UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of MORTON HOSPITAL AND MEDICAL CENTER, INC. Employer and JOSEPH MENARD Petitioner and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2020, AFL-CIO, CLC Union	Case 1-RD-2030

REPORT ON CHALLENGED BALLOT

Based on a Stipulated Election Agreement executed by the parties on February 6, 2004,[1] and approved by me on February 9, an election was conducted on February 20, among certain employees of the Employer.[2]

The tally of ballots cast at the election is as follows:

Approximate number of eligible voters 12
Void ballots 0

[1] All dates are 2004 unless otherwise stated.

[2] The appropriate collective-bargaining unit, as set forth in the Stipulated Election Agreement, is:

> All full-time and regular part-time skilled maintenance employees employed by the Hospital at its 88 Washington Street, Taunton, Massachusetts acute-care facility in its Plant Operations Department, including employees employed in the job classifications of maintenance electrician, plumber, carpenter, painter/carpenter, general maintenance mechanic, fireman, fireman/maintenance mechanic, and bio-medical technician, but excluding office clerical employees, managerial employees, the Director of Plant Operations, the Maintenance Shop Foreman, the Lead Carpenter, the Lead fireman, guards and supervisors as defined in the Act.

Votes cast for Union	6
Votes cast against participating labor organization	5
Valid votes counted	11
Challenged ballots	1
Valid votes counted plus challenged ballots	12

The challenged ballot is determinative of the results of the election.

The Union challenged the ballot of Joseph L. Menard at the election on the ground that he was not a member of the bargaining unit.

Under Section 102.69 of the Board's Rules and Regulations, an investigation of the challenged ballot was conducted. As a result of the investigation, I find, for the reasons discussed below, that Menard is an eligible voter; and, accordingly, I recommend that the challenge to his ballot be overruled, that his ballot be opened and counted, and that a revised tally of ballots be issued.

It is undisputed that Menard was hired in March 2003 as a fireman/maintenance mechanic, a position included in the stipulated election agreement. It is also undisputed that Menard was employed on the cutoff date for voting eligibility and on the day of the election. The Union asserts that he was only a temporary employee because he (1) did not have the proper license for his job and (2) would be replaced when someone who was properly licensed could be hired. The Employer denies that Menard was going to be replaced because of his lack of license or that it ever told Menard or anyone else Menard was temporary. For purposes of this decision, I will assume the facts asserted by the Union are correct.

Board law provides that to be eligible to vote, an employee must be employed on both the established eligibility date and on the day of the election. *Plymouth Towing Co.*, 178 NLRB 651 (1969). Even if an employee meets that test, however, he can be excluded if he has been hired as a temporary employee for a definite period of time. *Marian Medical Center*, 339 NLRB No. 23 (2003). However, the Board has consistently held that even a temporary employee is eligible to vote if his tenure remains uncertain. *Lloyd A. Fry Roofing Co.*,121 NLRB 1433,1437 (1958). In this case, even assuming the facts asserted by the Union, there is no evidence that Menard was only employed for a set time. Consequently, I find him to be an eligible voter.[3]

[3] The Union's argument is that Menard was temporary because he was going to be replaced once an employee with a license was hired. On the question of the effect of having a prospective replacement on eligibility status, the Board and the First Circuit squarely addressed this issue in *New England Lithographic Co.*, 233 NLRB 1013 (1977), enfd. sub nom *NLRB v. New England Lithographic Co.*, 589 F.2d 29 (1st Cir. 1978), which held that when an employee knows that a replacement is being sought, the employee remains eligible to vote if no definite date is set for the termination of his employment. In that case, prior to the election, the company had advertised for a replacement and confirmed this fact to the employee, and three days after the election the employee was discharged. The Board, upheld by the First Circuit, found that the employee was eligible to vote because, on the day of the election, the date of his replacement was unknown.

Recommendation

Having found Joseph L. Menard to be eligible to vote, I recommend that the challenge to his ballot be overruled, that his ballot be opened and counted, and that a revised tally of ballots be issued.

Rosemary Pye, Regional Director
National Labor Relations Board
First Region
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street - Sixth Floor
Boston, Massachusetts 02222-1072

Dated at Boston, Massachusetts on
this 30th day of March, 2004.[4]

[4] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington by April 13, 2004.

Under the provisions of Section 102.69(g) of the Board's Rules and Regulations, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support is its objections, which are not included in this report, are not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in this report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.