

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

IVOR J. LEE, INC.

Employer

and

Case No. 8-RC-15916

**UNITED STEELWORKERS
OF AMERICA, AFL-CIO, CLC**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,¹ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

¹ Both parties have filed post-hearing briefs that have been duly considered.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed by the Employer at its Masury, Ohio facilities excluding all production and maintenance employees at the Sharon, Pennsylvania Plant, all journeymen pipefitters and apprentices represented by Local 47 of the United Association, all machinists primarily performing work relating to the making of components in connection with commercial pipe fabrication work performed by employees represented by Local 47 of United Association, carpenter and helper, and office clerical employees, professional employees, guards and supervisors as defined in the Act.

There are approximately 36 employees in the unit found appropriate.

The United Steelworkers of America, AFL-CIO, CLC (the Petitioner) seeks to represent the employees in the above stipulated unit at the Masury, Ohio facility of Ivor J. Lee, Inc. (the Employer). The sole issue presented at the hearing is whether certain employees who are currently laid off from the Employer's Masury facility are eligible to vote in a Board-conducted representation election. The Petitioner asserts that these employees have only been temporarily laid off and thus should be eligible to vote because they have a reasonable expectation of being recalled to work. The Employer contends otherwise and maintains that the disputed employees do not have a reasonable expectancy of recall in the near future.

The Employer is a Pennsylvania corporation that is engaged in the custom fabrication of cryogenic plants and other products primarily for the basic steel industry. The Employer currently conducts its business operations at three separate locations in Masury, Ohio; Sharon, Pennsylvania; and Clairfield, Utah. The Employer's headquarters is located at the Masury site. Prior to the hearing, the Employer had formerly leased two additional facilities in Ambridge and Erie, Pennsylvania. However, only unrepresented production and maintenance employees at the Employer's Masury facility are involved here. Currently, Local 47 of the United Association of

Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, (the UA), represents employees at both of the Employer's Masury and Sharon facilities. Presumably, the UA represents those craft employees excluded in the stipulated unit. The record does not indicate that the UA has sought to intervene in the instant matter.²

The evolution of the Employer's business has taken a varied path over the years. In 1923, the Employer started as a plumbing contractor specializing in water heating systems. With the onset of World War II, the Employer began providing heating and plumbing services for commercial customers. In the 1960's, the Employer moved into the industrial area providing contracting services for both the renovation and construction of steel plants. Thereafter, the Employer began installing space simulators, which eventually led it into the cryogenic field. At that time, the Employer saw a need in the market to build cryogenic air separation plants for large gas companies that service the steel industry.

These separation plants consist of large cold boxes having scrubbers, compressors and piping components that lower the temperature of atmospheric air until it separates into various elemental liquids. The plants or units can be of various sizes ranging from 20 to 200 feet long and weighing from 10,000 to over a 1,000,000 pounds. The plants are rated as producing from 20 to 3,000 tons of liquid per day. Additionally, the Employer manufactures or fabricates component parts for separation plants including heat exchangers, air separation columns, collector-type vessels, storage tanks, pipes, and fittings. To give an idea of the size of these component parts, a 750 ton-a-day plant can have an air separation column, which is made out of aluminum, approximately 14 feet in diameter and approximately 130 feet in length.

² In its post-hearing brief, the Petitioner indicated that a jurisdictional agreement had been reached between the Petitioner and the UA pursuant to proceedings conducted under Article XX of the AFL-CIO's constitution.

As the Employer's cryogenic business initially progressed, it ceased doing outside construction work. In 1982, after it had outgrown its Sharon facility, the Employer bought a closed manufacturing facility in Masury with the intent to build cryogenic air separation plants only. However, the Employer decided to utilize the existing machinery at the Masury plant to build additional heavy industrial items, such as bells, hoppers, hot metal cars, ladles, ladle turrets, scrap buckets, shelves for BOF vessels, and BOF water-cooled hoods and panels, directly for customers in the steel industry. The Employer's pictorial exhibits indicate that these items are also mammoth in size. Presently, 10 percent of the Employer's total business is made up of manufacturing these heavy industrial components with the other 90 percent being devoted to its cryogenic endeavors, which includes the fabrication of large modular piping skids utilized by both cryogenic and non-cryogenic plants.

Presently, the unrepresented Masury production and maintenance employees build the frames and shells for the cold boxes and manufacture the heavy industrial items described above. The employees at the Sharon facility actually build the aluminum or stainless steel vessels that go into the cold boxes. They assemble, x-ray, and pressure test the vessels before shipping them to their ultimate destinations. The UA represented employees perform the work associated with the vessels, piping, wiring, and controls. As of June 1999, there were approximately 50 to 60 total employees working between the Masury and Sharon facilities; 10 of whom were represented by the UA. The total number of employees at these two facilities had declined from June 1996 when there were approximately 230 to 240 total employees. At the time of the hearing on July 9, 1999, there were approximately 36 unrepresented production and maintenance employees still working at the Masury facility at which the Petitioner seeks to represent.³ Additionally, there were approximately 30 non-

³ During the hearing, the parties disagreed on the Section 2(11) supervisory status of one

UA represented employees who currently are laid off from the Masury facility. One of these employees was laid off on August 28, 1998, and the rest were laid off in either late January or mid-February 1999.

The Employer has a general policy of laying off employees when it has a lack of work. Typically, a foreman will make a recommendation to layoff, or recall if business improves, to the Personnel Director, Jim Shepherd. Layoff and recall decisions are not determined by seniority, but rather by skill and ability. The record confirms that the current above-mentioned layoffs are the result of a lack of work.

Michael S. Murcko, who is the current Vice-president of Operations and one of the Employer's three Board of Directors, testified that while the Employer has recalled employees after previous layoffs, it had at those times, unlike now, projections of future work. Murcko testified that the Employer's current forecast for the future was "bleak." At the time of the hearing, it had no new orders and none on the immediate horizon. Murcko indicated that the Employer was attempting to reach a blanket contract with a gas company called Praxair, and an agreement to build component parts for a Japanese firm called Sumotoma. However, neither arrangement was definite. Moreover, the Japanese entity lacked its own orders. Additionally, Murcko remarked that the Employer was trying to become qualified under the Chinese code to build vessels and components to ship to China. While Murcko further testified that the Employer was also trying to expand into new market areas by recently hiring manufacturing representatives on a commission basis, nothing had yet developed. Murcko, who has been with the Employer since 1957, testified that he had never seen business so low since the Employer had ventured into the cryogenic field.

additional employee, Ray Chason. However, the issue was not developed in the record. While the Petitioner's brief contends that Chason should be included in the unit, there is insufficient evidence in the record to decide his status. Accordingly, I shall permit him to vote subject to

Murcko blamed the economic status of the steel industry, particularly the dumping of foreign steel on the U.S. market and the industry's overall decline in capital investment, for the Employer's lack of work. Murcko testified that the Employer's competitors in the cryogenic field, two of which are located in Canada, one in Mexico, and four in the U.S., were also hurting for business. Murcko stated that only one of its competitors, located in New Iberia, Louisiana, was presently engaged in building small cold boxes. Murcko indicated that the gas companies were simply not placing inquiries for bids because they were not receiving any orders from the steel industry. Notwithstanding, Murcko added that there is at least an approximately 4- to 5-month lead time from the point when a bid inquiry is placed to the actual start of construction on a cold box. Murcko testified that the last order the Employer had received was in June 1999 for a bell and hopper out of its heavy fabrication division. The lead time on this particular order was approximately 3 months. While Murcko conceded that there had been a slight increase in employment among its Masury employees between June and July 1999, he stated that this was the result of a short-lived order for four crane girders placed by Bethlehem Steel. At the time of the hearing, the girders had been completed and two had already been shipped. The Employer projected that unless it receives some new orders it will not require any UA represented employees past December 1999 and no unrepresented production and maintenance employees past January 2000.

Two current laid-off employees, Charles Ellis and Daniel Zigo, testified that they were notified of the Employer's layoff decision by Personnel Director Shepherd on January 19, 1999. While Shepherd did not testify, both employees indicated that they had not been given a definite return date. Rather, Shepherd had merely informed them that they would be recalled when the Employer had work. Neither employee was denied unemployment compensation and both were

challenge.

eligible to continue participating in the Employer's medical insurance under COBRA. While Zigo testified that recalled employees still retained their seniority for purposes of accruing vacation time, the record was void of evidence of whether the recently laid-off employees had actually been compensated for any unused vacation leave, or any other benefits, at the time of their layoffs.

Zigo also indicated that when he was laid off, he had not been asked to return his ID badge or the Employer's equipment and tools. Both employees further testified that they were not asked to clean out their lockers. While Ellis had cleaned out his locker at the time of his layoff, Zigo testified that he had not. Moreover, Zigo testified that he had returned to the plant since his layoff to talk to other employees with the Employer's knowledge. Additionally, the record indicates that both Ellis and Zigo had a history of previously being laid off and recalled. Ellis had been laid off in February 1998 for 2 months; while Zigo had been laid off twice in the 1980s for approximately 3 and 5 weeks. Zigo also testified that two employees, Jim Schaffer and John Griffith, had been laid off for over 6 months and then had been recalled. However, the record failed to indicate when these layoffs had occurred.

It is well established that temporary laid-off employees are eligible to vote in Board-conducted elections if they have a reasonable expectancy of recall in the near future. This "reasonable expectation of recall" must exist as of the payroll eligibility date, which in a directed election, is normally the payroll period immediately preceding the Regional Director's decision. In determining whether a layoff is of a temporary nature, the Board examines several objective factors including "the employer's past experience and future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall." **Osram Sylvania, Inc., 325 NLRB No. 147, slip op. at 2 (1998); Apex Paper Box Co., 302 NLRB 67, 68 (1991).** In the instant analysis, I find that at the time of the hearing, the laid-off employees in question did not possess a

reasonable expectation of recall in the near future.

Since June 1996, the Employer has had a substantial decline in the number of individuals it has employed at both its Masury and Sharon facilities. This decline is particularly sharp since January 1999 when the recent rounds of layoffs began. The record reflects that the layoffs were caused by a lack of work and that, at the time of the hearing, the Employer had only enough orders to keep its remaining workforce in place until the end of the year. Further, the record indicates that the Employer does not have any definite prospects of business which would sustain the recall of its laid-off employees while keeping its current workers. Moreover, even if the Employer would receive enough orders to effectuate a recall, it would not be immediate because of the considerable amount of lead time required before the actual fabrication of an item can begin.

While the record reflects that the Employer has laid off and recalled employees in the past, there is no indication that the circumstances surrounding those layoffs are similar to the ones at hand. Moreover, the span of the current layoffs is already over 6 months. Additionally, the record indicates that the laid-off employees were not given a definite date of when they could expect to be recalled, nor an estimate as to the duration of the layoff. Rather, they were simply told that they would be recalled when business improved. Such vague statements by the Employer cannot support a finding that its employees have a reasonable expectancy of reemployment in the near future, especially given the present economic status of the Employer. *See **Foam Fabricators, 273 NLRB 511, 512 (1984)***. Accordingly, I find that at the time of the hearing, the Employer's laid-off employees did not possess a reasonable expectancy of recall in the near future. Thus, I further find the approximately 30 laid off employees are ineligible to vote in the ensuing directed election.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the **United Steelworkers of America, AFL-CIO, CLC**.

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc.**, 156 NLRB 1236 (1966); **N.L.R.B. v. Wyman-Gordon Co.**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this

decision. North Macon Health Care Facility, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, by **August 27, 1999**.

Dated at Cleveland, Ohio this 13th day of August 1999.

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

362-3312