CVS Albany, LLC d/b/a CVS *and* Local 338 Retail, Wholesale and Department Store Union (RWDSU), United Food and Commercial Workers International Union (UFCW). Case 29–RC–155927

June 7, 2016

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On November 18, 2015, the Regional Director for Region 29 issued a Decision and Direction to Count Two Determinative Challenged Ballots. In that decision, the Regional Director concluded that the challenges to two ballots—those of employees Debra Ellsmore and Debbie Henry-Aughton—should be overruled, but that the challenge to the ballot of employee Kane Chow should be sustained.[1] Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Petitioner filed a timely request for review, contending that the three challenges should have been sustained on the basis that all three employees are "floaters," a category expressly excluded from the stipulated unit. The Employer filed an opposition to the Petitioner's request for review. In addition, the Employer filed a timely request for review, contending that the Regional Director erred in sustaining the challenge to Chow's ballot, to which the Petitioner filed an opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The requests for review are granted as they raise substantial issues warranting review. Having carefully considered the entire record in this proceeding in light of the requests for review and oppositions, we find, contrary to the Regional Director, that all three challenges should be sustained because the employees at issue are "floaters" and therefore excluded from the stipulated unit.

The petition in this case seeks a unit of employees who work at the Employer's Flatbush Avenue store. The Stipulated Election Agreement provides that the unit includes "[a]ll regular full-time and part-time retail employees, including Clerk/Cashiers, Shift Supervisor Bs and Photo Lab Supervisors, but excluding all floaters, seasonal employees and pharmacy employees, including pharmacists, pharmacy interns, inventory specialists and pharmacy technicians, and guards, managers and supervisors as defined in the Act." It is undisputed that the Employer does not have any classification specifically named "floater," and the Stipulated Election Agreement does not define the term.

The Petitioner challenged the ballots of Ellsmore, Henry-Aughton, and Chow on the basis that all three are excluded "floaters"; the Employer disputes this assertion. The Employer contends that the term "floater" refers to "pharmacist-floater," which is a classification used in the pharmacy department, and, thus, that the three employees in question—all of whom are retail employees—are not "floaters." By contrast, the Petitioner states that it understands the term "floater" to refer to employees whose "home store" is a CVS location other than the Flatbush store,[2] but who periodically or sporadically work—i.e., "float"—at the Flatbush store. The record is clear that all three disputed employees satisfy the Petitioner's understanding of "floater."[3]

The Regional Director analyzed this case by applying the three-prong test set forth in *Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002), for determining whether a challenged voter is properly included in or excluded from a stipulated unit. Under this test, the Board first determines whether the stipulation is ambiguous. If the objective intent of the parties is clearly and unambiguously expressed in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board attempts 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, the Board determines unit placement by employing its standard community of interest test. Applying this test, the Regional Di-

[1] In reaching his conclusions, the Regional Director adopted the recommendations of a hearing officer and overruled the parties' exceptions to those recommendations.

[2] For human resource purposes, each employee has a designated home store, determined by where the employee was initially hired or permanently transferred.

[3] All three employees have home stores at locations other than the Flatbush store. In his testimony, Kane Chow described himself as an "inventory specialist" who goes from store to store for a period of weeks in order to help sort out backlogs of inventory. He was directed by the district manager to go to the Flatbush store to help them sort a surplus of inventory in the store's basement, and he stayed there for 2 to 3 months to "clean up." He did not work pursuant to a consistent schedule at the Flatbush store, and he has not worked at the store since the day of the election. Chow stated that he had no plans to return to the Flatbush store to work any time soon, but he may simply check up on the store in a month or 2. Debra Ellsmore serves as a clerk/cashier at her home store, but works periodically at five other stores handling the stocking and maintenance of their Hallmark departments. She works sporadically at the Flatbush store, varying between 4 and 10 hours a week, and she sets her own schedule, which she reports to the district manager. In contrast, she has a consistent schedule at her home store, set by that store's manager. Debbie Henry-Aughton also has a consistent schedule at her home store, but she reached out to the Flatbush store to pick up extra hours. Although she has consistently been scheduled at the Flatbush store 2 days a week since she began working there, the particular days that she works there vary based on the staffing needs of the Flatbush manager.

rector concluded that the term "floater" is susceptible to multiple reasonable interpretations and is therefore ambiguous. In addition to the parties' proffered interpretations, the Regional Director also suggested that "floater" could be construed to encompass "employees who move from store to store who are not regular full-time or part-time retail employees." Having determined that the term is ambiguous, the Regional Director also found that resort to extrinsic evidence did not resolve the ambiguity and that, under the Board's community of interest test, Ellsmore and Henry-Aughton should be included in the unit, but Chow should be excluded.

We agree with the Regional Director that *Caesar's Tahoe* is the proper test for resolving this case. Further, we agree that the Stipulated Election Agreement is ambiguous with respect to the meaning of the excluded category of "floaters," because the Employer does not maintain any such job classification and the agreement itself does not define the term. Contrary to the Regional Director, however, we find that this ambiguity can be resolved through usual methods of contract interpretation, including the examination of extrinsic evidence.

We find that the definitions of the term "floater" proffered by both the Employer and the Regional Director violate the well-established principle that no part of a contract's language should be construed in such a way as to be superfluous. See Restatement (Second) of Contracts § 203(a).[4] If we were to accept the Employer's argument that "floaters" refers only to "pharmacist-floaters," the separate exclusion of "floaters" would be rendered superfluous because pharmacist-floaters are already covered by the express exclusion of "all . . . pharmacy employees, including pharmacists, pharmacy interns, inventory specialists, and pharmacy technicians . . . ." Although pharmacist-floaters are not specifically mentioned in the stipulation's exclusion of pharmacy employees, it is undisputed that pharmacist-floaters are, in fact, pharmacy employees. The Regional Director's suggestion that "floater" could encompass "employees who move from store to store who are not regular full-time or part-time retail employees" is similarly problematic. The stipulation includes "all regular full-time and part-time retail employees," and therefore employees who are *not* regular full-time or part-time retail employees are already excluded by the language of the stipulation.[5]

Accordingly, neither the Employer's nor the Regional Director's interpretation of "floaters" is persuasive, because both readings contravene a fundamental principle of contract construction by rendering the exclusion of "all floaters" superfluous. By contrast, the Petitioner's interpretation of the term "floaters"—all employees whose home store was not the Flatbush location but who simply worked there periodically or sporadically—does not render superfluous any other term in the stipulation. Rather, the Petitioner's interpretation is reasonable, and it provides effective meaning to the stipulated election agreement as a whole. We therefore find that the principles of contract interpretation support the Petitioner's interpretation of the term "floater."

Further, in resolving the ambiguous stipulation, we find that extrinsic evidence in the record also favors the Petitioner's interpretation of "floaters."

In interpreting the meaning of an ambiguous stipulation, the Board may consider changes in the language from the original petition to the language of the stipulated election agreement. See, e.g. *Gala Food Processing*, 310 NLRB 1193, 1194 (1993). Here, such an examination strengthens the distinction between "floaters" and "pharmacist-floaters." The original petition in this case excluded "[a]ll employees in the pharmacy section of the store (including pharmacists, pharmacy interns, inventory specialists, and pharmacy technicians), floaters, seasonal employees," etc. In the stipulation, however, the parties moved the exclusion of "all floaters" to the front of the list of excluded employees, before any mention, let alone enumeration, of pharmacy employees. This change in structure strongly suggests that the parties did not intend "floater" to refer to a category of employees in the pharmacy.

In addition, testimony from several witnesses illustrates how the term "floaters" is generally understood among CVS employees. In this regard, the record includes two instances in which store managers used the term, in the presence of employees, in a manner that comports with the Petitioner's definition.[6] Cf. *National*

[4] Restatement § 203(a) states: "[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect"); see also 11 Williston on Contracts § 32:11 (4th ed.) ("Interpretations which give a contract meaning are preferred to those which render it meaningless."). Cf. *Sawmill Restaurant*, 283 NLRB 537, 537, 541 fn. 7 (1987).

[5] Further, the Regional Director's interpretation appears to at least partly accept the Petitioner's contention that "floaters" are employees who only periodically work at the Flatbush store. If this is so, the stipulation's unqualified exclusion of "*all* floaters" (emphasis added) highlights the implausibility of the Regional Director's interpretation, because all "floaters" are excluded from the unit, regardless of whether they are full-time or part-time employees.

[6] Former employee Jason Ryan testified that his manager at the Flatbush store, Walter Rodriguez, used the term "floater" in January of 2015 to describe employees who did not have enough work at their home store, so they came to the Flatbush store to pick up more hours.

Public Radio, Inc., 328 NLRB 75, 75 fn. 2 (1999) (noting that the intent of the parties concerning the definition of job classifications to be included in the stipulated unit "may be determined by reference to the employer's regular use of the classifications in a manner known to its employees"). In addition, a number of employees, including two of the challenged voters themselves, testified about their understanding of the term "floater," testimony that generally supports the Petitioner's interpretation.[7]

For all the foregoing reasons, we agree with the Petitioner that the term "floater" was meant to encompass employees whose home store was a CVS location other than the Flatbush store, but who worked at the Flatbush store periodically or sporadically. Having reviewed the record, we are satisfied that employees Debra Ellsmore, Debbie Henry-Aughton, and Kane Chow meet these criteria, are therefore "floaters," and are excluded from the unit by the language of Stipulated Election Agreement.[8] We thus reverse the Regional Director and sustain the challenges to all three ballots.

ORDER

This proceeding is remanded to the Regional Director for further appropriate action consistent with this Decision on Review and Order.

We find Rodriguez' explanation of the term particularly persuasive evidence, because Rodriguez was directly addressing Ryan's concern about unfamiliar employees working at the Flatbush store when, Ryan thought, the Flatbush employees were not getting enough hours. Challenged voter Kane Chow testified that, 3 to 4 years earlier, he had heard the store manager he was working with (apparently at a location other than the Flatbush store) use the term to describe an employee who jumped from store to store based on which location needed his help and experience.

[7] Shift Supervisor Adrian Caddle, an employee in the stipulated unit, testified that he considered a "floater" to be an employee who moves from one location to the next. Employee Temanie Barthelemy stated that she understood a "floater" to be someone who goes from store to store to help or to cover a shift. Challenged voter Debbie Henry-Aughton defined a "floater" as an individual who is sent where she is needed, and said she would describe herself as a "floater" at the Flatbush location, which is not her home store. Challenged voter Debra Ellsmore described "floaters" as people who "come and go" to help out at a particular location, but whose home store is a different location.

Chairman Pearce finds it unnecessary to rely on the testimony of witnesses concerning their understanding of the term "floater."

[8] As we find that the ambiguous language of the Stipulated Election Agreement can be resolved at the second step of the *Caesar's Tahoe* analysis, we find it unnecessary to proceed, as the Regional Director did, to the community-of-interest test utilized at the third step. Accordingly, we need not address the contentions raised in the Employer's request for review concerning Chow's eligibility under the third step of *Caesar's Tahoe*.