

Kenosha News Publishing Corporation, Employer-Petitioner and Kenosha Newspaper Guild, Local #159, TNG, AFL-CIO. Case 30-UC-173

September 29, 1982

DECISION ON REVIEW AND CLARIFICATION OF BARGAINING UNIT

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 22, 1981, the Regional Director for Region 30 issued his Decision and Order Denying Petition for Unit Clarification in the above-entitled proceeding in which he found, contrary to the Employer's contentions, that the area editor,¹ sports editor, Horizons editor,² and chief photographer were neither supervisory nor managerial employees, and he dismissed the unit clarification petition. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Regional Director's decision on the grounds that, in finding the four disputed individuals not to be supervisors, he departed from precedent and made findings of fact which are clearly erroneous. The Union filed opposition thereto.

By telegraphic order dated June 11, 1981, the National Labor Relations Board granted the Employer's request for review as to the three disputed editors and denied it as to the chief photographer. The parties filed as briefs on review their briefs previously submitted to the Regional Director.

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 case, including the parties' briefs, and makes the following findings:

The Employer contends that the three disputed subeditors, sports editor James Kornkven, Horizons editor Elaine Edwards, and area editor Barbara Colicki, are supervisors as defined in the Act as the record supports findings that, *inter alia*,³ the sports

editor has authority to hire part-time employees working in his department, the Horizons editor effectively recommends the hiring of employees in her department, and all three disputed editors responsibly direct employees in their respective departments.

The Employer publishes a daily newspaper, The Kenosha News, and a weekly advertising supplement, The Courier. The Union's existing bargaining unit covers all employees in the Employer's editorial department, excluding supervisors as defined in the Act. The record reveals that the editorial department has 25 full-time and 9 part-time employees. Reporting to the publisher, editor Dick Martin is responsible for the overall supervision of the editorial department. The managing editor shares overall supervisory responsibility with Martin and acts for him in his absence. The editorial department has nine subdivisions, each headed by a subeditor. Three of the subeditors, the city, weekend, and news editors, are excluded from the bargaining unit as agreed-upon supervisors. The above five editors with admitted supervisory authority are referred to in the record as exempt editors.⁴ The other six subdivision heads have been included in the unit, and, as indicated above, the supervisory status of three of them is here at issue.

Sports Editor

As found by the Regional Director, sports editor James Kornkven has held his position since 1963 and at present works with two other full-time employees and two or three part-time employees.

overtime hours which is closely monitored by the editor, Dick Martin, we find ample record support for the Regional Director's finding that the assignment of overtime by the disputed editors is routine. The record does reveal one occasion, approximately 3 years ago, when area editor Colicki stopped assigning work to a newly hired part-time employee, Tierny. Editor Martin, who hired Tierny, told Colicki that she could assign work to Tierny if she needed him. Colicki gave Tierny several work assignments, but thereafter ceased assigning him further stories. We find no merit in the Employer's contention that this incident illustrates Colicki's power to terminate part-time employees, and thus her supervisory status. We note that there is no evidence that Tierny worked only on stories for Colicki, or that Colicki had authority to formally dismiss Tierny from employment. In any event, even assuming that this incident amounted to the exercise of the power to terminate a part-time employee, we find that this single incident which occurred about 3 years ago is insufficient to establish supervisory status. Rather, Colicki's action appears to be an isolated incident which does not provide a sufficient basis for a finding of supervisory status. *Willis Shaw Frozen Food Express, Inc.*, 173 NLRB 487 (1968). The Employer also asserts that these editors are all responsible for the content of their particular section of the newspaper, including the determination of which stories should be covered and who would cover them, and how much wire copy would be printed. However, for the reasons stated by the Regional Director, these responsibilities do not constitute indicia of either supervisory or managerial authority, but are elements of "news judgment" recognized by the Board as professional expertise rather than supervisory authority. *The Washington Post Company*, 254 NLRB 168 (1981).

⁴ It is not clear from the record what an exempt editor is. The record indicates only that subeditors must have authorization from an exempt editor to have photographs taken in conjunction with stories written for their sections.

¹ The area editor is responsible for a section of the Employer's newspaper which covers events within Kenosha County such as meetings of city councils, school boards, etc.

² The Horizons editor is responsible for a section of the newspaper which covers family-oriented news. This section once covered "society news," was later changed to cover "women's news," and now covers news and events of general interest to members of the community.

³ The Employer also contends that the disputed editors control employee work hours, and can therefore effectively terminate part-time employees and determine the amount of overtime worked by full-time employees. However, as it appears that hours of work are generally dictated by the duration of scheduled events which employees cover and, as found by the Regional Director, the Employer has a policy of minimizing

Kornkven testified he has no authority on his own to hire full-time employees. However, the record reveals that he has hired all three of the part-time employees now working with him on the sports section. Randy Donais, hired by him about a year ago, usually works 3 days a week from 6:15 until about 10 p.m., part of the time in the office and the rest of the time covering sports events. Kornkven referred to Donais as a regular part-time employee, and to the other two part-time employees working with him as "stringers."⁵ One of the latter, Brad Weinstock, had previously worked full time for Kornkven for 10 to 12 years and had left to work in his own business, but 4 or 5 years ago Kornkven engaged him to cover games; the other, Jean Tenuta, hired by Kornkven about 5 years ago, had previously worked for the Employer as a part-time employee in the office.

The above evidence does not support the Regional Director's conclusion that Kornkven's exercise of hiring authority with regard to part-time employees has been sporadic. To the contrary, it appears from the record that Kornkven hired all the part-time employees who work for him. Accordingly, on the basis of his exercise of authority to hire part-time employees, we find that Kornkven is a supervisor as defined in the Act.

Horizons Editor

Elaine Edwards, Horizons editor, has held her position since 1950. At present she works with two other full-time employees and one regular part-time employee. The Employer asserts that Edwards effectively recommended the hire of four full-time employees (three of whom were hired and one declined the offer) and one part-time employee currently working in her section. However, the record does not support the Employer's assertions.

Martin, describing the hiring process, testified that, after examining applications received in response to an advertisement, he gave Edwards the ones he considered the top applicants to look over, and the one which they mutually agreed would perhaps make a good employee was interviewed by both of them. Afterwards, Martin stated, he asked Edwards if she was interested in "hiring" the particular applicant, and, as she was, he offered that applicant the job. As to the present part-time employee, Joanne Remberg, Martin testified Edwards came to him and said the workload in her department was so heavy she would like to add another person, and that, since Remberg had worked for the Employer in the past, she would like to have her come in 1 day a week to do weddings and en-

gagements. Martin approved her request. Martin also testified he would not hire or transfer anyone into Edwards', Colicki's, or Kornkven's departments over their objections. Edwards testified that Martin did the hiring or made the transfers of employees for her department, but that she was asked her opinions as to their qualifications and whether they would fit in.

We are not persuaded from our review of the record that the participation of Edwards in the interviewing and hiring of applicants for employment confers upon her authority effectively to recommend hiring. Martin's policy of not hiring or transferring anyone over the subeditors' objections does not confer on the subeditors authority, in the interest of the Employer, to hire or transfer employees or to effectively recommend the same. Rather, in our opinion, the subeditors' role under Martin's policy is to act principally in their own interest to ensure the suitability of the applicant as a working companion in a small department, and thus preserve harmonious working relationships. See *Willis Shaw Frozen Food, supra* at 488. While Edwards appears to have selected Remberg as a regular part-time employee, she did so only after the approval of Martin and in large part on the basis of Remberg's previous employment by the Employer. In any event, Edwards' hiring of Remberg appears to have been an isolated case and thus not a predicate for finding Edwards to be a supervisor.

Alleged Responsible Direction by Colicki, Edwards, and Kornkven

The Employer also argued that all three disputed subeditors are supervisors within the meaning of the Act because they responsibly direct other employees. However, the record shows that they assign stories or areas of news coverage to employees in their departments generally in an attempt to accommodate individual interest, which in some cases involves taking assignments themselves, and often assignments of certain specialized areas are routinely made to the same persons unless workload or some other reason, such as the policy of minimizing overtime, requires assignment to another.⁶ Although the Employer asserts that these subeditors require employees to rewrite stories, there is no evidence that this has ever happened. The record indicates that the disputed editors edit the stories of others in their departments and, if rewriting is necessary, they either do it themselves or another employee in the department does it. Based

⁵ Kornkven defined a "stringer" as a part-time employee who did not work in the office but was assigned solely to cover sports events. It appears that these stringers are covered by the existing contract.

⁶ Area editor Colicki testified that she checks with reporters to see if they would like to cover certain events and to coordinate schedules. Horizons editor Edwards testified that assignments outside of regular duties are made to reporters after checking with the reporter to see if they would like to and have time to cover the story.

on the foregoing, we find no support for the Employer's contentions that the disputed subeditors responsibly direct employees or make assignments which require the exercise of independent judgment.⁷

Accordingly, as we have found, for the reasons set forth above, that the Horizons editor is not a supervisor as defined in the Act, and we have found wanting the only possible indicia of supervisory authority possessed by area editor Colicki, we conclude that both are statutory employees and affirm the Regional Director's denial of the Employer's request that the unit be clarified to exclude them. However, in view of our finding that sports editor Kornkven is a supervisor as defined in the Act, the unit is clarified to exclude him.

MEMBER ZIMMERMAN, concurring in part and dissenting in part:

I agree with my colleagues that sports editor James Kornkven is a supervisor within the meaning of Section 2(1) of the Act, and that he therefore should be excluded from the bargaining unit. However, contrary to my colleagues, and for the reasons set out below, I find that Horizons editor Elaine Edwards and area editor Barbara Colicki are also supervisors within the meaning of the Act, and that they should likewise be excluded from the bargaining unit.

We have found sports editor Kornkven to be a supervisor on the grounds that he has authority to hire employees. Indeed, he actually exercised his hiring authority twice about 5 years ago, and once again about 1 year ago.

But just as we have found Kornkven to have hiring authority, so too do I find, contrary to my colleagues, that Horizons editor Edwards has such authority, or at the very least the authority effectively to recommend hiring, so as to constitute her a supervisor and exclude her from the unit.

The Employer's editor, Dick Martin, testified that in April 1977 he screened several applications for an advertised full-time job opening in Edwards' department, and then gave the best of the applications to Edwards for her review. Thereafter, Martin and Edwards "decided mutually" that applicant Nancy Curtis should be interviewed for the position.

At the interview, Martin first met briefly with Curtis to discuss general matters. Then Edwards spoke with Curtis about the specific requirements of the position for which she was being interviewed. Martin, Edwards, and Curtis then went to lunch together.

⁷ *The News-Journal Company*, 227 NLRB 568, 570 (1976); *Suburban Newspaper Publications, Inc.*, 226 NLRB 154, 156 (1976).

Later, Martin asked Edwards whether she was interested in hiring Curtis and Edwards replied that she thought Curtis would make an excellent employee. So, according to Martin, "on Elaine's [Edwards] recommendation, I offered the job to Nancy [Curtis] and she took it."⁸

Subsequently, in early 1978, there was another full-time job opening in Edwards' department. According to Martin, Edwards was in favor of offering it to one particular applicant, who was offered the job, but declined the offer. Thereafter, Jean Korten was hired to fill the opening in Edwards' department. According to Martin, the procedures used in the hiring of Korten were very similar to those used in the hiring of Nancy Curtis, as described above. Specifically, following an interview and a trip around town with Korten, Martin asked Edwards if she wanted to hire Korten; Edwards replied that she did, and that "she thought [Korten] would work out fine." Martin thereafter offered Korten the job, and she accepted.⁹

In early 1980, another full-time position became available in the Horizons department. Martin asked Kay Jones, at that time a part-time employee in another department, whether she would be interested in working in the Horizons department. Jones said she might be interested, and Martin told her to speak with Edwards. Jones and Edwards met, and Martin subsequently asked Edwards whether she thought Jones would be a good employee. Edwards said yes, and told Martin that she thought Jones ought to be hired for the position. She was.¹⁰

There is also a part-time employee in the Horizons department, Joanne Remberg. Martin testified that Edwards told him that she would like to add another person in her department due to an increased workload involved in covering weddings and engagements. Edwards told Martin that Remberg had previously worked for the Employer, and that Edwards would like to hire her on a 1-day-per-week basis, to do just weddings and engagements. According to Martin, Edwards subsequently

⁸ In her testimony about the hiring of Curtis, Edwards first acknowledged that she had recommended that Curtis be hired, and then testified "Well, I don't think I would call it a recommendation. I gave my opinion which was that I thought she was fine."

⁹ In her testimony about the hiring of Korten, Edwards acknowledged that, following Korten's joint interview with Martin and herself, Martin asked her whether she liked Korten, whether she thought Korten could fit in and be a good reporter. Edwards replied affirmatively, and Korten was hired. In this respect, Edwards, like Martin, testified that the procedures followed in hiring Korten were similar—"the same thing"—as those used in hiring Nancy Curtis.

¹⁰ In her testimony about the hiring of Jones, Edwards stated that she did not sit in on Martin's interview with Jones, and that "I didn't make the decisions. Other than my opinion was requested."

hired Remberg on that basis.¹¹ Subsequently, according to Martin, Edwards has employed Remberg on a more expanded basis, as a substitute for absent full-time members of the Horizons department, or when the workload in the department has become particularly heavy.

Martin candidly acknowledged that he had the final authority to hire employees in the overall editorial department, encompassing, *inter alia*, the sports, area, and Horizons departments under discussion in the instant case.¹² Martin further testified that, while new employees are hired fairly infrequently by the Employer, when hiring is done the departmental editors participate in the interviewing process and thereafter make recommendations to Martin. Although Martin is not required to follow such recommendations, he has always done so, on the theory that he would not hire anyone whom the departmental editor did not want in his or her department; in this regard, he has never refused the recommendation of a department editor.¹³

Based on all of this substantial evidence of the repeated exercise by Edwards of her authority effectively to recommend the hiring of employees,¹⁴ I find her to be a supervisor within the meaning of Section 2(11) of the Act, and thus not properly included in the appropriate bargaining unit in this case.¹⁵

¹¹ In her testimony about the hiring of Remberg, Edwards acknowledged that she had asked Martin if Remberg could be hired to work part time, on weddings and engagements.

¹² Or, as Martin himself more accurately states: "I would say I do have the final authority to override anyone else's decision" on hiring.

¹³ In rejecting this as clear evidence of the exercise of Edwards' authority effectively to recommend hiring, my colleagues euphemistically refer to Martin's policy of not hiring anyone over an editor's objection as simply a case of an editor acting "principally in their own interest to ensure the suitability of the applicant as a working companion in a small department, and thus preserve harmonious working relationships." Here, my colleagues rely on *Willis Shaw Frozen Food Express, Inc.*, 173 NLRB 487 (1968). But such reliance is clearly misplaced on the facts of this case. In *Willis Shaw*, two-man coast-to-coast truckdriving teams drove long hauls of 12-23 days' duration. The designated head drivers of these two-man teams actively engaged in the recruitment of their assistant drivers. The employer permitted the head drivers to choose their assistants from any available employees on the basis of "compatibility."

It is clear that the special, unique need which existed in *Willis Shaw* for a "harmonious relationship between [head drivers] and their assistants during the lengthy periods when they will be alone on the truck and away from their homes and friends" simply does not exist in the instant case. Nor does, accordingly, the special hiring emphasis on personal compatibility between drivers which existed in *Willis Shaw*. Thus, the exercise by Edwards of her authority effectively to recommend the hiring of staff journalists on a daily newspaper can hardly be equated with the exercise by the head drivers in *Willis Shaw* of their prerogative to emphasize personal compatibility in the selection of their coast-to-coast driving companions.

¹⁴ Which evidence is, incidentally, similar in many respects to the evidence relied on by my colleagues, as well as me, to find sports editor Kornkven to be a supervisor.

¹⁵ In addition to establishing that Edwards has the authority effectively to recommend the hiring of employees, the record also establishes that Edwards has the authority to assign work, assign overtime, and effective-

I also disagree with my colleagues' conclusion that area editor Barbara Colicki is not a supervisor.

According to editor-in-chief Martin, Colicki determines which events are newsworthy, so as to be covered, and she then assigns three employees in her department to cover those events.

My colleagues contend that Colicki's exercise of her authority to assign work to, or direct the activities of the, employees in her department is not done with responsibility or in the exercise of her independent judgment. But the record evidence is to the contrary.

Martin testified that Colicki determines which events will be covered, on the basis of how many reporters she has available, as well as how much newspaper space she has available—in addition, of course, to her assessment of the newsworthiness of any particular event. Thus, according to Martin, "The only limit she has [with respect to the making of assignments] is to exercise her own judgment as to what should be done, including assigning herself."

Neither of the part-time employees in Colicki's department work a set minimum number of hours per week. Thus, Colicki, by virtue of making specific work assignments, also effectively determines how many, if any, hours per week these employees work.

Indeed, Colicki exercised this authority effectively to terminate the employment of part-time employee Gene Tierny, to whom, because of his generally poor performance, she simply stopped assigning any work at all. Tierny had been assigned to Colicki by Martin. Because Colicki found Tierny's work to be unsatisfactory, she assigned him no further work and his employment was eventually terminated.¹⁶

ly recommend the granting of time off all further indicia of her status as a supervisor.

¹⁶ My colleagues contend that Colicki's decision to stop assigning work to part-timer Tierny, thus effectively terminating his employment, does not illustrate Colicki's power to terminate part-time employees. But there is no better illustration of one's authority effectively to terminate the employment of an employee, part-time or otherwise, than the actual exercise of that authority, as in this case. Nevertheless, my colleagues reject the significance of this evidence of Colicki's supervisory authority, on the basis that there is no indication that Tierny worked *only* on stories for Colicki, or that Colicki had authority to *formally* dismiss Tierny from employment. As to the former ground the uncontroverted testimony of Martin is that:

[Tierny] was assigned to [Colicki]. I told her that she would be able to use him as much as she needed to to see how he worked out, see what kind of a reporter he would make as a part-timer, and what kind of an employee As a result of [insufficient quantity and quality of work] Ms. Colicki decided not to use him.

Martin also testified that Tierny was an employee to whom Colicki could assign work, and that it was her decision to cease doing so which directly resulted in the cessation of his employment. Tierny was not reassigned elsewhere within the Company, even though, according to Martin, "Anyone could have used him as a part-timer who wanted to." There is

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Colicki is also responsible for assigning overtime work to the employees in her department, as well as assigning photographers (who do not work in her department) to particular photographic responsibilities in conjunction with stories she plans to run in the paper. (The only qualification on Colicki's authority to assign photographers is that she must check with one of her superiors to insure there is no duplication of assignments.)

no evidence that Tierny did any work at all for any supervisor other than Colicki, and thus the inference properly to be drawn from the totality of the evidence available is that Tierny worked only for Colicki during the time he worked for the Employer.

As for their reliance on the fact that Colicki had no authority to *formally* discharge Tierny, my colleagues have elevated form over substance. Sec. 2(11) of the Act requires only that one have the authority "effectively to recommend" discharge in order to be found to be a supervisor. By refusing to give Tierny work Colicki made his services unneeded and effectively forced his discharge. A more concrete example of the exercise of the authority "to effectively recommend" is difficult to imagine.

My colleagues also claim that because Colicki's discharge of Tierny occurred "about 3 years ago" it is insufficient to establish supervisory status. First, Colicki herself estimates that she gave Tierny his final assignment in "early" 1979, which is, at most, only a little more than 2 years prior to the March 1981 hearing in this proceeding. Second, there is no evidence that anyone has been discharged from Colicki's three-em-

Based on the record evidence outlined above, I find that Colicki has the authority to assign employees, responsibly to direct them, and effectively to discharge them, all in the exercise of her independent judgment. Accordingly, I conclude that she is a supervisor within the meaning of Section 2(11) of the Act, and that, like her fellow editors Kornkven and Edwards, she should be excluded from the appropriate bargaining unit in this case.

ployee area department *before or since* Tierny's discharge in 1979. Thus, the method by which Colicki effectively terminated Tierny's employment has not been shown to have been a one-time-only departure from other procedures.

Finally, *Willis Shaw Frozen Food Express* presents a situation which clearly is distinguishable from this one and is thus inapposite. There, 2 of approximately 80 head drivers had to fire their assistant drivers in mid-journey because of drunkenness which rendered the assistants incapable of continuing their driving duties. The Board found that these two instances of discharge were too sporadic a use of authority to confer supervisory status on any of the head drivers. Surely, to fire a truckdriver because he is too drunk to keep driving cannot reasonably be termed an exclusive exercise of supervisory judgment. It is, rather, an unavoidable solution to an obvious operational problem, which, in the circumstances, any responsible driver would be forced to take. It is in any event not comparable to area editor Colicki's determination that Tierny did not have the writing skill or ability to be a reporter.