

In the Matter of an Arbitration ]  
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 between ]  
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 BAY AREA RAPID TRANSIT ]  
 DISTRICT (BART), ]  
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 Petitioner, ]  
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 and ]  
 ]  
 UNITED PUBLIC EMPLOYEES ]  
 LOCAL NO. 390, SEIU, ]  
 ]  
 Respondent. ]  
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RECOMMENDATION

of

SAM KAGEL,  
Hearing Officer

San Francisco, California  
June 25, 1981

INTRODUCTION:

On August 19, 1980 Donald Vial, Director of the State of California Department of Industrial Relations, appointed Sam Kagel as Hearing Officer to make a recommendation to him concerning the petition filed by BART seeking to exclude certain Employees now covered by the Union's Collective Bargaining Agreement from that Agreement on the ground that they are "confidential employees."

Standard to be Applied:

The BART Collective Bargaining Agreement (Jt. Ex. 3) does not have a definition of a "confidential" Employee.

BART contends that while BART is not subject to the National Labor Relations Act the practice of the National Labor Relations Board should be observed in determining whether certain Employees are "confidential employees" and therefore should be excluded from the Bargaining Unit and BART quotes from cases noted on page three of its closing

argument that the NLRA has defined such Employees as "employees who assist in a confidential capacity persons who formulate, determine and effectuate management policies in the field of labor relations."

The Board in Kleinberg, Kaplan 253 NLRB No. 54 (November 21, 1980) 105 LRRM at 1611 reviews in some detail the Board's application of the standard to be considered in this case. It should first be pointed out that in that case the Board referred to the B. F. Goodrich Company case from which BART has taken its proposed definition and states that quote as follows:

" ... assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations" (emphasis in original).

Apropos of such emphasis the Union in its brief points out with reference to the quote noted states:

"Actually a confidential employee is one who assists an individual who formulates, determines, and effectuates management policies in the field of labor relations, and actually is thereby him or herself engaged in such determination and effectuation of such policies. In other words, the function of the confidential employee must somehow be involved in confidential labor relations" (Un. Br., p. 2).

The Board in Kleinberg further states:

"... We consciously and consistently refused to expand our definition of confidential employees to exclude employees with access to confidential business information unrelated to labor relations matters. In fact, our application of the labor nexus standard often resulted in the exclusion of certain employees

and the inclusion of others in the same case."  
(105 LRRM at 1612)

The Kleinberg case involved a law firm and the Board in its decision examined extensively the legislative history of the National Labor Relations Act and the Taft Hartley Amendments as it relates to the question of confidential Employees and its final decision in the Kleinberg case itself resulted in finding as an appropriate unit for the purpose of collective bargaining "All full-time and regular part-time office workers, including executive secretaries, administrative secretary, . . . ." (105 LRRM at 1618)

DISCUSSION:

At the request of the Hearing Officer the Parties jointly constructed Joint Exhibit 4 which sets forth the specific positions involved that BART seeks to exclude from the Unit and the "confidential" tasks performed and the estimated date that the position could have begun performing the task listed.

Administrative Assistant to the Associate General Counsel: Legal Secretary: Clerk:

Based upon the suggested standard to be used in this case as explained by the NLRB itself the persons which BART seeks to exclude on the apparent basis that they are somehow involved in the labor "nexus" of BART's activities does not satisfy the test. There was no showing that any of the persons holding the positions identified above assist in actually formulating, determining and effectuating Management policies in the field of labor relations.

On February 26, 1973 this Hearing Officer excluded from the Bargaining Unit all Employees of the Labor Relations Department and all Employees of the Personnel Department. Those would be the departments which are directly related to formulating, determining and effectuating Management policies in the field of labor relations.

Budget Staff Assistant III and Staff Assistant II:

Here the tasks noted on Joint Exhibit 4 are not being performed by anyone but would be if they were excluded from the clerical sub-unit. No basis in the record or upon the suggested standard to be applied in this case for this petition provides that such an exclusion should be recommended.

Power and Way Maintenance Secretary to Director and Other Positions:

An examination of the tasks performed by that person does not bring it within the labor "nexus" area. It will be noted that the quote from Kleinberg shown hereinabove indicates that the Board's positions constantly and consistently has been to refuse to expand its definition of confidential employees to exclude Employees with " ... access to confidential business information unrelated to labor relations matters."

The same comment would apply to the proposed exclusion of the Secretary to Director in the Power and Way Maintenance Department, the Secretary to the Manager of the Rolling Stock Maintenance Division, the Secretary to the Director of Field Services, the Secretary to the Assistant Treasurer in the

Finance Department, the Secretary to the Director of Planning and Analysis, the Secretary to the Manager of the Management Services Division.

The record in this case does not support providing for any further excluded Employees on the contention that they are "confidential employees" than those that were excluded on February 26, 1973 upon the recommendation of this Hearing Officer.

Recommendations:

The proposed exclusion of the following positions should be denied based upon the record made in this case:

1. Administrative Assistant to the Associate General Counsel
2. All Secretarial and Clerical Positions in the Legal Department
3. Secretary to the Director of Budget
4. Three Staff Assistant positions in the Budget Department
5. Secretary to the Manager of Management Services
6. Secretary to the Director of Power and Way Maintenance
7. Secretary to the Manager of Rolling Stock Maintenance
8. Secretary to the Director of Field Services
9. Secretary to the Assistant Treasurer
10. Secretary to the Director of Planning and Analysis



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Hearing Officer