

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Eighteenth Region

VALLEY CONSTRUCTION, INC.<sup>1</sup>

Employer

and

NORTHERN WISCONSIN REGIONAL COUNCIL  
OF CARPENTERS

Petitioner

Case 18-RC-16635

**DECISION AND DIRECTION OF ELECTION**

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.

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

Upon the entire record in this proceeding, I find:

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

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>2</sup>

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<sup>1</sup> The Employer's name appears as amended at the hearing.

<sup>2</sup> The Employer, Valley Construction, Inc., is a Wisconsin corporation with an office and place of business in Eau Claire, Wisconsin. During the past calendar year, the Employer has purchased and received goods and materials valued in excess of \$50,000 directly from points outside the State of Wisconsin. According to a commerce questionnaire submitted in this matter by the Employer, the Employer's annual gross revenues exceed \$1 million.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A 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.

5. Petitioner seeks a unit consisting of all construction employees employed by the Employer, excluding clerical employees, salespersons, guards and supervisors as defined in the Act. Petitioner contends that there are seven employees in the unit. Contrary to the Petitioner, the Employer maintains that three of the seven, as crew foremen, are supervisors within the meaning of Section 2(11) of the Act.

The Employer is a home improvement company that replaces windows and siding for homeowners. Roger Sawatzky is the owner and president. Tom Beane is the general manager. Laurie Schuch is the office manager. Neither party contends that Sawatzky, Beane or Schuch are in the unit. The Employer has three installation crews, and the employees on the crews constitute its construction employees. Each crew has a foreman. Two of the crews consist of just a foreman and one employee, while the third crew consists of a foreman and two employees. The office manager is responsible for contacting homeowners to schedule installations. Each day each crew reports to the Employer's facility, unless the crew is on a project requiring more than one day. The foreman for each crew obtains job assignments from the office manager. Each crew loads a company truck with necessary supplies. Each crew uses a truck for transportation to the job location. If certain supplies are needed that are not in the Employer's warehouse, the foreman is authorized to purchase the supplies or to send a crew member to do so. Each foreman also has a credit card for the purchase of

gasoline for each crew's truck. Foremen wear blue dress shirts with their names on them. Other crew members are provided T-shirts with the Employer's name on them.

The Employer contends that crew foremen hire employees. According to the record evidence, the Employer places advertisements in local newspapers when vacancies occur. Applicants are first interviewed by Owner and President Roger Sawatzky. Sawatzky might schedule a second interview, during which a crew foreman would also be present. The role of the crew foremen in the interviews is not clear. One crew foreman testified that he has participated in one interview. Another testified that he participated in an unstated number of job interviews. Both testified that they recommended employees be hired and their recommendations were followed, although the testimony failed to provide a clear picture of how their recommendations were made, at what stage in the process they were made, or how frequently they were asked to make recommendations. It is also clear that any employee can recommend someone for hire, although only crew foremen appear to participate in some interviews.

The Employer also contends that crew foremen train and evaluate new hires and, within less than a week of hire, recommend whether new hires be retained. Crew foremen who testified acknowledge training new employees. They also did not rebut testimony by the office manager that crew foremen effectively recommend the termination of employees, including the office manager's testimony of specific individuals effectively terminated by specifically named foremen. However, the office manager later acknowledged that she had not personally witnessed any alleged recommendations by foremen to terminate employees; and that she was relying on what someone else told her. She testified that the most she personally heard a foreman say is that he did not think he could work with a certain person. On the other hand, only

the crew foremen are present on the job to evaluate new employees. Neither the general manager nor the president/owner of the Employer is generally on job sites. There is no evidence that crew foremen or anyone else has disciplined employees.

Foremen work alongside their crews, installing siding or windows for virtually all of their workdays. The office manager and foremen agreed at the hearing that the foremen are to make sure jobs are done properly, and that foremen can instruct crew members to redo work. The foremen are also responsible for all paperwork, for getting the customers to fill out completion certificates, and for obtaining payment from customers when the jobs are done. The completion certificate is a form wherein the customer indicates satisfaction that the job has been completed. In the event the customer includes good comments about the work of the installation crew, the crew receives a \$50 bonus for siding work and \$25 for window installation work. The foreman determines how the bonus is split among the crew. Foremen are to be in regular contact with the office manager and/or owner, so they know how projects are proceeding or if problems arise. Foremen can let crew members leave early, authorize a day off, or call off a job for a day due to inclement weather. On occasion a member of a crew will be moved to a different crew to help out, but the record is unclear how the decision is made to effect the temporary transfer. When a foreman takes a day off or is on vacation, the most senior person on the crew might be in charge, or the crew just operates without the foreman.

Foremen determine the pay of the members of their crews. The Employer calculates specific amounts for on-site labor costs for its jobs. Whatever that amount is on a given job is the amount available for the crew. The foremen submit pay sheets at the end of jobs. On each pay sheet the foreman lists either a percentage amount or a

dollar amount, designating how much each member of the crew is to get of the total available for labor costs. For example, one foreman testified that he generally divided the amount so that he got 40 percent of the amount available, and each crew member got 30 percent, if the crew consisted of three (including the foreman); or if there were just the foreman and one crew member, the split would be 60 percent and 40 percent, respectively. There is a pay sheet in evidence from another foreman who, on one particular job, gave himself 45 percent, gave a second crew member 30 percent, and gave a third crew member 25 percent. Thus, the way foremen choose to divide up the money varies among them, and also each foreman varies the division of money from job to job. Factors foremen take into account in deciding how to divide the money available for labor costs include whether the employee is new and, therefore, still learning; whether the employee missed work; and/or the speed and quality of the employee's work. As one foreman testified, the only way he can get a raise is to increase the percentage of the total amount he gets and, therefore, decrease the amount his crew member(s) get. While there is evidence that Sawatzky changes pay sheets to recover money from a crew where he has not received payment from a customer or if he questions whether certain work was done, there is no evidence that he has changed a foreman's allocation of the amount of money to be paid to each crew member after a job has been completed.

Two of three foremen who testified stated that they consider foremen to be supervisors of their crews. In July of last year, Sawatzky took the foremen on a fishing trip over the July 4 weekend. All crew members attend meetings held by the Employer on Monday mornings.

In view of the foregoing and the record as a whole, I conclude that crew foremen are supervisors within the meaning of the Act and, therefore, should be excluded from the unit herein. While I find that the evidence is insufficient to conclude that foremen hire, fire, discipline, or effectively recommend the hiring, firing, or discipline of employees, the record is clear that foremen train new employees, grant employees time off, and—most importantly—are solely responsible for determining the pay of their crew members. It is also clear that each foreman has the authority to determine his own formula for paying crew members, and that each foreman varies the amount paid to crew members from job to job. Thus, while there is no evidence that the Employer has a formal evaluation process, in effect, the crew foremen evaluate performance of crew members at the end of each job by deciding what crew members will be paid for the job; and, therefore, the foremen exercise supervisory authority. Harbor City Volunteer Ambulance Squad, 318 NLRB 764 (1995); Debber Electric, 313 NLRB 1094 (1994). In reaching the conclusion that crew foremen are supervisors, I recognize that the ratio of supervisors to employees is unusually high, and that, counting Sawatzky, I am concluding that, for every employee, there is a supervisor. However, the Board has made clear that the ratio of supervisors to employees is a secondary indicia and is not, by itself, determinative of supervisory status. J. C. Brock Corp., 314 NLRB 157, 159 (1994).

6. 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 and regular part-time construction employees employed by the Employer; excluding office clerical employees, salespersons, guards and supervisors as defined in the Act, as amended.

## DIRECTION OF ELECTION<sup>3</sup>

An election by secret ballot will be conducted by the undersigned among the employees in the unit found appropriate in the manner set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.<sup>4</sup>

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<sup>3</sup> 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 **May 3, 2000**.

<sup>4</sup> To ensure that all eligible voters 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 that may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that **two** copies of an election eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. In order to be timely filed, these lists must be received in the Minneapolis Regional Office, Suite 790 Towle Building, 330 Second Avenue South, Minneapolis, MN 55401, on or before **April 26, 2000**. No extension of time to file this list may be granted by the Regional Director except in extraordinary circumstances, nor

Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Northern Wisconsin Regional Council of Carpenters.

Signed at Minneapolis, Minnesota, this 19th day of April, 2000.

/s/ Ronald M. Sharp

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Ronald M. Sharp, Regional Director  
Eighteenth Region  
National Labor Relations Board

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shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.