MJM Studios of New York, Inc. *and* Local 311 of the International Alliance of Theatrical, Stage Employees, Moving Picture Technicians, Artists & Allied Crafts of the U.S. its Territories, and Canada, AFL–CIO, CLC. Case 34–RC–1881

December 14, 2001

DECISION ON REVIEW AND ORDER REMANDING

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On April 10, 2001, the Regional Director for Region 34 issued a Decision and Direction of Election in which he found appropriate a unit of carpenters and welders, excluding 13 carpenters and welders because they are "temporary" employees. The Regional Director also denied the Employer's request to postpone the election or dismiss the petition because the petitioned-for unit is contracting.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer and the Petitioner filed timely requests for review of the Regional Director's decision. The Employer contends that the petition should be dismissed because the unit is not substantial and representative of the complement of employees to be employed in the reasonably foreseeable future. The Petitioner is seeking to represent a unit of 27 carpenters and welders, including the 13 "temporary" carpenters and welders whom the Regional Director excluded. The Petitioner contends the 13 "temporary" carpenters and welders should be included in the unit. On May 3, 2001, the Board granted the Employer's and Petitioner's requests for review. The Employer filed a brief on review.

Having carefully considered the entire record in this proceeding, we affirm the Regional Director's finding that the unit is substantial and representative of the future complement of employees and that an immediate election is warranted. However, contrary to the Regional Director, we find that the 13 carpenters and welders at issue are not "temporary" employees under Board precedent and that they share a sufficient community of interest to be included in the unit.

I. FACTS

The Employer manufactures and installs unique architectural ornaments for commercial and residential properties. In business since 1979, the Employer operates six departments at its Rock Tavern, New York facility: carpentry, welding, casting, mold, painting, and shipping.

The Employer operates on a project-by-project basis, much like a construction industry employer.[1] Although completion dates for projects are scheduled, it is not unusual for those dates to change. Changes in completion dates may be beyond the Employer's control. The Employer's work force fluctuates greatly with many employment "spikes." To meet these fluctuations, the Employer often obtains employees from temporary agencies and labor organizations, including the Petitioner.

The Employer began work in late 1999 on the Potawatomi Casino, a large-scale project located in Milwaukee, Wisconsin. In early 2000, the Employer asked the Petitioner to supply workers for this project. On February 1, 2000, the parties entered into a 6-month agreement under which Petitioner agreed to provide carpentry and welding employees to the Employer for the Casino project. The agreement set forth the wages and benefits of the supplied employees. These wages and benefits were different from the wages and benefits of the Employer's regular employees. The 13 employees supplied by the Petitioner worked alongside the Employer's regular employees, performed the same work, and were under the same supervision.

The Casino project was scheduled for completion on July 1, 2000. Before finishing the Casino project, the Employer started work on another large-scale project located at the John F. Kennedy Airport in New York (JFK project) with a value of $6,500,000. Because the Employer needed carpenters and welders to work on the JFK project and to finish the Casino project, the Employer and the Petitioner extended their agreement for 60 days to September 30, 2000. During this 60-day period, the Employer completed the Casino project but not the JFK project. The parties attempted but failed to agree on another extension of their agreement, which then expired. The Employer, nevertheless, retained the 13 employees on its payroll, and they continued to work on the JFK project. The original completion date for the JFK project was February 1, 2001, later extended to April 15, 2001.

Although originally supplied to perform work on the Casino project, and then later, on the JFK project, the work of the 13 employees has not been limited to those projects. Carpenter Frank Coppola and welder Brian Baringer both testified that they worked on several other projects. In addition, Carpentry Department Supervisor Colin Heasman testified that he used the employees for other projects and that the carpenters under his supervision could be assigned to work on projects as needed. The Employer has several projects in progress and others

[1] There is no contention, however, that the Employer is engaged in the construction industry.

with contracts pending. Further, it is actively seeking new projects, including large ones like the JFK project.

The Employer anticipates that by April 15, 2001, it will have laid off the 13 "temporary" employees and 8 of its regular employees in the welding department. The Employer, however, has not notified any of these 21 employees of the impending layoffs. In addition, carpenter Coppola testified that the Employer has never told him that he is a "temporary" employee or anything else regarding his tenure at the Employer.

The Employer's practice is not to inform employees of their layoff until the day of the layoff or shortly before it is to occur. The supervisory personnel making the layoff decisions testified that the Employer's current projects would not require the existing number of carpenters and welders and that the 21 employees would be laid off on April 15, 2001. They also testified, however, that the layoffs "could change" and were "not final," and that "it would not be unusual" to learn of additional projects after the hearing. Although there was some evidence regarding the Employer's previous recalls of laid off employees, the parties stipulated at the end of the hearing that "some" laid off employees have been recalled and "others" have not.

II. ANALYSIS

1. Substantial and representative complement.

The Regional Director directed an immediate election, rejecting the Employer's contention that the unit was contracting to such a significant extent that an election was not appropriate. We agree.

To warrant an immediate election where there is definite evidence of an expanding or contracting unit, the present work complement must be substantial and representative of the ultimate complement to be employed in the near future, projected both as to the number of employees and the number and kind of classifications. *Douglas Motors Corp.,* 128 NLRB 307, 308 (1960). A mere reduction in the number of employees is insufficient to warrant dismissal of the petition; the Board will examine whether the reduction is a result of a "fundamental change in the nature of the Employer's business operations." Id. The Board finds an existing complement of employees to be "substantial and representative" when approximately 30 percent of the eventual complement is employed in 50 percent of the anticipated job classifications. See *Yellowstone International Mailing, Inc.*, 332 NLRB 386 (2000), relying on *Custom Deliveries*, 315 NLRB 1018, 1019 fn. 8 (1994).

We agree with the Regional Director that the Employer's present work force constitutes a substantial and representative complement of employees to be employed in the near future. The Petitioner seeks a unit of 27 employees containing two classifications: carpenters and welders. The Employer plans to retain six employees (two carpenters and four welders), and the Regional Director found that eight regular welders scheduled for layoff on April 15 had a reasonable expectancy of recall and are therefore eligible to vote.[2] Thus, apart from the 13 employees whose status as "temporary" employees is in dispute, it is undisputed that at least 14 of the Employer's 27 current employees, or 52 percent, will remain in the unit.[3] In addition, the projected complement will retain both classifications of employees, or 100 percent of its current classifications.

Further, the evidence does not indicate that any reduction in the Employer's work force is the result of a "fundamental change" in the Employer's operations. See *Douglas Motors Corp*., 128 NLRB at 308. Although the Employer has several ongoing projects, it contends that it currently does not have any projects pending in which wood and steel are the core product to be produced. Without new projects, the Employer contends that it will not need the current levels of carpenters and welders. However, the Employer does not contend that it is shifting to a different type of business operation or eliminating aspects of its current business. Cf. *Plymouth Shoe Co.,* 185 NLRB 732 (1970) (employer changed from shoe manufacturing to shoe warehousing); *Douglas Motors Corp.*, 128 NLRB at 308 (employer eliminated manufacturing aspect of operation in favor of new business operation confined solely to distribution, warehousing, and certain experimental functions). Rather, the Employer continues to pursue the same type of work (wood and steel products) that it performed before the planned reduction in its work force and is continuing to pursue new projects.[4] In addition, the Employer is retaining its carpentry and welding departments. Cf. *Plymouth Shoe Co.*, supra (employer eliminates all job classifications engaged in production of shoes or maintenance of shoe manufacturing equipment); *Douglas Motors Corp.*, supra (employer will compress 16 job classifications into 1 to 4 classifications). Accordingly, we

[2] The Employer did not seek review of this finding.

[3] The Regional Director found that the employee complement might also include three current employees from other departments that the Employer plans to transfer into the carpenter classification following the April 15 layoffs. Since we find the undisputed employee complement of 14 employees to be substantial and representative of the Employer's ultimate complement, it is unnecessary to determine whether these three employees are also part of the Employer's projected complement.

[4] The Employer's president testified he was looking for projects "like JFK," which involved extensive carpentry and metal work.

affirm the Regional Director's decision to conduct an immediate election.

2. Temporary employees

The Regional Director excluded the 13 disputed carpenters and welders from the unit because he found that they were "temporary employees" under Board precedent. The Regional Director relied on evidence that the Employer has a history of hiring temporary employees from temporary agencies and union hiring halls to supplement its work force, particularly when completing a project. He also relied on the agreement between the Employer and the Petitioner, which was for a set duration and was specifically limited to the Potawatomi Casino and JFK Airport projects. The Petitioner contends that the 13 employees should be included in the unit based on their substantial work histories and the fluctuating nature of the Employer's business. The Employer contends that these employees have a definite termination date and no community of interest with employees in the unit.

"[T]emporary employees, who are employed on the eligibility date, and whose tenure of employment remains uncertain, are eligible to vote." *Personal Products Corp*., 114 NLRB 959, 960 (1955). Accord: *WDAF Fox 4*, 328 NLRB 3 (1999), enfd. 232 F.3d 943 (8th Cir. 2000). The "date certain" test, however, does not necessarily require that the employee's tenure is "certain to expire on an exact calendar date"; it is only necessary that the "prospect of termination [is] sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired." *St. Thomas-St. John Cable TV*, 309 NLRB 712, 713 (1992), citing *Pen-Mar Packaging Corp.,* 261 NLRB 874 (1982). On the other hand, employees originally hired as temporary employees, retained beyond the original term of their employment, and subsequently employed for an indefinite period, are included in the unit. *Orchard Industries*, 118 NLRB 798, 799 (1957). We find that, while the Regional Director was correct in finding that the 13 employees initially were employed for a set duration, their tenure of employment subsequently became uncertain.

The 13 employees were first employed to work on the Casino project pursuant to a 6-month agreement between the Employer and Petitioner beginning in early 2000. That agreement later was extended an additional 2 months to complete the Casino project and to perform work on the JFK project. Although the agreement expired, the employees continued to work on the JFK project for over 6 additional months. Moreover, the JFK project originally was scheduled for completion on February 1, 2001, but at the hearing the Employer anticipated a completion date of April 15, 2001. Further, the Employer at no time notified the temporary employees that their tenure was coming to an end. This evidence illustrates that the Employer has retained the 13 employees for a substantial period beyond the original term of their employment, that the Employer's project completion dates are subject to change and remain uncertain, and that their prospect of termination is not certain, even at the end of a particular project.

In addition, the fact that the Employer has assigned these employees to work on other projects not specifically covered by the agreement demonstrates that the temporary employees were not employed solely to complete the Casino and JFK Airport projects, or any particular project. Further, the likelihood of a continuing need for the temporary employees is indicated by the existence of several projects in progress or pending and evidence that the Employer is actively seeking new projects that would require the skills of these employees.

Accordingly, we find the evidence is insufficient to support a "date certain" for the termination of the temporary employees or to dispel reasonable contemplation of continued employment beyond the term for which the employees were hired. See *Ameritech Communications*, 297 NLRB 654 (1990); *Horizon House 1*, 151 NLRB 766, 768 (1965); *Hollingsworth & Whitney*, 97 NLRB 599 (1951). Further, we find that the 13 employees share a sufficient community of interest to be included in the unit with the Employer's "regular" employees because there is no dispute that they work side-by-side with the regular employees, performing the same work, under the same supervision. See *Interstate Warehousing of Ohio*, 333 NLRB 682 (2001); *Pandick Press Midwest*, 251 NLRB 473, 474 (1980); *Fatato, Inc.,* 87 NLRB 546, 548 (1949). The fact that they receive different wages and benefits than the "regular" employees does not require their exclusion from the unit. See *NLRB v. New England Lithographic*, 589 F.2d 29, 36 (1st Cir. 1978); *Interstate Warehousing of Ohio*, 333 NLRB at 683 fn. 5; *Pandick Press Midwest*, 251 NLRB at 474; *Lloyd A. Fry Roofing* 121 NLRB 1433, 1437 (1958); *Fatato, Inc.,* 87 NLRB at 548.[5]

[5] In Chairman Hurtgen's view, if the wages and benefits of the temporary employees are different from those of the regular employees, and if the wages and benefits of the temporary employees are set by an employer who is not to be at the bargaining table, it may well be that there is no community of interests between the temporary and regular employees. See Chairman Hurtgen's dissent in *Interstate Warehousing*, above. However in the instant case, the Union is the entity that refers the temporary employees to the Employer, and the wages and benefits are set in discussions between the Employer and the Union. The Union, if selected, would obviously be at the bargaining table. In these circumstances, Chairman Hurtgen would include the temporary employees in the unit.

Although, as discussed above, we have included these 13 employees in the unit based on the evidence adduced at the hearing, it is possible that some or all of these employees were laid off prior to the May 3, 2001 election date. If those employees voted in the election, it would be necessary to determine, in order to resolve their voting eligibility, whether they had a reasonable expectancy of recall. We leave this issue to the post-election challenge procedure. See *Bituma Corp. v. NLRB*, 23 F.3d 1432, 1436 (8th Cir. 1994).

ORDER

The Regional Director's decision to conduct an immediate election is affirmed, but his decision to exclude the 13 temporary employees from the unit because they are "temporary" employees is reversed. This case is remanded to the Regional Director for further appropriate action.