

Desert Palace, Inc., d/b/a Caesars Tahoe and International Union of Operating Engineers, Stationary Local 39, AFL-CIO. Case 32-RC-4878

August 1, 2002

DECISION AND ORDER REMANDING TO THE REGIONAL DIRECTOR

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

The National Labor Relations Board, by a three-member panel, has considered a determinative challenge¹ to an election held June 1, 2001,² and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 19 for and 18 against the Petitioner, with one challenged ballot.

On June 14, the Regional Director issued a Report on Challenged Ballots and notice of hearing, finding that the challenge to the ballot of employee Kimbrough Maier raised substantial and material issues of fact and ordering that a hearing be conducted. Pursuant to that order, a hearing was conducted on July 11. The hearing officer recommended that the challenge to Maier's ballot be sustained, and that a certification of representative issue. The Employer filed exceptions to the hearing officer's report.

The Board has reviewed the record in light of the Employer's exceptions and brief, and adopts the hearing officer's findings, conclusions, and recommendations only to the extent consistent with this decision.

Background

The Employer operates a hotel and gaming casino in Stateline, Nevada. Petitioner (or Union) filed a petition seeking to represent certain employees employed in the Employer's engineering department. The parties stipulated to an election in the following unit:

All full-time and regular part-time Facility Maintenance Technicians I, II, and III and Outside Maintenance I and II employed by the Employer in the Engineering Department; excluding all office clerical employees, guards, and supervisors as defined in the Act.

The Union challenged the ballot of employee Maier, who is the engineering coordinator. The Union contended that Maier should be excluded from the unit because: the engineering coordinator position is not included in the bargaining unit; Maier performs clerical work, not engineering work, and thus does not share a community of

interest with other bargaining unit employees; and Maier is a supervisor. Conversely, the Employer contended that Maier should be included in the unit because he: shares a community of interest with other bargaining unit employees, does not perform supervisory functions, and is a dual-function employee.

The Hearing Officer's Report

As stated above, the hearing officer recommended that the Union's challenge to Maier's ballot be sustained, and that a certification of representative be issued. The hearing officer's report rests on three conclusions.

First, the hearing officer found that, to the extent that the express terms of the stipulation control, those terms reflect an intent to exclude Maier from the bargaining unit. The hearing officer noted that the stipulation excludes "office clericals," and found that Maier's "primary duties" consist of "office and/or plant clerical work."

Second, the hearing officer found that, assuming that the majority of Maier's work is nonunit clerical work which would exclude him from the unit, it was necessary to determine whether Maier should nonetheless be included in the unit as a dual-function employee. In analyzing the dual-function issue, the hearing officer applied the test enunciated in *Berea Publishing Co.*, 140 NLRB 516, 518, 519 (1963): that an employee performing both unit and nonunit work is eligible to vote if that employee regularly performs duties similar to those performed by unit employees for sufficient periods of time to demonstrate a substantial interest in working conditions in the bargaining unit. Under this test, the hearing officer found that Maier was not a dual-function employee. Specifically, the hearing officer found that: Maier's performance of unit work was irregular and sporadic; the bulk of bargaining unit work Maier performed (furniture moving) was of a nonrecurring nature; and the other unit work Maier performed was essentially to finish the unit work that he had begun before being transferred to the engineering coordinator position.

Finally, the hearing officer found that Maier was not a supervisor. The hearing officer rejected the Union's argument that Maier possessed the authority to responsibly direct unit employees by virtue of his dispatching duties.³

Employer's Exceptions

The Employer excepts to the factual assertions and related conclusions of law made by the hearing officer. The thrust of the Employer's argument is that: Maier was hired to perform facility maintenance work; upon transferring to the engineering coordinator position, he

¹ The Petitioner filed objections to the election, but withdrew those objections prior to the hearing.

² All dates herein are in 2001 unless otherwise specified.

³ The Union did not except to this finding.

was assigned clerical responsibilities which comprise about 2 hours of his average workday; and he is available to perform, and does perform, facility maintenance work the remainder of the time. The exceptions may be grouped into the following arguments.

The Employer first argues that the hearing officer erred in concluding that Maier should be expressly excluded from the unit as a "clerical employee." The Employer contends that the hearing officer's conclusion is flawed because he failed to make an essential distinction between "office clerical" and "plant clerical" functions. Unlike office clericals, plant clericals are traditionally included in production and maintenance units because they share a community of interest with unit employees. According to the Employer, to the extent that Maier performs clerical functions, they are plant clerical functions which are unit work, and which give Maier a community of interest with other unit employees.

The Employer next argues that the hearing officer erred in applying the dual-function test. The Employer contends that Maier's "clerical" duties, which consist of dispatching, payroll, and very limited note-taking, are plant clerical functions, and that Maier's other duties are facility maintenance work. Thus, argues the Employer, the dual-function test, which applies to employees performing both nonunit and unit work, is inapplicable here because all of the work that Maier performs is unit work.⁴ Instead, the applicable test is the community-of-interest test, which the hearing officer failed to consider.

Regarding the stipulation itself, the Employer makes alternative arguments. On the one hand, the Employer argues that the stipulated unit is ambiguous as to the eligibility of *plant clericals*. Under this argument, the Employer states that there is no extrinsic evidence from which to discern the parties' intent as to plant clericals, and that the community-of-interest test applies.

On the other hand, the Employer argues that the stipulation is unambiguous, and that Maier is eligible to vote as the *engineering coordinator* because he performs facility maintenance work. Under this argument, the Employer argues that the stipulation is not tied to job descriptions, and that the only possible reading of the stipulation is to include all employees in the engineering department who perform facility maintenance work. If the Board rejects this reading, the Employer argues that the Board must look to extrinsic evidence regarding intent,

which, in this case, supports the conclusion that Maier is eligible to vote. Finally, the Employer argues that, if the parties' intent as to the engineering coordinator position still cannot be discerned from the extrinsic evidence, the Board must then apply the community-of-interest test. The Employer argues that application of the traditional community-of-interest test favors placing the position of engineering coordinator in the bargaining unit.

For the reasons stated below, we find merit in the Employer's exceptions.

Analysis

The Board has long held that, when resolving determinative challenged ballots in cases involving stipulated bargaining units, its function is to ascertain the parties' intent and then to determine whether this intent is contrary to any statutory provision or established Board policy. *Northwest Community Hospital*, 331 NLRB 307 (2000), citing *Tribune Co.*, 190 NLRB 398 (1971). Recently, the United States Court of Appeals for the D.C. Circuit has followed this governing principle in applying a three-prong approach to resolving stipulated unit cases in *Associated Milk Producers, Inc. v. NLRB*, 193 F.3d 539 (D.C. Cir. 1999).

Under the D.C. Circuit's three-prong test, the Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

Associated Milk Producers essentially embodied the approach generally taken, but not always expressly articulated, by the Board in prior cases. We apply the *Associated Milk Producers* three-prong analysis here, and expressly adopt its test as a clear statement of the analytical approach to be followed prospectively in stipulated unit cases. As explained below, we conclude that the stipulation is ambiguous and that the parties' intent cannot be discerned by reference to extrinsic evidence. Accordingly, we apply the community-of-interest standard to find that the engineering coordinator position should be included in the bargaining unit.

1. The terms of the stipulated unit description

Applying the *Associated Milk Producers* analytical framework, our first step is to examine the terms of the stipulated unit description to determine whether it resolves the question of Maier's eligibility to vote. Be-

⁴ The Employer argues that, even if the dual-function test were applicable, Maier would be eligible under that test. The Employer states that the hearing officer's finding that Maier does not "regularly" and "sufficiently" perform unit work underestimates the amount of time Maier performs unit tasks and that, in any event, the Board does not apply a bright-line percentage test.

cause the express language of the stipulation neither specifically includes nor specifically excludes the classification of Engineering Coordinator, the parties' intent with regard to that position is unclear. *R. H. Peters Chevrolet*, 303 NLRB 791 (1991); *Lear Siegler*, 287 NLRB 372 (1987). Moreover, the failure to list a disputed classification (here engineering coordinator) as an included classification does not establish that the parties clearly intended to omit that classification. *R. H. Peters Chevrolet*; *Lear Siegler*, above.⁵

Here, the hearing officer correctly noted "that the position of engineering coordinator is not set forth expressly in either the list of included or excluded classifications." The hearing officer also correctly noted that neither the inclusions nor the exclusions contain any generic "all other employees" language that arguably could reflect the parties' intent to either include or exclude the engineering coordinator. Nonetheless, the hearing officer found that, to the extent that the express terms of the stipulation control, the stipulation reflected an intent to exclude Maier from the unit. The hearing officer based this conclusion on the language of the stipulation excluding "office clerical employees," and on his determination that Maier's primary duties consist of "office and/or plant clerical work." We find this analysis flawed in several respects.

First, contrary to the hearing officer, we do not believe that the parties' intent here can be determined from the language of the stipulation. This stipulation neither specifically includes nor specifically excludes the Engineering Coordinator position. In accordance with *R. H. Peters Chevrolet* and *Lear Siegler*, above, we decline to infer that the parties intended to exclude the Engineering Coordinator from the unit because they failed to list that position in the inclusions. We note, in fact, that the specific "classifications" of facility maintenance technicians I, II, and III and outside maintenance I and II listed as inclusions in the stipulation do not even mirror the actual classifications used by the Employer.⁶ Because of this, the applicability of the Board's general rule in *R. H. Peters Chevrolet* and *Lear Siegler*, finds even greater support here. Thus, while it is clear that the parties intended to include maintenance engineers and exclude office clericals, the parties' intent with respect to the engineering coordinator position is ambiguous.

⁵ We do not pass on whether the failure to list a classification as included, coupled with an express exclusion of "all other employees," would warrant a contrary result.

⁶ As noted by the hearing officer, Petitioner's Exh. 3, a list of all employees in the engineering department, reflects that the Employer employs 40 nonsupervisory unit employees in the classifications of facility maintenance I, II, and III. For ease of reference, we will refer to all three classifications generically as "maintenance engineers."

Second, the hearing officer, having examined Maier's job duties, categorized him as an "clerical employee" and then excluded him from the unit under the specific exclusion for "office clericals." We disagree with the hearing officer's conclusion and related rationale.

The hearing officer found that Maier's "primary job duties" consisted of "office and/or plant clerical work." We agree with the Employer that the hearing officer's analysis is flawed in that he failed to make a crucial distinction between office and plant clericals.⁷ We further find that the facts of this case, correctly analyzed, support the conclusion that Maier's duties are much more akin to those of a plant clerical than an office clerical employee.

The Board has long drawn a distinction between "plant clericals" and "office clericals." The distinction is rooted in community-of-interest concepts, *Cook Composites & Polymers Co.*, 313 NLRB 1105, 1108 (1994), albeit it is occasionally difficult to discern. *Gordonsville Industries*, 252 NLRB 563, 590 (1980), affd. 673 F.2d 550 (D.C. Cir. 1982), cert. denied 457 U.S. 1117 (1982), citing *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1041 (9th Cir. 1978). Certain factors predominate in Board decisions finding employees to be plant, rather than office, clericals. "The indispensable and conclusive element is that the asserted plant clericals 'perform functions closely allied to the production process or to the daily operations of the production facilities at which they work.'" Id. at 591, quoting *Fisher Controls Co.*, 192 NLRB 514 (1971). Normally, plant clericals spend most of their working time in the plant production area. The test generally is whether the employees' principal functions and duties relate to the production process, as distinguished from general office operations.

The record demonstrates that Maier performs three duties which are arguably "clerical" in nature: dispatching, payroll, and note-taking. As found by the hearing officer, Maier's dispatching duties consist of answering requests for a maintenance engineer, determining which engineer is qualified to handle the repair or problem, and then sending that engineer to the appropriate location to correct the problem. Such dispatching duties have been found to be plant clerical in nature. *Colonial Lincoln Mercury Sales*, 197 NLRB 54, 64 (1972), enf'd. 485 F.2d 455 (5th Cir. 1973) (dispatcher who receives repair orders and assigns work to mechanics on basis of who is qualified to do work, or, in case of general repairs, in accordance with availability, is plant clerical).⁸ Maier's

⁷ Indeed, while ultimately excluding Maier as an office clerical employee, the hearing officer cited case law dealing with plant clericals.

⁸ See also *Mosler Safe Co.*, 188 NLRB 650, 654 (1971); *Minneapolis-Honeywell Regulator Co.*, 115 NLRB 344, 346 (1956); *Martin Outdoor Advertising Co.*, 198 NLRB 1136, 1337 (1972) (employee

payroll duties include reviewing the employee sign-in sheet, comparing this sheet to the computerized card swipe records, recording overtime, inputting time-off requests, and noting which employees are "off" that day. Such duties have also been found to be plant clerical duties. *White Provision Co.*, 116 NLRB 1552, 1553 (1956) (plant clerks who perform payroll duties are plant clericals).⁹ Finally, Maier is responsible for taking notes and preparing minutes for both the biweekly construction meetings and the monthly engineering meetings. These are arguably the most "office clerical" of Maier's duties. However, the fact that clerical employees exercise some secretarial skills is no obstacle to finding them to be plant clericals, if other factors link them to the production process and other production employees. *Gordonville Industries*, 252 NLRB at 591, citing *Swift & Co.*, 119 NLRB 1556, 1567 (1958). Moreover, we note that these last duties occupy only a very small portion of Maier's time.

Further, we find that the hearing officer's characterization of these three arguably clerical duties as Maier's "primary" duties is questionable. It appears that the hearing officer made this characterization because the record is unclear as to what Maier's other duties really are. Maier testified, without contradiction, that he only spends about 2 hours per day performing his dispatching and timekeeping duties. That obviously leaves about 5 hours per day (assuming about an hour for lunch and breaks) unaccounted for. At the hearing, the hearing officer directly questioned Maier about what he did the other 5 hours per day. Maier's response was that some of that time was consumed by his note-taking duties, but otherwise he was "out on the floor . . . checking on those projects" (Tr. 185-186). Maier also testified that he often walked the hotel, checking on outside contractors to see if there were any "engineering needs" that the Engineering Department should address.¹⁰ Engineering Manager Cage testified, however, that checking on outside contractors was not one of Maier's assigned job duties (Tr. 222, 242).

Hence, there is some confusion on this record as to what Maier's assigned duties actually are since he transferred to the engineering coordinator position, but two points are clear. First, the hearing officer found that Maier, since becoming the engineering coordinator, has

not been regularly assigned those preventative maintenance or emergency dispatches which constitute the bulk of the unit employees' work. Second, the hearing officer also found (when applying the dual-function analysis) that Maier, since becoming the engineering coordinator, has spent about 19 percent of his working time on carry-over unit work or on work associated with the hotel's renovation project (which work is also assigned to unit employees).¹¹

On this record, then, while the scope of Maier's assigned duties may not be certain, it is clear, we think, that Maier cannot be excluded from the unit as an office clerical. To the extent that Maier performs clerical duties, we agree with the Employer that they are plant clerical in nature.¹² To the extent that he performs other work, it is, as discussed more fully below, unit work. Thus, because we find that Maier's duties are not "office clerical" functions, we find that he does not fall under that unit exclusion.

2. Extrinsic evidence of the parties' intent

Having concluded that the stipulation is facially ambiguous and that Maier's duties do not exclude him from the unit under the express exclusion for office clericals, we turn to the second prong of the analysis. Here, the only extrinsic evidence of intent contained in the record is testimony by the parties, and the Employer's submission of an *Excelsior* list which included Maier as an eligible voter. As to the testimony, there is conflicting evidence of intent. Engineering Manager Cage testified that he intended to include Maier, while union representative Frederick testified to the contrary and that, as soon as he saw Maier's name on the *Excelsior* list, he instructed his secretary to register an objection.¹³ The Board has held that such evidence of subjective intent is not a proper consideration. *White Cloud Products*, 214 NLRB 516, 517 (1974). As to the *Excelsior* list, its submission "is of little help in determining the intended scope of a pre-

who had daily contact with unit employees, distributed work orders and assisted unit employees in filling out forms is a plant clerical).

⁹ See also *Hamilton Halter Co.*, 270 NLRB 331 (1984) (collecting timecards is plant clerical); *Mosler Safe Co.*, 188 NLRB 650, 651 (1971) (timekeepers are plant clericals).

¹⁰ To the extent that Maier is wandering the hotel to check whether contractors need help from the Employer's maintenance engineers, he is arguably performing an extension of his dispatching duties.

¹¹ The Employer excepts to the 19 percent calculation. Our review of the record indicates that, indeed, this number may be low. However, we agree with the Employer that the dual-function test is inapplicable; thus, any error in this calculation is immaterial.

¹² The Employer argues that the evidence does not support the hearing officer's finding that Maier is the replacement for the maintenance department's former secretary. We agree. The former secretary did perform the dispatching, timekeeping, and note-taking that Maier performs. However, there is no evidence as to what she did the remaining 5-6 hours per day. The record is clear that she performed no engineering functions. Unlike Maier, she was commonly referred to as the engineering department director's "secretary," and reported to him, rather than to Cage.

¹³ There was some very limited testimony by employee Ross. The hearing officer never discussed or credited this testimony. Absent some credibility determination by the hearing officer, we decline to make findings based on this testimony.

election stipulation. The submission of the list has never been held to preclude union ballot challenges since it is required for the Union's benefit." *NLRB v. Speedway Petroleum*, 768 F.2d 151, 157 (7th Cir. 1985).¹⁴ Accordingly, we find that there is insufficient extrinsic evidence of intent from which we can discern the parties' intent.

3. The community-of-interest standard

Since we cannot discern the parties' intent from the language of the stipulation or from the extrinsic evidence before us, we must reach the final step of the analysis, and apply our normal community-of-interest standard. This approach to determining the bargaining unit is appropriate when the intent of the parties cannot be discerned. *Electrical Workers v. NLRB*, 418 F.2d 1191, 1201 (D.C. Cir. 1969).

The general criteria used for determining units in other industries, after weighing all the factors present in each case, are also applicable to the hotel and motel industry. These factors include distinctions in the skills and functions of particular employee groups, their separate supervision, the employer's organizational structure, differences in wages and hours, integration of operations, interchange and contacts. The Board has often approved separate units of maintenance employees in the hotel industry. *Omni International Hotel*, 283 NLRB 475 (1987).

Applying community-of-interest factors here, we find that the engineering coordinator position should be included in the unit, and that Maier is thus eligible to vote. Thus, the record evidence of Maier's duties that are "plant clerical" in nature, and his performance of bargaining unit work, inescapably lead to the conclusion that Maier shares a community of interest with the other bargaining unit members.

As suggested earlier in this decision, to the extent that Maier is a "plant clerical," he should be included in the unit. Historically, the Board has taken the position that "plant clericals" are normally included in production and maintenance units, while "office clericals" are excluded. *Gordonsville Industries*, 252 NLRB at 590; *Brown & Root, Inc.*, 314 NLRB 19 (1994); *Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127, 1129 (1971). Thus, the Board has stated that, in the absence of a bargaining history, the Board would include plant clericals in a production and maintenance unit, in accordance with its policy as to plant clericals. *White Provision Co.*, 116 NLRB at 1555. Plant clerical employees are customarily included

in a production and maintenance unit because they generally share a community of interest with the employees in the plantwide unit. *Armour & Co.*, 119 NLRB 623, 625 (1957); *Raytee Co.*, 228 NLRB 646 (1977).

The unit here is comprised of maintenance engineers, and is thus a maintenance unit. For purposes of placing plant clericals in a unit, we would not distinguish between a maintenance unit and a production and maintenance unit. That Maier is functionally integrated with this maintenance unit cannot be seriously disputed. The close relationship between Maier's dispatching functions and the maintenance engineers' functions is evident. He has daily contact with other unit employees by virtue of his dispatching, timekeeping, and attendance at department meetings. According to his testimony, he spends approximately 40 percent of his time in the office, and the rest of his time on the hotel floor or grounds. Thus, Maier is functionally integrated with the maintenance process and with the daily operations of the maintenance engineers.

Moreover, based on other factors related to Maier's position, it is clear that the engineering coordinator shares a community of interest with the maintenance engineers. Maier was initially hired as a facility maintenance I, and thus possesses the same skills, and has performed the same duties, as many of the other maintenance engineers. Like the maintenance engineers, he owns his own tools. Since his transfer to the engineering coordinator position, he has been called on to finish work he previously started, to do minor maintenance such as changing a wall scone and replacing light bulbs, and to move a significant amount of furniture, along with the maintenance engineers. Maier reports to Engineering Manager Cage, as do all of the other employees in the hotel's engineering department. Aside from the contact he has with the maintenance engineers by virtue of his dispatching functions, he also sees them during his frequent "walks" through the hotel. Maier is an hourly employee who falls within the general pay range of the maintenance engineers and receives the same benefits. He is also subject to the same sign-in and swiping procedure, has the same employee handbook, and eats in the same cafeteria. In similar circumstances, the Board has found a community of interest.¹⁵

In sum, for all of the reasons stated above, we find that the stipulation is facially ambiguous; that there is insufficient extrinsic evidence from which we can discern the

¹⁴ See also *Lear Siegler*, 287 NLRB 372 (1987), where the Board found (in the opposite situation from ours) that an employer's failure to include an employee on the eligibility list did not establish a clear intent by the parties to exclude that position from the unit. The Board stated that such occurrences could just as easily be explained as oversights.

¹⁵ See *Hamilton Halter Co.*, 270 NLRB at 337, where the Board found that operations-center employees had a community of interest with warehouse employees where they shared similar supervision, had frequent verbal contact and exchanged information, took breaks together, all punched timeclocks, and had common wages and benefits.

parties' intent, and that, applying community-of-interest principles, the engineering coordinator position should be included in the bargaining unit.¹⁶ Accordingly, Maier

¹⁶ Finally, if Maier is not included in the unit, there is a possibility that he may be disenfranchised. Other than the supervisors, the maintenance engineers, and the engineering coordinator, the only other employee in the maintenance department is Gina Ross. Ross never attempted to vote; thus, her ballot was not challenged. The hearing officer found that the parties agreed that Ross was excluded from the unit, and that she is "undisputedly a nonunit plant clerical." The Employer excepts to both findings, and argues that Ross was the person intended to be excluded by the "office clerical" exclusion. We need not determine Ross' placement as that issue is not before us. We raise it only to show that, if the Employer's arguments are true, then Maier would be the only engineering department employee left unaccounted for.

is eligible to vote and the challenge to his ballot is overruled.

ORDER

It is ordered that the Regional Director for Region 32, within 14 days from the date of this decision, shall open and count the ballot of Kimbrough Maier, prepare and cause to be served on the parties a revised tally of ballots, and issue the appropriate certification.

IT IS FURTHER ORDERED that the matter is referred to the Regional Director for Region 32 for further processing consistent with this Decision.

MEMBER COWEN, concurring.

I concur in the result.