Martin Enterprises, Inc. *and* International Union of Operating Engineers, Local Union No. 103, Petitioner. Case 25–RC–9696

April 30, 1998

DECISION AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND BRAME

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in a mail-ballot election held in September 1997,[1] and the hearing officer's report recommending disposition of them.[2] The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows eight for and seven against the Petitioner, with two challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction.

1. We adopt the hearing officer's recommendation to overrule the Petitioner's challenge to the ballot of Lynn E. Palmer, and we shall direct that his ballot be opened and counted. For the reasons stated by the hearing officer,[3] we agree that there is insufficient evidence to establish that Palmer is a supervisor within the meaning of Section 2(11) of the Act.[4]

2. For the reasons set forth below, however, we do not agree with the hearing officer's recommendation that the Employer's challenge to the ballot of Jon A. Schmidt be overruled.

The Petitioner seeks to represent a unit of the Employer's heavy equipment operators. The parties' Stipulated Election Agreement specifically excludes from the unit truckdrivers and certain other classes of employees not relevant here.

From September 1995 until approximately August 26, 1997, Schmidt worked primarily as a heavy equipment operator. As a result of an arthritic condition, Schmidt had difficulty operating certain types of cranes. The Employer had, to the extent possible, accommodated Schmidt by refraining from assigning him to the type of crane which he had a problem operating. Schmidt, however, continued to work as an operator between 50 and 80 percent of his time.

In April, Schmidt suffered a nonwork-related injury to his ankle. With the exception of a week in July during which he drove a tractor at an airport jobsite for the Employer, Schmidt was out of work on disability leave until about August 12. At that time, he returned to duty and continued to perform operator functions for approximately 2 weeks. On about August 26, one of the Employer's owners told Schmidt that he would be driving a truck permanently. The record shows that, after his transfer to truck-driving duties, Schmidt performed unit work for about 6 hours on September 16, an hour in late September, and once for an unspecified period of time in October. In addition, Schmidt sometimes assisted another city driver, Phil Clark, in operator functions.[5]

The hearing officer found that Schmidt was eligible to vote, concluding that, although Schmidt was transferred to a nonunit truckdriver position before the election, he still functioned sufficiently as an operator for him to qualify as a dual-function employee. In so finding, the hearing officer relied on Schmidt's performance of unit work during the calendar quarter prior to the eligibility date (before his transfer into a nonunit position), and found that Schmidt's performance of unit work during that time exceeded the average of 4 hours per week traditionally used by the Board to determine eligibility. In the alternative, the hearing officer found that Schmidt was eligible to vote because his medical condition may permit him in the future to resume more operator duties. We disagree with the hearing officer and find that Schmidt was not an eligible voter.

To be eligible to vote in a Board election, an employee must be in the appropriate unit on the established eligibility date and on the date of the election. *Plymouth Towing Co.*, 178 NLRB 651 (1969). An employee, as in this case, who is transferred out of the unit before the election and who has no reasonable expectancy of returning to the unit is not eligible. *Mrs.*

[1] All dates hereafter are in 1997 unless otherwise noted.

[2] The ballots were mailed to eligible voters on September 3, 1997, and were counted on September 19, 1997.

The Petitioner timely filed objections to the election but, with the approval of the hearing officer, withdrew the objections during the hearing.

[3] In adopting the hearing officer's finding that Palmer is not a supervisor within the meaning of the Act, Member Brame does not rely on the statement, on p. 11 of the report, that ''supervisory status should be narrowly construed lest an employee deemed a supervisor be denied employee rights which the Act is intended to protect,'' or on the citation to *Quadrex Environmental Co.*, 308 NLRB 101 (1992).

[4] The Petitioner filed a ''limited and conditional exception'' to the hearing officer's report. It stated that if the Board were to reverse the hearing officer and sustain the Employer's challenge to the ballot cast by Jon A. Schmidt, then the Petitioner wished to except to the hearing officer's recommended disposition of Palmer's ballot. The Petitioner requested leave to file a brief in support of the exception.

As discussed infra, we have decided to sustain the challenge to Schmidt's ballot. In accordance with the Petitioner's request, we have considered its exception to the hearing officer's recommendation to overrule the challenge to Palmer's ballot. However, as set forth above, we find no merit in the Petitioner's exception.

We deny the Petitioner's request for leave to file a brief in support of its exception. The Board's Rules provide that exceptions and a supporting brief are to be filed within 14 days from the date of issuance of the hearing officer's report on challenged ballots. See Sec. 102.69(c)(2).

[5] Phil Clark, although considered to be a city driver, spends 50 percent of his time performing operator functions and 50 percent driving trucks. The parties agreed that Clark was eligible to vote.

Baird's Bakeries, 323 NLRB No. 103 (Apr. 30, 1997). However, should that employee continue, after the transfer, to regularly perform duties similar to those performed by unit employees for periods of time sufficient to demonstrate that he has a substantial interest in working conditions in the unit, he may be found eligible as a dual-function employee. *Air Liquide America Corp*., 324 NLRB No. 104 (Oct. 7, 1997).

Dual-function employees, employees who perform more than one function for the same employer, may vote even though they spend less than a majority of their time on unit work, if they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit. *Continental Cablevision*, 298 NLRB 973 (1990); *Alpha School Bus Co*., 287 NLRB 698 (1987); and *Oxford Chemicals*, 286 NLRB 187 (1987). As the hearing officer correctly stated, employees devoting less than 50 percent of their time to unit work may have sufficient interest in the terms and conditions of employment to warrant their inclusion in the unit. *Avco Corp*., 308 NLRB 1045 (1992); and *Berea Publishing Co*., 140 NLRB 516 (1963).

In determining whether dual-function employees regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in the unit's working conditions, the Board has no bright line rule as to the amount of time required to be spent in performing unit work. Rather, the Board examines the facts in each particular case. See, e.g., *Oxford Chemicals*, supra (employee who regularly performed unit work for 25 percent of each working day was included in the unit); *Davis Transport*, 169 NLRB 557, 562–563 (1968) (employees who spent less than 3 percent of their time performing unit work during 10-month time period were not included in unit); *Mc-Mor-Han Trucking Co*., 166 NLRB 700, 702 (1967) (employee who drove truck on 20 days during the year with no regularity, pattern, or consistent schedule, was excluded from unit of truckdrivers). In *Syracuse University*, 325 NLRB No. 15 (Nov. 8, 1997), the Board held that it was inappropriate to apply the *Davison-Paxon*[6] formula in determining whether dual-function employees perform unit functions regularly and for a sufficient amount of time to be deemed eligible to vote.

[6] The formula set forth in *Davison-Paxon Co*., 185 NLRB 21 (1970), is commonly used for determining the eligibility of on-call employees who work on an irregular and unscheduled basis. Under that formula employees who work on average 4 or more hours per week in the calendar quarter prior to the eligibility date are eligible to vote.

Applying these principles to the facts here, we find that the hearing officer erred in finding Schmidt eligible to vote based on dual-function status. First, the hearing officer inappropriately used the *Davison-Paxon* 4-hour-per-week formula (although he did not explicitly refer to that case) in determining Schmidt's dual-function status. That formula does not apply in dual-function cases. See *Syracuse University*, supra.

Second, the hearing officer erred in using the hours worked by Schmidt as a unit employee before his transfer to a nonunit position to support his finding of dual-function status after the transfer. The hearing officer concluded that Schmidt was transferred to a nonunit position on August 26. That transfer represented a change of status. To the extent that Schmidt might qualify as a dual-function employee, his qualification must be based on his regular and substantial performance of unit work after the transfer. *Air Liquide America Corp*., supra; and *Meadow Valley Contractors*, 314 NLRB 217 (1994). As noted above, the record shows that after his transfer Schmidt only performed unit work for about 6 hours on September 16, an hour in late September, and once for an unspecified period of time in October. Schmidt himself testified that after the transfer he spent at most 10 percent of his time working with operators and did very little unit work. Based on this evidence, we conclude that Schmidt's performance of unit work after his transfer was sporadic rather than regular and was for an insufficient period of time to warrant a finding that he was eligible to vote as a dual-function employee.

In addition, we reject as speculative the hearing officer's alternative rationale that Schmidt is eligible to vote because in time he may be able to resume more operator duties. Schmidt is not on sick leave, nor is there any evidence that his transfer was temporary. Schmidt himself testified that he was told he would be driving a truck permanently. There is no evidence that the transfer was related to Schmidt's ankle injury. To the contrary, the record shows that Schmidt had been fully released to return to work in connection with his ankle injury at least 2 weeks before he was transferred. Thus, we cannot find on this record sufficient evidence to warrant the conclusion that Schmidt's performance of unit work will substantially increase.

For these reasons, we conclude that Schmidt was a nonunit truckdriver at the time of the election, and that his performance of unit work after his transfer from the unit was sporadic and insufficient to demonstrate that he has a continued interest in the unit's terms and conditions of employment. Accordingly, the challenge to Schmidt's ballot is sustained.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 25 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Lynn E. Palmer, prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.