

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

CONSOLIDATED TECHNOLOGIES, INC.

Employer

and

Case 6-RC-11884

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL NO. 66, AFL-CIO¹

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Patricia J. Daum, 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 powers in connection with this case to the undersigned Regional Director.²

Upon the entire record³ in this case, the Regional Director 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.

¹ The name of Petitioner appears as amended at hearing.

² 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 I4th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by November 9, 2000.

³ The Employer and the Petitioner filed timely briefs in this matter which have been duly considered by the undersigned.

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.

As amended at the hearing, the Petitioner seeks to represent a unit consisting of all full-time and regular part-time permanent, temporary and seasonal equipment operators, mechanics, rock truck drivers and laborers employed by the Employer at its Bark Camp Mine Complex site located in Penfield, Pennsylvania; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act and all others. While the parties are otherwise in agreement as to both the scope and composition of the unit, the Employer, contrary to the Petitioner, contends that the thirteen “temporary” employees at issue herein were hired for a specific project, and that when that project is completed the employees will be “let go” with no expectation of re-employment and, therefore, that they must be excluded from the unit found appropriate herein. There are approximately twenty employees in the petitioned-for unit, which number includes the thirteen individuals whose status is in dispute.⁴ At the hearing the parties stipulated that the seven permanent, or core group employees are properly included in any unit found appropriate herein.⁵ There is no history of collective bargaining for any of the employees involved herein. At the hearing the Employer moved to dismiss the petition on the ground that the thirteen employees in dispute were ineligible for representation under the National Labor Relations Act.

The Employer, a Pennsylvania corporation with an office and place of business in Blue Bell, Pennsylvania, is engaged in the business of developing and implementing methods of

⁴ The individuals whose status is in dispute are: John Bloom, Tom Mahaffey, Tim Mayes, Art Bickel, Kevin Taylor, Mike Lannin, Larry Foster, Al Connors, Don Mace, Dennis Solinski, Mike Reed, Danny Hueblu and Craig Foznienski.

⁵ The individuals whose status is not in dispute are: Nick Shugars, John Waling, Dallas Nelen, John Beatty, Joe Peters, Ron Wright and Jerry Haines.

processing waste materials for other uses. Solely involved in this proceeding is the Employer's operation at the Bark Camp Mine site in Penfield, Pennsylvania.

As noted, the Employer is engaged in the field of environmental services. Its primary purpose is the development and implementation of technologies for the beneficial use of waste materials for projects including land reclamation, brownfield sites⁶, redevelopment and land fill closure and capping. Its focus is on processing dredge materials and cold flyash (municipal waste incinerator ash) to render those materials into products which can appropriately be used for the projects noted above. The Bark Camp Mine site is a mine complex owned by the Pennsylvania Department of Natural Resources and Conservation, in the Moshannon State Forest. The Commonwealth of Pennsylvania, via its contract with the Employer, is performing the reclamation work on two deep mines and one surface mine at the site. Reclamation involves putting cold flyash and "manufactured fill material" into the mine. Manufactured fill material consists of dredge materials from rivers and waterways which has been processed to produce an appropriate structural fill. The contract between the Commonwealth of Pennsylvania and the Employer expires in 2002.

The operations at the Bark Camp Mine consist of the processing and placement of flyash as a fill material and the processing and placement of dredge and "amended" dredge materials into the mine. To accomplish this, the Employer is currently dredging in New York and New Jersey. The dredged materials are transported by railcar to the Bark Camp Mine site where they are unloaded, processed through a pugmill with the flyash material, and placed in the mine. The flyash is delivered to the site by outside suppliers, dumped from dump trucks into the pugmill, then processed with alkaline activators, which are waste lime products and waste silicate products, to produce a grout, or cement-like material. The processed material is then taken to the mines for the reclamation work. The pugmill is a twin shafted paddle mixer, with

⁶ A "brownfield site" is described in the record as a former industrial property or an "unclean or contaminated site" that requires remediation measures prior to re-entering the market for development. It is property that, for regulatory reasons, could not be developed in its "as-is" state.

two counter-rotating shafts which have paddles to mix the product consistently. The pugmill mixes the flyash and dredge materials on site. The pugmill is designed to be movable although it is at the Bark Camp Mine for the duration of the project described.

Steven Sands, the Employer's President, retains overall authority for the operation of the Employer's business. Ken Sykes has overall responsibilities for the Bark Camp Site. Reporting to Sykes is Chris Amaratis, the facility manager, and reporting to Amaratis is Dick Jones, the field supervisor. As previously noted, the employer has seven "core" employees who operate the pugmill, move the dredge materials and additives, and place the material at the mines. The thirteen "temporary" employees perform the same work as the "core" employees, under the same supervision, and have similar terms and conditions of employment. At the hearing, the parties stipulated that the same work is performed by all employees.

The record revealed that the Employer had permits from the Commonwealth of Pennsylvania enabling it to perform reclamation work at the Bark Camp Mine site with processed flyash (municipal waste incinerator ash). It approached the Commonwealth of Pennsylvania in approximately 1996, concerning its willingness to sponsor a demonstration project involving the use of dredge material and amended dredge material for mine reclamation projects. The Commonwealth, which owns the site and has oversight of the land, agreed to the experimental project. Accordingly, the Employer entered into a five year agreement, and obtained permits from the Commonwealth of Pennsylvania, for the processing and placement of no more than 550,000 cubic yards of dredge materials at the Bark Camp Mine site. The agreement expires in 2002 and the permit requires the placement of dredge material originating from the Hudson-Raritan Estuary and the Delaware River Basin. The site currently operates one shift, six days per week. The record reveals that the Employer is currently processing about 2,000 cubic yards of dredge material per day.⁷

⁷ At the hearing, the Employer's President, Steven Sands, testified that the facility will process 3,000 to 4,000 cubic yards of dredge material per day for the rest of the year.

The Employer began placing material at the Bark Camp Mine in August and September, 1998. At that time, the Employer employed its core employees to operate the pugmill system, and subcontracted with another employer for employees to load rail cars, transport material to the pugmill, and from the pugmill to the mine areas. The subcontract was entered into due to the small volume of material to be processed at that time. In 1999, no dredge materials came into the site and no employees other than the core employees were necessary to perform all of the pugmill operations as well as transport and placement operations. In March, 2000, dredge material was first received at the site. The core employees began the processing and placement operations of the dredge material at that time. Beginning in approximately July, 2000, the site began to receive much larger volumes of dredge material. The employer then hired the 13 employees at issue herein, in order to process, transfer and place the dredge material in the mines.

The Employer has contracts with the Port Authority of New York and New Jersey for dredge work at the Howland Hook Marine Terminal (for 70,000 cubic yards of material) and with the Port Authority of New York and New Jersey for dredging 200,000 cubic yards of material from various marine terminals. This material will be processed and placed at the Bark Camp Mine location. Both the Howland Hook and marine terminal contracts have dredging completion dates in November, 2000.

As noted, the Employer's contract with the Commonwealth of Pennsylvania limits it to placing no more than 550,000 cubic yards of dredge materials at the Bark Camp site. To date, it has placed approximately 100,000 cubic yards of dredged and processed materials. This number is calculated by adding the actual number of cubic yards of dredge materials, plus approximately 30% more in "additives" and processing materials. An additional approximately 300,000 cubic yards of dredged and processed materials will be placed by the end of December, 2000, from the New York and New Jersey area contracts. Therefore, about 400,000 cubic yards of material will be placed by December 31, 2000 or early January 2001. Another 65,000 cubic yards of material (50,000 cubic yards of dredge plus additives) will come from the

Delaware River Basin. The Employer has a permit for dredging 1.25 million cubic yards of material from the Claremont Channel (located in the New York harbor area), with 150,000 cubic yards of the material to be used at the Bark Camp Site, but no notice to proceed has issued from the Army Corps of Engineers for that project.

The Employer contends that the employees at issue, while hired to place large volumes of material, have no reasonable expectation of continued employment due to the planned completion of the dredging material work for which it has contracts, by the first week in January, 2001, at the latest. At that time, the Employer will return to processing solely flyash, with the seven core employees currently on site. According to the Employer's President, the thirteen "temporary" employees will be "let go" at that time. The Employer does not anticipate directly employing more than its core group of seven employees for any further dredging material operations at Bark Camp Mine, preferring to subcontract any future work as it has done in the past. In this respect, the Employer anticipated that no more than two months will be needed to process any remaining material due to the increased production capability which has been reached. The Employer asserts that it will subcontract for any further placement and processing of dredging materials, as these will be relatively small projects, of short duration. In the past the Employer has subcontracted projects for the placement of 20,000 cubic yards of dredged material. Accordingly, the Employer contends that the thirteen temporary employees have no expectation of continued employment after approximately December 31, 2000 or the beginning of January, 2001, and, therefore, that they should be excluded from the unit found appropriate herein.

The Petitioner contends, in the alternative, that the thirteen employees in dispute are seasonal employees, and therefore are eligible to vote. In this respect, the Petitioner notes that SEC filings on record for the parent corporation state that the Employer's business is seasonal, that the work force consists of permanent employees, and that the filings do not note temporary employees. Further, the record reveals that several of the temporary employees were informed when they were hired that there was a significant amount of work to be done on the Bark Camp

Mine project, and that while employees might be laid off in the winter, they would be recalled in the spring of 2001. No temporary employee was informed that he was temporary. Rather, the record indicates that they were hired as full-time employees and perform exactly the same work as the “core” employees.

The test for determining the eligibility of individuals designated as temporary employees is whether they have an uncertain tenure. If the tenure of the disputed individuals is indefinite and they are otherwise eligible, they are permitted to vote. United States Aluminum Corp., 305 NLRB 719 (1991). However, where employees are employed for one job only, or for a set duration, or have no substantial expectancy of continued employment and are notified of this fact, such employees are excluded as temporaries. St. Thomas-St. John Cable TV, 309 NLRB 712, 713 (1992); Indiana Bottled Gas Co., 128 NLRB 1441, 1442-1443 fn.4 (1960); Sealite, Inc., 125 NLRB 619, 620 (1959).

The record herein reveals that the employees at issue were hired to perform hauling, mixing and placing of dredge materials at the Bark Camp Mine site without being informed of any expected curtailment of employment other than seasonal layoffs and recall from layoff.⁸ However, the record further reveals that the Commonwealth of Pennsylvania has contracted for no more than 550,000 cubic yards of dredge material to be placed at the site, and that the Employer has contracts to dredge approximately 80% of the required amount, via contracts which have dredging termination dates in late November, 2000. The Employer expects to process and place that material within the next several months. The Employer has no expectation that it will continue to have dredged material to be placed at Bark Camp after early January, 2001, other than projects of very short duration, which it expects to accomplish with its core employee group supplemented, if necessary, by subcontracted employees, as it has done in the past. The record reveals no contracts for dredging past November, 2000, which have the

⁸ At the hearing, the Employer’s President explained that Dick Jones, the field supervisor at Bark Camp Mine to whom the employee witnesses attributed the remarks concerning layoff and recall, did not have knowledge of the completion dates of the dredging contracts.

requisite permits. Accordingly, as the record affirmatively establishes that the Employer's contract with the Commonwealth of Pennsylvania limits the amount of material to be placed, the majority of which will be placed by January, 2001, and that the employees at issue herein will be "let go" at that point, I find the employees in dispute herein to be temporary employees.⁹

With respect to the Petitioner's argument that the employees at issue are seasonal employees, the Board has long held that regular seasonal employees are those who have a reasonable expectation of reemployment in the foreseeable future and that temporary or casual seasonal employees are excluded. L & B Cooling, Inc., 267 NLRB 1, 2-3 (1983). In this regard, the Board will evaluate, inter alia, the following factors: the stability of the employer's labor requirements, the extent to which the employer is dependent upon seasonal labor, the actual season-to-season reemployment, and the employer's preference or recall policy regarding reemployment of seasonal employees. L & B Cooling, Inc., Id. In the instant case, the record reveals that the employer's labor requirements are continually in flux, and that the dredging work which underlies the processing procedures may continue without seasonal fluctuation. While weather conditions may hamper dredging and other operations, there is no indication that the work ceases for any prolonged period of time, thus requiring seasonal employment and reemployment. The record further reveals that pursuant to the Claremont Channel contract the Employer has a forced hiatus on dredging from January 1 to May 31 of any year. This contractual limitation does not transform the Employer's operations into a seasonal business. I find, therefore, that the employees in dispute, who have no history of layoff and recall by the Employer, are not seasonal employees.

⁹ In its brief the Petitioner asserts that even if the employees are found to be temporary, they share a sufficient community of interest with the permanent employees so as to be included in the unit, citing M.B. Sturgis, Inc., 331 NLRB No. 173 (2000). I find Sturgis to be inapposite inasmuch as, in that case, the Board utilized the term "temporary employees" to refer to employees supplied by another employer to the user employer. The Board was not addressing the temporary employee issue presented herein.

Based on the above, and the record as a whole, I find that the thirteen individuals in dispute herein are temporary employees, and shall exclude them from the unit found appropriate herein.¹⁰

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 and regular part-time equipment operators, mechanics, rock truck drivers and laborers employed by the Employer at the Bark Camp Mine Complex, Penfield, Pennsylvania; excluding office clerical employees, temporary employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit set forth above at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.¹¹ Eligible to vote are those employees in the unit who were employed during the payroll period 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

¹⁰ As noted above, at the hearing, the Employer moved to dismiss the petition on the ground that the Petitioner seeks to represent employees who are ineligible for representation under the National Labor Relations Act. As the Petitioner has indicated its desire to proceed to an election in any unit found appropriate herein, I hereby deny the Employer's motion.

¹¹ Pursuant to Section 103.20 of the Board's Rules and Regulations, official Notices of Election shall be posted by the Employer in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed. The Board has interpreted Section 103.20(c) as requiring an employer to notify the Regional Office at least five (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.

vote are employees who have quit or been discharged for cause since the designated payroll period and 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.¹² Those eligible shall vote whether or not they desire to be represented for collective bargaining by International Union of Operating Engineers, Local No. 66, AFL-CIO.

Dated at Pittsburgh, Pennsylvania, this 26th day of October 2000.

/s/Gerald Kobell

Gerald Kobell
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
Room 1501, 1000 Liberty Avenue
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460-5067-7000
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¹² In order to assure 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). Accordingly, it is hereby directed that the election eligibility list, containing the full names and addresses of all 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. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, Room 1501, 1000 Liberty Avenue, Pittsburgh, PA 15222, on or before November 2, 2000. No extension of time to file this list may be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.