Hardy Herpolsheimer's—A Division of Allied Stores of Michigan, Inc. *and* Erma Sikkenga, Petitioner and Retail Store Employees Union Local No. 20, Retail Clerks International Association, AFL–CIO. Case 7–RD–1333

December 30, 1976

DECISION AND DIRECTION

BY CHAIRMAN MURPHY AND MEMBERS FANNING AND PENELLO

Pursuant to authority granted it under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to and determinative challenges in an election held June 11, 1976,[1] and the Hearing Officer's report (the pertinent part of which is attached hereto as an appendix) recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief and hereby adopts the Regional Director's findings and recommendations,[2] with the following modifications:

The sole issue before us is whether B. Helm, B. Jeannot, G. Sietsema, P. Smith, and R. Stone are regular part-time employees. The Hearing Officer concluded they were not.[3] The Hearing Officer found that any employee who averaged more than 4 hours of work per week was eligible to vote.[4] He further concluded that in determining which employees meet this test the first calendar quarter of 1976 (January-March) should be used as he construed such period as the last calendar quarter preceding the eligibility date. Employer contends that eligibility should be determined by reference to the average weekly hours worked by the employees in question in the quarterly 3-month period preceding the eligibility date. We agree.

The Board normally determines eligibility for part-time employees on the basis of a representative period, usually a quarter which immediately precedes the eligibility date.[5] The Hearing Officer does not suggest any reason for deviating from this principle.[6] Nor do we perceive any. Therefore, we shall look to the 13-week period immediately preceding the eligibility date in resolving these challenges.

The five employees found by the Hearing Officer to be ineligible all averaged more than 4 hours work per week during the 13-week period immediately prior to the eligibility date. Accordingly, we find that these employees are regular part-time employees who are eligible to vote. We shall therefore overrule the challenges to their ballots and direct that all 22 ballots be opened and counted.

DIRECTION

The Regional Director is hereby directed to open and count the ballots of E. Averill, M. Silberman, C. Andree, M. DeVries, N. Jensen, S. Subler, M. DeMarco, J. Kevern, N. Williams, R. Fox, N. Weiner, D. Jensen, M. Kramer, B. Lange, S. Neal, G. Perigard, N. Van Lare, B. Helm, B. Jeannot, G. Sietsema, P. Smith, and R. Stone, and to prepare and serve on the parties a revised tally of ballots, and to issue an appropriate certification based on the count therein.

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[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election The tally was 42 for, and 48 against, the Petitioner, there were 22 challenged ballots.

[2] In the absence of exceptions thereto, we adopt *pro forma* the Hearing Officer's findings and recommendations concerning the Union's objections.

[3] No exceptions were filed to the Hearing Officer's finding that the other 17 employees whose ballots were challenged were regular part-time employees eligible to vote

[4] No exception was filed as to this finding

[5] *Motor Transport Labor Relations, Inc.*, 139 NLRB 70, 72 (1962); *Scoa, Inc*, 140 NLRB 1379, 1381 (1963); *Allied Stores of Ohio, Inc*, 175 NLRB 966, 169 (1969); *Davison-Paxon Company*, 185 NLRB 21, 23, 24 (1970), *Sears, Roebuck and Co.*, 193 NLRB 330 (1971)

[6] The Hearing Officer's ruling is apparently based on a misreading of the relevant case law, since the cases cited by him are in accord with our holding herein.

APPENDIX

I. CHALLENGES

To support its position that the 22 challenges should be sustained, the Union relies on the definition of the term "contingent employee" found in article I, section 2 of the collective-bargaining agreement between the Employer and the Union. In brief, that agreement defines "contingent employee" as one who works more than 15 hours a week.

The Union did not explicate what follows from its reliance on the contractual definition of "contingent employee" presumably, the Union concludes that none of the 22 disputed employees could meet its test and that none would be eligible.

The Employer argues, first, that the contractual definition of "contingent employee" relied on by the Union is irrelevant to the determination of eligibility to vote in a representation election and, second, that the 22 disputed employees are eligible under the standard set in *Allied Stores of Ohio, Inc.*, 175 NLRB 966, 969.

The following table shows hours worked by each of the contested employees for the indicated payroll period:

Dates are in 1976

	1/3	1/10	1/17	1/24	1/31	2/7	2/14	2/21	2/28	3/6	3/13	3/20	3/27
E. Averill		24	32	16.50		16.75	16	9	26		8	40.50	
M. Silberman		7	10.50		7.00					10.50	10.50	10.50	17.25
C. Andree	38	16	11	11	14.50	13.75	14	14.50	14.25	14.75	16	14.50	15
B. Helm			7	17								8	6
M. DeVries	13	15	12.25	20.50	15.25	8.25	12.75	4.50	6.50	19.00	19.50	19.25	15.25
B. Jeannot			4	19.25						6.50	5		
N. Jensen				17.75	18		6	6			16.50	22.75	26
G. Sietsema				19.50									
S. Subler	6.75			8.25	6.75	4				4	13.50	8.75	4
M. DeMarco			4						8.50	16.75	12.50	16.25	13
J. Kevern		10	10	20.25	20		4.25			10	19.75	13.25	19.25
N. Williams	33.75	25.75	28.75	31.75			5.50	24.50	17.75	2		20	19
R. Fox		19.25	15	24	6.75		18.25	23.75	18	29.25	27.75	10.25	24.50
N. Weiner	16.50				4					8.25	18	25.75	20
D. Jensen			14	4	21.00	7.50		16.50	10.75	4	18	41.75	40.50
M. Kramer	22.50	17.75	14.25	21.00	17.50	10.50	6	10.50	10.50	7.50	10.50	19.50	14
B. Lange	31.75	8.25	12	34	14.25	12.25	11	8.25	7	32.75	33	33.50	43.75
S. Neal						7				15	31	25.50	22.50
G. Perigard	11	6.25	4	20.50	11	12.25	13.75	30.25		23	7		15.25
P. Smith	22									25.75			
N. Van Lare										8.50		30.25	19.75
R. Stone	8.25											9.25	4.25

The Union's position is untenable. It would be inappropriate for the Board, at the sacrifice of its own standards for determining voting eligibility to permit parties to a collective-bargaining agreement to disenfranchise eligible voters. Such would be the effect of following the Union's standard. *Recipe Foods, Inc.,* 145 NLRB 924, 925. The Board does not countenance an extraneous eligibility standard. *Sears, Roebuck & Co.,* 193 NLRB 330, 331.

In accordance with the Board's eligibility formula for contingent employees as set forth in *Allied Stores of Ohio, Inc., supra,* and succeeding cases such as *Davison-Paxon Company,* 185 NLRB 21, 24, I find that 17 of the 22, disputed employees averaged more than 4 hours of work a week in the quarter before the eligibility date of May 22, 1976, and thereby satisfied the Board's eligibility requirement. Accordingly, I recommend that the challenges to the ballots of the following 17 employees be overruled: E. Averill, M. Silberman, C. Andree, M. DeVries, N. Jensen, S. Subler, M. DeMarco, J. Kevern, N. Williams, R. Fox, N. Weiner, D. Jensen, M. Kramer, B. Lange, S. Neal, G. Perigard, and N. Van Lare. Under the same formula I find that five employees averaged less than 4 hours of work a week in the quarter before the eligibility date and therefore did not meet the Board's eligibility requirement. Accordingly, I recommend that the challenge to each of their ballots be sustained: B. Helm, B. Jeannot, G. Sietsema, P. Smith, and R. Stone.