

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Subregion 17

Armstrong Flooring, Inc.

Employer

and

United Steel, Paper & Forestry, Rubber
Manufacturing, Energy, Allied Industrial
& Service Workers

Petitioner

14-RC-234703

REGIONAL DIRECTOR'S DECISION AND ORDER

I have considered determinative challenged ballots in an election held on February 13, 2019, and the Hearing Officer's Report on Challenged Ballots issued on March 28, 2019, recommending disposition of those challenges. For the reasons discussed below, I, pro forma, adopt the Hearing Officers recommendation to overrule challenges to certain ballots to which no exceptions were filed, but I do not adopt the Hearing Officers recommendation as to two other challenged ballots. I, thus, am overruling the challenges to all 11 ballots.

The election was conducted pursuant to a Stipulated Election Agreement among employees in the following appropriate collective-bargaining unit:

All full-time and regular part-time maintenance, production, and quality employees in Print, DC, LVT, Baseline, C&F and MFG/DST, at Armstrong Flooring, Inc.'s facility located at 4115 N. Perkins Road, Stillwater, Oklahoma 74075 but excluding all other employees, including office clerical, temporary employees, engineering, management, guards, and supervisors as defined by the Act.

The tally of ballots made available to the parties at the conclusion of the election discloses that, of approximately 102 eligible voters, 47 cast votes in favor of representation by the Petitioner, 41 cast votes against such representation, there were no void ballots, but there were 11 challenged ballots, a number sufficient to affect the results of the election.

At the election, the United Steel, Paper, & Forestry, Rubber Manufacturing, Energy, Allied Industrial & Service Workers (Petitioner) challenged the ballots of 11 individuals, claiming that each was ineligible to vote. For three of those challenged ballots the Petitioner maintained that the individuals were office clerical employees, who were expressly excluded from the stipulated unit. For six of the challenged ballots the Petitioner asserted that these individuals were supervisors as defined by Section 2(11) of the National Labor Relations Act (the “Act”). As for the final two challenged ballots, the Petitioner contended that the individuals are engineers and are professional employees. Following the election, Armstrong Flooring, Inc. (Employer) filed a timely objection to conduct affecting the results of the election.

Pursuant to my Order dated February 22, 2019, a hearing was held before a Hearing Officer to resolve the Petitioner’s challenges and the Employer’s objection. The Hearing Officer conducted a hearing on March 6 and 7, 2019, in Tulsa, Oklahoma, and the Hearing Officer issued his Report on Challenged Ballots on March 28, 2019. On April 11, 2019, the Employer filed exceptions to that Report, along with a brief in a support of its exceptions.

I have reviewed the record in light of the Employer’s exceptions and brief, and I adopt the Hearing Officer’s findings and recommendations to the extent consistent with this Decision and Order. No exceptions were filed to the Hearing Officer’s recommendation to overrule the Petitioner’s challenges to the ballots of Martell Carter, Jason Durham, Gary Jarvis, Sanford A. Kurth III , Cody Maloy, Kevin Richardson, Melisa Sadler, Tanner Thompson, and Shawn Watkins. In the absence of exceptions, I, pro forma, adopt the Hearing Officer’s recommendations to overrule the challenges to the ballots of Martell Carter, Jason Durham, Gary Jarvis, Sanford A. Kurth III , Cody Maloy, Kevin Richardson, Melisa Sadler, Tanner Thompson, and Shawn Watkins.

Additionally, at the hearing, the Employer requested withdrawal of its sole objection. The Hearing Officer advised the parties that he was without authority to approve the withdrawal request, but would, and did, recommend to me that it be approved. The Employer’s request to withdraw its objection does not appear to be inconsistent with the purposes and policies of the Act and is approved.

I. The Hearing Officer’s Report and Recommendation

At the election, the Petitioner objected to the ballots of James Counce and Adam Pratt on the grounds that they are engineers. At hearing, the Petitioner expanded upon that objection,

claiming that the two employees are professional employees. The Hearing Officer recommended sustaining the Petitioner's challenges to the ballots of James Counce and Adam Pratt, not on the basis of the Petitioner's challenge, but instead, finding that each employee should be excluded from the stipulated voting unit because each worked in the engineering department, and the unit description expressly excludes "engineering employees." The Employer filed timely exceptions to the Hearing Officer's findings and recommendations regarding the Hearing Officer's recommendations to sustain the challenges to the ballots of Counce and Pratt. The Employer argues, in part, that the Hearing Officer improperly shifted the burden onto the Employer to prove that Pratt and Counce should be included in the voting unit.

In determining that the parties intended to exclude Counce and Pratt from the bargaining unit, the Hearing Officer relied upon the three-prong test set forth by the Board in *Caesar's Tahoe*, 337 NLRB 1096 (2002). Specifically, the Hearing Officer concluded that issue of whether Counce and Pratt should be excluded could be resolved using solely the first prong of the *Caesar's Tahoe* test, which is whether the stipulated bargaining unit is ambiguous as to the inclusion or exclusion of the employees in question. As noted by the Hearing Officer, the stipulated unit expressly excludes all "engineering" employees. In finding that parties intended to exclude Counce and Pratt because they were engineering employees, the Hearing Officer relied upon two points. First, the Hearing Officer concluded that Counce and Pratt were engineering employees because they work in the engineering department. Second, the Hearing Officer found that although Counce and Pratt are designated by the Employer as MFG/DST employees, employees of which are referenced as included in the stipulated unit description, only production, maintenance, and quality employees with the MFG/DST designation are included in the unit description. Given that the Hearing Officer found Counce and Pratt to be engineering department employees, not production, maintenance, or quality employees, he concluded that they should be excluded regardless of their MFG/DST designation.

II. Analysis

Based on my review of the record and the Employer's exceptions and supporting brief, I conclude that the Petitioner did not meet its burden of proving that Counce and Pratt should be excluded from the unit because they are professional engineers. As a result, I overrule the Hearing Officer's recommendation and findings that Counce and Pratt should be excluded the appropriate voting unit.

At the hearing and in his report, the Hearing Officer correctly identified that the burden of proof, in the first instance, rests on the party seeking to exclude a challenged individual from voting. *Sweetener Supply Corp.*, 349 NLRB 1122, 1122 (2007), citing *Golden Fan Inn*, 281 NLRB 226, 230 n. 24 (1986).

Section 9(b)(1) of the Act provides that professional employees may not be included in the bargaining unit with nonprofessionals unless they vote in favor of such inclusion. Section 2(12) of the Act defines a professional employee as:

- (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
- (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work in the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

In determining whether employees are professionals, the Board considers the character of the work required as opposed to the qualifications of each individual within the group. *Loral Corp.*, 200 NLRB 1019, 1021-2022 (1972); *Chesapeake Telephone Co.*, 192 NLRB 483 (1971).

Given that the Petitioner challenged the inclusion of Counce and Pratt on the basis that they were professional engineers, it was the Petitioner's burden to establish through competent evidence that the character of the work was such that they would be considered professional employees within the meaning of Section 2(12) of the Act. Based on my review of the record evidence, I find that the Petitioner failed to present any evidence that Counce and Pratt were engaged in the type of work described in Section 2(12) of the Act. Neither Counce nor Pratt were called to testify as to their job duties. Moreover, I find the testimony adduced by the Petitioner at hearing wholly insufficient to find that Counce and Pratt engage in the type of work characteristic of a professional employee that might include an engineer, possess the degree of

education or scientific knowledge characteristic of a professional employee, or that their jobs require them to possess the type of education or knowledge described in Section 2(12) of the Act. As such, I find that the Petitioner failed to meet its evidentiary burden, and I overrule the challenges to the ballots of Counce and Pratt.

Because the Petitioner failed to sustain its burden of establishing its sole reason for challenging the inclusion of Counce and Pratt on its claim that they are professional employees, I find, contrary to the Hearing Officer, that it is unnecessary to analyze further whether these non-professional employees should be excluded unit based on their employment in the engineering department. Unlike the investigation of post-election challenged ballots or objections where the Regional Director may expand the scope of the investigation beyond the precise reasons stated for the challenged ballots or the objections, a hearing does not afford the same latitude. An order directing the hearing specifies the issues that are to be litigated. Expanding the scope of the hearing beyond those issues specified in the notice of hearing places the parties at a distinct disadvantage as they do not have knowledge of the issues that are to be considered.

Because I have found that the Petitioner failed to meet its burden of establishing that Counce and Pratt are professional employees excluded from the unit, I find it unnecessary to address the Employer's other exceptions to the Hearing Officer's Report.

IT IS HEREBY ORDERED that the ballots of Martell Carter, James Counce, Jason Durham, Gary Jarvis, Sanford A. Kurth III, Cody Maloy, Adam Pratt, Kevin Richardson, Melisa Sadler, Tanner Thompson, and Shawn Watkins be opened and counted on a date to be determined by the undersigned. After the opening and counting of those ballots a Revised Tally of Ballots will be prepared and served on the parties, followed by the issuance of the appropriate certification.

III. Request for Review

Pursuant to Section 102.69 (c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, D.C., a Request for Review of this Decision. This Request for Review must conform with the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by Washington by May 16, 2019. If no Request for Review is filed, the Decision is final and shall have the same effect as if issued by the Board.

A Request for Review may be E-Filed through the Agency's website, but may not be filed by facsimile. To E-File the Request for Review, go to www.nlr.gov, select E-File

Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, D.C. 20570-0001. A party filing a Request for Review must serve a copy on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the Request for Review.

Dated: May 2, 2019

/s/ Leonard J. Perez

Leonard J. Perez, Regional Director
National Labor Relations Board
Region 14
1222 Spruce Street, Room 8.302
Saint Louis, MO 63103-2829