

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

INDEPENDENT BERKELEY
PUBLISHING COMPANY,
d/b/a DAILY CALIFORNIAN¹

Employer

and

Case 32-RD-1347

DARREL NG, an Individual

Petitioner

and

NORTHERN CALIFORNIA MEDIA
WORKERS UNION #39521, affiliated with
COMMUNICATION WORKERS
OF AMERICA²

Union

and

INDEPENDENT BERKELEY
PUBLISHING COMPANY,
d/b/a DAILY CALIFORNIAN

Employer

and

Case 32-UC-370

NORTHERN CALIFORNIA MEDIA
WORKERS UNION #39521, affiliated with
COMMUNICATION WORKERS
OF AMERICA

Petitioner

¹ The name of the Employer appears as corrected at the hearing.

² The name of the Union in Case 32-RD-1347 appears as corrected at the hearing.

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding³, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer, a California non-profit corporation located in Berkeley, California, is engaged in the production and distribution of a newspaper of general circulation. During the past 12 months, the Employer has received gross revenues in excess of \$200,000 and, during that same period of time, has subscribed to nationally syndicated features and published advertisements valued in excess of \$10,000 for nationally distributed products. In such circumstances, I find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The record establishes and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act and represents certain employees of the Employer.

4. With regard to Case 32-RD-1347, for the reasons set forth below I find that the petitioner, Darrell Ng, is a managerial employee of the Employer, and as such,

³ Briefs filed by the parties have been duly considered.

Ng is ineligible to file a decertification petition for the Employer's unit employees. Accordingly, I find that no question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act and, therefore, the petition in Case 32-RD-1347 should be dismissed.

Although the Act makes no express provision for "managerial employees," this category of personnel has been consistently excluded under Board policy from the protection of the Act. See, Ladies Garment Workers v. NLRB, 339 F.2d 116, 123 (2nd Cir. 1964); Ford Motor Co., 66 NLRB 1317 (1946); Palace Dry Cleaning Corp., 75 NLRB 320 (1948). "Managerial employees" are defined as employees who have authority to formulate, determine, or effectuate employer policies by making operative the decisions of their employer and those who have discretion in the performance of their jobs independent of their employer's established policies. Tops Club, Inc., 238 NLRB 928 fn. 2 (1978), quoting Bell Aerospace, 219 NLRB 384 (1975), on remand from the Supreme Court's decision 416 U.S. 267 (1974). The Supreme Court has held that, although managerial employees are not explicitly mentioned in the Act, this was because Congress reasoned that they are so clearly outside its protection that no specific exclusionary provision was required. NLRB v. Yeshiva University, 444 U.S. 672 (1980). Managerial employees are excluded because their functions and interests are more closely allied with those of management than with production workers, and, therefore, they are not truly "employees" within the meaning of the Act.

In the instant case, the record establishes that Ng has been employed by the Employer in a unit classification since about February, 1997. However, the record also reflects that, since May, 1999, Ng has served as a full voting member of the Employer's eleven member Board of Directors. As such, Ng attends Board of Directors' meetings, participates as a full Board member in its deliberations, and votes on matters that come before the Board for decision. Issues that were discussed and voted on during Ng's tenure as a member of the Board included whether money should be spent to upgrade the computer system which the unit employees utilize to perform their work; whether money should be spent to establish a scholarship program for returning students; the financial reports of the Employer; and, in general, all matters affecting the business side of the newspaper.⁴

As a member of the Employer's Board of Directors, the body which formulates, determines, and effectuates corporate policy, Ng clearly falls within the scope of the Board's definition of managerial employee. Accordingly, he should be excluded from the protection of the Act. See, e.g., Blue & White Cab Co., 126 NLRB 956 (1960); Harrah's Lake Tahoe Resort Casino, 307 NLRB 182 (1992). More importantly, as a managerial employee, Ng does not fall within the scope of the term "employee" as described in Section 9(e) and Section 9(c)(1)(A). Accordingly, I find that, as a managerial employee of the Employer, Ng is precluded from filing the decertification petition concerning its unit employees, since, to hold otherwise, would give him the right

⁴ The only limit to Ng's authority as a full Board member is that, because he is an employee of the newspaper, he is excluded from attending and voting at Board sessions in which issues concerning labor relations, the Union, and the hiring and terms and conditions of employment of the General Manager are discussed. I find that this limit is insufficient to change my conclusion that Ng is a managerial employee and barred from serving as the Petitioner herein. Florence Volunteer Fire Department, Inc., 265 NLRB 955 (1982).

to act as party in the decertification proceeding, to call and examine witnesses, to file objections to the election, and to file requests for review. As the Petitioner in the instant case, Ng has, in fact, already engaged in a number of these activities, thereby placing himself in the anomalous position of serving simultaneously as both the representative of the unit employees and as an agent of the Employer. By finding him ineligible to serve as the Petitioner herein, I preclude this conflict of interest from arising. Rose Metal Products, 289 NLRB 1153 (1988); Doak Aircraft Co., 107 NLRB 924 (1954). Accordingly, since the petition in Case 32-RD-1347 was filed by an ineligible party, it will be dismissed.

By its petition in Case 32-UC-370, the Union seeks to clarify the collective bargaining unit by excluding the currently included classification of student intern. The Union asserts that the student interns are temporary employees and they lack a sufficient community of interest to be included in the same bargaining unit with the remaining production unit employees. At the outset, it should be noted that it is questionable whether it is appropriate to resolve this issue through a unit clarification procedure. In this regard, the record reflects that the student interns have historically been included within the bargaining unit, the most recent collective bargaining agreement contains express provisions detailing their terms and conditions of employment, and there have been no recent substantial changes in their duties so as to call into question their historical inclusion. In Union Electric Company, 217 NLRB 666, 667 (1975), the Board reasoned that it would treat these cases as follows:

Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for

example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category – excluded or included – that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

Thus, although the Board has held that a unit clarification petition is appropriate for resolving ambiguities concerning the unit placement of individuals, in Union Electric and its progeny, it has also held that such proceedings are not appropriate where it would upset an agreement between a union and an employer to exclude or include particular employees or groups of employees. To rule otherwise would be disruptive of the collective bargaining process and, therefore, inconsistent with one of the Board's statutory mandates. Plough, Inc., 203 NLRB 818 (1973). Accordingly, based upon this rationale, it is questionable whether it is even appropriate to entertain the instant unit clarification petition.

Nevertheless, even if I assume, arguendo, that it is appropriate to process the instant petition, I find that the student interns share a sufficient community of interest with the remaining unit employees such that it is appropriate to clarify the bargaining unit by including them within it.⁵ In this regard, the record reflects that the Employer first created and staffed the classification of student intern sometime in early 1995. Subsequent to the initial creation of this classification, the parties reached agreement on

⁵ Because I have found dismissal of the petition in Case 32-RD-1347 to be warranted, and because the student interns have historically been part of the bargaining unit, there is no question concerning representation before me which would bar processing the instant unit clarification petition. Gould-National Batteries, 157 NLRB 679 (1966); Bendix Corp., 168 NLRB 371 (1968).

the terms of a new collective bargaining agreement, to be effective from June 25, 1995 to August 31, 1998. It is undisputed that the student interns fall within the scope of the unit description set forth in the recognition clause of this agreement; that the agreement contains a Section 40 "Student Interns," which sets forth the wages and other terms and conditions of employment of this classification; and that, until the instant unit clarification position was filed, the parties treated the student interns as part of the bargaining unit and the Union served as their bargaining representative.

At the present time, the Employer employs about 10-12 student interns in its production department, and another 12-14 journey people, of whom 7-8 are also student interns. The journey people each work anywhere from 15 to 22 hours a week, whereas the student interns work anywhere from a few hours up to about 22 hours a week. The record reflects that, in order to be considered for a position as a student intern, an applicant needs to be somewhat familiar with desktop publishing systems such as "Quark Express" or "Adobe Pagemaker". However, once they are hired, they receive further on-the-job training from the journey persons. It generally takes about three lessons before a typical student intern becomes proficient in the paste-up duties they must perform. Student interns also receive subsequent training in a number of other production tasks. During and after this training process, the student interns perform essentially the same

tasks as the journey persons in typesetting and laying out the newspaper,⁶ with the lone exception that they do not deal with the representatives of the advertisers.⁷

After a student intern works for the Employer for about 18 months, they become eligible for promotion to a position as a journey person. According to the payroll record compilations submitted by the Union and the Employer, since 1995, around 89 per cent of the student interns voluntarily quit before obtaining this status. However, with one exception, all of the student interns who worked longer than twenty-one months were promoted to journey person status. These twelve journey persons worked for the Employer for periods ranging from 25 to more than 42 months in total, before they also left voluntarily.⁸

With regard to the working conditions of the student interns and the journey persons, the record reflects that they each work on both the day and night shifts; they punch time cards; they share the same rest rooms; and they are subject to the same disciplinary and overtime systems.⁹

Based upon these facts, the Union first contends that the student interns should be excluded from the bargaining unit as temporary employees whose employment will end no later than shortly after their graduation from the University. Under the so-called “date

⁶ The actual printing of the newspaper is done by an outside contractor utilizing non-unit employees.

⁷ The reason that the student interns do not interact with the ad representatives is that they generally do not work a full eight hour shift, so they would not be aware if a particular ad was missing.

⁸ Although both student interns and student journey persons are allowed to continue working for the Employer after they graduate, the record reflects that, to date, all of them have voluntarily quit no later than a few months after graduation.

⁹ With regard to the journey persons, the record does not reflect any difference between their terms and conditions of employment based on whether they are students or non-students.

certain test,” the Union argues that the student interns employee tenure is “sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment.” St. Thomas-St. John Cable TV, 309 NLRB 712, 713 (1992).

I find this argument to be unpersuasive. Although the record reflects that all of the student employees of the newspaper quit voluntarily no later than shortly after their graduation, there is no way to determine at any given time which student interns will become journey persons; which student interns will quit voluntarily before that time; which student journey persons will continue their employment until graduation; or which student journey persons will quit before then. Rather than setting them apart, this concept of intending to quit their own employment upon graduation is something that the student interns and the student journey persons have in common. If I were to adopt the Union’s view that this makes them temporary employees, the “date certain test” would require exclusion of all of these student employees, not just the student interns. This would result in the unit being reduced in size to the 4-6 non-student journey persons currently employed by the Employer, an anomalous result that the Union clearly does not seek. Under these circumstances, I reject the Union’s contention that the student interns should be excluded as temporary employees, based on the application of the “date certain test.”

The Union also asserts that the student interns lack a community of interest with the journey person employees because they are generally less skilled than the journey persons; they need to work under the direction of a journey person and receive continual training by them; and the interns are not assigned to deal with representatives from the

advertiser customers of the newspaper. However, the record reflects that, once they receive their initial training, the student interns are assigned to essentially the same tasks as the journey persons. Moreover, if they chose to remain employed by the Employer long enough and their work performance is satisfactory, all student interns are eligible for promotion to journey person status. Finally, as noted supra, the student interns and journey persons share essentially the same working conditions. Under these circumstances, I find that the student interns and the journey persons have a similar community of interest to that of unskilled and journey person employees in a typical production unit. The Board routinely includes such employees in one overall unit and I find that a similar result is warranted herein.

Based upon the above - and given both the historical inclusion of the student interns in the unit and the lack of evidence of any recent substantial changes in their job duties - I find that the Union has failed to meet its burden of demonstrating that the student interns lack a sufficient community of interest with the journey persons to warrant their exclusion from the unit. University of West Los Angeles, 321 NLRB 61 (1996). Accordingly, for all of the above-reasons, I shall clarify the unit to include the student interns.

ORDER

IT IS HEREBY ORDERED that the petition in Case 32-RD-1347 be, and it hereby is, dismissed.

IT IS HEREBY FURTHER ORDERED that the existing bargaining unit is clarified to include the student interns.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by March 27, 2000.

Dated at Oakland, California this 13th day of March, 2000.

/s/ James S. Scott

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