

See's Candy Shops, Inc. and Helen Franco, Petitioner and Bakery and Confectionery Workers, International Union of America, Local No. 400, AFL-CIO, CLC. Case 31-RD-429

August 5, 1977

DECISION ON REVIEW

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND WALTHER

On March 25, 1977, the Regional Director for Region 31 issued a Decision and Direction of Election in the above-entitled proceeding in which he found appropriate, and directed a decertification election in, a unit of all full-time and all regular part-time employees at the Employer's Los Angeles, California, facility, including, *inter alia*, certain temporary employees if they met an eligibility formula devised by him. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Union filed a timely request for review of the Regional Director's decision on the ground that the formula devised by the Regional Director departed from officially reported Board precedent. On April 18, 1977, the National Labor Relations Board granted the request for review and stayed the election pending decision of review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this proceeding with respect to the issues under review and makes the following findings:

The Employer is engaged in the manufacture of candy at its Los Angeles, California, facility. Although it is operated on a year-round basis, the Employer experiences five peak production periods—Christmas, Valentine's Day, Easter, Mother's Day, and Father's Day—Graduation. The regular full-time employees work continuously throughout the year. The regular part-time (or seasonal) employees also work throughout the year, principally during the peak seasons, but are subject to layoff during slow periods. The temporary employees are hired almost exclusively for work during the peak periods and for vacation relief in the summer. The hiring of these temporary employees is accomplished primarily through the use of a recall list containing the names of former temporary employees whom the Employer has rated eligible for rehire.

Although there was no prior Board certification of the unit, the collective-bargaining agreement entered into by the Employer and the Union establishes as

the unit all employees of the Employer. The agreement defines regular full-time employees as those who work 1,600 or more hours in a 12-month period, and regular part-time (or seasonal) employees as those who work between 800 and 1,599 hours in a 12-month period. All employees with less than 800 hours in a 12-month period are considered temporary employees. The Petitioner sought a decertification election among all regular full-time employees and regular part-time employees, thus excluding all temporary employees from being eligible to vote. The Employer claimed that all part-time employees, including temporary employees, should be eligible to vote with the exception of casual employees who do not have a reasonable expectation of reemployment in the foreseeable future. The Union contended that the temporary employees should be excluded from the unit and thereby prevented from voting.

The Regional Director rejected the contentions of the Petitioner and the Union regarding the eligibility to vote of temporary employees, and instead devised a formula to determine which temporary employees would be eligible to vote. The Regional Director's formula included in the unit as eligible to vote those temporary employees, rated eligible for recall by the Employer, who have worked at least 70 hours monthly in 4 months within the year preceding the date of issuance of the Direction of Election.

The Union, in its request for review, abandoned its previous claim that all temporary employees be excluded from the unit, and instead contended that the Regional Director's decision substantially departed from Board precedent established in *See's Candy Shops, Inc.*, 202 NLRB 538 (1973). In that decision, involving the same Employer's retail shops, the Board, in determining an appropriate unit for purposes of a representation election, excluded as casual employees those employees who worked only at peak periods, but included as regular part-time employees those who worked at least 350 hours in more than the peak periods. Thus the Union claimed that the Regional Director's eligibility formula substantially departed from that established in *See's Candy Shops, supra*, because it allowed employees who worked only at peak seasons to be included in the unit and thus to be eligible to vote.

We find no merit in that contention, as the Board's formula in the retail case is inapposite here. The Employer's retail operation involves 55 shops in Los Angeles County, employing a total of 350 employees. Certain part-time seasonal employees work during the five peak sales periods of the year: a week to 10 days at Thanksgiving, Valentine's Day and Mother's Day, 1 to 2 weeks at Easter, and 2 to 3 weeks at Christmas. The total number of such part-time employees is 68, a small proportion of the total work

force. In contrast, the Employer's manufacturing operation requires approximately 1,050 employees, 781 of whom are classified as temporary employees. In addition, the so-called peak seasons are much longer, as the Christmas production season lasts almost 3 months, and the Easter production season lasts about 1 month. Unlike the retail case, the Employer in this case maintains a list of those employees who are eligible for recall based upon prior work with the same Employer, so that a majority of the temporary employees hired at each peak season have worked for the Employer at some previous time; also, in order to become a full-time or part-time employee, it is necessary to begin as a temporary employee. Significantly, there was no prior history of collective bargaining between the parties in the retail case, whereas in the present case there exists a history of bargaining in which the parties have recognized the bargaining unit as including temporary employees. Since the evidence before us in this case indicates a high degree of involvement of temporary employees in the Employer's manufacturing operation, we find it unnecessary to adhere to the eligibility formula established for the Employer's retail operation in *See's Candy Shops, supra*.

However, we believe that the eligibility formula devised by the Regional Director is inappropriate to the facts of this case. It is well-established Board law that the scope of the unit in a decertification election should be coextensive with the certified *or* recognized bargaining unit.¹ This is the rule even where a certain class of employees, such as freelance casual employees, would not have been included in the unit had it been an original representation proceeding.² In the present case, although there had been no prior Board certification of the Union as the exclusive bargaining representative of the Employer's manufacturing employees, the parties have concluded at least one 3-year collective-bargaining agreement in which the Employer recognized the Union as the representative of, and the Union bargained on behalf of *all* the Employer's manufacturing employees, including those who were classified as temporary in the contract itself. The only significant differences between temporary employees and those classified as regular full-time and regular part-time employees are that the former have no contract seniority, and they

cannot qualify for vacation or sick leave. Otherwise, as compared to regular employees, temporary employees receive the same wages (determined by length of service); they are entitled to holiday pay if working on a holiday; they can qualify for a Christmas bonus and health and welfare coverage if they work the required number of hours; they perform the same duties under the same supervision, using the same lunchroom and having the same rest periods; and they work the same 40-hour workweek with the same opportunity for overtime.

Under these circumstances, we find that the temporary employees share a substantial community of interest with regular full-time and regular part-time employees in their terms and conditions of employment. Since these temporary employees were included in the contractual bargaining unit between the parties, they should also be included in the appropriate unit for purposes of a decertification election.

However, we recognize the fact that certain temporary employees are true "casuals" within the meaning of that term. Therefore, we shall exclude from the unit as casual employees those employees who are not eligible for recall and thus do not have a reasonable expectation of reemployment in the foreseeable future.³

As the recognized contractual unit is the appropriate unit in a decertification proceeding, we find that the following employees of the Employer constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular part-time and temporary employees of the Employer at its facility located at 3423 South La Cienega Boulevard, Los Angeles, California, excluding all casual employees, warehouse employees, truckdrivers, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

We shall remand the case to the Regional Director for the purpose of conducting an election pursuant to his Decision and Direction of Election, as modified herein, except that the payroll eligibility date shall be for that payroll ending immediately before the issuance date of this Decision on Review. [*Excelsior* footnote omitted from publication.]

¹ *Newhouse Broadcasting Corporation d/b/a WAPI-TV-AM-FM*, 198 NLRB 342 (1972); *Bell & Howell Airline Service Company*, 185 NLRB 67 (1970); *Booth Broadcasting Company*, 134 NLRB 817 (1961); *Seaportel Metals, Inc.*, 115 NLRB 960 (1956); *Great Falls Employers Council, Inc.*, 114 NLRB 370 (1955).

² *Ray Patin Productions, Inc.*, 121 NLRB 1172 (1958).

³ *Stouffer Management Food Service*, 210 NLRB 119 (1974); *Maine Sugar Industries, Inc.*, 169 NLRB 186 (1968).