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

GRAND RAPIDS PRESS, DIVISION OF THE HERALD COMPANY, INC.

Employer

and **Case GR-7-RD-3423**

MICHAEL P. NOVAK, An Individual

Petitioner

and

DETROIT NEWSPAPER LOCAL 13N, GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, AFL-CIO

Union

APPEARANCES:
Sidney Kress, Attorney, of New York, New York, for the Employer.
Michael P. Novak, of Rockford, Michigan, pro se.
John Adam, Attorney, of Royal Oak, Michigan, for the Union.

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

On December 31, 2003, I issued a Decision and Direction of Election for all full-time pressmen and pressmen apprentices employed by the Employer, but excluding, inter alia, substitutes. I excluded substitutes on the basis that the language in the contract between the Employer and Union unambiguously excluded them from the unit. The Union filed a Request for Review with the Board. On January 28, 2004, the Board issued an Order in which it found that the contract is not entirely free from ambiguity on its face as to whether substitute pressmen are included in the unit. It remanded the case "to consider extrinsic evidence, including, if necessary, reopening the record, and to issue a Supplemental Decision." Accordingly, a hearing was held before a hearing officer of the Board.

Upon the entire record in this proceeding[1], the undersigned finds that the hearing officer's rulings made at the supplemental hearing are free from prejudicial error and are hereby affirmed.

The purpose of the supplemental hearing was to take further evidence regarding the parties' bargaining history and practices concerning the substitute pressmen. The Petitioner seeks a decertification election in a unit of pressmen and pressmen apprentices employed by the Employer at its Grand Rapids, Michigan facility, but excluding foremen, professional employees, office clerical employees, and guards and supervisors as defined in the Act.[2] The Union maintains that substitute pressmen are included in the bargaining unit and eligible to vote. The Employer and Petitioner assert that substitutes are not in the bargaining unit and thus are ineligible to vote because the collective bargaining agreement between the parties explicitly excludes them, they do not have a community of interest with the full-time pressmen because they have full-time employment elsewhere, they do not enjoy the same economic benefits under the contract that the full-time pressmen enjoy, they do not vote in contract ratification elections or other internal union matters, and, finally, the need for substitute pressmen will be eliminated with the installation of automated presses scheduled for the summer of 2004.

I have considered the extrinsic evidence adduced during both hearings and, as set forth below, I now find that the substitute pressmen are included in the bargaining unit, and thus are eligible to vote. The parties' bargaining history, their collective bargaining agreements, and their practices with respect to the substitute pressmen for over 28 years of representation establish that the substitutes are in the unit.

History of Collective Bargaining
and the Collective Bargaining Agreements

The Union has represented the Employer's pressmen since about the mid-1970's, when the Grand Rapids Printing Pressmen and Assistants' Local Union No.13 of the International Printing Pressmen and Assistants' Union of North America merged with the Detroit Newspapers and Graphic Communications Union, Local No. 13 of the International Printing and Graphic Communications Union (the Union). The Employer employed substitute pressmen before the Union became the collective bargaining representative of the pressmen. The substitute pressman are comprised of retirees from the Employer or other printers, pressman who have jobs at other newspapers or printers, including some who are members of other Union chapels, and individuals who are self-employed. Substitute pressmen regularly work weekend shifts, and cover holiday and summer vacation schedules.

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[1] The Employer, the Petitioner, and the Union filed supplemental briefs, which were carefully considered.
[2] This bargaining unit description is from ***The Grand Rapids Press***, 327 NLRB 393 (1998) and ***The Grand Rapids Press***, 325 NLRB 915 (1998).

The collective bargaining agreement between the Employer and the Union's predecessor addressed the use of substitute pressmen to the extent that it provided that a substitute would be entitled to holiday pay and accrued vacation pay, a discharged employee could work as a substitute at the foreman's discretion, and an employee could not be compelled to work if a competent substitute was available.

The first collective bargaining agreement between the Employer and the Union was effective May 21, 1976 through November 20, 1979. In that contract, Article 2, Recognition, defined the unit as pressmen and pressmen apprentices. That language has remained the same in all subsequent contracts.

In the 1976-1979 contract, the parties expanded the references to substitutes in the collective bargaining agreement to include a definition of substitute and classes of substitutes, i.e., "priority" substitute or "casual" substitute, and specifically limited substitutes' contractual economic benefits to wages, holiday and vacation pay, and health benefits in limited circumstances. The collective bargaining agreement also provided that the Union would maintain a list of priority substitutes, and when notified by the foreman, the chapel chair would call the substitute to report to work. Additionally, contract language notwithstanding, at one point the practice was that a full-time pressman could simply advise the chapel chair that he was not reporting to work and needed a substitute, and the chapel chair would call in a substitute without first conferring with the foreman.

The contract language addressing the status and working conditions of substitute pressmen remained virtually unchanged until the most recent contract, which was effective April 1, 1998 through March 31, 2003.[3] From Article 4, Definition of Employee and Substitute, the parties eliminated the terms "priority", "casual", and "slugged up", and eligibility for medical insurance.

> Article 4 Definition of Employee and Substitute
>
> 4.1 When used in this Agreement, the term "Employee" refers only to active, regular full-time individuals performing production and/or maintenance work in the press department.
>
> 4.2 a. The term substitute when used in this agreement refers to an individual who is not an employee (an "employee" refers only to active regular full time individuals performing production and maintenance work in the press department), but rather, is a person hired by the Company on a temporary basis to fill production needs.

[3] The parties extended this contract indefinitely, by oral agreement. This is the contract in effect at the time the instant decertification petition was filed.

> A substitute will be paid as a journeyman if the individual holds a journeyman's card or as an apprentice if still serving an apprenticeship period.
>
> A substitute will be excluded from participating in any of the specified economic benefits granted to full time employees by way of this agreement, except for overtime and shift premium, holiday and vacation pay as provided in other Article/Sections of this agreement.

As in prior contracts, substitutes are not entitled to medical insurance benefits, or to participate in pension and 401(k) plans. They do, however, receive the same hourly wage as full-time pressmen commensurate with their status as journeyman or apprentice, earn vacation pay, albeit at a different rate, and, like full-time pressmen, are entitled to accrued vacation pay at the time of termination.

In the 1998 – 2003 collective bargaining agreement, the parties reduced to writing the procedure for calling substitutes into work and increased the Employer's role in the hiring procedure for substitutes. Previously, the Union was the sole source of referrals for substitutes, maintained the substitute list, and the chapel chair determined which substitutes worked and when. With the new contract language, substitutes are obtained through any source, and are required to apply through the Employer's normal application process. The contract provides that when the Employer decides to hire a substitute, the foreman notifies the chapel chairman to add the person's name to the substitute list, and the Employer and the Union jointly maintain that list. The responsibility for calling substitutes into work remains with the chapel chair, but unlike under previous contracts, only the foreman determines whether a substitute is needed, and the foreman then requests the chapel chair to call in either a substitute from the list or a full-time employee from his off-day.

Also during negotiations for this collective bargaining agreement, the Employer proposed and the Union agreed to reversing the language from the prior collective bargaining agreement and calling in substitutes before full-time pressmen to replace an absent employee. While the contract specifically prohibits the Union from arbitrating the Employer's decision to hire substitutes, (Article 4.2 b), and at least arguably prohibits the Union from pursuing grievances for terminated substitutes (Article 4.1, 4.2 a, and 19.2), it does not exclude substitutes from utilizing the dispute resolution process for other issues. Article 19, Adjustments of Disputes, section 1, reads "[s]hould a dispute arise between the parties…" and then lists the three steps of the procedure to resolve such dispute. Step 1 of the dispute resolution procedure at 19.1 a. provides for "[a]n oral discussion between the chapel chairman and the foreman."

Parties' Practice

The Employer's weekly Employee Pay History Summary for January 1, 2003 through December 4, 2003, establishes that substitutes worked as frequently as 49 pay periods and as infrequently as 1 pay period during that period. The collective bargaining agreement does not require that substitute pressmen become members of the Union, but the Union charges a substitute a service fee of $5.00 for every shift he works. Either the chapel chairman collects this service fee from the substitute when he works, or the substitute tenders the fee to the Union hall directly. A substitute does not vote on internal union matters such as union officers, nor does a substitute participate in contract ratification votes.

With regard to grievance processing, the Union has filed few grievances over the years, and the majority have concerned terminations. However, several grievances have been filed on behalf of substitutes. Subsequent to the onset of the Detroit Newspaper strike on July 13, 1995, the Union filed two grievances in the interest of substitute pressmen. In 1995 and then again in 1997, the Union filed grievances over the Employer's failure to hire substitutes who were striking employees from the Detroit Newspapers. The Employer denied the grievances, and the Union subsequently filed Section 8(a)(3) and (5) charges with the Board.[4]

Sometime prior to the 1998 contract negotiations, the Union filed a class action grievance over the Employer's alleged overcharge on employees' wage deductions for sickness and accident benefit insurance. The Union prevailed, and a large amount of money, estimated in excess of $1,000,000, was distributed among all the pressmen, including substitutes.[5]

In November 2003, Chapel Chairman Ernie Bellechasse handled a pay dispute for substitute pressmen John Anderson. Anderson advised Bellechasse that the Employer had failed to pay him for a day's work. Bellechasse spoke to the assistant foreman regarding the payroll error, and the Employer corrected the error and paid Anderson. Since the matter was resolved pursuant to oral discussion, it was unnecessary for Bellechasse to reduce the dispute to writing and advance it to the next step.[6]

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[4] These cases, 7-CA-37463, et.al., and GR-7-CA-40290, are the basis of ***The Grand Rapids Press***, 325 NLRB 915 (1998) and ***The Grand Rapids Press***, 327 NLRB 393 (1998), respectively. The Union alleged Section 8(a)(3) violations, failure to hire, and Section 8(a)(5) violations, unilateral changes to the hiring procedure concerning substitutes. The Board found violations in both cases.

[5] Although the sickness and accident benefit is one of the economic benefits substitutes do not enjoy, they are assessed $.10 on every $10.00 of insurance, pretax, as is every other bargaining unit employee, and thus were entitled to reimbursement on the overpayment when the matter was resolved.

[6] In about 1997, The Flint Journal discharged three substitutes employees for suspected sabotage. The Union represents pressmen at The Flint Journal under a collective bargaining agreement virtually identical to the one it has with the Employer. The Union asked the substitutes about filing a grievance on the discharges, but the substitutes were not interested.

2003 Negotiations for a New Collective Bargaining Agreement

During the 2003 contract negotiations, the Employer proposed that all references to substitutes in the collective bargaining agreement be deleted. The Union rejected this proposal, the Employer subsequently withdrew it, and the language in Article 4 remained the same. Significantly, during these negotiations, the Union proposed that the substitute pressmen who had retired from the Employer be allowed to work 60 shifts per year, instead of the current limitation of a maximum of 40 hours per month. The Employer agreed to this change, and has implemented it. This charge was important because under the prior agreements, if a substitute pressmen who was retired from the Employer worked as a substitute in excess of 40 hours a month, he could not collect his pension from the Employer for the following month. Thus, while these substitutes still are limited to 60 shifts per year, they have a great deal more flexibility as to when they work those shifts.

Analysis

It is well established that in a decertification election the bargaining unit in which the election is held must be coextensive with the certified or recognized unit. To be considered in the bargaining unit and thus eligible to vote an employee must work in a classification that has actually been represented by the union involved. ***Campbell Soup Co.***, 111 NLRB 234 (1955); ***W.T. Grant Co.***, 179 NLRB 670 (1969); ***Bell & Howell Airline Service Co.***, 185 NLRB 67 (1970); ***Mo's West***, 283 NLRB 130 (1987). If the contract language in an established unit is ambiguous with regard to the composition of the bargaining unit, the Board will consider extrinsic evidence of the parties' past practices in administering the contract. ***Heritage Broadcasting Co. of Michigan v. NLRB***, 308 F.3d 656, 660 (6th Cir 2002), citing ***Booth Broadcasting Co.***, 134 NLRB 817, 822 (1961). Community of interest factors, however, do not have any relevance in eligibility determinations in a decertification election. **Id**.

The extrinsic evidence, in addition to the contract language, establishes that the substitute pressmen are appropriately included in the bargaining unit. The parties have over 25 years of collective bargaining history concerning the substitute pressmen. Their first negotiated agreement included provisions governing terms and conditions of employment for the substitutes. During negotiations for the 1998 – 2003 collective bargaining agreement, the Union and the Employer bargained over the procedure for hiring substitutes. These negotiations resulted, for the first time, in a written process requiring substitutes to apply through the Employer's usual application process, excluded from arbitration the foreman's hiring decisions regarding substitutes, and provided for joint maintenance of the substitute list.

The contract sets forth the substitutes' wages and benefits. It provides that substitutes earn the same wages as the full-time pressmen, earn overtime and holiday pay, and accrue vacation pay. They are entitled to accrued vacation pay when they sever employment with the Employer, the same as full-time pressman. Although substitutes are not entitled to health and welfare, pension or 401(k) benefits, these differences do not dictate their exclusion from the unit.[7] ***See's Candy Shops, Inc.***, 231 NLRB 156 (1977) (Board found that the temporary employees were in the bargaining unit and eligible to vote in a decertification election, although they did not enjoy contract seniority or qualify for vacation and sick leave, as did the regular full and part-time employees.)

Most recently, during 2003 contract negotiations, the Union successfully bargained for less limitations on retiree substitutes' opportunity to work in a given month, and the Employer withdrew its proposal to eliminate all references to substitutes in the collective bargaining agreement. Although over the course of its collective bargaining relationship with the Employer the Union has not filed many grievances, it has represented substitutes in disputes with the Employer on numerous occasions.

The additional arguments advanced by the Petitioner and the Employer not previously addressed, i.e., that the substitutes work elsewhere, and/or do not rely upon their employment with the Employer as their sole means of support and income; the substitutes do not vote on internal union matters or contract ratification votes; and, finally, substitute pressmen will be eliminated from the Employer's payroll sometime in the summer of 2004 as a result of the introduction of automated presses do not overcome the totality of evidence in support of inclusion.

It is well established that an employee is not excluded from a bargaining unit because the employee also works for another employer. ***Ironton Publications, Inc.***, 321 NLRB 1048, 1068 (1996), citing ***Tri-State Transportation Co.***, 289 NLRB 356 (1988) and ***Leaders-Nameoki, Inc.***, 237 NLRB 1269 (1978)

Internal union privileges are not to be confused with the rights of bargaining unit employees. Inclusion in a bargaining unit is not dependent on whether an employee is or is not a member of the union. Eligibility to vote in a representation election flows from the individual's employment relationship with the employer, not his/her status as a union member or supporter.

[7] This difference in benefits is not unlike the phenomena seen in numerous industries today of a two-tiered economic benefit package negotiated by unions.

Finally, regardless of whether or not the Employer's reliance on and use of substitute pressmen actually ends with the advent of automated presses at some date in the future, the parties' history establishes that they have included substitutes in the unit in the past, and they are still working in the unit and covered by the collective bargaining agreement today. As with the other arguments they have proffered, the Employer and Petitioner fail to separate out the relevant factors for consideration in a decertification election as compared to initial representation matters. See ***See's Candy Shop***, supra, at 157; ***W.T. Grant Co.,*** supra**.** Additionally, union representation at this time, when their work is assertedly being eliminated, could be vitally important to substitute pressmen who hope to have some bargaining over the effects of the elimination of the work.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time pressmen, pressmen apprentices, and substitute pressmen employed by the Employer at its Grand Rapids, Michigan facility; but excluding foremen, professional employees, office clerical employees, guards and supervisors, as defined in the Act.[8]

Those eligible shall vote as set forth in the attached Direction of Election.[9]

Dated at Detroit, Michigan, this 24th day of March, 2004.

(SEAL) /s/ Stephen M. Glasser

Stephen M. Glasser, Regional Director
National Labor Relations Board – Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue – Room 300
Detroit, Michigan 48226

Classifications

355-3301
355-3350
460-5067-4200

[8] Although the bargaining unit is significantly larger than the unit petitioned for, an administrative investigation has established that the Petitioner's showing of interest is still sufficient.

[9] Because the substitutes are on-call employees, those substitutes who average four hours or more of work per week during the quarter immediately preceding the election eligibility date are eligible to vote. ***West Virginia Newspaper Publishing Company,*** 265 NLRB446 (1982); ***Davison-PaxsonCompany,*** 185 NLRB 21 (1970). Limited testimony was adduced with respect to the eligibility of full-time pressman Jamie Edwards. The Employer terminated Edwards in October 2003 following an extended medical leave. The termination is currently subject of a grievance. Consequently, Edwards may vote subject to challenge by any party.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction and supervision of this office among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Employees who are otherwise eligible but who are in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who quit or are discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike, who have quit or been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

DETROIT NEWSPAPER LOCAL 13N, GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, AFL-CIO

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. ***Excelsior Underwear, Inc.***, 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969); ***North Macon Health Care Facility***, 315 NLRB 359 (1994). Accordingly, it is hereby directed that **within 7 days** of the date of this Decision, **2** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. The list must be of sufficient clarity to be clearly legible. The list may be submitted by facsimile transmission, in which case only one copy need be submitted. In order to be timely filed, such list must be received in the **DETROIT REGIONAL OFFICE** on or before **March 31, 2004.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

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, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570.** This request must be received by the Board in Washington by **April 7, 2004.**

POSTING OF ELECTION NOTICES

a. Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sundays, and holidays.

c. A party shall be stopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. */

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

*/ Section 103.20 (c) of the Board's Rules is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.