Tawa Brothers, Inc. d/b/a Modern Food Market, Employer-Petitioner and Retail Clerks Union, Local 905, Chartered by United Food and Commercial Workers International Union, AFL-CIO. Case 21 RM 1969

December 10, 1979

DECISION AND DIRECTION

By Members Penello, Murphy, and Truesdall

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the determinative challenge to a ballot in an election held on June 28, 1979, and the Regional Director's report recommending disposition of the same. The Board has reviewed the record in light of the exceptions and supporting brief, and hereby adopts the Regional Director's findings and recommendations only to the extent consistent herewith.

The Union challenged the ballot of one employed voting in the election,² and the Regional Director recommended sustaining this challenge in his report of August 3, 1979. Petitioner has filed a timely exception to the Regional Director's Report.

Petitioner operates a grocery store in which, on the date of the election, Matt Suminaga was employed as a grocery clerk on a part-time, as-needed basis to stock shelves. At the election, Suminaga's ballot was challenged by the Union on the ground that Suminaga had not been employed in the bargaining unit on the eligibility date. Although the Regional Director found that Suminaga had been employed on the eligibility date³ and that stocking shelves was bargaining-unit work.⁴ he recommended sustaining the challenge to Suminaga's ballot on the ground that Suminaga had worked an insufficient number of hours per week in the quarter immediately preceding the eligibility date to share a sufficient community of interest with other bargaining-unit employees.⁵

In making his recommendation, the Regional Director indicated that he relied on *Davison-Paxon*

Company,6 in which part-time, on-call employees who averaged at least 4 hours of bargaining unit work per week during the quarter preceding the eligibility date were included in the bargaining unit. Thus, although Suminaga had not been hired until the fifth week of the quarter preceding the eligibility date, the Regional Director computed the total hours Suminaga worked prior to the eligibility date and averaged them over all the weeks in the quarter, rather than over only the weeks subsequent to Suminaga's hire. In so doing, he included 4 weeks in which Suminaga's "hours worked" were necessarily zero, and found that Suminaga had averaged less than 4 hours of work per week over the quarter. Petitioner excepts to the Regional Director's inclusion of these 4 weeks in his computation. For the following reasons, we find merit in this exception.

The Regional Director's report included data indicating that, out of the 9 weeks during which Suminaga was actually employed in the quarter preceding the eligibility date, in only I week did he fail to work at least 4 hours, and in 5 out of the 9 weeks he worked more than 4 hours. In its exceptions to the Regional Director's recommendations, Petitioner points to the regularity of Suminaga's employment and argues that it does not further the policies of the Act to apply Davison-Paxon Company, supra, so as to disenfranchise Suminaga. Petitioner further argues that, in applying the 4-hour rule, the Board should look only to the average hours worked during the weeks subsequent to an employee's actual date of hire and that, if this is done in the present case, Suminaga will be found to have averaged 4.4 hours of work per week.

As noted, we find merit in Petitioner's exception. The paramount consideration in determining whether a part-time employee doing unit work should be included in the bargaining unit is whether he or she shares a community of interest with regular unit employees. In making this determination, the Board considers not only the length, but also the regularity of employment. Since the facts of this case clearly reveal that, as of the eligibility date, Suminaga had a reasonable expectation of continued and regular employment, and in the absence of evidence that his work pattern during the 9 weeks preceding the eligibility date was atypical, we here deem the length of

¹ On June 7, 1979, the Retail Clerks International Umon, AFI, CIO, merged with the Amalgamated Meatcutters and Butcher Workmen of North America, thereby forming the United Food and Commercial Workers International Union, AFI, CIO.

² The election was conducted pursuant to a Stipulation for Certification Upon Consent Election, and the tally indicated five votes for, and four votes against, the Union, with one ballot challenged.

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The eligibility date was June 10, 1979. Suminaga was hired on April 9 1979.

⁴ The unit stipulated as appropriate was: All grocery clerks and boxboys employed by the Employer at its facility located at 601 West Anaheim Street, Wilmington, California; excluding all meat department employees, office clerical employees, guards, and supervisors as defined in the Act

^{*}In his report, the Regional Director also mentioned certain aspects of

Suminaga's employment which differed from those of other bargaining unit employees. He did not, however, base his finding of an insufficient community of interest between Suminaga and other bargaining unit employees on these differences but rather on the insufficient number of hours that Suminaga worked. Although we have considered these factors, we do not find they warrant a conclusion that Suminaga does not share community of interest with employees in the unit.

⁶ See Davison Paxon Company, a Division of R. H. Macy & Co., Inc., 185. NLRB 21 (1970).

⁷ Davison-Paxon Company, 185 NI RB 21, 24 (1970).

⁸ Capitol Insidution Company, Inc., 233 NLRB 902 (1977).

⁴ Cf. See's Candy Shops, Inc., 231 NLRB 156, 157 (1977).

Suminaga's employment to be less important than its regularity. Thus, the fact that he averaged less than 4 hours of work per week when his hours were computed over a period of time which included the 3 weeks prior to his hire is not controlling. Of more relevance in this case is the average of weekly hours worked 4.4 since his employment began. Accordingly, we find that Matt Suminaga was a member of the bargaining unit on the eligibility date and

11 See Stockham Valve & Fittings, Inc., 222 NLRB 217 (1976).

thereafter. Accordingly, we shall direct that his ballot be opened and counted and that a revised tally of ballots thereafter be issued with the appropriate certification.

DIRECTION

It is hereby directed that the Regional Director for Region 21 shall, pursuant to the Board's Rules and Regulations, Series 8, as amended, within 10 days from the date of this Decision and Direction, open and count the ballot of Matt Suminaga, prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

¹⁰ This case does not present the issue of an employer who has a pattern of hiring large numbers of part-time employees, only some of whom work with regularity. See *The May Department Storey Company d/b/a the M. O'Neil Company*, 181 NLRB 710 (1970).