

**Trailways, Inc. and Amalgamated Transit Union,
AFL-CIO-CLC, Petitioner. Case 16-RC-8157**

31 July 1984

DECISION AND DIRECTION

**BY MEMBERS ZIMMERMAN, HUNTER, AND
DENNIS**

Pursuant to a Second Supplemental Decision, Order, and Direction of Second Election issued 2 March 1981 by the Acting Regional Director for Region 16, an election by secret ballot was conducted on 22 May 1981 among the employees in an appropriate unit.¹ At the conclusion of the election the parties were furnished with a tally of ballots which showed that of approximately 463 eligible voters 413 cast ballots, of which 187 votes were cast for the Petitioner, 168 votes were cast against the Petitioner, and 58 ballots were challenged. The challenged ballots were sufficient in number to affect the results of the election. Thereafter the Employer filed timely objections to the conduct of the election.

On 18 June 1981 the Regional Director issued a Report on Objections and Challenges in which he approved the Employer's request that Objections 4 and 7 be withdrawn, concluded that the Employer's Objections 1, 2, 3, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 raised substantial and material issues of fact which could best be resolved by a hearing, and ordered that a hearing be conducted for the purpose of resolving those objections and the 58 challenged ballots.

Prior to the hearing, the Petitioner requested that the Regional Director "notify the parties in advance [of the hearing] that in defending against the original challenges, the Employer will not be permitted to relitigate the scope of the unit. The unit consists solely of employees of Trailways, Inc. Hence, the sole question now is to whose payroll did these voters belong on the eligibility date." On 18 June 1981 the Regional Director referred the Petitioner's motion to the hearing officer for ruling, and on 19 June 1981 the Employer filed a response to that motion.

On various dates between 30 June and 3 September 1981, a hearing was held before Hearing Officer Larry D. Smith for the purpose of resolving

¹ The appropriate unit is:

INCLUDED: Employer's office clerical employees, mailroom employees, stockroom employees at the Employer's Jackson Street, Logan Street, Harry Hines, Commerce Street and Continental Avenue locations in Dallas, Texas.

EXCLUDED: Guards, watchmen, confidential employees, professional employees, technical employees, seasonal employees, sales representatives, VUSA representatives and supervisors as defined in the Act.

the issues raised by the challenged ballots and objections. All parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce relevant evidence, and to present oral arguments. On 18 March 1982 Hearing Officer Smith issued and served on the parties his report on Challenges and Objections.

On 15 April 1982 the Regional Director transferred the above-entitled matter to the Board for review pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations. Thereafter, the Employer filed exceptions to the hearing officer's report and a motion for leave to submit its brief to the hearing officer to the Board, and the Petitioner filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the hearing officer's report, the exceptions and briefs,² and the entire record in this proceeding, and adopts the findings,³

² The Employer mistakenly attached the Petitioner's brief to the hearing officer, instead of its own brief to the hearing officer, to its motion for leave to submit its brief to the hearing officer to the National Labor Relations Board. Upon being informed of its error by the Board's Office of the Executive Secretary, the Employer filed its brief to the hearing officer with the Board. We have considered all briefs submitted.

³ The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

In his report, the hearing officer relied on *Hollywood Ceramics Co.*, 140 NLRB 221 (1982), and *General Knit of California*, 239 NLRB 619 (1978), to support his recommendation that the Employer's objections, which allege that the Petitioner made material misrepresentations warranting setting aside the election are without merit.

In *Midland Life Insurance Co.*, 263 NLRB 127 (1982), the Board ruled that it will no longer probe into the truth or falsity of the parties' campaign statements, and that elections will no longer be set aside on the basis of misleading campaign statements. We rely on the latter standard in finding that these objections concerning alleged material misrepresentations are without merit.

The hearing officer also recommended that the Board find under *Formco, Inc.*, 233 NLRB 61 (1977), that Employer's Objection 15, alleging that the Petitioner abused Board processes and distributed to employees campaign material which misrepresented the findings of the Board, is without merit. In *Riveredge Hospital*, 264 NLRB 1094 (1982), the Board ruled that it will no longer treat allegations concerning misrepresentations of Board processes different from any other misrepresentation allegation, thus overruling *Formco Inc.*, supra. Applying *Riveredge Hospital*, we adopt the hearing officer's recommendation.

conclusions,⁴ and recommendations⁵ of the hearing officer, as modified below.

The Employer has excepted to the hearing officer's recommending that the challenges to the ballots of Robert Snyder, Jackman Gill, Larry Sewell, Grady Coble, and Marlin W. Byrd be sustained. We find merit to the Employer's exceptions for the reasons set forth below.

1. Marlin Byrd is a salaried employee earning \$1,352.58 per month⁶ Nupervised by Pete Kerrigan, director of administration, who also supervises three other unit personnel. Byrd's job duties entail pulling information from a machine known as the Trail-Net machine in order to determine the number of buses that are out of service, and assimilating that material into a report which is routed to the Employer's various regional directors.

In finding that Byrd lacks the requisite community of interest with the office clerical personnel, the hearing officer relied on the following factors: (1) he has his own office; (2) his pay level exceeds that of acknowledged unit personnel; (3) his job is functionally distinct from the type of work performed by unit personnel; (4) he has authorization to submit items he needs typed directly to secretaries; (5) he is exempt from the coverage of the Fair Labor Standards Act; and (6) he basically performs his work on his own without the benefit or necessity for daily instructions. In the circumstances of this case, we do not believe that these factors provide a sufficient basis for excluding Byrd from the unit.

⁴ We agree with the hearing officer's finding that Shirley Alford is a confidential employee because she assists and acts in a confidential capacity to Ted Burke, the Employer's director for region 5, who formulates and effectuates labor relations policies for the Employer. Our dissenting colleague would not exclude Alford from the unit because Burke does not exercise labor relations responsibilities for unit employees. We find that fact to be of no consequence. The potential for conflict remains. For example, labor policies that Burke formulates may be adopted by the entire company or used as a guide or bargaining tool by other divisions, departments, or districts, including the management official in charge of labor relations for the unit here in question. Further, Burke may receive confidential labor relations material or information concerning the unit that Alford would have access to solely because of her position. And it is conceivable that the Union in the future may seek to become, or may become, the representative of a unit of some or all of the employees for whom Burke is responsible. Contrary to Member Hunter's view, therefore, a sufficient nexus exists between the duties of Alford and the Employer's labor relations to render her a confidential employee, regardless of Burke's current lack of involvement with the unit. *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170 (1981).

⁵ In the absence of exceptions thereto, we adopt, pro forma, the hearing officer's recommendations with respect to Objections 1, 2, 3, 5, 6, 8, 9, 11, 12, 13, 14, 16, 17, and 18 and to the challenges to the ballots of Mildred Martin, Judy Fuller, Laverne Layton, Christine Grubbs, Catherine Cunningham, Gloria Danie, Vernell Bailey, Casandra Golden, Eva Clippenger, Debbie Harrill, Mona Fullerton, Frederick Price, Ken Millsap, William Mann, Richard Trice, Gene Stegal, Clark Whitehall, Terry Tunks, Jimmy Saunders, Palliehera Thomas, and Asha Shah.

⁶ Byrd is classified as a supervisor apparently because he used to have supervisory responsibilities. However, on 16 March 1981 those responsibilities were removed. There is no contention that Byrd is currently a supervisor.

We do not agree that Byrd's duties are nonclerical in nature. As the hearing officer found, the compilation of the report prepared by Byrd does not entail the use of independent judgment. Generating paperwork that does not require the use of independent judgment has generally been considered the domain of clericals. As for Byrd's pay level, it is comparable to that of certain unit employees including accountants; similarly there are unit employees who, as in the case of Byrd, are exempt from coverage under the Fair Labor Standards Act. Furthermore, unit employees such as accountants, senior accountants, and tax accountants, like Byrd, have duties, functions, responsibilities, and interests which are more extensive than the duties of traditional clericals.⁷ These unit employees also perform work on their own without daily instruction and are authorized to submit work directly to secretaries.⁸ In light of the foregoing, we find that Byrd has a sufficient community of interest with unit employees to be included in the unit. We therefore overrule the challenge to his ballot.

2. Robert Snyder holds the position of real estate assistant. The only evidence in the record detailing the duties of Snyder is the Employer's official position description for this position. The Employer's official summary of this position describes it as follows:

Maintains master blueprint files and other real estate related files and publications. Assists in office building and parking garage management and administration. Assists in facility design and plan drawing.

In addition, the Employer's position description itself sets out "major responsibility areas" which, as found by the hearing officer, indicate that Snyder is responsible for: receiving maintenance problem calls; referring the calls to the appropriate sources for corrective action; preparing monthly rental building statements; assisting in the "Trailways Sign Program"; furnishing real estate information to company officials; assisting the vice president, real estate, in property management in lease negotiation and property sales and acquisitions; and preparing plans and drawings for Trailways facilities.

Although some of Snyder's job functions may, as the hearing officer concluded, go "beyond those normally considered office clerical in nature," this is also true of other employees, such as account-

⁷ The inclusion of the accountants in the unit was not due to inadvertence. The issue of the accountants' status was raised during the hearing and the parties agreed that it was their intention that accountants be included in the unit.

⁸ The mere fact that Byrd has his own office is insufficient to warrant his exclusion from the unit.

ants, who are admittedly part of the unit. For example, two of the accountants testified that, using generally acceptable accounting principles, they prepared journal entries in the general ledger; do editing; analyze and explain variances in expense accounts; prepare financial statements; close books (a process which requires the accountant to reconcile and make necessary adjustments on all journal entries); and assist outside auditors by answering inquiries regarding various accounting matters. All these functions detail duties "beyond those normally considered office clerical in nature."⁹

Furthermore, notwithstanding that Snyder may perform duties that seem to be more than "office clerical in nature," it is apparent from the position summary and description for real estate assistant that he performs clerical tasks, such as maintaining various files and publications and receiving and referring telephone calls. In any event, that Snyder's duties may go beyond those normally assigned to office clerical employees is of little significance where, as here, the duties of a number of other employees, particularly the accountants, also go beyond those traditionally assigned to office clericals. That fact, together with his clerical duties, is sufficient to establish that Snyder shares a community of interest with other employees who are in the unit, and we so find.¹⁰

Accordingly, we shall include Robert Snyder in the unit and overrule the challenge to his ballot.

3. Grady Coble is classified as an equipment allocation supervisor. He is a salaried employee earning \$1,631.16 per month. He is supervised by Steve Galbreath who has three other employees reporting to him, two of whom may be 2(11) supervisors themselves; the third is a secretary. Coble prepares the pool turn sheets which chronologically list the scheduled arrivals and departments of business at particular locations. The information used to compile the pool turn sheets comes from schedule changes made by the Employer's traffic department. Based on this information Coble endeavors to construct pool turn sheets which allow for maximum use of equipment but with sufficient service time provided. After a pool turn sheet is completed

⁹ We also note that the record establishes that most of the accounts have college degrees in accounting, business, and related fields.

¹⁰ In so finding, we reject the hearing officer's alternative finding that Snyder is a maintenance employee and, therefore, on that ground, should be excluded from the unit. In making that finding, the hearing officer relied solely on what he describes as a concession in the Employer's brief which states in pertinent part:

During the election in this matter, the Petitioner challenged the following non-supervisory building maintenance personnel: (1) Sharon Bentley, (2) Doris Bowie . . . (9) Robert Snyder These employees . . . are engaged in typical maintenance duties at the employer's five Dallas facilities.

We find this "concession," standing alone, insufficient to warrant a finding that Snyder is a maintenance employee.

it is distributed to the Regional vice presidents, directors of maintenance, district managers, branch managers, transportation supervisors, and the Employer's garages.

Coble is also involved in obtaining licenses for the Employer's Texas vehicles from the title and license division of the Texas Highway Department in Dallas, and then sending check requests to cover the license fees to the Employer's accounts payable department.

The hearing officer found that Coble, although not cloaked with 2(11) authority, exercises independent judgment in the preparation of the pool turn sheets. Relying on the significance of pool turn sheets and that they are not reviewed by an acknowledged supervisor, the hearing officer found that the preparation of pool turn sheets constitutes the type of work product done by a "true representative of management" rather than a rank-and-file worker. Thus the hearing officer found Coble to be a managerial employee, citing the Board's decision in *General Dynamics Corp.*, 213 NLRB 851 (1974).

Contrary to the hearing officer, we find that Coble is not a managerial employee, and that the hearing officer's reliance on *General Dynamics Corp.* is misplaced. The Board long has defined managerial employees as those who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy. The Board specifically stated in *General Dynamics Corp.* that managerial status is not conferred on an employee simply because the employee's job functions may involve the exercise of judgment and discretion. While Coble obviously exercises discretion in preparing pool turn sheets, there is no evidence to indicate that he can deviate from the Employer's established policy or can establish new policy concerning the preparation of those sheets. Moreover, pool turn sheets do not appear to be a product requiring the exercise of managerial discretion, since Coble prepares them from information provided by the traffic department. As for Coble's involvement in licensing of vehicles, we fail to see how that activity is anything other than routine in nature. In these circumstances we find that Coble's job responsibilities do not establish managerial status for him.

As an alternative basis for excluding Coble from the unit, however, the hearing officer found that he lacks a community of interest with unit employees because: (1) Coble's salary exceeds that of acknowledged unit personnel; (2) is exempt from the coverage of the Fair Labor Standards Act; (3) he

performs a function distinct from unit personnel which restricts severely his interaction with unit employees; (4) the Employer's official job description imposes job requirements of "three years' prior experience in Operations" and an "Accounting background;" and (5) Coble is placed on the Employer's organizational chart in line with two acknowledged supervisors. We disagree.

Coble's pay level is comparable to accountants who are unit employees.¹¹ With respect to his being exempt from the coverage of the Fair Labor Standards Act, that, as previously noted, is also true of some unit employees. To the extent an accounting background is required for his position, that tends to show that he shares a community of interest with accountants in the unit. Further, his compiling and analyzing information is not so dissimilar or distinct from certain functions performed by unit employees, such as accountants,¹² as to warrant his exclusion from the petitioned-for unit. Nor is the job requirement of 3 years' experience in operation a reason to exclude him from the unit. We fail to see the relevance of such a requirement to the issue in question, absent a contention or evidence that all acknowledged unit positions are open to, or filled by, inexperienced personnel, or that unit positions require no skills or training of some kind. Finally, it is insignificant that Coble is placed on the Employer's organization chart in line with acknowledged supervisors because there is no contention that Coble is a supervisor.

Accordingly, we find that Coble has a sufficient community of interest with unit employees to warrant his inclusion in the unit. We therefore overrule the challenge to his ballot.

4. Gill and Sewell are classified as purchasing agents. They are exempt from the coverage of the Fair Labor Standards Act. Gill's salary is \$1,708.88 per month and Sewell's rate of pay is \$1,491.88. Both are supervised by Sarah Petzinger, manager of corporate purchasing. As part of their job responsibilities, purchasing agents receive a requisition order which has already been approved by Petzinger or Petzinger's superior, Karner, to purchase a particular item.¹³ Upon receiving the order, the purchasing agent secures bids from various vendors interested in supplying the particular item. After bids are received (a minimum of three), the purchasing agent makes a recommendation to his superiors as to which of the bids should be accepted, based on price and whether the vendor's

product meets the requisition's specifications. The final decision on which product to purchase is made by Petzinger or Karner. Thereafter the purchasing agent issues a purchase order in favor of the successful bidder and "follows through" on the order in the event the commodity does not arrive on time or is not in the correct quantity. Purchasing agents also search for new supply sources by checking with Petzinger, by reviewing the Yellow Pages, and by reviewing books maintained by the Employer that provide information on commodities. Finally, purchasing agents are expected to make visits (about once every two months) to vendors' premises in the Dallas area to evaluate their facilities and to determine if they have inventories to meet the Employer's needs.

The hearing officer found that the duties exercised by Gill and Sewell, especially their duties to search for new sources and to make recommendations as to which vendor management should use, require the exercise of independent judgment sufficient to meet the definition of a managerial employee set forth in the Board's decision in *General Dynamics Corp.*, supra. We disagree.

In determining which vendor to recommend, Gill and Sewell must follow a fixed procedure in that, on receipt of requisition orders, they have to solicit bids from at least three vendors and then make a recommendation after comparing the price and checking the product's conformity to the requisition's specifications. Although judgment is involved in making such a recommendation, it clearly is exercised within the certain set parameters and pursuant to established guidelines. Furthermore, the decision as to which vendor to use is made by Gill's and Sewell's superiors after independent review. In these circumstances we find that Gill and Sewell do not possess sufficient discretion or authority to qualify as managerial employees. Consequently, the challenges to their ballots cannot be sustained on managerial grounds.

Alternatively, however, the hearing officer found that Gill and Sewell lack a community of interest with unit employees because they are exempt from coverage of the Fair Labor Standards Act; their salary generally exceeds that of acknowledged unit personnel; they do not perform typical office clerical work; they possess qualifications and experience not required for most office clerical positions; they are in a position which provides a vehicle to management positions; and they are allowed to leave their work station unaccompanied and to make visits to vendors on behalf of the Employer. Again, we disagree.

With respect to pay, Sewell's salary is lower than several unit employees and Gill's salary is

¹¹ Senior accountants receive slightly more than Coble. Some other accountants receive slightly less.

¹² Thus accountants compile and analyze information in carrying out their duties.

¹³ Purchasing agents do not make purchases without prior approval.

only approximately \$60 per month higher than several accountants. We have already noted that some unit employees are exempt from the coverage of the Fair Labor Standards Act. Further, Gill's and Sewell's job duties, while somewhat different from the duties of most unit employees, are not so dissimilar to those of employees in the unit as to require their exclusion from the unit. As to whether they possess qualifications not required for most clerical employees, the hearing officer does not list the qualifications on which he is relying. In any event, we do not perceive any qualification or experience possessed by either Gill or Sewell which is so unique as to justify a finding that they do not possess a community of interest with unit employees. Also, that they are in a position to be promoted to a management position is not particularly significant since that is true of a number of unit employees. Finally, their limited absences from the Employer's premises do not significantly detract from their community of interest with other employees who are in the unit.

Accordingly, we find that Sewell and Gill have a community of interest with unit employees and, therefore, we overrule the challenges to their ballots.

DIRECTION

It is hereby directed that, as part of the investigation to ascertain a representative for the purpose of collective bargaining with the Employer, the Regional Director for Region 16 shall, pursuant to the Board's Rules and Regulations, within 10 days from the date of this Decision and Direction, open and count the ballots cast by Howard Hooper, Everett Osterhold, Linda Williams, O. M. Klein, Gaynell Toney, Patrick McKenna, Mildred Martin, Judy Fuller, Laverne Layton, Robert Snyder, Mary Bourland, Christine Grubbs, Catherine Cunningham, Gloria Daniel, Bobby Harkless, Vernell Bailey, Katherine Wright, Casandra Golden, Eva Clippenger, Debbie Harrill, Mona Fullerton, Frederick Price, Jackman Gill, Larry Sewell, Grady Coble, and Marlin W. Byrd, and thereafter cause to be served on the parties a revised tally of the ballots including therein the count of the above-mentioned ballots. Thereafter, the Regional Director shall issue the appropriate certification in accordance with the Board's Rules and Regulations.

MEMBER HUNTER, dissenting in part.

Contrary to my colleagues I would overrule the Union's challenge to the ballot of Shirley Alford. I do not agree that Alford is a confidential employee who should be excluded from the unit.

I note that Alford is secretary to Ted Burke, and Employer's regional director for its Region 5. While Burke is involved in grievance proceedings and assists in the negotiation of collective-bargaining contracts, his involvement in labor relations is limited to the Employer's bus operators and terminal employees, none of whom are encompassed in the petitioned-for unit. Burke is not involved in the formulation of labor policy for the unit involved here. Alford as secretary to Burke types, inter alia, Burke's responses to grievances and management proposals in negotiations for the nonunit employees mentioned above. The Employer argues that, since Alford's duties have no connection with the petitioned-for unit, she is not a confidential employee and, accordingly, she may properly be included in the unit. I agree. In so doing, I note that the Board has never held that *all* employees who have access to confidential business matters should be excluded from a unit. Rather, the Board does so only when there is a sufficient nexus between the duties of the employee in question and the Employer's labor relations. *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170 (1981). In the instant case, since Alford has no access to sensitive labor relations material for the petitioned-for unit, I find no useful purpose to be served by depriving her of the protections of the Act. The case relied on by the hearing officer as a basis for excluding Alford clearly is inapposite. Thus, in *Reymond Baking Co.*, 249 NLRB 1100 (1980), the employee found to be a confidential employee, Gail Albert, was employed as a receptionists/typists/floater. In this position she had typed labor relations material for the employer's vice president and plant manager concerning two of its employees not in the petitioned-for unit. While there was some evidence that the Employer's office manager and controller also could type and had typed labor relations material, Albert was the employer's *only* typist. A fortiori, the employer would have been severely constrained had its sole typist been included in the unit. In the instant case, the Employer would be under no such constraints since it employs many typists and there is no evidence that Burke will be responsible for the petitioned-for unit's labor relations which currently are handled by the human resources department. My colleagues speculate that Burke may in the future be involved in the formulation of labor policy for the unit or that the Union could conceivably in the future represent a unit for which Burke formulates labor policy. I find such speculation inappropriate and an unreasonable basis on which to exclude Alford from this unit now. Accordingly, contrary to my colleagues, I would include Alford in the unit.