

New World Communications of Kansas City d/b/a WDAF Fox 4 and American Federation of Television and Radio Artists (AFTRA), AFL-CIO, Petitioner. Case 17-RC-11675

April 7, 1999

DECISION AND DIRECTION

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

The National Labor Relations Board, by a three-member panel, has considered the determinative challenge in an election held January 7, 1999, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Decision and Direction of Election issued by the Regional Director for Region 17 on November 16, 1998.¹ The tally of ballots shows 15 for and 15 against the Petitioner, with 1 challenged ballot.

The Board has reviewed the record and the attached hearing officer's report (pertinent portions are attached as an appendix) in light of the exceptions and briefs and adopts the hearing officer's findings, and recommendation for the reasons set forth below.

At issue is the eligibility status of Amanda Jahn whom the Employer has challenged as a temporary employee. "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.) *Pen Mar Packaging Corp.*, 261 NLRB 874 (1982). In adopting the hearing officer's recommendation that temporary employee Amanda Jahn is an eligible voter, we have considered Jahn's employment status as of November 13, 1998,² the payroll period eligibility date. The Board finds temporary employees eligible to vote if their tenure of employment remains uncertain on the eligibility date. *St. Thomas-St. John Cable TV*, 309 NLRB 712 (1992). The Employer contends that on the November 13 eligibility date, Jahn had a "date certain" of about December 11 as the end of her employment, and that Jahn, therefore, was ineligible to vote. We disagree.

The Employer's then assistant news director, Henry Chu Jr., hired Jahn on August 28 for a temporary sports department position. Chu advised Jahn that the Employer needed her to work for 2 months, until about October 30. At the time, the Employer was seeking to fill a full-time sports reporter position and a full-time news reporter position. Chu told Jahn that she would be

considered for the two full-time positions then available. During her employment interview, Jahn inquired what would happen to her after a sports reporter was hired. Chu answered that he did not know, and they discussed the possibility that she could be hired for the news position.

During her first 2 months of employment, Chu conducted critique sessions in which he discussed Jahn's strengths and weaknesses. In early October, Chu decided to hire Ann Carroll to fill the full-time sports position, and learned that Carroll could not begin the job until about December 11. Chu asked Jahn if she would continue working until Carroll arrived, and Jahn agreed. Jahn also knew she was being considered for the open full-time news position. When a part-time news position became available in early November, Jahn discussed that job with Chu and learned that she also was being considered for that position. Jahn preferred the full-time position. Chu told her the Employer had a good record of hiring full-time people from its part-time staff.

Quoting the above-cited *Pen Mar Packaging* rule regarding the eligibility of temporary employees, the Board has stated that, "the critical inquiry on [the eligibility payroll] date is whether the 'temporary' employee's tenure of employment remains uncertain. If so, the employee is eligible to vote." *St. Thomas-St. John Cable TV*, supra at 713 (footnote omitted). For the following reasons, we find that Jahn's tenure status was uncertain on November 13.

As of November 13 the Employer had already extended Jahn's initial tenure of employment. In early October, Chu asked if she would stay until December 11. This was the second "date certain" she was given for termination. At the same time, the Employer clearly communicated to Jahn that she was being considered for available permanent positions, and worked with her to refine her skills. Given that the Employer demonstrated its termination dates were not immutable; that, from the inception of her employment and continuing to the eligibility date, it considered Jahn for various permanent positions; that it sought to allay Jahn's fears regarding the termination of her employment and encouraged her to believe that she might obtain permanent employment at the station; and that it worked with her to hone her performance, we find Jahn did not have a "date certain" for the termination of her employment on November 13. Compare *Pen Mar Packaging Corp.*, 261 NLRB 874 (1982) (at eligibility date, there had been no change in employee's employment status or expectations). Accordingly, we agree with the hearing officer that Jahn was eligible to vote, and we overrule the challenge to her ballot.

DIRECTION

It is directed that this case be remanded to the Regional Director for Region 17. Within 14 days from

¹ The appropriate unit is: "All full-time and regular part-time on-air personnel including anchors, anchor/reporters, and reporters employed by the Employer at its facility located at 3030 Summit Street, Kansas City, Missouri, but excluding photographers/photographer-editors, office clerical employees, guards and supervisors as defined in the Act, and all other employees."

² All subsequent dates refer to 1998 unless specified otherwise.

the date of this Decision and Direction, the Regional Director shall open and count the ballot of Amanda Jahn and shall thereafter prepare and serve on the parties a revised tally of ballots, on which basis he shall issue the appropriate certification.

MEMBER BRAME, dissenting.

Contrary to my colleagues, I would reverse the hearing officer and sustain the challenge to Amanda Jahn's ballot because as of the election eligibility date of November 13, 1998,¹ she was a temporary employee who had a fixed termination date and thus was ineligible to vote.

Jahn was hired in August for a temporary position in the sports department. She was told she would be employed until about October 30. The Employer also told her that she would be considered for two full-time positions as a sports or a news reporter. But the Employer continued to interview applicants for both these positions and hired a full-time sports reporter in early October. That individual was to begin work on December 11 and the Employer, in October, asked Jahn if she could stay on until that individual's arrival. Jahn agreed. Thus, on the election eligibility date of November 13, Jahn had a definite termination date of December 11. The fact that after the eligibility date the Employer decided to extend her employment beyond December 11 is irrelevant since it is the employee's status as of the eligibility date that controls. *Belcher Towing Co.*, 122 NLRB 1019 (1959). Also, the fact that Jahn was treated as an applicant for certain open positions does not change her status. Rather, she was specifically hired to fill a temporary role with a fixed termination date while the Employer considered a host of applicants for the same open positions Jahn sought. Indeed, by the time of the eligibility date, she had lost out on one of those full-time positions and simply remaining an applicant for the other full-time position or a possible part-time position did not change her status from that of a temporary employee. It is speculative in these circumstances to conclude otherwise. Accordingly, I would find Jahn was a temporary employee with a fixed termination date on the eligibility date and sustain the challenge to her ballot.

APPENDIX

HEARING OFFICERS REPORT ON CHALLENGED BALLOT WITH FINDINGS AND RECOMMENDATION

Following the filing of the petition on October 9, 1998, and pursuant to a Decision and Direction of Election issued by the Regional Director on November 16, 1998, an election by secret ballot was conducted on January 7, 1999, among the employees in the appropriate collective-bargaining unit.¹ The tally of

¹ All dates are in 1998.

¹ The appropriate unit is: All full-time and regular part-time on-air personnel including anchors, anchor/reporters, and reporters employed by the Employer at its facility located at 3030 Summit Street, Kansas City, Missouri, but EXCLUDING photographers/photographer-editors, office clerical employees, guards and supervisors as defined in the Act,

ballots, copies of which were made available to the parties at the conclusion of the election, shows that there were approximately 33 eligible voters, 15 of whom cast ballots for and 15 of whom cast ballots against representation. One ballot was challenged and was determinative of the outcome of the election.

On January 20, 1999, the Regional Director issued an Order Directing Hearing on Challenged Ballot and Notice of Hearing. In accordance with that order, and Section 102.69 of the Board's Rules and Regulations, series 8, as amended, the hearing officer designated for the purposes of conducting such hearing was directed to prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, findings of facts, and recommendations to the Board as to the resolution of said challenged ballot.

Pursuant to the notice of hearing duly served on the parties, a hearing was conducted by me on February 5, 1999, at Overland Park, Kansas. The Employer and Petitioner appeared by counsel and both participated in the hearing. The parties were afforded a full opportunity to be heard, to call and examine witnesses, cross-examine witnesses called by the opposing party, and introduce other evidence relevant to the issues. All the evidence adduced and contentions advanced have been considered by me. The findings of fact and credibility resolutions contained here are based on my observations of the testimony and demeanor of witnesses. Accordingly, any failure to detail all conflicts and evidence does not mean that such conflicting evidence was not considered.²

The ballot of Amanda Jahn³ was challenged by the Employer. The reason for the challenge to the ballot of Jahn is that she is a temporary employee.

Background

On December 21, 1998, the Regional Director issued a complaint and notice of hearing in Case 17-CA-19932, contending that the Employer has interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act. On January 14, 1999, the Petitioner filed timely objections to the conduct of election which parallel the aforementioned unfair labor practice allegations. In the interest of expediency and since resolution of the challenged ballot may resolve the pending question concerning representation, the Regional Director determined it appropriate to bifurcate the challenged ballot from the election objections. If a determination of the eligibility of the challenged ballot does not render the Petitioner's objections moot, the Petitioner's objections will be consolidated with the outstanding complaint in Case 17-CA-19932 and placed before an administrative law judge for determination.

Facts

The Employer presented two witnesses, Henry Chu Jr., former assistant news director, and Stanley Claude Knott, vice president and general manager. The Petitioner declined to present any witnesses. Thus, the testimony of both Chu and Knott was un rebutted and their testimony is fully credited here.

and all other employees. The payroll period ending date for eligibility to vote in the election was November 13, 1998.

² *Walkers*, 159 NLRB 1159 (1966).

³ Evidence was presented that Amanda Jahn is also known as Amanda Jahn Rutkowski.

Chu, who left the Employer's employ at the end of 1998, testified that around the end of August 1998, Jahn had contacted him concerning employment and subsequently was hired on August 26, 1998, for a temporary position in the sports department. Employer's Exhibit 2 showed that she began her employment on September 3, 1998, in that capacity. At the time Jahn was hired, the Employer had positions available for a full-time sports reporter and a full-time news reporter. Chu testified that while the Employer was reviewing applications and considering applicants for the available reporter positions, the Employer was seeking to hire a person on a temporary basis to help in the sports department for a period of August 31 to October 30, 1998.

Chu testified that when he hired Jahn he informed her that the Employer was still looking for a sports reporter and that she would be employed for approximately 2 months. In response to a question on direct examination as to whether he told her she would be employed until October 30, 1998, Chu responded that he was assuming so. Chu stated he discussed both the sports reporter and news reporter position with Jahn and that she was most interested in the news reporter position. Chu stated that he informed Jahn that she would be considered for those positions.

On cross-examination Chu testified that when he hired Jahn, she asked several times about what would happen to her (employment) if a sports reporter was hired and that in response to those questions he told her he did not know. (Tr. 25.) Chu testified that Jahn asked about the possibility that she could be hired for the full-time news reporter position and that he told her yes, that there was always that possibility. (Tr. 25-30.) Chu testified that Jahn's primary interest was working on a full-time basis, preferably as a reporter, but she also expressed interest in the part-time weekend freelance position if it did not come about that she was hired for a full-time position. Chu did not recall whether he had a specific discussion with Jan about part-time versus full-time employment. (Tr. 25-26.)

Chu stated that he was proud of the fact the Employer had a good record of promoting from within and advancing part-time employees to full-time positions. (Tr. 32.) On redirect Chu testified that Jahn has a slightly greater chance of being hired for open positions over other applicants with equal strengths. (Tr. 34.)

Chu testified that after Jahn was hired the Employer continued to interview applicants for the full-time sports reporter position. On October 2, 1998, he submitted paperwork for the hiring of Ann Carroll in the position of full-time sports reporter. On November 16, 1998, Ann Carroll executed an employment agreement to provide professional and artistic services primarily as a staff sports reporter/anchor to commence on December 11, 1998.

Chu stated that subsequent to hiring Carroll he had conversations with Jahn concerning her employment status. He stated that during one conversation he informed Jahn that Carroll had been hired. He testified sometime in early October 1998, during one of the conversations he had with Jahn, he asked Jahn if she could continue working until the arrival of Carroll on December 11, 1998, or thereabouts and that Jahn agreed to continue working until that time. (Tr. 19-20.) Chu stated that he had another conversation with Jahn around Thanksgiving 1998, after the Employer made a commitment on November 16, 1998, to hire Sherrey Deanne Roberts for a full-time reporter position to commence employment on December

21, 1998. Chu testified that Jahn was concerned about her future at the station and he informed her that he could keep her busy until the end of the year. Both Chu and Knott testified that Jahn was told she could continue working until the end of 1998 because Roberts would not be reporting for work until December 21, 1998, and because the Employer would be shorthanded during the holidays. Knott testified that Jahn continues to be employed by the Employer in the same temporary position and no decision has been made as to when her employment will end.

Chu stated that during the first 2 months of Jahn's employment, he had some critique sessions with her concerning her work where they discussed her strong and weak points. He stated that she was doing traditional sports reporting and it was not satisfactory, so he discussed with her having her do more human interest, profile-type sports pieces with an eye toward improving what she was doing on the air. In addition, Chu testified that during the first 3 months of Jahn's employment he estimated that on 3 days she performed work as a news reporter. (Tr. 27.) When asked on cross-examination if there was a possibility that Jahn might become a news reporter for the Employer at some point in the future, Chu responded that there is always that possibility and that the door is always open. (Tr. 28.)

Employer's Exhibits 7 and 8 were received into the record. Knott testified that exhibit 7 is a list of employees and their employment status as of November 15, 1998. Jahn is shown in exhibit 7 as a new hire. Knott testified that on both exhibits Jahn's employment status is shown with a number 1, which indicates that she is a full-time temporary employee. (Tr. 39-40.) Employer exhibit 8 shows that as of January 12, 1999, Jahn remained as a full-time temporary employee. Knott testified that temporary employees do not enjoy the same benefits as regular employees, including vacation, medical benefits, sick days, life insurance, 401(k) plan, and pension benefits. In contrast, regular full-time employees as well as part-time employees who work in excess of 17 hours a week are provided with the Employer's benefit package. Jahn does not receive the Employer's benefit package.

Received into the record were three exhibits, dated September 11 and November 10, 1998, and January 12, 1999, each of which is entitled Fox Opportunities. The exhibits list open positions for which the Employer is seeking applicants. The September 11, 1998 listing showed openings for one regular full-time sports reporter and one regular full-time reporter, among other openings. The November 10, 1998 listing showed, among others, positions for regular full-time special projects reporter, regular full-time reporter, and part-time per diem reporter. The January 12, 1999 listing had openings for two regular full-time special projects reporters and a part-time per diem reporter, among others. Knott testified that the position of part-time reporter, vacated by former employee Randy Eilts around early November 1998, remains open.

Conclusion and Recommendations

Based on the testimony of the Employer's witnesses, Amanda Jahn began her employment as a temporary employee with the Employer on September 3, 1998, and has continued to be employed thereafter. As of the date of the hearing her employment status remained as temporary, but the date on which her employment is scheduled to end has not yet been determined. During the period of her employment she was informed initially that her employment would end on or about

October 30, 1998. Before October 30, 1998, she was informed that her employment would continue until on or about December 11, 1998, and in late November 1998 her employment was extended to sometime the end of 1998. Throughout her period of employment, according to Chu, there remained the possibility of hiring Jahn for a regular full-time or a regular part-time position. In addition, throughout her employment she inquired of Chu as to whether she was being considered for regular employment and she was informed that she was. Chu stated that her application continued to be on file and she was considered for open positions for which she would be qualified. Thus, as of November 13, 1998, the payroll period eligibility date, Jahn was employed and had been given a date when her employment would cease. However, that date was extended twice thereafter; and since the end of December 1998 her employment has been extended indefinitely.

The Petitioner argues that the proper analysis includes not only Jahn's status as of the date she was employed and the eligibility date, but also whether or not a definite termination date has been set. It argues that prior to the eligibility date the Employer had indicated to Jahn that she would be considered for permanent positions as they came available. Further, the Petitioner contends that the evidence demonstrates that Jahn was not hired exclusively for the temporary position of sports reporter, but that she also has been assigned to perform news reporter work, which infers she was being groomed to take over a position in the news department. From this the Petitioner argues that Jahn was treated as a permanent employee. Further, the Petitioner argues that the Employer had on more than one occasion changed her date for termination of employment and that this belies the "date certain" test in *St. Thomas-St. John Cable TV*, 309 NLRB 712 (1992).

The Employer premises its argument on *Trustees of the Stevens Institute of Technology*, 222 NLRB 16 (1976). Jahn was hired as a temporary employee and as of the payroll period ending date of November 13, 1998, for eligibility to vote, she had a date certain of December 11, 1998, on which her employment was to terminate. Thus, as a temporary employee with a date certain as to when her employment would cease she would not be eligible to vote. Although the Employer contends that the essential fact is that as of the eligibility date Jahn had a date certain when her employment was to cease, even after November 13, 1998, she had been given another date certain of the end of 1998 when her employment would terminate. The Employer argues that the test is what Jahn's status was as of the eligibility date and as of that date she was a temporary employee with a set date for termination of her employment. The Employer argues that the Board has not envisioned an employer having the right to alter an employee's status after an established eligibility date for an election in order to make an ineligible employee eligible.

In *St. Thomas-St. John Cable TV*, supra, the Board found an employee who was hired as a temporary employee was ineligible to vote. The Board noted that the "critical inquiry . . . is whether the 'temporary' employee's tenure of employment remains uncertain. If so, the employee is eligible to vote." Citing *Pen Mar Packaging Corp.*, 261 NLRB 875 (1982), the Board said "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." In *Pen Mar*, supra, the Board found no evidence to indicate a change

in employment status between the employee's date of hire and the eligibility date. The employee had been hired as a temporary employee but had continued working beyond the period for which he had been initially hired.

In *Trustees of the Stevens Institute*, supra, a visiting instructor who had been appointed for a specified period of time to replace a professor who was on sabbatical leave for a year was found to be a temporary employee for a specified duration on the eligibility date and on the date of the election.

In *Ameritech Communications*, 297 NLRB 654 (1990), employees hired temporarily to work on projects of set duration were found to be eligible to vote. They were employed on the payroll eligibility date and on the date of the election and because the project completion dates were subject to change due to construction delays, it was concluded that the employees' employment was of an indefinite duration.

In *Personal Products Corp.*, 114 NLRB 959 (1955), a part-time, temporary electrician was found to be eligible to vote. Although he had been hired on a temporary basis to fill a vacancy until a full-time replacement could be hired, the Board concluded that he was employed on the payroll eligibility date and on the day of the election and was employed for an indefinite period.

In *Orchard Industries*, 118 NLRB 798 (1957), employees who were hired on a temporary basis but were retained beyond the original term of their employment were found to be properly included in a bargaining unit because the term of their employment had become indefinite.

While the fact that Jahn was being considered for other positions is not, standing alone, sufficient to find that she was not a temporary employee or that her temporary status was not for a finite period, it does appear to be a factor to be considered in context with the other facts surrounding Jahn's employment. Jahn was given several finite dates as to when her employment would cease, yet Chu also testified that Jahn had inquired several times as to what would happen to her after the sports reporter was hired and that he had responded that he did not know. This appears to establish that there was some uncertainty as to whether Jahn's employment status was indefinite. The facts further demonstrate that Jahn's employment remained in a state of flux. The testimony of the Employer's witnesses revealed that Jahn had been given three different dates for the termination of her employment, yet she continued to be employed on the date of the election. Further, the testimony of Knott revealed that subsequent to the end of December 1998 Jahn has not been given any date certain as to when, or whether, her employment will end. No evidence was presented as to why Jahn has continued to be employed beyond December 1998.

The facts in *St. Thomas-St. John Cable TV*, supra, appear to be distinguishable. In *St. Thomas-St. John Cable TV* there was no evidence that the employee in question had ever been promised or told she was being considered for permanent employment. In the instant matter Chu testified that Jahn had been and would be considered for openings. In *St. Thomas-St. John Cable TV* the employee's employment was finite in that she had been informed she would continue working until the completion of a specific project. Jahn's employment status, however, was repeatedly extended beyond the initial scope of the terms of her employment.

Contrary to the facts in *Pen Mar*, Jahn was given mixed signals concerning her employment status. She was given

projected dates when her employment would end while at the same time being told she was being considered for other positions and that Chu did not know what exactly would happen to her employment. The facts further affirm that there was uncertainty as to the term of her employment. The Employer continued to employ Jahn beyond each projected termination date and on the day of the election, well past the third termination date. Further, at the time of the hearing Jahn continued to be employed with no certain date of termination.

This further reinforces the fact that Jahn's employment was for an indefinite period. In the absence of evidence that as of the eligibility date and the date of the election Jahn's employment was for a specific finite period, it appears that she would be eligible to vote in the election.

Based on the foregoing, I recommend that the ballot of Amanda Jahn be overruled and her ballot be opened and counted.