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New York Display & Die Cutting Corp. and Paper Allied Industrial Chemical Energy Workers International Union, AFL-CIO-CLC Local 107, Petitioner. Case 2-RC-22744

May 12, 2004

DECISION AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held on September 18, 2003, 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 12 votes for and 9 against the Petitioner, with 6 challenged ballots, a sufficient number to affect the results of the election.

The Board has reviewed the record in light of the exceptions¹ and briefs and has adopted the hearing officer's findings and recommendations, only to the extent consistent with this Decision and Direction.

The hearing officer recommended that the Petitioner's challenge to the ballot of Gina McCormick be sustained, finding insufficient evidence in the record that she was a regular part-time employee. Contrary to the hearing officer, we find that the challenge should be overruled, for the reasons stated below.

Facts

Gina McCormick was hired on September 9, 2003, as a part-time employee, to perform "general help" in the factory, in addition to some secretarial duties.² McCormick was hired 5 days before the voting eligibility date (September 14, 2003) and 9 days before the election. McCormick's timecards show that she worked for the Employer on 6 days prior to the election for a total of 28-1/2 hours.³

¹ In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation sustaining the Petitioner's challenge to the ballot of Carlos Forte. We further adopt, pro forma, the hearing officer's recommendation to overrule the Petitioner's challenges to the ballots of V. Seemangal, Claudia Vakhrusheva, Raisma Vaysman, and Crisante Torres.

² McCormick had previously worked full time for the Employer as a secretary, but had left the job in 2000.

³ More specifically, McCormick worked on the following dates prior to the September 18 election: Tuesday, September 9, 2003, 4 hours; Wednesday, September 10, 5.75 hours; Friday, September 12, 6 hours;

At the election, the Petitioner challenged McCormick's ballot on the grounds that she was not a regular employee because she had been hired only a short time before the election.⁴ The hearing officer agreed, concluding that McCormick's period of employment before the election "is too brief to find that McCormick is a regular employee." In sustaining the challenge, the hearing officer did not apply the Board's usual formula for determining whether an employee is a regular part-time employee or a casual employee. See *Arlington Masonry Supply, Inc.*, 339 NLRB No. 99, slip op. at 3 (2003), citing *Davison-Paxon Co.*, 185 NLRB 21 (1970).⁵

Analysis

We find that the hearing officer erred in concluding that McCormick is not a regular part-time employee. The test to determine whether an employee is a regular part-time or a casual employee "takes into consideration such factors as regularity and continuity of employment, tenure of employment, similarity of work duties, and similarity of wages, benefits, and other working conditions." *Arlington Masonry*, supra, slip op. at 3, quoting *Muncie Newspapers, Inc.*, 246 NLRB 1088, 1089 (1979). In making a determination concerning an individual's status as a casual or a regular part-time employee, the Board considers not only the length, but also the regularity of employment. *Pat's Blue Ribbons*, 286 NLRB 918, 919 fn. 6 (1987). This is true even where, as here, an individual is a recently hired employee. *Modern Food Market*, 246 NLRB 884, 885 (1979).

Regularity does not necessarily mean a fixed schedule; rather this requirement can be satisfied by evidence that an employee has worked a substantial number of hours within the period of employment prior to the eligibility date and there is no showing that such work has been only on a sporadic basis. *Pat's Blue Ribbons*, supra at 919 fn. 6. The standard frequently used by the Board to determine the regularity of part-time employment is to examine whether the employee worked an average of 4 or more hours a week in the quarter preceding the eligibility date. *Arlington Masonry*, supra, slip op. at 3 (citing *Davison-Paxon Co.*, supra at 24).

Tuesday, September 16, 4 hours; Wednesday, September 17, 4.5 hours; Thursday, September 18, 4.25 hours.

⁴ The Petitioner had also asserted before the hearing officer that McCormick was excluded from the unit as a clerical. However, the hearing officer rejected this argument because the parties "unambiguously agreed to a plant-wide unit and they have not specifically excluded clericals." The Petitioner did not except to this finding.

⁵ Under *Davison-Paxon*, an employee "who regularly averages 4 hours or more per week for the last quarter prior to the eligibility date has a sufficient community of interest for inclusion in the unit and may vote in the election." 185 NLRB at 24.

McCormick was hired 9 days before the election and worked on a total of 6 days prior to the election. It is undisputed that she was working for the Employer both on the eligibility date and the election date, as required by Board law. *Roy Lotspeich Publishing Co.*, 204 NLRB 517 (1973). The hearing officer found, however, that under *Arlington Masonry*, supra, employees hired 10 days or less prior to the election are excluded from eligibility.

Contrary to the hearing officer, *Arlington Masonry* does not hold that 10 days is too brief a period of time by which to determine eligibility of a part-time employee. Instead, the Board simply noted in *Arlington Masonry*, supra, slip op. at 3, that, because the employee had only worked 10 days prior to the eligibility date, it would expand the period of consideration (for calculating the employees' hours) to include the election date, pursuant to *Stockham Valve & Fittings, Inc.*, 222 NLRB 217 (1976). Indeed, *Arlington Masonry* supports our decision because there the Board applied the *Davison-Paxon* test to find the newly hired part-time employee eligible to vote.

We recognize that "tenure of employment" is a factor to be considered in determining whether an employee is a regular part-time employee or a casual employee. However, brevity of employment is not, by itself, a reason for denying eligibility. Rather, as in *Arlington Masonry*, that factor can be addressed by widening the period for consideration to include the period from the hire date to the election date, rather than the hire date to the payroll eligibility date.

Applying the *Davison-Paxon* test, we conclude that McCormick did work a sufficient period of time in the period preceding the election to qualify as a regular part-time employee. The evidence shows that McCormick worked 28-1/2 hours, an average of 14-1/4 hours per

week, during the 2 weeks preceding the election. This amount far exceeds the 4 hours per week minimum requirement. Indeed, McCormick worked 4–6 hours a day for 3 days both weeks preceding the election, an amount that is not sporadic.

For the reasons set forth above, we conclude that Gina McCormick is a regular part-time employee under the Act and should be included in the unit. Accordingly, we overrule the challenge to McCormick's ballot and shall direct that her ballot be opened and counted. We shall further direct that a revised tally of ballots thereafter be issued with the appropriate certification.

DIRECTION

IT IS DIRECTED that the Regional Director shall, within 14 days from the date of this Decision and Direction, open and count the ballots of V. Seemangal, Claudia Vakhrusheva, Raisma Vaysman, Crisante Torres, and Gina McCormick, and prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

Dated, Washington, D.C. May 12, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD