

**BEFORE THE SAFETY AND HEALTH REVIEW BOARD**

**OF NORTH CAROLINA**

COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v. DOCKET NO. OSHANC 94-3051  
OSHA INSPECTION NO. 18451369  
CSHO ID NO. P1759

THE LUNDY PACKING COMPANY

RESPONDENT.

**ORDER GRANTING MOTION TO  
CONFORM CAPTION OF PLEADINGS  
AND DENYING MOTION TO  
DISQUALIFY UNION**

v.  
DENISE FAISON, BILLY R. BOONE  
WAYNE STRICKLAND, EVELYN D.  
FREDERICK AND ALIENE M. RAYNER,

Affected Employees.

**DECISION OF THE REVIEW BOARD**

This case was scheduled for hearing before the full board on two of Respondent's motions, the first was a Motion to Conform Caption of the Pleadings filed with the Board on October 12, 1995 and the second was a Motion to Disqualify the UFCW as Representatives of Employees Granted Party Status filed with the Board on November 9, 1995. These motions and the arguments of all parties were heard at or about 9:00 A.M. on the 22nd day of January, 1996 in Room 700 on the seventh floor of the Wake County Courthouse, 316 Fayetteville Street Mall, Raleigh, North Carolina by Robin E. Hudson, Chair, Kenneth K. Kiser, Member and L. McKay Whatley, sitting as designated Member of the North Carolina Safety and Health Review Board.

**APPEARANCES**

Ranee Sandy, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Thomas A. Farr, Michael C. Lord and Robert Arthur Valois of Maupin, Taylor, Ellis and Adams, P. A. for Respondent.

Donnell Van Noppen, III of Patterson, Harkavy & Lawrence for United Food and Commercial Workers Union (UFCW) and for Denise Faison, Billy R. Boone, Wayne Strickland, Evelyn D. Frederick and Aliene M. Rayner.

**ISSUE PRESENTED**

1. What is the status of and the correct caption with respect to the Union (UFCW) and the affected employees in this case.
2. Do the recent decisions of the Court of Appeals require that the Union (UFCW) be removed as the authorized employee representative of the five affected employees.

**STATUTES AND REGULATIONS AT ISSUE**

1. N.C.G.S. § 95-137(b)(4) which provides in pertinent part:

. . . The rules of procedure prescribed by the chairman of the Board shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this section.

2. Rule of Procedure of the Safety and Health Review Board of North Carolina .0201 which provides:

Affected employees or their authorized employee representative may elect to participate as parties in an action concerning their employer. Such election must ordinarily be made within 30 days prior to the time the case is set for initial hearing on the merits. However, in cases where settlement is proposed or modification of abatement is proposed, such employees or their authorized employee representative shall have 15 days after notice, as required by these rules, of the proposed settlement or proposed modification of abatement in which to seek or participate as parties in the case and to be heard on any questions, including the proposed settlement or modification of abatement.

3. Rule of Procedure of the Safety and Health Review Board of North Carolina .0203(a) which provides in pertinent part:

Any party or intervenor may appear in person, through an attorney, through an authorized representative as defined in rule .0101(4) of this Chapter, or through a representative as defined in Rule .0101(5) of this Chapter . . . .

4. Rule of Procedure of the Safety and Health Review Board of North Carolina .0101(4) which provides:

"Authorized employee representative" means a labor organization whether local or international which has a collective bargaining relationship with the cited employer and which represents affected employees. Such an organization may appear through an authorized representative. Affected employees may appear pro se (unrepresented by counsel), through an attorney at law or through an authorized employee representative. See Rules .0202 and .0203 of this Chapter.

5. Rule of Procedure of the Safety and Health Review Board of North Carolina .0101(5) which provides:

"Authorized representative" includes an authorized employee representative; a bona fide full-time officer or employee of a party or intervenor which is an association, partnership, corporation or other business entity and, for a cited employer, includes its attorney at law of record but excludes private safety consultants.

6. Rule of Procedure of the Safety and Health Review Board of North Carolina .0101(2) which provides:

"Affected employee" means an employee of a cited employer who is exposed to or has access to the alleged hazard described in the citation, as a result of his assigned duties.

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Having reviewed and considered the record and the briefs and the arguments of the parties, the Safety and Health Review Board of North Carolina hereby makes the following Findings of Fact, Conclusions of Law, and Order:

**FINDINGS OF FACT**

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(9).

4. The employer (Respondent) The Lundy Packaging Company is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
5. The Respondent was inspected by compliance safety and health officers from the Department of Labor from July 8, 1993 through January 10, 1994.
6. As a result of that inspection three serious violations were alleged in one serious citation and one nonserious violation was alleged in one nonserious citation which were issued on January 11, 1994 with total proposed penalties of \$13,500.00.
7. Various documents have been filed with the Board but the ones that are pertinent to this hearing are the ones that pertain to designating the United Food and Commercial Workers Union (hereinafter Union and UFCW) as the "authorized employee representative" of the affected employees and the designation of the Union as an intervenor on the caption of the case.
8. By letter dated July 27, 1994 which was filed with the Board on August 4, 1994, the Union requested to elect party status on behalf of 5 employees at the Lundy plant.
9. On August 12, 1994, the honorable Robin E. Hudson, then an administrative law judge issued an order as follows:

It is therefore **ORDERED** that Denise Faison, Billy R. Boone, Wayne Strickland, Evelyn D. Frederick and Aliene M. Rayner be granted party status, through their authorized Employee Representative, United Food and Commercial Workers International Union. (emphasis added).
10. On November 14, 1994 the Respondent filed a motion to disqualify the union as the representative of employees granted party status.
11. On November 28, 1994 the Union filed its opposition to the motion to disqualify.
12. On January 4, 1995, the Chair of the Review Board denied the motion to disqualify.
13. On October 12, 1995 Respondent filed a motion to conform the caption of the pleadings to include only the five employees as Party-Employees and to delete any reference to the Union from the caption.
14. On November 9, 1995 Respondent filed a second motion to disqualify the Union as representative and requested that the full Board rule on the motion.
15. On November 17, 1995 the Union filed its opposition to the motion to disqualify.
16. On November 27, 1995 Respondent filed a reply in support of its motion to disqualify the Union.
17. On January 4, 1996 the Chair scheduled the case for further review by the full Board at its next meeting to be held on January 22, 1996.
18. By letter dated January 5, 1996 and filed January 8, 1996 the Respondent renewed its request to conform the caption of the pleadings.
19. On January 16, 1996 the Union filed a letter in response to Respondent's renewal of its request to conform the caption of the pleadings.
20. Denise Faison, Billy R. Boone, Wayne Strickland, Evelyn D. Frederick and Aliene M. Rayner are all "affected employees" within the meaning of the NCOSH Act and the Rules of Procedure of the Safety and Health Review Board of North Carolina.

21. The National Labor Relations Board (NLRB) has certified the United Food and Commercial Workers Union (UFCW) as the exclusive collective-bargaining representative of the production and maintenance employees at the Respondent's Clinton, North Carolina Plant pursuant to a decision issued September 12, 1994.

22. On November 3, 1995, the Fourth Circuit Court of Appeals denied enforcement of the order issued by the NLRB requiring Respondent to bargain with the UFCW.

23. On January 2, 1996 the Fourth Circuit Court of Appeals denied the UFCW's Petition for Rehearing en banc.

24. The UFCW and the NLRB have 90 days from January 2, 1996 to petition the United States Supreme Court for a writ of certiorari to reverse the Fourth Circuit's decision. In oral argument before this Board, counsel asserted that the UFCW planned to file such a petition.

25. In a Scheduling Order signed January 4, 1995 by the Honorable Robin E. Hudson, Chair of the Safety and Health Review Board and in subsequent orders thereafter, the UFCW was designated as an Intervenor in the caption of the case. The UFCW never applied for intervenor status and was never granted intervenor status.

## **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact, the Board concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. The Board has jurisdiction of this cause and the parties are properly before this Board.
3. The Chair's Order of August 12, 1994 granted party status to Denise Faison, Billy R. Boone, Wayne Strickland, Evelyn D. Frederick and Aliene M. Rayner and those five employees are the proper parties to be listed on the caption of this case.
4. The Chair's Order of August 12, 1994 granted the above mentioned five employees party status through their authorized employee representative, the United Food and Commercial Workers Union (UFCW).
5. The caption listing the UFCW as an intervenor is incorrect and the Motion to Conform Caption of Pleadings should be granted.
6. The Motion to Disqualify the UFCW as Representative of Employees is premature as the time for filing a petition for writ of certiorari has not yet expired and it appears likely that one will be filed.

## **DISCUSSION**

It is clear from a review of the order of the administrative law judge, dated August 12, 1994 that the affected employees, Denise Faison, Billy R. Boone, Wayne Strickland, Evelyn D. Frederick and Aliene M. Rayner were granted party status and that the UFCW was not granted party status. The Board Rules of Procedure and OSHANC do allow for unions to be granted party status but in this case the UFCW was not granted party status. A review of the record also makes it clear that the UFCW never applied for nor was granted intervenor status and the caption designating the UFCW as an intervenor was incorrect. The correct caption should be as follows: COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA, Complainant v. THE LUNDY PACKING COMPANY and its successors, Respondent v. DENISE FAISON, BILLY R. BOONE, WAYNE STRICKLAND, EVELYN D. FREDERICK AND ALIENE M. RAYNER, Affected Employees.

The status of the UFCW as the exclusive collective-bargaining representative of the production and maintenance employees at the Respondent's Clinton, North Carolina Plant is currently being litigated in the federal court system. Both the UFCW and the NLRB have 90 days after January 2, 1996 to apply for a writ of certiorari to the United States Supreme Court to overturn the decision of the Fourth Circuit refusing to enforce the NLRB's

bargaining order. The Motion to Disqualify the UFCW as Representative of Employees is therefore premature as that matter is still pending in the federal courts.

**ORDER**

For the reason stated herein, the Review Board hereby **ORDERS** that the Motion to Conform Caption of Pleadings is granted and the caption is to read as follows:

COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

THE LUNDY PACKING COMPANY  
and its successors,

RESPONDENT.

v.

DENISE FAISON, BILLY R. BOONE  
WAYNE STRICKLAND, EVELYN D.  
FREDERICK AND ALIENE M. RAYNER,

Affected Employees.

The caption of this order has already been changed to conform to the correct designation of the parties.

The Board **FURTHER ORDERS** that the Motion to Disqualify the UFCW as Representative of Employees is denied as premature as that matter is still pending in the federal courts.

This the 23rd day of February, 1996

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ROBIN E. HUDSON, CHAIR

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KENNETH K. KISER, MEMBER

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L. MCKAY WHATLEY, SITTING AS DESIGNATED MEMBER