Pepsi-Cola Company *and* International Ladies' Garment Workers' Union, Local 170, AFL–CIO, Petitioner. Case 6–RC–10981

January 19, 1995

DECISION, DIRECTION, AND ORDER

BY MEMBERS BROWNING, TRUESDALE, AND COHEN

The National Labor Relations Board, by a three-member panel, has considered determinative challenged ballots in an election held December 29, 1993, 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 21 for and 20 against the Petitioner, with 3 determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, and has decided to adopt in part and reverse in part the hearing officer's findings[1] and recommendations.

We adopt the hearing officer's findings and recommendation that the challenges to the ballots of Don Wolinski and Donald McCleary be overruled and that their ballots be opened and counted. For the reasons set forth below, we do not adopt the hearing officer's recommendation that the challenge to the ballot of Paul Reese Sr. be sustained.

As indicated, Paul Reese *Sr*. cast a challenged ballot. But the Regional Director's subsequent order directing hearing indicates that the challenged ballot is that of Paul Reese *Jr*. The parties agreed at the hearing that the challenged *voter* in question is Paul Reese *Sr*. Thus, the Employer has requested that the Regional Office make certain that the challenged *ballot* being held is that of Paul Reese Sr.

If the name on the challenged ballot envelope is Paul Reese Jr., then the ballot must be opened and counted, because there was no challenge to his ballot. And if the name on the envelope is Paul Reese Sr., then it too must be opened and counted, because for the reasons discussed below, we find merit in the Employer's exception to the hearing officer's failure correctly to apply the Board's rule in *Red Arrow Freight Lines*, 278 NLRB 965 (1986),[2] and we therefore overrule the challenge to the ballot of Paul Reese Sr.

[1] The Petitioner has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] In *Red Arrow*, the Board held that the ''fundamental rule governing the eligibility of an employee on sick leave or maternity leave is that he or she is presumed to continue in such status unless and until the presumption is rebutted by an affirmative showing that the employee has been discharged or has resigned.'' Id. at 965.

I. FACTUAL BACKGROUND

The Petitioner challenged the ballot of Paul Reese Sr.[3] on the ground that he is disabled and has no reasonable expectation of returning to work. The Employer asserts that Reese is eligible to vote because he remains an active employee on disability leave and he has not been terminated, nor has he resigned. We agree with the Employer.[4]

Paul Reese Sr. worked in a unit position as warehouseman for many years. In January 1992, he went on short-term disability leave for lung cancer. After exhausting 26 weeks of short-term disability benefits, Reese applied for and was placed on long-term disability under the Employer's insurance program.

An attending physician's statement dated March 10, 1992, that was received in evidence and prepared in connection with Reese's application, states that Reese suffers from lung cancer that has resulted in: ''Severe limitation of functional capacity; incapable of minimum (sedentary) activity.'' The doctor's statement also indicates that Reese is totally disabled; that no fundamental or marked change in his condition is expected (although Reese's condition had improved from the previous month with treatment, including radiation therapy); and that Reese is not suitable for occupational rehabilitation. The parties stipulated that had this prognosis been updated it would have remained the same. The parties also stipulated that had Reese testified, he would have stated: ''That he still wants to return, he has not given up and he is still fighting.''[5]

Gregory Horton, the employee relations manager for Johnstown until December 1992, testified that he decided not to terminate Reese when he went on long-term disability. While on long-term disability, Reese continues to receive mailings sent to active employees, including newsletters and promotional items, and maintains contact with the human resources department about benefit questions. More importantly, Reese continues to receive the same benefits that he received as an active working employee. Perhaps the most important benefit still received is the Employer's ''Flex Benefits'' or ''Benefits Plus'' program, a cafeteria plan under which the Employer contributes toward the cost of a variety of health and welfare benefit options selected by the employee.[6] In fact, Reese executed a 1994 Benefits Plus Choices Confirmation form that summarizes the coverages he selected for himself and

[3] All subsequent references to Reese are to Paul Reese Sr.

[4] *Red Arrow*, supra.

[5] Reese was subpoenaed to appear at the hearing but was unable to do so because of shortness of breath. Because of the parties' cooperation concerning evidentiary stipulations, Reese was excused from the subpoena by the hearing officer.

[6] The Employer contributed $2964.63 toward the cost of Reese's 1994 benefits. Reese also receives Social Security disability benefits.

his wife for calendar year 1994.[7] This form indicates that Reese is an eligible employee whose work location is Johnstown, Pennsylvania.

The Employer maintains an ''Employee Profile'' for each employee, containing basic personnel information. Reese's ''Employee Profile'' shows that on the election date he was an active employee on full-time status—designated by an ''F'' after ''status''—employed as a warehousemen in the Johnstown facility. The record does not show whether Reese's warehouse job has been filled on any basis—temporary, permanent, or otherwise.[8] The record reflects that if Reese had been terminated, his ''Employee Profile'' would have been designated by a ''T'' after ''status''—not full time.

Merritt Saunders, the current human resource manager for the Johnstown facility, testified that when he requested a listing of active employees from the Employer's computer data base to submit to the Board as the *Excelsior* list Reese's name appeared on that list. The Stipulated Election Agreement defines ''Eligible Voters'' to include employees who did not work during the payroll eligibility period (the week ending November 20, 1993) ''because they were ill.'' It is undisputed that Reese did not work during the payroll period because he was ill and on disability leave.

II. THE HEARING OFFICER'S ANALYSIS

The hearing officer set forth the fundamental rule governing the eligibility of an employee on sick leave at the time of an election: that the employee is presumed to continue in that status until the presumption is rebutted by an affirmative showing that the employee has been discharged or has resigned. *Red Arrow Freight Lines*, supra. Accord: *A & J Cartage*, 309 NLRB 319 (1992); and *Atlanta Dairies Cooperative*, 283 NLRB 327 (1987). The hearing officer opined that the Board and the courts have allowed some narrow range of flexibility when applying this rule where the facts demand it. See *NLRB v. Economics Laboratory, Inc*., 857 F.2d 931 (3d Cir. 1988); *Advance Waste Systems*, 306 NLRB 1020, 1032 (1992).

As noted by the hearing officer, the court in *Economics Laboratory* denied enforcement of a Board Order in an unpublished 8(a)(5) case because the totality of the overwhelming evidence indicated that the employment of four individuals on long-term disability had been terminated. The court did find that the long-term disability recipients continued to receive health benefits from their employer and its insurance carrier, and that they were not specifically notified of their discharge. But the court further found that while these facts were consistent with the employer's adoption of a humane disability program, they were not necessarily indicative of continued employee status. The court stated that the Regional Director had apparently failed to consider the possibility that the employees in question had been constructively terminated, so as to rebut the *Red Arrow* presumption on that basis. 857 F.2d at 937. On remand, the Board applied the court's decision as the law of the case. 286 NLRB No. 66 (1989) (not reported in the bound volumes).

In *Advance Waste Systems*, the Board adopted without comment the judge's finding that a disabled worker who could not procure medical certification to perform weight-bearing tasks had an ''open-ended'' disability with no definite time frame for return to work and no reasonable expectation of recall on election day. Therefore, he was found ineligible to vote in the election.

The hearing officer found Reese's case to be analogous to *Advance Waste Systems* because Reese's medical evaluation indicates that he is wholly unable to perform his work duties and provides absolutely no indication that his status will change. Therefore, notwithstanding the Employer's retention of Reese in its benefit programs, the hearing officer found no sound basis for concluding that Reese will ''regain a community of interest with employees in the bargaining unit'' in the foreseeable future. Accordingly, the hearing officer sustained the Petitioner's challenge to Reese's ballot and found him ineligible to vote in the election.

III. RATIONALE FOR REVERSAL

Contrary to the hearing officer, we find that the facts here fail to warrant any departure from, or expansion in the application of, the Board's well-established rule in *Red Arrow*, as refined and made applicable to employees on long-term disability. See *Atlanta Dairies Cooperative*, Supra. Under this rule, Reese is presumed to continue to be a disabled employee until the presumption is rebutted by a showing that he has been discharged or resigned. As explained below, the presumption remains unrebutted here. Consequently, we find Reese eligible to vote.

In *Atlanta Dairies*, the Board reversed a hearing officer's determination that a disabled employee (Winsett) was ineligible to vote because his disability precluded him from working for several years and he had no reasonable expectation of returning to work. Because the evidence failed to show that Winsett retired or was discharged before the election, the Board overruled the challenge to his ballot.

The facts in *Atlanta Dairies* are strikingly similar to those present here. In fact, Reese and Winsett share many common characteristics. Both disabled individuals worked in unit positions for many years before

[7] We find merit in the Employer's exception to the hearing officer's finding that employees on disability may only continue with the coverage they previously had and may not elect increases in coverage. There is no record evidence to support this finding.

[8] Accordingly, we find merit in the Employer's exception to the hearing officer's oblique finding that, ''There is no evidence in the record that his job has been filled on other than a permanent basis.''

taking disability leave a few years before a representation election. Their physicians had not declared them well enough to return to work, but both individuals intended to return when able. Reese and Winsett were retained in their employers' health insurance programs and they drew Social Security disability benefits. Both of them maintained regular contact with their employer concerning their health condition. Testimony from their employers established a company policy to carry disabled and nonworking employees on employment rolls until retirement. Finally, Reese, like Winsett in *Atlanta Dairies*, did not retire, nor was he discharged before the election. Accordingly, the presumption that Reese retains his status as an employee on disability leave remains unrebutted.

In contrast, in *NLRB v. Economics Laboratory*, relied on by the hearing officer, the court in reversing the Board found overwhelming evidence amounting to constructive employment termination. The four individuals on long-term disability at issue there had been removed from the payroll and employee status reports. They had been replaced according to the terms of the collective-bargaining agreement with permanent employees. In addition, the nature of the employer's means of communicating with the disabled individuals indicated that it no longer considered them to be employees. The Board accepted the remand and applied the court's decision as the law of the case.

Here, however, Reese is carried on the active employee list, there is no evidence of a replacement, and the nature of the Employer's means of communicating with Reese, as described at the hearing, clearly shows that the Employer intended to retain Reese as a disabled employee.

The hearing officer's reliance on *Advance Waste Systems* is likewise misplaced. As of the day of the election in that case, the employee in relevant question (Martucci) was permanently laid off, because the employer did not expect a position to be available for him. 306 NLRB at 1027. Thus, there was a basis in that case for the application of the ''reasonable expectation of recall'' standard. In the instant case, however, Reese has not been permanently laid off. For the reasons set forth in *Thorn Americas, Inc*., 314 NLRB 943 (1994), we disavow any construction of *Advance Waste Systems* as appropriately applying a ''reasonable expectation of employment'' test to sick leave cases, and we continue to adhere to the *Red Arrow* test in such cases, including the one at hand.[9]

We find that Reese was on disability leave at the time of the election and did not quit, retire, or resign, nor was he discharged. Accordingly, applying the *Red Arrow* rule, we overrule the challenge to Paul Reese Sr.'s ballot and direct that it be opened and counted.

DIRECTION

IT IS DIRECTED that the Regional Director shall, within 14 days from the date of this Decision, Direction, and Order, open and count the ballots of Don Wolinski and Donald McCleary.

IT IS FURTHER DIRECTED that the Regional Director shall ascertain whether the remaining challenged ballot is that of Paul Reese Sr. or Paul Reese Jr. If it is either of them, then the Regional Director shall open and count that ballot also, and prepare and serve on the parties a revised tally of ballots. Thereafter, the Regional Director shall issue the appropriate certification.

ORDER

It is ordered that the matter is referred to the Regional Director for Region 6 for further processing consistent with this Decision, Direction, and Order.

MEMBER COHEN, dissenting in part.

Contrary to my colleagues, I would affirm the hearing officer and sustain the Petitioner's challenge to the ballot of Paul Reese Sr. I do not agree with my colleagues that the presumed voting eligibility of an employee on leave because of sickness or disability should be rebuttable only by a showing that the employee has resigned or has been discharged. Rather, I believe that the eligibility of that employee should turn on whether he/she has a reasonable expectancy of returning to the unit. See my dissent in *Vanalco, Inc*., 315 NLRB 618 (1994).

In the instant case, Paul Reese Sr. is permanently disabled. The stipulated medical evidence establishes that he is not suitable for occupational rehabilitation and has no reasonable expectancy of returning to work. Accordingly, I would sustain the challenge to his ballot.

[9] *Thorn Americas* was issued subsequent to the hearing officer's April 11, 1994 report in the instant case.