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Butler Asphalt L.L.C. *and* International Union of Operating Engineers Local 18, AFL–CIO, Petitioner. Case 9–RC–18130

February 29, 2008

DECISION AND DIRECTION

BY MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered determinative challenges in an election held on April 10, 2007, and the hearing officer's report recommending disposition of them.[1] The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 4 votes for and 6 votes against the Petitioner, with 7 challenged ballots.

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

I. BACKGROUND

Butler Asphalt L.L.C. (Employer) is an asphalt paving contractor in the construction industry operating from a facility located in Vandalia, Ohio. The Board election was conducted in the following stipulated unit:

> All heavy equipment operators employed by the Employer working out of its 7500 Johnson Station Road, Vandalia, Ohio facility, but excluding all laborers, truck drivers, office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

The Petitioner challenged the ballots of Travis Robinson and Mark Evans on the ground that they are supervisors. Near the close of the hearing, the Petitioner withdrew its contention that Robinson and Evans are supervisors, and now maintains that they must be excluded because they are laborers. The Board agent challenged the ballots of Mike Craft, Bert Gogan Jr., Raymond Lawson, Ricki Tucker, and Joseph Gisewite because their names did not appear on the election eligibility list.[2] The hearing officer recommended that the challenges to the ballots of Robinson and Evans be sustained, and that the challenges to the ballots of Craft, Gogan, Lawson, and Tucker be overruled.

The Employer excepts to all of the hearing officer's recommendations. The Employer asserts that Craft, Gogan, and Lawson are classified as laborers and Tucker as a truckdriver, and thus all four are excluded from the unit by the unambiguous language of the parties' stipulated election agreement. The Employer additionally asserts that Robinson and Evans are classified as operators and thus unambiguously included in the unit by the parties' stipulation.

The Petitioner agrees with the hearing officer's recommendations. It asserts that Craft, Gogan, and Lawson spend a substantial amount of their worktime performing the work of heavy equipment operators and thus should be included in the unit. The Petitioner also asserts that Tucker is a dual-function employee who shares a community of interest with other employees in the unit and thus also should be included. As stated above, the Petitioner asserts that Robinson and Evans are laborers and therefore should be excluded from the unit.

For the reasons explained below, we find merit in the Employer's arguments concerning Craft, Gogan, Lawson, Robinson, and Evans. As to these five employees, we reject the hearing officer's recommendations and find that Craft, Gogan, and Lawson are excluded from the unit, and Robinson and Evans included in the unit, by the unambiguous language of the parties' stipulated election agreement. As to Tucker, however, we agree with the hearing officer's recommendation and find that he is properly included in the unit based on community of interest.

II. DISCUSSION

A. The Applicable Law

In determining whether an individual is included in a stipulated unit, the Board applies a three-part test. Under that test:

> [T]he Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The parties and the Regional Director subsequently agreed not to count Gisewite's ballot.

still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

Caesar's Tahoe, 337 NLRB 1096, 1097 (2002). Where the parties' intent can be ascertained, the Board will give it effect unless it is "inconsistent with any statutory provision or established Board policy." *Bell Convalescent Hospital*, 337 NLRB 191 (2001).

To determine whether the stipulation is clear or ambiguous, the Board compares the express language of the stipulated bargaining unit with the disputed classification. *Northwest Community Hospital*, 331 NLRB 307 (2000). "The Board will find that the parties have 'a clear intent to include those classifications matching the description and a clear intent to exclude those classifications not matching the stipulated unit description.'" *Los Angeles Water & Power Employees' Assn.*, 340 NLRB 1232, 1235 (2003) (quoting *Northwest Community Hospital*, supra). Where a stipulation expressly excludes a classification, the Board will find a clear intent to exclude it. See, e.g., *White Cloud Products,* 214 NLRB 516, 517 (1974). Where a stipulation neither includes nor excludes a disputed classification, the Board will find "that the parties' intent with respect to that classification is not clear." *Los Angeles Water & Power*, supra. "The Board bases this approach on the expectation that the parties know the eligible employees' job titles, and intend their descriptions in the stipulation to apply to those job titles." *Halsted Communications*, 347 NLRB No. 20, slip op. at 1 (2006).

B. Analysis of Challenges

1. The ballots of Craft, Gogan, and Lawson

Craft, Gogan, and Lawson are grading-crew employees. Grading crews consist of two employees: an operator, who runs the grader, and another employee who dumps, spreads, and hand-rakes gravel in areas that cannot be reached by the equipment, and who uses a hand-operated plate compactor to compact the gravel. This second employee also uses a piece of heavy equipment called a stone roller to compact the stone or gravel after it has been graded. Craft, Gogan, and Lawson perform the tasks of this second, nongrader-operator employee. They also occasionally operate other types of heavy equipment.

The hearing officer began his analysis of Craft's, Gogan's, and Lawson's eligibility by observing that the only record evidence of job titles held by the Employer's employees is a document entitled "Employer's Profile List." In that document, Craft, Gogan, and Lawson are classified as "laborers." The hearing officer questioned the reliability of the Profile List as evidence of employee job titles, noting that some of the titles it contains "are not entirely accurate." Nonetheless, the hearing officer found that, even assuming that the Employer classifies Craft, Gogan, and Lawson as laborers, the stipulation is ambiguous as to them because their job titles do not "fairly represent the [employees'] function," citing *Viacom Cablevision*, 268 NLRB 633, 633 fn. 8 (1984). Further finding insufficient extrinsic evidence of the parties' intent, the hearing officer proceeded to step three of the *Caesar's Tahoe* analysis and found that Craft, Gogan, and Lawson are dual-function employees who operate heavy equipment for sufficient periods of time to demonstrate their interest in the working conditions of the unit. He therefore recommended that Craft, Gogan, and Lawson be included in the unit.

The Employer excepts, asserting that the stipulated unit unambiguously excludes "all laborers," that Craft, Gogan, and Lawson are classified as laborers, and thus, that they must be excluded from the unit under the first step of the *Caesar's Tahoe* analysis. The Employer also asserts that the hearing officer misapplied *Viacom Cablevision*. In this regard, the Employer argues that the Board's statement in *Viacom* that it will only consider classifications that "fairly represent" the work employees perform was only intended to protect petitioning unions from employer "gerrymandering" of the stipulated unit in response to an organizing effort. The Employer maintains that this is not the situation in the instant case, as the Employer has not changed any employee's job classification since the parties agreed to the language of the stipulation.

We find merit in the Employer's exceptions. We find, contrary to the hearing officer, that the stipulation is not ambiguous with regard to Craft, Gogan, and Lawson, and that these three employees are unambiguously excluded from the unit. The stipulated election agreement excludes "all laborers," and these three employees are classified as laborers in the Employee's Profile list. Although we acknowledge that the Profile List contains some anomalous job titles, the hearing officer did not find (and the Union does not contend) that the classifications contained therein do not reflect the job titles the Employer has assigned to the employees whose ballots are at issue in this case. Moreover, the Profile List and testimony based on the Profile List provide the only record evidence of employee classifications, on which we are constrained to rely by the parties' agreement to a stipulation phrased in terms of classifications.[3]

[3] Where a stipulated unit is defined in terms of type of work performed, however, the stipulation itself requires the Board to look behind job titles or classifications. See *Halsted Communications*, supra, slip op. at 2 fn. 5.

Further, we find that the *Viacom Cablevision* exception for instances in which job titles or classifications do not fairly represent employees' functions, invoked by the hearing officer, is not applicable here. Although the Board in *Viacom* did not clarify the scope of that exception, the facts of that case support the Employer's contention that the Board was concerned with preventing employers from attempting to gerrymander a stipulated unit on the eve of an election. There, the employer, a few weeks before the eligibility cutoff date, transferred an employee from the position of "commercial marketing representative" to that of "commercial sales representative." The stipulated unit consisted of "sales representatives," and the Board found the transferred employee unambiguously included in the stipulated unit. In this context, the Board added a footnote stating that it "will only consider bona fide titles or job descriptions that fairly represent the employee's function and have been applied for a reasonable period of time." *Viacom*, 268 NLRB at 633 fn. 8. Although left unspoken, the Board's reason for adding this footnote is apparent: to forestall future attempts to rely on *Viacom* to justify bad-faith, eleventh-hour efforts to gerrymander a stipulated unit.

Additionally, applying the *Viacom* footnote as the hearing officer did would undermine the *Caesar's Tahoe* analytical framework. Citing *Viacom* for the proposition that a stipulated job title must "fairly represent the employee's function," the hearing officer found Craft's, Gogan's, and Lawson's "laborer" classification ambiguous because it "does not match what they actually do." That is not the correct method for determining whether a stipulation is ambiguous. As set forth above, the proper method is to compare the express language of the stipulated bargaining unit with the disputed classification. Invoking *Viacom* to look behind classifications to the work employees perform is inconsistent with the expectation, upon which the *Caesar's Tahoe* analysis is based, that the parties know the employees' job titles and intend their descriptions in the stipulation to apply to those job titles. Doing so, moreover, would compromise the predictability and finality afforded by the *Caesar's Tahoe* framework, under which employers and labor organizations can expect that their unambiguous stipulated election agreements will be enforced as written. Thus, absent gerrymandering, where a classification-based stipulation is unambiguous and not inconsistent with the Act or established Board policy, the analysis ends at step one of the *Caesar's Tahoe* test.

Here, gerrymandering is not at issue, and neither is the consistency of the stipulation with the Act or established Board policy. Comparing the express language of the stipulated bargaining unit with the disputed classification, the stipulation specifically excludes "all laborers," and Craft, Gogan, and Lawson are classified as "laborers." As the language of the stipulation is unambiguous with regard to these three employees, they are excluded at the first step of the *Caesar's Tahoe* analysis. We therefore reverse the hearing officer and sustain the challenges to the ballots of Craft, Gogan, and Lawson.

2. The ballot of Ricki Tucker

Ricki Tucker spends most of his worktime operating the prime truck or the tack truck, which are also called distributor trucks. Prime is a mixture of tar and diesel fuel; tack, a mixture of tar and water. Tucker applies these liquid mixtures between layers of gravel and asphalt for sealing and bonding purposes. The prime and tack trucks differ from other trucks operated by other of the Employer's employees. They carry tanks containing the prime or tack and feature a bar mounted on the back of the truck with 40 to 50 small nozzles, through which the prime or tack is dispensed. When operating the truck, Tucker throws a toggle switch to lower the bar and opens a valve to set the pressure for the liquid to flow out at a given rate. Tucker does not work with a specific grading or paving crew, but goes from jobsite to jobsite as needed. When he is not operating the prime or tack truck, Tucker works in the garage assisting with mechanics' work, runs parts, performs various maintenance and landscaping chores, and occasionally operates heavy equipment. His immediate supervisor is Operations Manager Phil Moyer, who also oversees the operators. Tucker is classified on the Employee's Profile List as "Asphalt Distributor."

Analyzing Tucker's status under *Caesar's Tahoe*, the hearing officer first noted that the stipulated unit specifically excludes truckdrivers. He then noted that, although the Employer contends that Tucker is a truckdriver, he is classified on the Profile List as "Asphalt Distributor," the trucks he drives are markedly different from other trucks utilized by the Employer, and he spends a significant amount of his working time performing tasks other than driving the tack and prime trucks. Again citing *Viacom,* fn. 8, the hearing officer found that, if Tucker is considered a truckdriver, that job title does not fairly represent his function. He therefore found the stipulation ambiguous with regard to Tucker, and further found (proceeding to the second step of the *Caesar's Tahoe* analysis) that extrinsic evidence did not clarify the parties' intent. Proceeding to the third step of *Caesar's Tahoe*, the hearing officer found that although Tucker is not a dual-function employee with regard to the unit, he should be included in the unit based on a traditional community-of-interest analysis. In that regard, the hearing officer noted that Tucker has work-related contact with heavy equipment

operators, his pay is within the same range as that of some of the operators indisputably included in the unit, he shares common immediate supervision with employees in the unit, and his work is integrated with the Employer's production process. For these reasons, the hearing officer concluded that Tucker shares a sufficient community of interest with the unit to warrant his inclusion, and he recommended that Tucker's ballot be opened and counted.

The Employer excepts, arguing that since Tucker is a truckdriver and the stipulation excludes "truck drivers" he should be found excluded from the unit at step one of the *Caesar's Tahoe* analysis. The Employer also argues that extrinsic evidence confirms that the parties meant to exclude Tucker from the unit. In this regard, the Employer points out that the Union's first petition (which was dismissed) specifically included within the unit employees who operate "distributor trucks," while its second petition specifically excluded "dump truck drivers, low boy and distributor truck drivers." The Employer contends that the parties' subsequent stipulated agreement to exclude all "truck drivers" merely shows that the Union adhered to its "second petition" intent to exclude distributor truckdrivers and cannot logically be read as indicating a return to its "first petition" intent.

For reasons that will be apparent from our foregoing discussion of *Viacom*, we do not agree with the hearing officer's analysis with respect to Tucker. We agree, however, with his finding that the stipulation as regards Tucker is ambiguous. The problem with the Employer's argument is that it is based on an assumption that Tucker's classification is "truck driver." However, Tucker's classification as set forth in the Employee's Profile list is "Asphalt Distributor." The stipulation neither includes nor excludes this classification, and therefore "the parties' intent with respect to that classification is not clear." *Los Angeles Water & Power*, supra, 340 NLRB at 1235. We must therefore proceed to the second step of the *Caesar's Tahoe* analysis and consider extrinsic evidence of the parties' intent.

We agree with the hearing officer that the fact that the language describing the proposed unit was changed from the first to the second petition and again from the second petition to the stipulation does not necessarily indicate that the parties intended to exclude Tucker from the unit. The first petition described the petitioned-for unit (in relevant part) as consisting of "[a]ll heavy equipment operators operating . . . distributor trucks." The revision of that language in the second petition likely indicates nothing more than that the Union had learned that the Employer's heavy equipment operators do not drive distributor trucks. The change from the specific language of the second petition to the general language of the stipulation is equally inconclusive. This language could have been changed for a reason or reasons unrelated to the parties' intentions with respect to Tucker.

We must therefore proceed to the third step of *Caesar's Tahoe*, the community-of-interest analysis. We agree with the hearing officer that Tucker is properly included in the unit under such an analysis. The elements of common supervision, functional integration, frequency of contact with unit employees, and commonality of wages (with some unit employees) and working conditions are sufficient to warrant Tucker's inclusion in the unit. See, e.g., *Publix Super Markets*, 343 NLRB 1023, 1024 (2004) (setting forth community-of-interest factors). We therefore overrule the challenge to Ricki Tucker's ballot.

3. The ballots of Travis Robinson and Mark Evans

Travis Robinson's and Mark Evans' classifications are listed on the Employee's Profile List as "Operator—Paver/Grader." They are foremen on the Employer's paving crews. Each crew consists of a foreman, a paver operator, two asphalt roller operators, and two or three laborers. The foremen work with the other members of the crews and, like the other crew members, are paid at an hourly rate. Robinson and Evans spend much of their time operating one of two screws on the back of the paver. The screws regulate the amount of asphalt distributed by the paver. The Employer's president testified that he does not consider turning a paver screw to be heavy equipment operation. Robinson spends more than 50 percent of his time turning the screw. Robinson has operated some heavy equipment, but only on a few occasions, for 20 minutes at a time. Evans also spends most of his time operating the screw, and has operated heavy equipment on only a few occasions.

Once again relying on *Viacom,* fn. 8, the hearing officer found the stipulation ambiguous with regard to Robinson and Evans because the job classification of "Operator—Paver/Grader" does not fairly represent their function. The hearing officer found that Robinson and Evans rarely operate heavy equipment, spending most of their time turning a screw, which does not qualify as heavy equipment operation. Finding insufficient extrinsic evidence of the parties' intent, he proceeded to the third step of *Caesar's Tahoe* and examined community-of-interest factors. Doing so, he found that, in light of the disparity between their rates of pay and those of the unit employees, their different day-to-day functions from those of the operators, and differing working conditions, Robinson and Evans should be excluded from the unit. The Employer excepts, arguing that Robinson and Evans are

classified as operators and thus should be included in the unit under the first step of *Caesar's Tahoe*.

We find merit in the Employer's exception. We recognize that Robinson's and Evans' classification of "Operator—Paver/Grader" does not exactly match the language of the stipulation. The stipulated unit consists of "all heavy equipment operators." The Employer, however, does not employ any individuals with the title of "heavy equipment operator." In a recent decision, the Board addressed a similar situation. In *USF Reddaway,* 349 NLRB No. 32 (2007), the language of the stipulation did not match any of the employer's actual job titles. The Board considered whether to include an individual with the classification "parts/mechanic" in a unit of "all mechanics." Given that the classifications in the stipulation did not match the actual classifications used by the employer, the Board indicated that it would be reasonable to read the stipulation as unambiguously including all job classifications that included the word "mechanic."[4]

Similarly, in the instant case, the stipulation refers to "heavy equipment operators," rather than breaking down the classifications according to which type of heavy equipment each operator operates. As no employee has the specific title of "heavy equipment operator," it is reasonable to read the stipulation as including employees whose job titles include the word "operator," combined with the name or names of a piece or pieces of heavy equipment. Because Robinson and Evans are classified as "Operator—Paver/Grader," and pavers and graders are types of heavy equipment, we find that Robinson and Evans are unambiguously included in the unit under the first step of *Caesar's Tahoe*. We therefore reverse the hearing officer and overrule the challenges to their ballots.

[4] The Board ultimately found the stipulation ambiguous, however, because the unit description also separately listed the position of trailer mechanic, calling into question what was meant by "all mechanics."

DIRECTION

It is directed that the Regional Director for Region 9 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Ricki Tucker, Travis Robinson, and Mark Evans. The Regional Director shall then prepare and serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. February 29, 2008

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD