

**J.K. Pulley Co. and Ancel Products and International Association of Machinists & Aerospace Workers, AFL-CIO.** Case 14-RC-12367

May 5, 2003

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held on July 26, 2002, 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 14 for and 12 against the Petitioner, with 2 challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings<sup>1</sup> and recommendations only to the extent consistent with this decision, and finds that a certification of representative should be issued.<sup>2</sup>

The Petitioner challenged the ballot of Robert Soehngen, a high school student who worked for the Employer<sup>3</sup> during the summer of 2002.<sup>4</sup> The hearing officer concluded that Soehngen was a temporary summer employee who was not eligible to vote and recommended that the challenge be sustained. The Employer has excepted to the hearing officer's recommendation and contends that Soehngen was a regular part-time employee whose ballot should be counted. For reasons discussed below, we agree with the hearing officer that Soehngen was ineligible to vote.

The evidence shows that Soehngen, who is the nephew of J.K. Pulley President Brian Koch, asked Koch for a job during a family gathering in the spring of 2002. Soehngen was a high school sophomore at the time, and asked about the job after his mother suggested that he find work for the summer. Koch told Soehngen that he would hire him once the school year ended. Soehngen did not speak with Koch about the job again until several days after the end of the school year, when he phoned

Koch about employment on June 9. The record does not detail what was said between Koch and Soehngen in that phone conversation. He started work the next day, 4 days prior to the filing of the representation petition.

There is no evidence that Koch and Soehngen discussed the possibility of Soehngen's employment continuing through the upcoming school year until July 25, the day before the election. At that time Soehngen told Koch that he was considering leaving his job because he wanted some time off before school started again. In response, Koch asked Soehngen if he would continue to work until the school year started and also if he would be willing to work during the school year on his days off and after school. Soehngen agreed to continue working for the rest of the summer, and told Koch he would also like to work during the school year. However, Soehngen was laid off on August 8 due to a lack of available work. He had not been recalled to work at the time of the hearing.

To be eligible to vote in a Board election, an employee must be in the appropriate unit on both the established eligibility date and the date of the election. *Martin Enterprises*, 325 NLRB 714 (1998); *Plymouth Towing Co.*, 178 NLRB 651 (1969).<sup>5</sup> Where a student is hired for the summer vacation and will terminate employment at the beginning of the school year, the student is a temporary employee and not included in the unit. See *Georgia-Pacific Corp.*, 195 NLRB 258, 259 (1972); *Crest Wine & Spirits*, 168 NLRB 754 (1967); see also *Davis Supermarkets*, 306 NLRB 426, 428 (1992).

Applying these cases, we conclude that Soehngen was a temporary employee—and therefore not included in the unit—on the eligibility date.<sup>6</sup> The evidence shows that Soehngen, a high school sophomore, did not begin working until June 10, after the school year had ended and 4 days before the petition was filed. There is no evidence that, at the time he was hired, Soehngen's employment was to continue into the next school year, or even that this prospect was considered or discussed. Instead, the only record evidence that Koch and Soehngen discussed the possibility of Soehngen's employment continuing through the upcoming school year occurred on July 25, the day before the election and approximately a month after the eligibility date. Because Soehngen was a temporary employee who was not in the unit on the eligibil-

<sup>1</sup> 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.

<sup>2</sup> In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the challenge to the ballot of Randy Sneed. Additionally, we agree with the hearing officer that Sneed's ballot is not determinative, and it is therefore not necessary to count it.

<sup>3</sup> J.K. Pulley Co. and Ancel Products are named as a single employer in the representation petition.

<sup>4</sup> All dates hereafter are in 2002 unless otherwise noted.

<sup>5</sup> That Soehngen was laid off after the election is not relevant to our analysis. See *Dakota Fire Protection, Inc.* 337 NLRB 92 (2001).

<sup>6</sup> The record indicates that the payroll period for eligibility is the period ending June 16, 2002.

ity date, he was ineligible to vote in the election.<sup>7</sup> We therefore sustain the challenge to his ballot.

The hearing officer also recommended sustaining the challenge to Soehngen's ballot because Soehngen's status as Koch's nephew precluded him from sharing a community of interest with other employees. The Employer has excepted to this recommendation because the issue was not before the hearing officer, and because the Employer was denied the opportunity to present evidence that Soehngen was treated no differently than other employees. In its brief, the Employer proffered evidence that other employees benefited from scheduling flexibility similar to that afforded Soehngen. We find merit in the Employer's exception.

Soehngen's relationship with Koch was not a stated basis for the Petitioner's challenge to his ballot, nor was the issue arguably within the scope of the Petitioner's challenge based on Soehngen's status as a summer employee. The parties adduced little evidence at the hearing

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<sup>7</sup> The Employer's reliance on the discussion between Koch and Soehngen on July 25, about the possibility of Soehngen continuing his employment through the upcoming school year, does not alter the fact that Soehngen was ineligible on the eligibility date. Compare *Meadow Valley Contractors*, 314 NLRB 217 (1994) (employee initially hired to perform nonbargaining unit work transferred to performing bargaining unit work *before* the eligibility cutoff date and continued to perform bargaining unit work through the date of the election, held eligible to vote).

on this issue and were given no indication by the hearing officer that he would consider Soehngen's relationship with Koch as a basis for determining Soehngen's voting eligibility. Therefore, we find that this issue was not properly before the hearing officer, and that he erred by considering Soehngen's eligibility on this basis. See, e.g., *Precision Products Group*, 319 NLRB 640 (1995); *Iowa Lamb Corp.*, 275 NLRB 185 (1985). Accordingly, we rely solely on Soehngen's status as an ineligible temporary employee on the eligibility date as grounds to affirm the hearing officer's recommendation that the challenge to his ballot be sustained.

#### CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the International Association of Machinists & Aerospace Workers, AFL-CIO, and that it is the exclusive representative of the employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees employed by the Employers at its St. Louis, Missouri, facility, excluding office clerical and professional employees, temporary employees employed by temporary agencies, guards and supervisors as defined in the Act, and all other employees.