Air Liquide America Corporation *and* Kyle Saad, Petitioner and ILWU Local 142, AFL–CIO

Air Liquide America Corporaton, Employer-Petitioner *and* ILWU Local 142, AFL–CIO. Case 37–RD–294 and 37–RM–157

October 7, 1997

DECISION AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The National Labor Relations Board has considered determinative challenges in an election held on September 12 and 13, 1996, 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 10 for and 8 against the Union, with 3 determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, and has decided to adopt the hearing officer's findings[1] and recommendations[2] only to the extent consistent with this Decision and Direction.

1. The Employer has excepted to the hearing officer's recommendation that the challenge to the ballot of Vernon Abe be sustained. For the reasons set forth below, we find merit in this exception.

On February 27, 1995, Abe was hired as an inside salesperson at the Employer's Kapolei, Hawaii location. He was paid on an hourly basis pursuant to the parties' collective-bargaining agreement covering inside salespersons. As of July 1, 1996, he was transferred to the Employer's Kalihi location in Honolulu, Hawaii, and his title was changed to outside sales representative. At that time his pay was increased and he became a salaried employee. Outside salespersons were not covered by the parties' prior collective-bargaining agreement.[3] Abe was given this position because the Employer wanted to increase sales at the new location and to generate new revenue. At the Kalihi location Abe performed both inside and outside sales work.

The hearing officer concluded that Abe was ineligible to vote because he was an outside sales representative at the time of the election and that position was not included in the stipulated unit. The hearing officer found that the clear intent of the parties to the stipulated election agreement was to include inside salespersons in the unit and to exclude ''all other employees.''[4] Because Abe's title was ''outside sales representative'' as of July 1996, the hearing officer found that the parties intended to exclude Abe from the unit. The hearing officer saw ''no reason to examine beyond the clear intent of the election agreement'' and found that Abe was ineligible to vote. The hearing officer further found that when Abe was transferred, the Employer had the full intention of making him an outside salesperson and that because he performed other duties in addition to inside sales work, Abe did not share the necessary community of interest with the inside sales employees.[5]

In its exceptions, the Employer contends that the hearing officer erred in finding that the parties to the stipulated election agreement clearly intended to exclude Abe as an outside salesperson. The Employer relies on a *Norris-Thermador*[6] agreement executed by the parties specifically stating that Abe may vote subject to challenge. The Employer argues that this agreement indicates that, regardless of his title, the parties did not clearly intend to exclude Abe from the unit. Rather, the clear intent of the parties was to have Abe's eligibility determined by traditional community-of-interest factors. The Employer further maintains that although Abe's job title was not within the unit description, that title did not fairly represent what Abe actually does and is, therefore, not controlling. The Employer also excepts to the hearing officer's finding that Abe was predominantly performing outside sales work, and argues that Abe has actually performed very little outside sales work since his transfer. Because Abe continues to perform mainly inside sales work, the Employer contends that he shares a community of interest with unit employees and should be included in the unit. The Employer also maintains that Abe should be included in the unit because he is a dual-function employee, performing unit work for sufficient periods of time to demonstrate that he has a substantial interest in the unit's working conditions. We find merit in the Employer's contentions.

[1] The Employer 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 the absence of exceptions, we adopt pro forma the hearing officer's recommendation that the challenge to the ballot of Jack Worthley be overruled.

[3] The collective-bargaining agreement expired on November 30, 1995.

[4] On August 9, 1996, the parties executed a stipulated election agreement, which described the appropriate bargaining unit as follows:

> All full-time and regular part-time production and maintenance employees, plant drivers, plant clericals, inside sales people (counter salesmen) and warehousemen employed by the Employer at its facility located at 91-163 Hanua Street, Ewa Beach, Hawaii, and its store at 306 Kalihi Street, Honolulu, Hawaii, but excluding all office clerical employees, confidential employees, professional employees, casual employees, all other employees, guards and supervisors as defined in the Act.

[5] The hearing officer found that during the period of August 9 through September 12, 1996, Abe was predominantly performing outside sales work.

[6] 119 NLRB 1301 (1958).

We agree with the Employer that the hearing officer erred in concluding that the parties clearly intended to exclude Abe from the unit. The *Norris-Thermador* agreement executed by the parties plainly shows that the parties did not agree to the exclusion of Abe. Rather, the parties intended that Abe would vote subject to challenge and his eligibility would be determined at a later date, if necessary. Thus, contrary to the hearing officer, we do not find Abe's exclusion compelled by the stipulated unit description and his job title.[7] Accordingly, we shall determine Abe's eligibility in accordance with traditional Board principles.

We find, in agreement with the Employer, that Abe is a dual-function employee who performs both unit and nonunit work. The test for determining whether a dual-function employee should be included in a unit is ''whether the employee [performs unit work] for sufficient periods of time to demonstrate that he . . . has a substantial interest in the unit's wages, hours, and conditions of employment.'' *Berea Publishing Co*., 140 NLRB 516, 518–519 (1963).[8]

Applying this test to the facts presented here, we conclude that Abe performs sufficient unit work to demonstrate a substantial interest in the unit's terms and conditions of employment. Abe testified, without contradiction,[9] that during the month of July he spent only about 5-1/2 hours doing outside work, during August he spent about 60 hours performing outside work,[10] and during September he performed no outside work.[11] On the basis of this testimony, we find that between the time that Abe's job title changed on July 1, 1996, and the election, Abe spent over three-quarters of his time performing unit inside sales work.[12] Applying the *Berea* test, we conclude that Abe performs unit work for a sufficient number of hours that, despite his title change, Abe has a substantial interest in the unit's terms and conditions of employment. For these reasons, we find that Abe should be included in the unit as a dual-function employee. In light of that conclusion, we find it unnecessary to analyze the other community-of-interest factors relied on by the Employer to warrant Abe's inclusion in the unit. *Fleming Industries*, 282 NLRB 1030 fn. 1 (1987). Accordingly, we shall overrule the challenge to Abe's ballot and shall direct that his ballot be opened and counted.

2. The hearing officer found that the challenge to the ballot of Edward R. Bumanglag Jr. should be overruled. For the following reasons, we agree with the hearing officer.

Bumanglag began work for one of the Employer's predecessors in 1976. He became a quality control inspector for the Employer in 1994. Upon his election as a business agent for the Union in December 1994, Bumanglag requested, and was granted, a leave of absence to conduct union business.[13] In the fall of 1995, the Employer and the Union were involved in contract negotiations. Before the November 20, 1995 session, Bumanglag told Chauncey Blaisdell, the Employer's regional manager, that he was not satisfied with his job as union business agent and expressed a desire to perhaps return to work for the Employer. He asked Blaisdell if he was still covered by his union leave of absence and Blaisdell replied, ''[S]ure.''

On November 27, 1995, the Union requested a second leave of absence for Bumanglag effective January 1, 1996, to December 31, 1996. At the same time, the Union requested a 3-day leave of absence for Jackie Wallace to attend contract negotiations in December 1995. As found by the hearing officer, in the past the Employer had consistently granted leave-of-absence requests for union business. Consistent with past practice, the Employer gave written approval to the Wallace leave request. The Employer, however, never responded to the Bumanglag leave request.

On November 30, 1995, the parties' collective-bargaining agreement expired. In December 1995, the Employer withdrew recognition from the Union and

[7] We also agree with the Employer that Abe's job title would not be controlling because, as discussed below, it does not fairly represent the work that Abe actually performs. *Viacom Cablevision*, 268 NLRB 633 fn. 8 (1984).

[8] See *Avco Corp*., 308 NLRB 1045 (1992) (reaffirming the validity of *Berea*).

[9] Although the hearing officer stated that he believed that Abe was purposefully attempting to downplay his role as an outside saleperson, he did not specifically discredit Abe's testimony, and, in the absence of any contrary evidence, we rely on Abe's estimates, based on reference to his calendar, of the number of hours he spent performing inside and outside work.

[10] Abe testified that between August 12 and 30 he worked from about 7 or 7:30 a.m. until about 5 p.m. During that period he generally left the store between 8:30 and 9:30 a.m. and returned to the store between 3 and 3:30 p.m. During the time away from the store, Abe performed outside work with the exception of a half-hour lunch period. He further testified, however, that some of the work performed during the time away from the store was not necessarily related to outside sales, but was related to inside sales.

[11] The election was held September 12 and 13.

[12] In other words, during this period, which consisted of approximately 10 weeks or 400 working hours, only 65.5 hours (or about 16 percent of the total hours) were spent performing nonunit work.

[13] The Employer's letter dated December 23, 1994, acknowledged Bumanglag's leave of absence for the period from January 1, 1995, to and including December 31, 1995. However, sec. 5 of the collective-bargaining agreement effective for the period of December 1, 1991, through November 30, 1995, provides that leaves of absence for union business ''shall not extend beyond the term of this agreement or beyond one (1) year, whichever is shorter.'' Therefore, it could well be argued that under the collective-bargaining agreement Bumanglag's leave of absence ended on November 30, 1995, when the contract expired. In its brief, however, the Employer states that ''when the Company granted Bumanglag's leave of absence, it agreed to extend the leave of absence one month beyond the termination of the collective bargaining agreement to December 31, 1995.'' See the discussion, infra, of the Employer's contentions.

unilaterally put into effect new terms and conditions of employment set forth in an employee handbook.[14]

Bumanglag subsequently made several attempts to speak to Blaisdell about the status of his November 27, 1995 request. Bumanglag testified that around December 20, 1995, he spoke with Hubert Jesse, an employee who handles computer work in the office, and gave him a message to inform Blaisdell that Bumanglag wanted to discuss his leave of absence. About a week later, he talked to Office Manager Marilyn Naone, and she told him that she would leave a note on Blaisdell's computer screen so he would get the message. Bumanglag went back to Jesse, 2 or 3 days' later (prior to New Year's Eve), who told Bumanglag that he had not spoken to Blaisdell about Bumanglag's request and that Blaisdell was on vacation, but that he would talk to Blaisdell when Blaisdell returned. In early January 1996, Bumanglag asked Plant Manager Bob McBride whether he was scheduled to return to work, and McBride stated that Bumanglag was still on union business leave of absence. The second or third week of January, Bumanglag spoke with Blaisdell who stated that the Employer had received the Union's letter, and that ''he would have to check with his legal people first.'' Blaisdell never got back to Bumanglag about the request.[15] However, in February 1996 Blaisdell filled out a ''Human Resources Employee Change Form,'' which stated that Bumanglag was terminated. No one from the Employer ever informed Bumanglag that he was terminated.[16]

In finding that Bumanglag was eligible to vote, the hearing officer relied primarily on the test set forth in *Red Arrow Freight Lines*, 278 NLRB 965 (1986). Under *Red Arrow*, an employee is presumed to continue in sick or maternity leave status unless the presumption is rebutted by an affirmative showing that the employee has resigned or been discharged. Although *Red Arrow* involved sick leave, we agree with the hearing officer that that test applies by analogy to other types of leaves of absence, including leaves of absence for union business. The *Red Arrow* test is an easily applied standard and we see no reason not to apply it here and to other types of leaves of absence.[17] This conclusion is consistent with court precedent applying a standard akin to the *Red Arrow* test in nonsick leave situations. For example, in *Trailmobile Division, Pullman Inc. v. NLRB*, 379 F.2d 419 (5th Cir. 1967), a case involving the eligibility of an employee on a leave of absence for the purpose of working on trucks the employee owned privately, the court stated that ''an employee on leave of absence generally continues to be regarded as an employee unless it can be established by overt action or objective evidence that the employment relationship has been severed.'' 379 F.2d at 423.

In *Cavert Acquisition Co. v. NLRB*, 83 F.3d 598 (3d Cir. 1996), in which the court approved the application of the *Red Arrow* test to sick leave cases, the court noted that in order to find an affirmative termination of employment, there must be ''a manifestation of the intent to terminate which is clearly communicated to the other party.'' 83 F.3d at 607. However, the court went on to state that it is not necessary that the communication that effects the termination be a formal termination letter. Rather, an affirmative termination can be found even in the absence of any formal or informal communication, in instances where the surrounding circumstances make clear that the employment relationship has ended. 83 F.3d at 607.[18]

Applying the *Red Arrow* test, we find first, in agreement with the hearing officer, that there is no evidence that Bumanglag quit his employment or that the Employer communicated to him—either formally or informally—that his employment had been terminated. We,

[14] The handbook contains a ''Leave of Absence'' provision, which reads as follows:

> You may be granted a leave of absence in certain circumstances. You should request any leave in writing as far in advance as possible. It is your responsibility, while on a leave of absence, to keep in touch with your immediate supervisor and/or the Human Resources Department, and to give prompt notice if there is any change in the agreed return date.
>
> It is understood that you will not obtain other employment or apply for unemployment insurance while you are on a leave of absence. Acceptance of other employment while on leave will be treated as a voluntary resignation of employment from the Company.
>
> Vacation, holidays and other benefits will not accrue while you are on a leave of absence. Upon return from a leave of absence, you will be credited with the full employment status which existed prior to the start of your leave. You will not receive credit for the time during the leave, except that your original date of hire will be retained.
>
> Questions regarding Leave of Absence or the Leave of Absence forms should be directed to your manager or the Human Resources Department.

[15] Blaisdell testified that he made a conscious decision not to answer the Union's November 27, 1995 leave of absence request.

[16] Blaisdell testified that the Employer sent Bumanglag a letter advising him of his rights under the Consolidated Omnibus Budget Reconciliation Act (COBRA). However, Bumanglag testified that he did not recall receiving such a letter, and no COBRA letter was introduced into evidence.

[17] We do not adopt, however, the hearing officer's reliance on the ''reasonable expectation of employment'' test. The Board has found that the ''reasonable expectation of employment'' test applies to eligibility determinations involving laid-off employees, while the *Red Arrow* test governs eligibility determinations involving employees on sick leave. *Thorn Americas, Inc.*, 314 NLRB 943 (1994). Similarly, we find here that it is the *Red Arrow* test, not the ''reasonable expectation of employment'' test, that controls in cases involving the eligibility of employees on leaves of absence.

[18] The court referred to this kind of severance of the employment relationship as a ''constructive termination.'' See also *Hercules, Inc.*, 225 NLRB 241 (1976), relied on by the Employer, in which the Board found that an employee had been terminated even though that termination had not been communicated to the employee. In that case, the Board found that the surrounding circumstances indicated that the employee had been terminated.

therefore, turn to the question whether, as argued by the Employer, the surrounding circumstances in the instant case make clear that Bumanglag's employment relationship had ended.

The Employer argues in substance that termination is shown by the following facts: (1) as of January 1, 1996, Bumanglag no longer had a leave of absence because the one the Employer granted him expired December 31, 1995, and the collective-bargaining agreement, the source of his right to a leave of absence for union business, expired November 30, 1995; (2) the employee handbook in effect as of January 1, 1996, mandated the termination of an employee as of the expiration of a leave of absence; and (3) Bumanglag did not return to work and was removed from the payroll in February 1996. For the following reasons, we find no merit in the Employer's contentions.

First, the fact that Bumanglag's leave of absence and the collective-bargaining agreement had both expired by January 1, 1996, cannot be accorded significant weight in the circumstances of this case. In our view, the probative value of that evidence is substantially diminished by the undisputed facts that on November 27, 1995, while Bumanglag was still on approved leave and prior to the expiration of the contract, the Union requested a new leave of absence for Bumanglag, and the Employer never acted on this request. Particularly in light of the past practice of consistently granting such requests, the Employer's failure to respond to the November 27, 1995 request left Bumanglag's status ambiguous and the *Red Arrow* presumption of continued employee status unrebutted.

Second, contrary to the Employer's contention, the ''Leave of Absence'' provision of the employee handbook does not mandate the termination of an employee upon the expiration of a leave of absence. Indeed, the handbook does not even address that circumstance. Although the handbook does state that ''[a]cceptance of other employment while on leave will be treated as a voluntary resignation of employment with the Company,'' Bumanglag did not, in fact, accept employment with any entity other than the one that the Employer had authorized when it granted him the leave of absence (i.e., the Union).

Finally, the Employer's claim that Bumanglag was terminated in February 1996 for not returning to work is undermined by its failure to maintain this position consistently throughout the relevant time period. It is of course understandable that the Employer would want to secure legal advice before responding to the November 27, 1995 request for a second leave of absence. However, once the Employer had decided not to grant the request, it never communicated its position to Bumanglag, notwithstanding his several requests for clarification of his status. Nor can the Employer's claim that it terminated Bumanglag in February 1996 be reconciled with the statement of its plant manager to Bumanglag a month earlier that he was still on union business leave of absence.

For all these reasons, we find that the surrounding circumstances, when considered in their entirety, do not warrant a finding of a constructive termination. We, therefore, conclude that under *Red Arrow*, the Employer has not rebutted the presumption of continued employee status and we agree with the hearing officer that Bumanglag was an eligible voter. Accordingly, we shall direct that his ballot be opened and counted.[19]

DIRECTION

IT IS DIRECTED that the Officer-in-Charge for Subregion 37 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Vernon Abe, Jack Worthley, and Edward R. Bumanglag Jr., prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

[19] Member Higgins agrees with this result but he does not agree with *Red Arrow*, supra. Rather he agrees with former Member Cohen's dissent in *Vanalco, Inc*., 315 NLRB 618 (1994). In his view, the test here is whether the employee has a ''reasonable expectancy'' of continued employment. The Employer has not shown, by a preponderance of the evidence, that Bumanglag lacks a reasonable expectancy of continued employment.