

Caribbean Communications Corp. d/b/a St. Thomas-St. John Cable TV and United Steelworkers of America, Local 8249, AFL-CIO, CLC. Case 24-RC-7465

November 30, 1992

DECISION, DIRECTION, AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

Questions presented in this representation election proceeding concern the hearing officer's recommendation to overrule the Employer's challenges to ballots cast by Patricia King and Sandra Lawrence.¹ The hearing officer found that King, the Employer's dispatcher, shared a sufficient community of interest with the unit employees to warrant inclusion in the unit. He found that Lawrence was a unit employee with a reasonable expectation of continued future employment, rather than a temporary employee.

The Board has reviewed the record in light of the exceptions and brief and has adopted the hearing officer's findings and recommendation with respect to King's ballot.² For the reasons which follow, we reverse the hearing officer and find that Sandra Lawrence was a temporary employee who lacked a sufficient community of interest with unit employees to be an eligible voter. Accordingly, we shall sustain the challenge to Lawrence's ballot.

The Employer provides cable television service in the United States Virgin Islands. The Petitioner seeks to represent customer service representatives and clerks. For several years, the Employer has employed a student as a temporary filing clerk working with unit employees in the customer service department. Each student's job tenure was limited to 1 year, after which the student usually departed for college study.

¹The National Labor Relations Board, by a three-member panel, has considered the determinative challenges in an election held on April 23, 1992, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 4 for and 4 against the Petitioner, with 2 challenged ballots.

²In finding that the dispatcher position should be included in the customer service employees unit, we find no need to rely on the factor of bargaining history in the service and installers unit represented by the Petitioner. We also note the following factual misstatements, which do not affect the validity of the hearing officer's findings and recommendation as to King:

(1) The hearing officer incorrectly stated that King worked in an office on the second floor of the Employer's building throughout the approximately 18 months of her employment as a dispatcher. In fact, her office was in another building during her first 7 months on the job.

(2) The hearing officer stated that the service and installer employees' contractual benefits were "totally different" from those of the customer service employees and the dispatcher. The only differences specifically proven related to vacation benefits.

The Employer hired Sandra Lawrence on November 13, 1990, as a temporary file clerk in the work-study program. Lawrence expected to leave the Employer to attend college in September 1991. On August 16, 1991, however, she informed the Employer's vice president, Andrea Martin, that she would not be going to college. Lawrence asked Martin if she could become a permanent employee. Martin told Lawrence that no permanent file clerk position was available but that the Employer "would keep her on at the same hourly rate until the filing backlog was completed." Lawrence agreed. A January 29, 1992 performance appraisal, signed by Lawrence, specifically identified her continuing clerkship as a temporary position and advised her to "concentrate on improving her knowledge and performance if she wants to be considered for permanent employment." There is no evidence that Lawrence was ever promised or considered for a permanent job.

The filing backlog which was Lawrence's primary job responsibility after August 1991 resulted from devastation of the Employer's operations by Hurricane Hugo in September 1989. In restoring its operations, the Employer had to recreate and revise its customer files. This substantial undertaking resulted in an enormous filing backlog. In October or November 1991, Customer Service Manager Debra Thomas decided that Lawrence needed assistance in completing the filing project. She obtained two more clerks from Working World, a temporary personnel service.

Thomas gave Working World an estimate of 3 to 4 months for completion of the temporary filing project.³ In fact, the clerks took about 6-1/2 months to complete the project. On April 28, 1992, the Employer notified Working World that the filing project was nearing completion and that the two temporary clerks would not be needed after May 15. On April 30, Vice President Martin notified Lawrence that her temporary job would also end on May 15 due to the project's completion.

There is no question that Lawrence performed work in a classification in the stipulated unit. The Employer contends, however, that the temporary nature of Lawrence's job made her ineligible to vote in the election. The hearing officer found that Lawrence had no certain termination date for her job until after the election, when she received the Employer's April 30 notice. The hearing officer further found that the reference to "permanent employment" in Lawrence's January 28, 1992 work appraisal suggested that she had some expectancy of future employment. The hearing officer concluded that the lack of a "date certain" for termination, the expectation of future employment, and

³The hearing officer erroneously stated that the clerks from Working World were hired and the project completion estimate was made in August 1991.

Lawrence's active employment in a unit position on both the eligibility and election dates made her eligible to participate in the election. Accordingly, he recommended that the challenge to Lawrence's ballot be overruled. We do not agree with the recommendation.

In *Pen Mar Packaging Corp.*, 261 NLRB 874 (1982), the Board stated: "It is established Board policy that a temporary employee is ineligible to be included in the bargaining unit and that an employee's eligibility status is determined by his status as of the eligibility payroll date." (Footnotes omitted.) The critical inquiry on this date is whether the "temporary" employee's tenure of employment remains uncertain. If so, the employee is eligible to vote.⁴

The hearing officer has apparently misconstrued the foregoing "date certain" eligibility test for temporary employees. This test does not require a party contesting an employee's eligibility to prove that the employee's tenure was certain to expire on an exact calendar date. It is only necessary to prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired.⁵ In this case, it is clear that the Employer retained Lawrence as a temporary employee on August 16, 1991, to complete a specific filing backlog project of several months duration. Although this project lasted 2 to 3 months longer than estimated by the Employer, its ultimate completion was a sufficiently certain event as of the March 21, 1992 eligibility date.

⁴ *NLRB v. New England Lithographic Co.*, 589 F.2d 29, 33-34 (1st Cir. 1978); *Lloyd A. Fry Roofing Co.*, 121 NLRB 1433, 1436-1438 (1958); *Personal Products Corp.*, 114 NLRB 959, 960 (1955).

⁵ *Pen Mar Packaging*, supra at 874.

The hearing officer also erred in finding that Lawrence had an expectancy of employment beyond the completion of the special filing project. Her January 29, 1992 appraisal merely identified areas for improvement "if she wants to be considered for permanent employment." There is no evidence that the Employer was considering Lawrence for an available permanent unit position at that time or at any subsequent time prior to the eligibility date. Once the special filing project ended, she had no prospect of future employment.

Based on the foregoing, we find that Lawrence was a temporary employee who did not share a community of interests with unit employees. Accordingly, we shall sustain the challenge to Lawrence's ballot.⁶

DIRECTION

IT IS DIRECTED that the Regional Director shall, within 10 days from the date of this Decision, Direction, and Order, open and count the ballot cast by Patricia King and prepare and serve on the parties a revised tally of ballots. Thereafter, the Regional Director shall issue the appropriate certification.

ORDER

IT IS ORDERED that the proceeding is remanded to the Regional Director.

⁶ *U.S. Aluminum Corp.*, 305 NLRB 719 (1991), is not to the contrary. In that case, the Board found an employee eligible to vote where it was shown that the employee, who had been converted from temporary to permanent status but was laid off for lack of work, was in layoff status as of the eligibility date and had a reasonable expectancy of recall. Here, Lawrence was at all times a temporary employee without promise of conversion to permanent status and without a reasonable expectation of continued employment.