Young Broadcasting of Los Angeles, Inc. d/b/a KCAL-TV *and* Local 45, International Brotherhood of Electrical Workers, AFL–CIO, Petitioner. Case 31–RC–7773

June 13, 2000

DECISION AND DIRECTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

The National Labor Relations Board, by a three-member panel, has considered a determinative challenge to an election held on October 22, 1999, and the hearing officer's report recommending disposition of it. The election was held pursuant to a Decision and Direction of Election. The tally of ballots shows 3 for and 2 against the Petitioner, with 1 challenged ballot.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings and recommendations.

For the reasons stated by the hearing officer in his report, attached here as an appendix, we find that the challenge to the ballot cast by Stephanie Farr should be overruled. The parties have stipulated that Farr is a dual function employee, who spends approximately 60 percent of her worktime as a weekday associate producer and approximately 40 percent of her time as a weekend show producer.[1] As an associate producer, Farr was eligible to vote in the September 9, 1999 election, in Case 31–RC–7766 that resulted in certification of IBEW Local 45, the Petitioner in this case, as exclusive collective-bargaining representative of an appropriate unit of newsroom employees. Now, the hearing officer has found that as a weekend show producer, Farr is eligible to vote in the election in this case, where the same union seeks to represent a separate bargaining unit of show producers.

We agree with the hearing officer that the precedent cited by the Employer in contesting Farr's eligibility is distinguishable from the present case. In exceptions, the Employer makes the further argument that permitting one employee to vote twice in representation elections for bargaining units of full-time employees contravenes Board policy by giving her disproportionate influence over the choice of bargaining representative by the Employer's employees. We disagree.

Farr has one vote, and therefore no more influence in deciding the question concerning representation than any other unit employee, in each of the bargaining units to which she belongs as a consequence of her dual function status. In *Berea Publishing Co.*, 140 NLRB 516, 518–519 (1963), the Board made clear that dual function employees who share a substantial community of interests with full-time employees in a bargaining unit are entitled to the same rights and privileges in the selection of the majority representative. Noting that the Board had traditionally permitted a part-time employee to vote in a unit where the employee is regularly employed for sufficient periods of time, the Board stated that, "we can perceive no distinction between the part-time employee, who may work for more than one employer, and the employee who performs dual functions for the same employer." 140 NLRB at 519.

Quite obviously, an individual who works parttime for more than one employer may be eligible to vote in an appropriate unit of each employer's employees. Consistent with *Berea Publishing*, we see no policy reason why a dual function employee may never vote in two separate units. We need not and do not define here all instances in which it would be appropriate to permit a dual function employee's participation in more than one unit election. We agree with the hearing officer, however, that under the circumstances of this case, where time spent and work performed by a single dual function employee in one job classification is distinct and separate from time spent and work performed in another classification, that employee should be eligible to participate fully in both bargaining units in which she has a substantial interest. We therefore adopt the hearing officer's recommendation to overrule the challenge to the ballot cast by Farr. We shall remand this case to the Region for the purpose of opening and counting Farr's ballot, preparing a revised tally of ballots, and issuing the appropriate certification.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 31 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Stephanie Farr, the weekend show producer. The Regional Director shall then serve on the parties a revised tally of ballots, and issue the appropriate certification.

APPENDIX

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

Pursuant to a petition filed on August 16, 1999, and a Decision and Direction of Election issued by the Regional Director for Region 31 on September 27, 1999, an election by secret ballot was conducted under the supervision of the Regional Director for Region 31 on October 22, 1999, among the employees of the Employer in the unit agreed appropriate.[2] After the election, each party was furnished with a tally of ballots which showed that of approximately six eligible voters, six cast ballots, of which three were cast in favor of the Petitioner, two

[1] There is no claim or evidence that any other employee has the same dual function job situation as Farr.

[2] In the instant case, an election was directed in two separate and distinct units. This Report pertains only to a challenge which occurred in unit B, the full description of which is set forth below

INC: All show producers employed by the Employer at its facility located at 5515 Melrose Avenue, Hollywood, California.

EXC: On-air talent, promotional writer/producers, directors, technicians, clerical employees, all other employees, guards and supervisors as defined in the Act.

were cast against the Petitioner, and one ballot was challenged. There were no void ballots. The sole challenged ballot was sufficient in number to affect the results of the election. No party has filed timely objections to conduct affecting the results of the election.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the Regional Director, after reasonable notice to all parties to present relevant evidence, completed an investigation of the challenge. After having duly considered all evidence submitted by the parties and otherwise disclosed by the investigation, on December 22, 1999, the Regional Director issued a supplemental decision, order directing hearing, and notice of hearing, wherein the Regional Director ordered a hearing be held on the challenged ballot of Stephanie Farr, the weekend show producer.

Pursuant to the above-mentioned supplemental decision, order directing hearing, and notice of hearing, a hearing was held before the undersigned, at Los Angeles, California, on January 11, 2000. The hearing was conducted in accordance with the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended. All parties were present, with the Employer and the Petitioner represented by counsel, and afforded full opportunity to be heard, to examine witnesses, to introduce relevant evidence, cross examine witnesses, and to make oral argument at the close of the hearing.

In determining credibility and resolving conflicts in this proceeding, I have considered, inter alia, the following: the demeanor and the conduct of the witnesses; their candor and lack thereof; their apparent fairness, bias, or prejudice; their ability to know, comprehend, and understand the matters about which they testified; whether they had been contradicted or otherwise impeached; the interrelationship of the testimony of the witnesses and the written and/or documentary evidence presented; and the inherent probability and plausibility of the testimony. In addition, certain qualities, such as motive, may only be shown circumstantially when the possessor has not previously revealed these qualities in a direct manner. Therefore, uncontradicted testimony need not necessarily be accepted as true when the circumstances may outweigh the credibility of a direct statement testified to at hearing. I have also considered the nature of conclusionary statements as distinguished from statements of fact, and whether answers are self-serving, or in response to leading questions of counsel. Therefore, when credibility issues arise, the credited version may be indicated without further reference to the standard applied and any failure to detail each of the standards is not to be deemed a failure on my part to consider it. *Walker's*, 159 NLRB 1159 (1966). The following recitation of facts, where not specifically noted, follows credited testimony on evidence contained in the record.

FINDINGS OF FACT

The sole determinative challenge which the Regional Director determined should be set for hearing is set forth and discussed below. Issues of fact and law, together with the hearing officer's conclusions are set forth after the challenge. The conclusions are also summarized at the end of the report.

Challenged Ballot

The ballot of Stephanie Farr, the weekend show producer, was challenged by the Board agent conducting the election, based upon an order of the Board, dated October 20, 1999, wherein the Board stated that the request for review filed by the Employer subsequent to the issuance of the Decision and Direction of Election in the instant matter, raised a substantial issue solely with respect to the inclusion of the weekend show producer, and concluded that the issue would be best resolved through the use of the challenge procedure.

In the supplemental decision, order directing hearing, and notice of hearing issued by the Regional Director, the Regional Director stated that the Employer contended that the weekend show producer was not a dual function employee, and was ineligible to vote. The Regional Director further stated that Petitioner contended that the weekend show producer was a dual function employee who spent approximately 50 percent of her time performing the duties of a show producer with a substantial interest in the working conditions of show producers and should therefore be allowed to vote.

During the course of the hearing, employer counsel offered a stipulation that Farr was a dual function employee, which stipulation was entered into by the Petitioner's counsel. In support of the stipulation, employer counsel put into evidence transcript pages 109 to 112 and pages 326 to 357 from the hearing held in Case 31–RC–7766, which dealt in detail with Farr's duties as an associate show producer and weekend show producer. Based upon the stipulation of the parties, I find that Farr is a dual function employee, and without more, has a presumptive right to vote in the instant matter.

Employer counsel has made part of the record of the instant case pages 21 to 24 of Employer's request for review of Regional Director's Decision and Direction of Election, filed in the instant case, wherein counsel argued:

> A limitation has been placed on the representation of dual function employees. The Board and courts have held it would be incongruous for employees to be represented in two units for the same employer. See *Davis Supermarkets, Inc. v. NLRB,* 2 F.3d 1162 (D.C. Cir. 1993); *Bentson Contracting Co.*, 941 F.2d 1262 (D.C. Cir. 1991).
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> Although *Davis Supermarkets*, supra, and *Bentson Contracting,* supra, concerned whether two different unions could represent dual function employees in two separate units, many of the same policy considerations apply herein. If the Employer was faced with negotiating two separate contracts with the union covering the weekend show producer in her two job capacities, she could at any moment, be covered by different salary, hours, overtime, insurance, vacation and holiday provisions. It would often be unclear which contract covered her at which moment. She could also have to pay two separate sets of dues, attend two sets of meetings and somehow split her allegiances between two groups of employees. In *The Pulitzer Publishing Co*., 203 NLRB 639 (1973), the Board recognized dual function employees in the television industry may need to be in their own separate unit, rather than with single function employees.
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> The Board would deny the weekend show producer the right to vote in two separate elections if different unions were petitioning to represent the associate producers and other news staff, and the show producers. See, e.g., *Sunray Ltd*., 258 NLRB 517 (1980). That determination should not change solely because the same labor organization, the union, has sought to represent both groups. Indeed, given the circumstances of this case, where the union has attempted to manipulate the Board's processes to give the weekend show producer two votes, it is imperative the Board apply that principle herein.

> For the Regional Director, to have granted the union's request to include the weekend show producer was inconsistent with the provisions of the Act. Under Section 9(c)(5), the extent of union organization cannot be given controlling weight. Yet, having included the weekend show producer in both units granted such weight to the union's organizational efforts. Moreover, for the weekend show producer to vote for union representation in Case 31-RC-7766 on September 9, and again, in this unit before September 9, 2000, would be inconsistent with Section 9(c)(3), which prohibits holding successive elections in the same unit or subunit within a period of one year.

Initially, I note that *Davis Supermarkets,* supra, and *Bentson Contracting***,** supra**,** involved situations where two separate unions represented dual function employees simultaneously with respect to the *same* (emphasis added) conditions of employment, i.e., the same job classifications in two different units during the same working hours, which is a different situation from the instant case. In the instant case it is clear that Farr acts as show producer on the weekends, and that during the week, Farr's normal duties are that of associate producer, a job category distinct and separate from that of show producer. In the event that Farr does act as a show producer during the week, she performs the duties of a producer, not associate producer, and again her job duties would appear to be distinct. I further note that employer counsel alluded to this situation in his introduction into evidence of Employer Exhibits 7 and 8, the parties initial contract proposals for the unit containing associate producers, when counsel stated; "There can be no assurance at this point or at any point that the interests of the news room, the larger unit, and the producer bargaining unit will be exactly, 100 per cent, completely identical." (Tr. 26, 2–5.)

Accordingly, I conclude that *Davis Supermarkets***,** supra, and *Bentson Contracting***,** supra, are inapposite to the situation in the instant case, and I give no weight to the findings and/or conclusions of law contained in the cited cases.

Employer counsel cites *Pulitzer Publishing***,** supra, for the proposition that dual function employees in the television industry may need to be in their own separate unit, rather than with single function employees. In *Pulitzer Publishing***,** supra**,** the Board found that a unit of newsmen who appeared on the air or on television were considered to be "talent" as distinct from a group of newsmen who did not appear on the air, and although both groups were considered duel function employees, as such a separate unit of on-air newsman was appropriate. In the instant case, there is only one dual function employee in question, and the Board has long held that it is contrary to Board policy to certify a representative for bargaining purposes in a unit consisting of only one employee, or to direct elections in such units. *Mount St. Joseph's Home for Girls*, 229 NLRB 251 (1977); *Sonoma-Marin Publishing Co*., 172 NLRB 625 (1968). In light of the fact that the unit of dual function employees in the instant case consists of only one employee, I conclude that reliance on *Pulitzer Publishing*, supra, is inappropriate, and not relevant to the considerations raised in the instant case.

Employer counsel argues that the Board would deny Farr the right to vote in two separate elections if different unions were petitioning to represent the associate producers and other news staff, and the show producers in one unit, citing *Sunray*, supra. Counsel is correct in his assertion. *Sunray*, supra, involved a situation where the Acting Regional Director found appropriate two separate and distinct units of dual function employees, each unit consisting of the same employees. The Board found that agreement with the Acting Regional Director would cause a situation where an appropriate unit of all the Employer's employees elected separate unions to be their exclusive representative in two or more separate units, a result incongruous with the policies of the Act, and found that only one unit was appropriate, consisting of all the Employer's employees, and gave the employees a choice of voting for one of the two competing unions, or no union. The situation in *Sunray*, supra, is contrasted with the instant situation, where it has been determined that two separate and distinct units of employees are appropriate, and each unit is made up of different employees, with the exception of the dual function employee in question. As such I conclude that the principle set forth in *Sunray***,** supra**,** is not applicable to the instant situation, and I will not apply the finding in *Sunray***,** supra, to the instant case.

Employer counsel argues that allowing Farr to vote is violative of the Act, specifically Section 9(c)(3) and (5). Section 9(c)(3) states "No election shall be directed in any bargaining unit or any subdivision within which, in the proceeding twelve-month period, a valid election shall have been held." The issue before me is not whether or not such an election has been so directed; and there is no evidence that such is the case; but rather whether Farr should be permitted to vote in an election in a unit including show producers, when Farr has already voted within a 12-month period in a unit of associate producers. The section cited by employer counsel does not deal with the eligibility rights of specific individual voters, but rather with the general issue of whether an election per se is appropriate. Section 9(c)(5) states, "In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling." Counsel argues that the inclusion of Farr in two separate and appropriate units grants such weight to the union's organizational efforts. Counsel offers no evidence in support of this theory and I fail to see any merit to it.

The compelling argument that employer counsel makes is the problems that the Employer would be faced with if Farr were permitted to vote in and be part of two separate and distinct units. Counsel argues that the Employer could conceivably be faced with negotiating two separate contracts with the union which would encompass Farr; Farr could at any moment be covered by, a different salary, hours, overtime, insurance, vacation, and holiday provisions. It would be unclear which contract covered Farr at which moment, and Farr would be obligated to pay two separate sets of dues, attend two sets of meetings, and somehow split her allegiances between two groups of employees.

With respect to employer counsel's arguments with respect to Farr's union obligations, union counsel has stated in the prehearing statement by the Union, which was made part of the record, that Farr would only be obligated to pay one set of union dues and would belong to the same local union, IBEW Local 45, thus obviating employer counsel's arguments concerning the burden that would be placed on Farr, if permitted to vote, to meet her union obligations.

I am left then with the remaining considerations raised by employer counsel with respect to the possibility of different salary, hours, and other benefits if Farr were to be permitted to vote in and be part of both appropriate units. The instant situation is akin to the situation of a dual function employee who is

found to be part of an appropriate unit represented by a union and at the same time is part of a nonrepresented unit of employees at the same employer. The Board has stated that once the standard for finding an employee to be dual function has been met, "it is both unnecessary and inappropriate to evaluate other aspects of the dual-function employee's terms and conditions of employment in a kind of second tier community-of-interest analysis." *Oxford Chemicals, Inc.***,** 286 NLRB 187 (1987). In *Oxford*, supra, fn. 5, the Board stated, "Any resulting disparity in wages and benefits should not form a separate basis for continuing to exclude an employee from the unit when that employee now performs a sufficient amount of unit work." Further, in *Alpha School Bus Co*., 287 NLRB 698 (1987), the Board overruled a challenge to an employee finding that the employee was a dual function employee and eligible to vote, even though when working as a employee in the nonrepresented unit, the employee had different supervision and a benefit package unavailable to the union represented employees, and when employed in the represented unit received the same wage rate and benefits, and was subject to the same supervision as the union represented employees.

Based upon the foregoing, I will, therefore, recommend that the challenge to the ballot of Stephanie Farr be overruled.

Recommendation

I, having made the above findings and conclusions, based on the record as a whole, recommend that the challenge to the ballot of Stephanie Farr be overruled, and that her ballot be opened at a time, date, and place be hereinafter announced, at which time a revised tally of ballots shall issue.[3]

[3] Pursuant to Sec. 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days of the issuance of this report, any party may file with the Board in Washington, D.C., an original and eight copies of exceptions there to. Immediately upon the filing of such exceptions, the party filling the same shall serve a copy thereof on the other parties, and shall file a copy with the Regional Director. If no exceptions are filed, the Board will adopt the recommendations of the hearing officer.