

**M. C. Decorating, Inc. and Teamsters Union Local No. 115 a/w International Brotherhood of Teamsters, AFL-CIO,<sup>1</sup> Petitioner.** Case 4-RC-17632

March 24, 1992

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered determinative challenges and objections to an election held July 12, 1991,<sup>2</sup> 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 15 for and 11 against the Petitioner, with 4 challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs and has decided to adopt the hearing officer's findings and recommendations and to sustain the challenges to the ballots of Diana DeLeon and Robert Silvert as amplified below. Since the challenged ballots of Washington Gueho and Lorenzo Yumul are no longer determinative,<sup>3</sup> we find that a certification of representative should be issued. In view of our decision, we need not consider the Petitioner's objections to the conduct of the election.

(1) The Petitioner challenged Diana DeLeon's ballot on the ground that she is the Employer's personnel manager and is a confidential employee or a supervisor. The Employer argues that she is a dual-function employee whose ballot should be counted. The hearing officer found that DeLeon is not a statutory supervisor or a confidential employee. He also found, however, that DeLeon is not a dual-function employee because she had ceased regular work in the unit before May 31, 1991, the payroll eligibility date, and was thereafter employed as a clerical employee, a classification that is specifically excluded from the unit.<sup>4</sup> He recommended that the challenge to DeLeon's ballot be sustained.

The Employer excepts to the hearing officer's finding that DeLeon was not a dual-function employee.

<sup>1</sup> The name of the Petitioner has been changed to reflect the new official name of the International Union.

<sup>2</sup> All dates herein are in 1991 unless otherwise indicated.

<sup>3</sup> In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation to overrule the challenge to Gueho's ballot. In view of our decision, however, his vote is no longer determinative and we do not order that his vote be counted. We need not resolve the challenge to Yumul's ballot because it is no longer determinative. Member Raudabaugh finds it unnecessary to pass on the challenge to the ballot cast by Silvert because it is no longer determinative.

<sup>4</sup> The unit consists of all regular, full-time production, and maintenance employees, excluding, among others, "clerical employees."

For the following reasons, we adopt the hearing officer's recommendation and sustain the challenge to DeLeon's ballot.

The Employer hired DeLeon in May 1988 as a packer in its factory, a unit job. Within a few months, it assigned her to part-time duties as the office receptionist. Gradually, her office duties increased until by April 1991 she was spending about 40 percent of her time on office clerical work and 60 percent in the factory. In late April, a month before the payroll eligibility date, one of two full-time office-clerical employees resigned and, rather than hire an outside replacement, the Employer assigned DeLeon to full-time clerical duties in the office.

The Employer contends that, notwithstanding DeLeon's reassignment to a full-time office clerical position, she continued to maintain a sufficient community of interest with the unit employees to warrant a finding that she is a dual-function employee and is eligible to vote in the election. The Employer relies primarily on (1) its requirement that DeLeon perform unit work during production line emergencies, and (2) DeLeon's temporary job on the second shift in the factory during the summer of 1991, following the payroll May 31, 1991 eligibility date. We find the Employer's reliance on these factors to be misplaced.

As to the first factor, the question is whether DeLeon was "regularly employed for sufficient periods of time to demonstrate that [she] ha[d] a substantial interest in the unit's wages, hours, and conditions of employment." *Oxford Chemicals*, 286 NLRB 187 (1987). In our view, the evidence is insufficient to show that DeLeon's emergency work in the unit was any more than de minimis. The record contains some general testimony that after DeLeon began full-time office clerical work, the Employer required her to perform unit work during emergencies on the production line. The record is devoid of evidence, however, specifying the number, frequency, and duration of DeLeon's emergency stints in the factory and the percentage of her worktime they represent. We know from the testimony of Controller Samuel Pollack that DeLeon received her regular office clerical wage when she performed emergency work on the production line, rather than the lower factory wage, and that management and supervisory employees similarly worked on the factory floor during emergencies. In view of these facts which militate against finding that DeLeon had a community of interest with the unit employees, and in the absence of more specific evidence about DeLeon's post-April assignments to unit work, we find that there is insufficient evidence in the record for us to conclude that DeLeon is a dual-function employee.

We also do not agree with the Employer's contention that DeLeon was a dual-function employee by virtue of her summer job on the second shift in the fac-

tory. DeLeon testified that, unable to find a second job elsewhere, she took advantage of her child's summer visit with relatives to work an additional shift. From June to late August, DeLeon worked on the Employer's production line each day, after she had completed her regular, full-time clerical job in the office. Thus, she held this job on a short-term, limited basis from the outset and, insofar as the record shows, she performed this additional work only for one summer, after the payroll eligibility date. We conclude that DeLeon was a temporary employee as to the second-shift job and, accordingly, is excluded from the unit.

(2) The Petitioner challenged Robert Silvert's ballot on the ground that he is the brother-in-law of the Employer's part-owner and president, Joe Majowicz. The Petitioner argued that Silvert's family relationship affords him a special status and thus that he lacks a community of interest with the employees in the unit. The hearing officer found, and we agree, that the challenge to Silvert's ballot should be sustained.<sup>5</sup>

A relative of an employer's owner may be an employee and nonetheless be excluded from the unit if he enjoys special benefits as a result of that relationship or if his special status aligns his interests more closely with management than with unit employees. *NLRB v. Action Automotive*, 469 U.S. 490 (1985).

Silvert's working conditions differed from those of the unit employees in several significant respects. Prior

<sup>5</sup>We do not rely on the hearing officer's finding that Silvert had the ability to leave and return to employment status without difficulty.

to the filing of the petition, Silvert recorded his work hours for payroll purposes and submitted his accounting directly to Majowicz. He was not required to clock in and out at starting and quitting time and before and after lunch.<sup>6</sup> He unilaterally determined when he would work overtime. No other employee had these privileges.

We find that Silvert's family relationship with Majowicz afforded him certain privileges not shared by other employees in the unit. By virtue of his special status, Silvert does not share a sufficient community of interest with the unit employees. Accordingly, we sustain the challenge to his ballot.

#### CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Teamsters Union Local No. 115 a/w International Brotherhood of Teamsters, AFL-CIO, and that it is the exclusive representative of the employees in the following appropriate unit:

All regular full-time production and maintenance employees employed by the Employer at its Cape May County Airport, Rio Grande, New Jersey facility, excluding all other employees, including clerical employees, guards, and supervisors as defined in the Act.

<sup>6</sup>See *Wilkes-Barre Wholesale*, 246 NLRB 491, 497 (1979). After the petition was filed, the Employer began requiring Silvert to clock in and out at starting and quitting time. It did not require him to clock in and out at lunchtime.