Dean & Deluca New York, Inc. *and* District 6, IUISTHE, Petitioner and United Food & Commercial Workers, Locals 1500 & 342-50, AFL–CIO–CLC, Intervenor. Case 2–RC–22427

April 28, 2003

DECISION, DIRECTION, AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held September 7, 2001, and Administrative Law Judge Raymond P. Green's decision, which is attached, recommending disposition of them.[1] The tally of ballots shows 1 for the Petitioner, 57 for the Intervenor, 53 against the participating labor organizations, and 32 challenged ballots, a sufficient number to affect the results.[2]

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

The Employer has excepted, inter alia, to the judge's findings that Michael Scibilia and Mustafizer Kahn are statutory supervisors and that therefore the Intervenor's challenges to their ballots should be sustained.[3] For the reasons set out below, we find merit in these exceptions.

As to Scibilia, the Intervenor challenged his ballot on the grounds that he was a statutory supervisor and/or a buyer, a classification specifically excluded from the bargaining unit.[4] In finding that Scibilia was a statutory supervisor, the judge relied on the testimony of the Intervenor's witness, Xavier Lopez, an individual who had been employed in the store's gift department for about 1 year before being laid off on September 20, 2001. Lopez testified that Scibilia acted as the store manager on Saturdays, and that on those days, Scibilia was the person to go to if problems arose. Lopez further testified that he had heard from Joseph Reda, the store's assistant general manager, that Scibilia had fired employee Jude Waterston.

While conceding that "there [was] not that much to go on with respect to Scibilia," the judge nevertheless found that the Intervenor had made out "a prima facie showing" that Scibilia exercised "some of the powers listed i[n] Section 2(11) of the Act,[5] including the power to discharge employees."[6] In reaching this conclusion, the judge apparently also relied on a personnel review that Scibilia had filled out for Waterston (Intervenor Exh. 11) and on the fact that Scibilia attended periodically held management meetings. Finding "that the Employer ha[d] not adequately overcome this prima facie showing,"[7] the judge recommended that the challenge to Scibilia's ballot be sustained.

As to Kahn, the Intervenor challenged his ballot on the ground that he was the manager of the maintenance department and a statutory supervisor. In finding that Kahn was a statutory supervisor, the judge again relied on Lopez' testimony. Lopez testified that Kahn was in charge of about 8 to 10 maintenance employees, that Kahn made out the schedule for the maintenance employees, and that

[1] On September 13, 2001, the Intervenor filed timely objections to the election. The Region is holding those objections in abeyance pending resolution of the challenges at issue here.

[2] Contrary to the judge's finding, the parties did not enter into a stipulation at the hearing as to the eligibility status of Lori Nelson. Indeed, the judge subsequently overruled the Intervenor's challenge to Nelson's ballot, a ruling to which the Intervenor did not except, and it is on this basis that we adopt the judge's recommendation to open and count Nelson's ballot.

[3] The Employer has also excepted to the judge's recommendations to sustain the challenges to the ballots of the individuals who work in the sushi and flower departments located on the Employer's premises. The Employer contends that the judge erred by finding that the individuals who work in the sushi and flower departments are solely the employees of the companies which contracted with the Employer to operate those departments and by excluding these individuals from the bargaining unit of the Employer's employees on that basis. The Employer contends that it (the Employer) and the companies which operate, respectively, the sushi and flower departments are the joint employers of the individuals who work in these departments and that these individuals should therefore be included in the bargaining unit and the challenges to their ballots overruled. We find the Employer's exceptions without merit. We agree with the judge, for the reasons stated by him, that the companies which operate the sushi and flower departments are solely the employers of the individuals who work in those departments and we therefore adopt his recommendation to sustain the Intervenor's challenges to the ballots of Soe Hzun, Myint Aung, Oo Maung Than, and Maung Cho (sushi department), and to the ballots of Kahn Mohammed, Mohammed Lasker, and Mohammed Ali Hossain (flower department).

[4] The Employer, on the other hand, contended that Scibilia was a merchandiser, a category specifically included in the bargaining unit. At p. 8 of its Brief in Opposition to the Employer's Exceptions, the Intervenor concedes, in effect, that Scibilia is a merchandiser.

[5] Sec. 2(11) of the Act states:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[6] Judge's decision, "Supervisors" sec., par. 12 (fn. omitted).

[7] Id. The Employer's witness, Emil Grosso, the Employer's vice president of retail operations, testified that on Saturdays, Scibilia's primary responsibility was customer service and that Scibilia had no responsibility for the operation of the store on Saturdays or on any other days. Grosso further testified that he had heard that Waterston had had an argument with Scibilia, but he denied that Scibilia had fired her.

on 5 nights a week he closed the store and set the alarm code. "More importantly," according to the judge, Lopez testified that he once witnessed Kahn scream at a maintenance man and fire him, and, "[l]ess persuasively," that he had heard that Kahn had fired a woman who worked in the maintenance department. Finding that the Intervenor had established "a prima facie showing" that Kahn was a statutory supervisor,[8] and that the Employer had not "adequately overcome the Intervenor's prima facie showing,"[9] the judge recommended that the challenge to Kahn's ballot be sustained.

As an initial matter, we find that the judge applied the wrong evidentiary standard in finding that the Intervenor satisfied its burden of establishing that Scibilia and Kahn were statutory supervisors. That is, by analyzing the supervisory issue in terms of the Intervenor's having established a prima facie case that Scibilia and Kahn were statutory supervisors, and then determining that the Employer had failed to rebut that prima facie case, the judge incorrectly used a burden-shifting evidentiary standard in reaching his conclusion that Scibilia and Kahn were statutory supervisors. The Board does not apply a burden-shifting standard in its analysis of whether employees are statutory supervisors under the Act. Rather, "[i]t is well settled that the burden of proving supervisory status rests on the party asserting that such status exists." *Freeman Decorating Co.*, 330 NLRB 1143, 1143 (2000), citing *Ohio Masonic Home*, 295 NLRB 390, 393 (1989). The party asserting such status must establish it by a preponderance of the evidence. *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999); *Volt Information Sciences*, 274 NLRB 308, 330 (1985).

Thus, as relevant here, the burden is on the Intervenor to establish that Scibilia and Kahn have the authority to exercise at least one of the powers enumerated in Section 2(11) of the Act and that the use of that authority involves a degree of discretion that rises to the level of "supervisory independent judgment." See *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999).

Applying the correct evidentiary standard, and even assuming that Lopez' testimony is credited, we find that the Intervenor has not met its burden of establishing that Scibilia and Kahn are statutory supervisors. As to Scibilia, the judge found, in effect, that Scibilia had discharged employee Jude Waterston, and it was primarily on this basis that he concluded that Scibilia's power to discharge employees evidenced his supervisory status. In so finding, the judge erred.

Initially, we observe that the election was held on September 7, 2001, and that Lopez testified that the "incident" with Jude Waterston "probably did happen after the election." (Tr. 63.) Since, "[a]s a general rule, the Board does not determine voter eligibility based on evidence of events that occurred after the election,"[10] the judge should not have relied on Lopez' testimony to find that Scibilia had the authority to discharge employees. Further, even if the Waterston "incident" had occurred prior to the election, Lopez' bare testimony to the effect that he had heard that Scibilia had fired Waterston fails to establish that Scibilia's action involved the use of independent judgment as required under Section 2(11). For it is unclear from the record whether Scibilia fired Waterston on his own authority, or whether he fired her at the direction of management. In the latter circumstance, Scibilia's termination of Waterston would not evidence the use of independent judgment.[11] Similarly, the fact that Scibilia may have been in charge of the store on Saturdays, or that he may have filled out a personnel review for Waterston,[12] does not establish that he exercised supervisory authority in the absence of any evidence that Scibilia's actions involved the use of "supervisory independent judgment."[13] Finally, although Sci-

[8] Id. at "Supervisors" sec., par. 17.

[9] Id. The Employer's witness, Grosso, testified that Kahn was a utility maintenance person who performed minor repairs. Grosso further testified that at the time of the election Kahn did not supervise anyone and that, to his knowledge, Kahn did not prepare schedules for other maintenance employees. Grosso also testified that to his knowledge Kahn had never fired anyone.

[10] *Freeman Decorating Co.*, 330 NLRB at 1144, citing *Georgia-Pacific Corp.*, 201 NLRB 831, 832 (1973).

[11] If the decision to discharge Waterston was made by someone other than Scibilia, and Scibilia then terminated Waterston because he was told to do so, Scibilia's termination of Waterston would not establish that he was a statutory supervisor. See *Wilson Tree Co.*, 312 NLRB 883, 885 (1993) (crew leader Lester found not to be statutory supervisor where, in discharging employee Arnett, he informed Arnett, "I was told to let you go.").

[12] The Employer contends that although the Intervenor introduced at the hearing a performance appraisal prepared by Scibilia (Intervenor Exh. 11), the appraisal is for an unidentified employee. We find merit in the Employer's contention to the following extent. Although Intervenor Exh. 11 begins at p. 2 of the performance appraisal and therefore does not include the name of the employee being reviewed, the fax information at the top of each page of Intervenor Exh. 11 includes the words "Janet Waterston." From this description of the document, we infer that Scibilia filled out Intervenor Exh. 11 for an employee identified as "Janet Waterston." However, in the absence of record evidence that would establish that "Janet Waterston" and "Jude Waterston" are the same person, we cannot find that Intervenor Exh. 11 refers to Jude Waterston and we therefore do not rely on this document in determining Scibilia's supervisory status. For the reason set out at fn. 13 below, however, even if we were to assume that Scibilia did fill out Intervenor Exh. 11 for Jude Waterston, this would not, by itself, establish that Scibilia was a statutory supervisor.

[13] The mere fact that Scibilia was in charge of the store on Saturdays would not establish that Scibilia exercised supervisory authority during that time. See *Billows Electric Supply*, 311 NLRB 878, 879 (1993)

bilia may have attended certain management meetings, such attendance does not establish that Scibilia is a statutory supervisor.[14] In sum, applying the proper evidentiary standard here, and construing, as we must, any lack of evidence against the Intervenor, we find that the Intervenor has failed to establish that Scibilia is a statutory supervisor. We therefore overrule the Intervenor's challenge to Scibilia's ballot and shall direct that it be opened and counted.

We reach the same result as to Kahn for similar reasons. Even assuming that Lopez' testimony is credited, that testimony does not establish that Kahn exercised any of the powers enumerated in Section 2(11) of the Act with the requisite independent judgment necessary to establish supervisory status. Again, Lopez' testimony, this time to the effect that Kahn was in charge of the maintenance employees, that he made out their schedules, and that he closed the store 5 nights a week, does not establish that Kahn used "supervisory independent judgment" in carrying out these duties.[15] Lopez' further testimony to the effect that he had seen Kahn fire an employee, and that he had heard that Kahn had fired another employee, lacks any evidentiary basis from which to find that Kahn exercised independent judgment in firing the employee(s) in question.[16] Since, as explained above, any lack of specific evidence that would support a finding of supervisory status must be construed against the Intervenor, as the party asserting supervisory status, we find that the Intervenor has not established that Kahn is a statutory supervisor. We therefore overrule the challenge to his ballot and shall direct that his ballot be opened and counted.

(fact that individual was in charge of operations on alternating Saturdays not sufficient to establish supervisory status since no evidence that individual "exercised authority requiring independent judgment as required by Sec. 2(11) of the Act"). Further, even assuming that Scibilia did fill out Intervenor Exh. 11 for Jude Waterston, this fact, standing alone, would not provide evidence of supervisory status. See *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 427 (1998) (Board declined to find supervisory status where no evidence that evaluations filled out by alleged supervisors directly affected the other employees' job status.)

[14] See, e.g., *McClatchy Newspapers*, 307 NLRB 773, 779 (1992) (secondary criteria such as attendance at management meetings "do not establish supervisory status by themselves").

[15] An individual's direction and scheduling of employees does not necessarily establish that the individual is a statutory supervisor. See *Jordan Marsh Stores Corp.*, 317 NLRB 460, 467 (1995) (Stock Supervisor Stone, who was in charge of the soft goods end of the receiving department, and whose duties included directing, assigning, and making up the work schedules of employees working there, found not to be statutory supervisor in the absence of evidence that she possessed any of the "statutory attributes of supervisory authority"). As to Kahn's closing the store 5 nights a week, such responsibility, while it may be evidence of trustworthiness, does not evidence supervisory status. See *Hexacomb Corp.*, 313 NLRB 983, 984 (1994) (foremen/assistant supervisors, who, inter alia, had access to employer's keys and codes, found not to be statutory supervisors).

[16] See fn. 11, supra.

DIRECTION

It is directed that the Regional Director for Region 2 shall, within 14 days from the date of this Decision, Direction, and Order, open and count the ballots of Byron Andres, Luis Fraticelli, Herbert Harris, Stanley Hatzakis, Terrance Huggins, Mustafizer Kahn, Vincent Kirsch, Michelle Lambert, Anna Lombardi, Renee Maynard, Lori Nelson, Jessica Randall, Ava Riccardi, Charles Robinson, Cindy Sato, Michael Scibilia, Ghislaine Taho, Mathew Woran, and Jacques Zrimba, and thereafter prepare and caused to be served on the parties a revised tally of ballots. In the event that the revised tally of ballots shows that the Intervenor has received a majority of the valid votes cast, the Regional Director is directed to certify the Intervenor as the exclusive collective-bargaining representative of the unit employees. In the event that the revised tally of ballots shows that the Intervenor has not received a majority of the valid votes cast, the Regional Director is directed to take further appropriate action not inconsistent with this Decision.

ORDER

It is ordered that this matter is referred to the Regional Director for Region 2 for further processing.

Craig S. Schwartz, Esq., for the Employer.
Nephty Cruz, Vice President, for the Petitioner.
Patricia McConnell, Esq., for the Intervenor.

DECISION ON CHALLENGES

RAYMOND P. GREEN, Administrative Law Judge. I heard this matter on December 3 and 4, 2001. Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the briefs filed by the Employer and the Intervenor, I make the following findings and conclusions.

The Petition in this matter was filed on July 20, 2001. Pursuant to a Stipulated Election Agreement, entered into and approved on August 7, 2001, a secret-ballot election was conducted on September 7, 2001. The Election Agreement contains the following stipulation regarding the voting unit.

> *Included:* All full-time and regular part-time employees, including catering department employees, catering sales employees, housewares department employees, gift/services department employees, candy-coffee-fruits and nuts department employees, packaged food employees, produce department employees, cheese department employees, prepared food department employees, commissary department employees, sous chefs, chefs, fresh meat department employees, fresh fish department employees, charcuterie department employees, bread department employees, pastry department employees, front-end department employees, cashiers, assistant head

cashiers, head cashiers, janitorial department employees, receiving department employees, maintenance department employees, merchandisers, graphic artists, department managers in the housewares, fresh meat, fresh fish, charcuterie, bread, pastry and espresso bar departments and espresso bar employees employed by the Employer at its facilities located at 560 Broadway and 575 Broadway, New York, New York.

Excluded: All other employees, including individuals not employed by the Employer, the General Manager, Assistant General Managers, Executive Chef, Director of Catering, Front End Manager, Candy-Coffee-Fruits and Nuts Department Manager, Cheese Manager, Produce Manager, Prepared Foods Managers, Packaged Foods Manager, the Buyer, Assistant Buyers and guards, professional employees and supervisors as defined by the Act.

In addition, the parties specifically agreed to disagree regarding the sushi and flower departments. In this respect, the Employer at the time of executing the Stipulated Election Agreement, took the position that employees in those two departments, who also were on the payroll of two other companies, were jointly employed by Dean & Deluca and therefore eligible to vote. The Unions took the contrary position and maintained that they are not eligible voters.

The tally of ballots showed that there was 1 vote cast for the Petitioner (District 6), 57 votes cast for the Intervenor, and 53 votes cast against the participating labor organizations. There also were 32 challenged ballots, some of which were challenged by the Intervenor and some by the Board agent. The Board agent made challenges because certain names did not appear on the Employer's proposed eligibility list which was submitted to the Board before the election.[1]

At the hearing certain of the challenged ballots were resolved either by way of stipulation or by the Intervenor withdrawing certain of its challenges.[2] Accordingly, I conclude that the following individuals should have their ballots opened and counted: Lori Nelson, Renee Maynard, Stanley Hatzakis, Herbert Harris, Ava Riccardi, Ghislaine Taho, and Charles Robinson.

Based on stipulations made at the hearing, I also conclude that the following employees are not eligible voters and that their ballots shall remain unopened: Leona Bronson, Muhammad Bass, Isavro Marin, Carlos Bermudez, Jose Rodriguez, and Muhammad Mijin.

Supervisors

There were eight people who were challenged by the Intervenor on the grounds that they were supervisors within the meaning of Section 2(11) of the Act. Two others, Vincent Kirsch and Michael Scibilia, were also contended to be supervisors at the hearing. Of this group, there were six individuals whose status, the Employer contends were resolved when the parties entered into the Stipulated Election Agreement on August 7, 2001. Although the Intervenor concurs that the parties agreed to include certain individuals who were department managers, it argues that they should nevertheless be excluded because their actual supervisory status should trump the Stipulated Election Agreement.

The Stipulated Election Agreement specifically includes certain department managers and excludes others.[3] Included in the unit were the department managers in the house wares, fresh meat, fresh fish, charcuterie, bread, pastry, and espresso bar departments. At the time the agreement was entered, there is no doubt that the parties knew who occupied these respective positions as well as the identities of the persons who were the managers of the departments who were agreed to be ineligible voters. That the parties understood what they were doing when they entered into the agreement is also indicated by the fact that in the Stipulated Election Agreement, they specifically indicated that they continued to disagree as the unit placement of people in the flower and sushi departments. One must, therefore, assume that at the time of the election agreement the parties had sufficient knowledge to know or have a good idea as to which department managers had supervisory authority and which did not.

In my opinion, the whole purpose of an election agreement is to resolve, to the extent practicable, unit and eligibility issues. This is done to avoid the necessity of holding a hearing either before or after the election is conducted to resolve issues which have been agreed upon. Thus, unless a stipulation, by its terms, violates some public policy, there would be no purpose served in permitting parties to make agreements, while at the same time permitting either side to withdraw from the stipulation when events didn't go their way. In *Premier Living Center*, 331 NLRB 123 (2000), the Board held that an employer who had stipulated to the inclusion of LPNs in the unit, but later withdrew recognition on the grounds that it had "reconsidered" and now believed the LPNs to be supervisors, was barred from raising the supervisory issue as a defense to a refusal to bargain allegation. The Board also noted that in *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921, 922 fn. 7 (1997), it had overruled *McAlester General Hospital*, 233 NLRB 589 (1977), in which an employer who had stipulated to the inclusion of certain employees, was permitted to litigate their supervisory status in a subsequent unit clarification proceeding.

To the extent that evidence was taken in this case regarding the supervisory status of department managers who were covered by the Stipulated Election Agreement, one can only say that their supervisory authority is borderline at best. The Stipulated Election Agreement was freely entered into at a time when the parties must have had sufficient knowledge of relevant facts to make a reasoned judgment regarding their ultimate status. A stipulation that certain department managers should be excluded while others should included in the unit, does not

[1] Although the parties to an election may agree ahead of time as to who is and who is not eligible to vote, typically they agree, as in this case, on the job categories that are in the voting unit. In the latter instance, an employer submits, prior to the election, a list of names who fit those categories and who were employed on the eligibility date, which ordinarily is the payroll date prior to the execution of a Stipulated Election Agreement. Therefore, as the list is generated unilaterally by the employer, it is not the last word on who is an eligible voter.

[2] The Petitioner neither objected nor opposed any of the stipulations.

[3] Excluding the floral and sushi departments, which are operated by outside concessionaires, there are 18 departments.

strike me as violating some public policy.[4] Rather, it should be construed as a mechanism whereby parties can resolve otherwise litigable issues before an election is held, so as to make the entire election process more efficient and expeditious.

Accordingly, I conclude that the following employees are included in the unit by virtue of the unambiguous terms of the Stipulated Election Agreement and that their ballots should be opened and counted: Cindy Sato (bread department manager), Jessica Randall (pastry department manager), Mathew Woron (fresh meat department manager), Jacques Zrimba (fish department manager), Terrance Huggins (charcuterie department manager), and Byron Andres (espresso bar manager).

The Intervenor challenged the ballot of Anna Lombardi, alleging that she was a supervisor at the time of the election. It is agreed that at some point she became the manager of the prepared foods department, a category that the parties stipulated was a supervisory position. The only question is when she was promoted into this job.

The testimony of both side's witnesses were equally equivocal. The Union's witness, Xavier Lopez, testified that he thought that Lombardi became the prepared foods manager sometime in late August or early September 2001. The Company's witness, Emil Grosso, while not certain as to the date when Lombardi was promoted, asserted that it was after the election. Neither side called Lombardi to testify and neither produced any records to indicate when she was promoted. (The Union subpoenaed company records and therefore was not without means to find and offer company documents regarding this subject).

Because the party asserting a challenge has the burden of proving that the individual is not eligible to vote, I shall conclude that the Intervenor has not met its burden of proof and recommend that the ballot of Lombardi be opened and counted.

The Intervenor challenged the votes of Michael Scibilia and Vincent Kirsch on the alternate grounds that they are supervisors and/or buyers. The Employer claims that both were employed as "merchandisers," a category included in the unit by the Stipulated Election Agreement.

Lopez testified that from his observation, Scibilia helps run the houseware's department and that he orders some of the baskets for that department. He also testified that Scibilia picks out products for the store manager. According to Lopez, Scibilia acts as the store manager on Saturdays and that on those days, he is the person to go to for any kinds of problems. Lopez also testified that he heard from another supervisor, Joe Reda, that on one occasion, Scibilia fired an employee named Jude Waterston.[5]

The Employer's witness, Emil Grosso, testified that Scibilia works on Saturdays from 1 to 8 p.m. and that on Saturdays his primary responsibility is to provide customer service. Grosso testified that other than that, Scibilia has no responsibility for the operation of the store on Saturdays or any other days; those responsibilities belong to the store manager or assistant store managers. Grosso testified that Scibilia, who reports directly to him, is responsible for the look and feel of the store and is, in a sense, an artist.[6] Gross testified that although he heard that Waterston had an argument with Scibilia, he denied that Scibilia had fired her. (He could not, however, be more specific as to who fired Waterston or under what circumstances she was fired.) Intervenor's Exhibit 11 is a company document which is a personnel review that Scibilia made of Waterston. Also, it is acknowledged that Scibilia attends periodically held management meetings.

Frankly there is not that much to go on with respect to Scibilia. Nevertheless, it is my opinion that the Intervenor has made out a prima facie showing, through credible evidence, that Scibilia exercised some of the powers listed in Section 2(11) of the Act, including the power to discharge employees.[7] As it is my conclusion that the Employer has not adequately overcome this prima facie showing, I shall recommend that the ballot of Scibilia remain unopened and uncounted.[8]

As to Vincent Kirsch, there was no evidence to indicate that he had any of the attributes of supervisory authority. Also as the evidence shows that he was not part of the buying department, I shall recommend that his vote be opened and counted.

The Intervenor challenged the vote of Mustafizer Kahn asserting that he is the manager of the maintenance department and therefore a supervisor.

Lopez testified that Kahn is in charge of about 8 to 10 maintenance employees; making sure that they clean and "stuff like that." He asserts that Kahn makes the schedule for the maintenance employees, and that on 5 nights a week he closes the store and sets the alarm code. More importantly, Lopez testified that on one occasion he witnessed Kahn scream at another maintenance man and fire him. Less persuasively, Lopez also testified that in April or May 2001, he heard that Kahn had fired a woman who worked in the department.

[4] This is not a situation where parties agree that certain individuals are in fact supervisors, but nevertheless include them in the unit as eligible voters.

[5] Inasmuch as the declarant was a supervisor, the testimony of Lopez to the effect that Reda told him that Scibilia had fired Waterston, would not be considered hearsay under Rule 801(d)(2) of the Fed.R.Evid.

[6] I note that Dean & Deluca is a boutique grocer, whose stores are, in fact, quite amazing to look at if you like food. There is no doubt that the design of the store and the selection and display of its merchandise are key components of its business plan.

[7] Sec. 2(11) of the Act has generally been construed as meaning that an individual will be deemed to be a supervisor if he or she possesses any one of the authorities listed in that section of the Act. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949); *Pepsi-Cola Co*., 327 NLRB 1062 (1999); *Allen Services Co*., 314 NLRB 1060 (1994); and *Queen Mary*, 317 NLRB 1303 (1995).

[8] This situation, is to my mind, somewhat different from the situation involving the department heads. As to the latter, the statements of counsel and the evidence at this hearing, make it clear that at the time that the parties entered into the Stipulated Election Agreement, they knew which individuals occupied the respective department head positions. There is no such evidence that this also applied to the category of "merchandisers." I do not know from this record if the merchandisers were identified by name at the time that the Stipulated Election Agreement was executed. Thus, unlike the situation involving the department heads where there is no question but that there was mutual agreement as to who was to be included and who was to be excluded from the unit, I do not find the evidence equally compelling with respect to the category of "merchandisers."

Grosso testified that Kahn is a utility maintenance person who does minor repairs in the store. He testified that at the time of the election Kahn did not supervise anyone and that to his knowledge, Kahn did not prepare schedules for other maintenance employees. Gross also testified that to his knowledge, Kahn never fired anyone. Kahn was not asked to testify by either side.

In my opinion, the Intervenor has made out a prima facie showing, through credible testimony, that Mustafizur Kahn is a supervisor within the meaning of the Act. As I don't think that the Company has adequately overcome the Intervenor's prima facie showing, I shall conclude that Kahn's ballot should remain unopened and uncounted.

Catering

Pursuant to the terms of the Stipulated Election Agreement, employees in the catering department, including sales people, are included in the unit. At the election, the Intervenor challenged the ballots of Michelle Lambert and Lori Nelson on the grounds that they were professional employees.

The evidence shows that these two individuals are sales employees in the catering department and are paid on a salary plus commission basis. They solicit sales from corporate and other prospective customer. There is no evidence to suggest that either person could be classified as a professional employee as defined in Section 2(12) of the Act. And as their job categories are specifically included in the Stipulated Election Agreement, I find that they are eligible voters whose ballots should be opened and counted.

Guards

The Intervenor challenged the votes of Herbert Harris and Luis Fraticelli on the grounds that they were guards within the meaning of the Act. At the hearing, the Intervenor withdrew its challenge to Harris but continued to maintain its position with respect to Fraticelli.

The evidence shows that both of these employees worked in the receiving department. They work primarily at the back entrance to the store where they receive and check in products from the Employer's vendors. There is simply no evidence that Fraticelli enforces, against employees and other persons, rules to protect the property of the Employer's premises. At most, he sometimes locks up at night, arms the alarm system, and works in an area where there are security cameras that are used to record events in the receiving area.

As the evidence does not support the contention that Fraticelli is a guard I conclude that he is an eligible voter whose ballot should be opened and counted.

Concessionaires

The employer contracts with two independent companies, one for the preparation and sale of sushi on its premises and the other for the preparation and sale of flowers. Both of these companies are completely separate from Dean & Deluca; there being no common ownership or control.

The employees of each company are situated on the premises of Dean & Deluca where they prepare and sell the products. Each concessionaire, which also provides similar services at other retail establishments, deals with its own vendors and is solely responsible for negotiating the price for its own supplies. Basically, all items are sold through Dean & Deluca's cash registers, but the concessionaires get more than a majority percentage of the gross retail price. (Dean & Deluca absorbs the sale tax.)

The concessionaires are responsible for the hiring of their respective employees and they determine the wages and benefits without any input by Dean & Deluca.[9] The flower and sushi department employees are not supervised by the managers at Dean & Deluca and they do not interchange with any of the store's other employees. They do not participate in any of the employee benefits that are accorded to the employees of Dean & Deluca such as the 401(k) plan, medical insurance, sick pay, or vacation pay.

On the basis of this record, I cannot conclude that the employees who are employed by the concessionaires are jointly employed by Dean & Deluca or that they otherwise should be part of the bargaining unit. Cf. *Interstate Warehousing of Ohio*, 333 NLRB 682 (2001). Accordingly, I find that the sushi department persons, Soe Hzun, Myint Aung, Oo Maung Than, and Maung Cho are not eligible voters and that their ballots should remain closed and uncounted. I further find that the flower department persons, Kahn Mohammed, Mohammed Lasker, and Mohammed Ali Hossain, are not eligible voters and that their ballots should remain closed and uncounted.

Conclusion

In the manner more fully described above, I recommend that certain ballots be opened and counted and that certain others remain closed and uncounted.[10]

---

[9] Although there was testimony that Dean & Deluca could require the concessionaire to remove a particular employee from its store, it cannot make the concessionaire fire the employee, who can be moved to another location.

[10] Any party may, within 14 days from the date of issuance of this recommended decision, file with the Board in Washington, D.C., an original and eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director for Region 2. If no exceptions are filed, the Board will adopt the recommendations set forth herein.