

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

CAPITAL DRYWALL, INC.¹

Employer

and

Case 21-RC-20202

LABORERS' INTERNATIONAL ASBESTOS AND
TOXIC ABATEMENT, LOCAL 882, LABORERS'
INTERNATIONAL UNION OF NORTH AMERICA,
AFL-CIO²

Petitioner

and

SOUTHERN CALIFORNIA CONFERENCE OF
CARPENTERS, UNITED BROTHERHOOD OF
CARPENTERS, AFL-CIO

Intervenor

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, hereinafter referred to as 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 proceeding, 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 is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved claim to represent certain employees of the Employer.³

4. 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.

The following three issues were raised at the hearing in this matter: (1) whether the current collective-bargaining agreement between the Employer and the Intervenor is a Section 8(f) agreement; (2) whether the current collective-bargaining agreement between the Employer and the Intervenor bars the processing of the instant petition; and (3) assuming the current collective-bargaining agreement does not constitute a bar, whether the

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

² The name of the Petitioner appears as amended at the hearing.

³ Southern California Conference of Carpenters, United Brotherhood of Carpenters, AFL-CIO currently serves as the collective-bargaining representative of the employees of the Employer, including those in the petitioned-for unit. Intervenor status was granted at the hearing based on the Intervenor's currently existing collective-bargaining agreement with the Employer.

unit the Petitioner seeks to represent is an appropriate unit for the purposes of collective bargaining.

The Petitioner maintains that the current collective-bargaining agreement qualifies as a Section 8(f) agreement and, consequently, should not bar the processing of the petition. On the other hand, the Intervenor asserts that its current collective-bargaining agreement with the Employer is not a Section 8(f) agreement because its relationship with the Employer matured into a Section 9(a) relationship before entering into the agreement. The Intervenor maintains that, as a result, the current collective-bargaining agreement bars the Petitioner's petition. The Employer stated no position at the hearing with respect to whether its collective-bargaining agreement with the Intervenor is an 8(f) agreement, or whether the agreement bars the instant petition. However, in its post-hearing brief, the Employer contends that its agreement with the Intervenor is governed by Section 8(f), and serves as a bar to the instant petition.

With respect to the final issue, the Employer and the Intervenor contend that the petitioned-for unit is not an appropriate unit inasmuch as it does not correspond with the unit described in their current collective-bargaining agreement, which includes a geographic region consisting of

12 Southern California counties where the Employer conducts business. The Petitioner claims that the petitioned-for unit, consisting of San Diego County only, is an appropriate unit because the Employer has historically treated San Diego County different from the other counties in which it operates.

Section 8(f)/Contract Bar

The Employer is a drywall contractor engaged in the non-retail installation of drywall at construction jobsites throughout Southern California. Based on the description of the Employer's business, the parties stipulated at the hearing that the Employer operates within the construction industry.

The record reveals that sometime in 1992, while operating under the business name Gateway Drywall, Inc., approximately 90% of the Employer's 400 employees participated in an industry-wide strike in conjunction with employees from numerous other drywall contractors operating

in Southern California.⁴ According to Joseph Scardino, the Employer's General Manager and Vice President, the strike effectively shut down the Employer's operations.⁵

Scardino testified that in an effort to halt the strike, the Employer commenced negotiations with the Intervenor and thereafter entered into a collective-bargaining agreement with the Intervenor known as the Southern California Residential Drywall Agreement ("1992 Drywall Agreement").⁶ Pursuant to the terms of the 1992 Drywall Agreement, the Employer affirmatively recognized the Intervenor as the collective-bargaining representative of its employees. No evidence was presented at the hearing to indicate that the Employer based its recognition of the Intervenor on a claim that the Intervenor represented a majority of the Employer's employees. However, Scardino

⁴ At the hearing, the parties stipulated that the Employer previously conducted business as both Gateway Drywall, Inc. and United Drywall, Inc., before adopting its current business name. The record reveals that the Employer's operations have remained unchanged despite undergoing these name changes during its business history.

⁵ The record reveals that, at the time of the strike in 1992, Scardino served as Gateway Drywall, Inc.'s Chief Operating Officer.

⁶ The 1992 Drywall Agreement was negotiated on the Employer's behalf by the Pacific Rim Drywall Association. The Employer became a member of the Association on October 13, 1992, upon its assent to a Labor Relations Membership Agreement.

testified that he believed that a majority of the Employer's employees wanted the Employer to negotiate with and recognize the Intervenor in 1992. Scardino admitted that he never received any objective evidence from the Intervenor, such as signed union authorization cards, to support his belief. Scardino further testified that no election, NLRB-conducted or otherwise, was held at any time following the strike in 1992 to determine whether the employees of the Employer desired to be represented by the Intervenor for purposes of collective bargaining.

The record reveals that upon the expiration of the 1992 Drywall Agreement, the Employer and the Intervenor entered into a series of successive collective-bargaining agreements, the most recent being the 1999-2000 Southern California Residential Drywall Agreement ("1999 Drywall Agreement"), effective by its terms from January 1, 1999, to December 31, 2000. The parties stipulated at the hearing that the Employer became a signatory to the 1999 Drywall Agreement by virtue of its assent to the Labor Relations Membership Agreement (supra, n. 5), and pursuant to a November 12, 1996 transaction report referenced in the 1999 Drywall Agreement.

Based on the foregoing facts, the Intervenor contends that the currently existing 1999 Drywall Agreement

does not qualify as a Section 8(f) contract but is instead a Section 9(a) contract. The Intervenor further contends that the 1999 Drywall Agreement bars the instant petition.

Contrary to the Intervenor's position, the foregoing facts do not support either contention. It is well-established that the relationship between a union and a construction industry employer will be presumed to be governed by Section 8(f) of the Act. Casale Industries, Inc., 311 NLRB 951 (1993); James Julian, Inc., 310 NLRB 1247 (1993).

In the instant matter, there is no evidence that the Intervenor has ever been certified as the collective-bargaining representative of the employees of the Employer pursuant to any Board proceeding. Moreover, there is no evidence that the Intervenor demanded recognition as the Section 9(a) representative of the employees of the Employer or that the Employer accepted the Intervenor as such. Contrary to the claims of the Intervenor, its current collective-bargaining agreement with the Employer does not show that it is recognized as the majority representative of the Employer's employees. Oklahoma Installation Co., 325 NLRB 741 (1998). Therefore, I find that the relationship between the Intervenor and the Employer, as well as their most recent collective-

bargaining agreement, is governed by Section 8(f) of the Act. J&R Tile, Inc., 291 NLRB 1034 (1988); Bell Energy Management Corp., 291 NLRB 168 (1988).

With respect to the issue of whether the 1999 Drywall Agreement between the Employer and the Intervenor bars the pending petition, the Board has consistently held that an 8(f) agreement does not operate to bar an election petition filed by a rival union. John Deklewa & Sons, 282 NLRB 1375 (1987); James Julian, Inc., 310 NLRB 1247 (1993). As noted above, the 1999 Drywall Agreement is governed by Section 8(f) of the Act. Accordingly, the 1999 Drywall Agreement is not sufficient to bar the processing of the instant representation petition.

Appropriate Unit

Because the 1999 Drywall Agreement does not constitute a contract bar, the only remaining issue is whether the unit sought by the Petitioner is an appropriate unit for the purposes of collective bargaining.

The Petitioner seeks to represent a unit, as amended at the hearing, consisting of all residential drywall employees of the Employer working in San Diego County, including, but not limited to, foremen, drywall hangers, tapers, metal men, and pick-up men; excluding office clerical employees, confidential employees, guards,

and supervisors as defined in the Act. The Employer and the Intervenor contend that the only appropriate unit should consist of foremen, drywall hangers, tapers, metal men, and pick-up men performing work at construction job sites in Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, San Diego, Imperial, Ventura, Santa Barbara, San Luis Obispo, and Kern Counties, as described in their 1999 Drywall Agreement.

As indicated earlier, the Employer is a drywall contractor engaged in the installation of drywall at construction jobsites. To conduct its drywall operations at construction jobsites, the record reveals that the Employer employs superintendents, foremen, drywall hangers, tapers, metal men, and pick-up men. With the exception of superintendents, the 1999 Drywall Agreement between the Employer and the Intervenor covers employees in the above classifications who perform work in Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, San Diego, Imperial, Ventura, Santa Barbara, San Luis Obispo, and Kern Counties. The record discloses that the Employer presently does not conduct business in Santa Barbara, Imperial, and Kern Counties, but is silent concerning the prospects of the Employer conducting business in these counties in the future.

According to Joseph Scardino, the Employer's general manager and vice president, approximately 740 employees currently perform work for the Employer in the unit described in the 1999 Drywall Agreement. The record reveals that of these 740 contractually covered employees, 140 presently perform work at construction jobsites throughout San Diego County, whereas the remaining 600 employees work in counties other than San Diego County. The record reveals that all of the Employer's unit employees, including those situated in San Diego County, perform the same type of work, namely, drywall work at construction job sites, and all utilize the same type of equipment as well.

The record further reveals that the Employer maintains a corporate office in San Dimas, California, as well as satellite offices in Fremont and San Diego, California. Scardino testified that the Employer's satellite office in San Diego is small in size and is equipped only with a fax machine and a telephone. The San Diego office does not employ a receptionist, an estimator, or a salesperson.⁷ According to Scardino, the San Diego office is used exclusively by three superintendents whose job duties require them to oversee the Employer's drywall

finishers, nailing operation, and pick-up department. A general superintendent from the Employer's San Dimas corporate office conducts routine visits to the San Diego office to supervise the operations there.

The Employer's labor relations policies, including those applicable to the Employer's Southern California unit employees, are centrally established by Scardino and his son at the corporate office in San Dimas.⁸ Other terms and conditions of employment for the employees performing unit work in Southern California, such as wages and benefits, vacation policy, and holidays, are governed by a universally applicable collective-bargaining agreement - the 1999 Drywall Agreement. Employees covered by this agreement are paid in accordance with wage rates set forth therein regardless of their location. Although wage rates for Southern California unit employees are established by the agreement, the record discloses that Scardino and his son, from time to time, have set wage rates for San Diego County employees that exceed the terms of the agreement when the job involved warrants such an upward deviation.

With respect to administrative matters, the record reveals that the purchase of materials for the

⁷ Employees performing work in these job classifications work at the Employer's corporate office in San Dimas.

Employer's business operations throughout Southern California, including San Diego County, is handled by the San Dimas corporate office. The record further reveals that employment records for all of the Employer's employees are maintained at the San Dimas corporate office. No employment records are separately kept at the San Diego satellite office. Similarly, payroll checks for unit employees, including those in San Diego County, are prepared by personnel in the San Dimas office. Pursuant to an established policy, a designated superintendent in each of the counties where the Employer conducts business, including San Diego County, is required to pick up payroll checks from the San Dimas office every Thursday. Once retrieved from San Dimas, payroll checks are then distributed to unit employees by job foremen the following day.

The record reveals that superintendents employed in San Diego County have the authority to hire, discipline, and discharge unit employees when warranted. According to Scardino, San Diego County superintendents have exercised their authority to hire and discharge employees in the past, although they have not disciplined employees. The record does not reveal whether superintendents working

⁸ The record reveals that Scardino's son, Frank Scardino, serves as

outside of San Diego County have the authority to mete out discipline. However, all superintendents of the Employer have the authority to hire unit employees, consistent with industry-wide practice.

With respect to hiring, the record reveals that superintendents work in conjunction with their respective foremen locally to satisfy staffing needs. Scardino testified that the corporate office in San Dimas becomes involved in the local hiring process only in circumstances where the superintendents in San Diego County are unable to satisfy their manpower needs through normal hiring procedures, or a builder notifies the Employer that it is behind schedule in its drywall operations at a particular job site. Depending on the circumstance involved, the Employer will either transfer employees to San Diego County from jobsites in other counties to provide assistance, or send manpower to the jobsite where the Employer is behind schedule.

With respect to the transfer of unit employees, Scardino testified that unit employees in San Diego County have occasionally been called upon to assist at job sites in Los Angeles County and Orange County. According to

the Employer's President.

Scardino, however, the transfer of unit employees to San Diego County from other counties occurs more frequently.⁹

In addition to the transfer of manpower to San Diego County, equipment is transferred to San Diego County as well. Specifically, the record reveals that the Employer transfers spray rigs from Los Angeles County to San Diego County.¹⁰ Scardino explained that the Employer transfers this equipment to San Diego County primarily because the one spray rig maintained by the Employer in San Diego County at times cannot sufficiently accommodate the volume of work there.

While uniformly clothed with the authority to hire unit employees, the record also reveals that superintendents, including those employed in San Diego County, lack the authority to resolve grievances filed by unit employees. Rather, grievances filed by unit employees are typically resolved by either Scardino or his son.

In determining whether a petitioned-for multisite unit is appropriate, the Board considers relevant the following criteria: bargaining history, functional

⁹ No testimony was offered concerning the frequency with which the Employer transfers employees to San Diego County from other counties. However, Scardino testified that currently over 20 of the Employer's unit employees from Los Angeles County are performing work in San Diego County.

¹⁰ The record does not reveal how often the transfer of spray rigs occurs.

integration of operations, the similarity of skills, duties and working conditions of employees, control of labor relations and supervision, and interchange or transfer of employees among job sites. Oklahoma Installation Co., 305 NLRB 812 (1991). The Petitioner seeks to represent only the drywall employees of the Employer working throughout San Diego County. A single-county unit may be appropriate unless the record demonstrates that a substantial community of interest is shared in a broader area. However, in the 8(f) context, the appropriate unit will usually be the single employer's employees covered by the existing collective-bargaining agreement. John Deklewa & Sons, 282 NLRB 1375, 1377 (1987). The current collective-bargaining agreement between the Employer and the Intervenor covers 12 Southern California counties.

The record establishes that all unit employees working for the Employer, regardless of their job location, perform similar work, utilize the same equipment, and are paid in accordance with the current collective-bargaining agreement between the Employer and Intervenor. The record additionally establishes that there is routine employee interchange among the counties where the Employer conducts business, including San Diego County. Further, all labor relations policies are centrally established at the

Employer's corporate office in San Dimas. Finally, collective bargaining between the Employer and the Intervenor has historically been conducted on a multi-county basis. P.J. Dick Contracting, Inc., 290 NLRB 150 (1988).

In light of these factors, namely the uniform working conditions, the transfer of employees among job sites, the Employer's centralized labor relations, the lack of a separate identity for the petitioned-for unit, as well as the bargaining history between the Employer and the Intervenor, I find that a unit limited to San Diego County is not appropriate for collective-bargaining.¹¹ Rather, I find that the appropriate unit encompasses all of the Employer's jobsites in the 12 Southern California counties. Oklahoma Installation Co., supra; P.J. Dick Contracting, Inc., supra.

At the hearing, the Petitioner represented that it does not wish to proceed to an election if the

¹¹ I make this finding despite the issue raised by the Petitioner at the hearing that the 1999 Drywall Agreement does not apply to employees working in San Diego County. There was insufficient evidence presented at the hearing to support Petitioner's claim. Moreover, for the reasons stated above, San Diego County, standing alone, is not an appropriate unit.

petitioned-for unit is deemed inappropriate. Since I find that the petitioned-for unit is not an appropriate unit for the purposes of collective bargaining, I shall dismiss the petition.

ORDER

IT IS HEREBY ORDERED that the petition herein be, and the same hereby is, dismissed.

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. 10570. This request must be received by the Board in Washington by 5 p.m., EDT, on May 26, 2000.

Dated at Los Angeles, California, this 12th day of May, 2000.

/s/Peter Tovar
Peter Tovar
Acting Regional Director, Region 21
National Labor Relations Board

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