

NOT INCLUDED IN
BOUND VOLUMES

HGB
COLUMBUS, MS

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OMNOVA SOLUTIONS, INC.

Employer

and

Case 26-RD-01182

HADEN SELF

Petitioner

and

UNITED STEELWORKERS, AFL-CIO, CLC,
ON BEHALF OF ITS LOCAL UNION NO. 748-L

Union

DECISION AND DIRECTION

The National Labor Relations Board, by a three-member panel, has considered challenged ballots in a mixed manual-mail ballot election and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election, under which striker replacements voted manually on July 13, 2011, and striking employees voted by mail between July 8 and July 28, 2011. The tally of ballots shows 0 votes for and 0 against the Union, with 294 determinative challenged ballots.

Having reviewed the record in light of the exceptions¹ and briefs, the Board adopts the hearing officer's findings and recommendations as modified below.

¹ In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to sustain the Employer's challenges to ballots cast by striking employees who retired during the course of the strike and to ballots cast by those who printed, instead of signed, their names on their mail ballot envelopes.

We adopt the hearing officer's recommendation to overrule the Union's challenges to the 136 ballots cast by permanent replacement employees. We also adopt the hearing officer's recommendation to sustain the Employer's challenges to ballots cast by permanently replaced employees who had been on strike for more than one year.² Yet, we do not adopt the hearing officer's finding that *all* striking employees were thus ineligible to vote. As the hearing officer noted, the parties stipulated that 32 striking employees were not permanently replaced. Those employees, therefore, were eligible to vote in the election. *Gulf States Paper Corporation*, 219 NLRB 806, 806-807 (1975). Accordingly, we shall direct that the ballots of 32 eligible striking employees be opened and counted, but only if those ballots remain determinative after the ballots of the permanent replacement employees have been counted.³

DIRECTION

The Regional Director for Region 26 shall, within 14 days from the date of this Decision and Direction, open and count the 136 ballots cast by permanent replacement employees, and prepare and serve on the parties a revised tally of ballots. If, at that point, the challenged ballots of the 32 eligible strikers are nondeterminative, then the Regional Director shall issue the appropriate certification. Otherwise, the Regional Director shall open and count the ballots of

² Member Griffin agrees that the ballots of the replacements who took the striking employees' jobs should be counted, as the employer has carried its burden here of demonstrating the permanency of the replacements' employment. In this regard, he finds it unnecessary to rely on *Jones Plastics & Engineering Co.*, 351 NLRB 61 (2007). Member Griffin also agrees that the challenges to the ballots of the permanently replaced strikers should be sustained, since their strike was still in progress when the election was conducted and was more than a year old at that time. Contrary to the hearing officer, in sustaining these challenges he would not rely on *Wahl Clipper Corporation*, 195 NLRB 634 (1972), or *Thoreson-McCosh, Inc.*, 329 NLRB 630 (1999), as he agrees with the dissenting views expressed by Member Fanning in the former case and Members Fox and Liebman in the latter case.

³ We leave to further proceedings by the Regional Director the identification, if necessary, of the striking employees who were eligible to vote.

those eligible striking employees, prepare and serve on the parties another revised tally of ballots, and issue the appropriate certification.

Dated, Washington, D.C., July 12, 2012.

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD