guards and supervisors as defined in the Act.

[5] The Employer's reliance on *Town Concrete Pipe of Washington*, 259 NLRB 1002 (1982), is misplaced. In that case, an employee resigned because of a substance abuse problem. Before the election, he met with the employer and agreed to seek professional help, and the employer changed his status from voluntary quit to medical leave of absence. See 259 NLRB at 1003. Noting the presumption that "an employee granted a leave of absence is still an employee," the Board found that the employee was an eligible voter. Id. at 1004. In this case, the Employer did not contact Mitzel about returning to work until after the election, and Mitzel was not on medical leave or any other leave of absence at the time of the election.

[6] Because we find that Mitzel was ineligible to vote because he quit his employment and stopped working before the election date, we need not pass on the Petitioner's alternative argument that Mitzel was a summer employee with no reasonable expectation of employment in the future. Thus, we do not rely on the hearing officer's finding that there was insufficient evidence to show that Mitzel had a reasonable expectation of future employment.