

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

PILON LATH & PLASTERS, INC.¹

Employer

and

OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL 5, AFL-CIO

Petitioner

and

INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTWORKERS, LOCALS 6, 56, AND 74, AFL-CIO

Intervenors

Case 13-RC-20513

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; 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 record² 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

3. The labor organization(s) involved claim(s) 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. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:⁴

All full-time and regular part-time plasterers, journeymen, and apprentices employed by the Employer at its facility currently located at 2519 Lenox Road, Joliet, Illinois 60433, excluding office clerical employees and guards, professional employees and supervisors as defined by the Act.

DIRECTION OF ELECTION*

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place 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(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In addition, all employees who have been employed for a total of 30 days

or more within the 12-month period immediately preceding the eligibility date for the election, or have had some employment in that period and have been employed 45 days or more within the 24-month period immediately preceding the eligibility date, are also eligible. 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 employees 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. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Operative Plasterers and Cement Masons International Association, Local 5, AFL-CIO **and** International Union of Bricklayers & Allied Craftworkers, Locals 6, 56, and 74, AFL-CIO⁵, **or** neither.

LIST OF VOTERS

In order to insure 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); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the names and addresses of all of the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in **Suite 800, 200 West Adams Street, Chicago, Illinois 60606** on or before March 7, 2001. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

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, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by March 14, 2001.

DATED February 28, 2001 at Chicago, Illinois.

/s/ Elizabeth Kinney
Regional Director, Region 13

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- */ The National Labor Relations Board provides the following rule with respect to the posting of election notices:
- (a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Director in the mail. In all cases, the notices shall remain posted until the end of the election.
 - (b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.
 - (c) A party shall be estopped from objection to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Director at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

1/ The names of the parties appear as amended at the hearing. The parties stipulated that the International Union of Bricklayers & Allied Craftworkers, Locals 6, 56, and 74, AFL-CIO (herein collectively referred to as the Intervenors and singularly as Bricklayers Local 6, Local 56, and Local 74) were proper Intervenors in this proceeding based upon having current or expired collective bargaining agreements with the Employer covering the employees sought by the Petitioner in the instant petition.

2/ The arguments advanced by the parties at the hearing and in their post-hearing briefs have been carefully considered.

3/ The Employer is a corporation engaged in construction.

4/ The Petitioner since 1988 has had collective bargaining agreements with the Employer pursuant to Section 8(f) of the Act covering the employees it seeks to represent under Section 9(a) through the instant petition. Due to agreements between the International Unions of the Petitioner (International Association of Operative Plasterers and Cement Masons, herein the “Operative Plasterers” and the Intervenors (International Union of Bricklayers & Allied Craftworkers, herein the “Bricklayers”), establishing certain geographical limitations on each other where there was overlapping coverage of job classifications, the collective bargaining agreements between the Petitioner and the Employer have not been applicable to plastering work performed by the Employer in DuPage and Kankakee Counties, Illinois. In DuPage County, the work performed by the employees covered by the instant petition has been under the jurisdiction of Bricklayers Locals 56 and 74, and the record indicates that, at least for the period of 1990 to 1993, the Employer had a collective bargaining agreement with those locals covering the Employer’s plasters while they worked in DuPage County. In 1997, the Employer entered into an 8(f) agreement with Bricklayers’ Local 6, covering its employees when working in Kankakee County.

In 1998, the Operative Plasterers unilaterally revoked its agreement with the Bricklayers regarding geographical restrictions. This action by the Operative Plasterers was upheld at the convention of the Building and Construction Trades Department of the AFL-CIO in July, 2000. Thereafter, the Operative Plasterers authorized the Petitioner to expand its geographic jurisdiction, including covering both DuPage and Kankakee Counties. As a result, the Petitioner filed the instant petition seeking to become the certified representative under Section 9(a) of the Act of the employees of the Employer covered by its 8(f) collective bargaining agreement with the Employer, without regard to the previous geographical restrictions, such as DuPage and Kankakee Counties. The Petitioner contends the unit it seeks to represent herein is an appropriate single employer unit in which the employees share a sufficient community of interests. The Intervenors, on the other hand, contend that the unit sought by the Petitioner is inappropriate as it is broader than that which the Petitioner has historically represented through its 8(f) agreements with Employer, asserting that the history of collective bargaining under Section 8(f) of the Act is controlling as to the scope of the unit under Board precedent. Accordingly, the Intervenors’ assert that petition must be dismissed, or alternatively, that the unit description be amended to exclude DuPage and Kankakee Counties from its scope to conform the unit to its historical scope.

At the hearing there was also an issue raised about the voting eligibility of Ronald P. Pilon, the son of the owner. The Petitioner maintains that he is eligible to vote because he is treated as an employee of the Employer, paid the same wages, and was considered as coming within the Plasterers Local 5 pre-hire agreement with Pilon Lath & Plastering. The Intervenor maintains that he is ineligible to vote because he is the son of a majority shareholder of a closely-held corporation.

FACTS:

Pilon, Lath & Plastering Business Operations

The Employer is located in Joliet, Illinois, and is engaged in performing plastering work at construction sites. Carolyn and Theresa Pilon, who handle administrative functions, are the joint owners of the Employer. Both women own 50% of the business. Ronald F. Pilon and his brother Philip Pilon are in charge of the day to day operations and supervision of employees. Ronald F. Pilon handles the assignment of work. Since 1988, the Employer has regularly employs between six to 10 plasters (sometimes, the Employer counts Ronald and Philip Pilon among its employees, as they are not the owners of the Company). The Employer has a core group of four full-time plasterers, who are members of the Petitioner. The Employer has obtained apprentice plasterers from the Petitioner, but not from any other local union. The Employer believes that in the Summer of 1998, it may have employed a plasterer that was a member of Bricklayers' Local 74. All employees perform the same work and they may all work together on a job site or they may work on different job sites, depending on the number and nature of the jobs that the Employer has at any given time. Employees are assigned to jobs based on the complexity and scope of the job, not upon the job situs, the employees' local union membership, or the geographical coverage of any particular local union. Generally, the employees report to work at the job site to which they are assigned and not to the Employer's Joliet, Illinois facility. All employees may have the use of company vehicles which are stored at the Employer's Joliet, Illinois facility. The Employer undertakes, on average, 90 to 120 jobs per year that can range from \$50 to \$750,000 per job. Within the last two years, the Employer has completed projects in Cook, Kane, Will, Grundy, LaSalle, Livingston, DuPage and Kendall Counties

Notwithstanding the historical separate geographical jurisdictions between the Petitioner and the Intervenor, the record shows that the Employer has paid the hourly rate set forth in its agreement with the Petitioner to its plasterer employees, regardless of whether they were working in the Petitioner's geographical jurisdiction or outside of it, unless the local wage rates were higher where the employees were working. Similarly, the Employer's testimony indicates that it paid the fringe benefits set forth in its agreement with the Petitioner to the Petitioner, regardless of whether the employees were working within the historical geographical jurisdiction of the Petitioner or not. Only if the Employer was contacted by a local union with whom it had a contract concerning the payment of benefits would it pay the benefits to the other local union.

Status of Ronald P. Pilon

Ronald P. Pilon is the son of Ronald F. Pilon. His mother is a 50% shareholder in Pilon Lath & Plastering. He is an employee of Pilon Lath & Plastering and is paid the same scale as the other employees. According to the record, Ronald P. Pilon was considered as being covered by the pre-hire agreement signed with Plasterers Local 5.

ANALYSIS

I. Appropriateness of the Bargaining Unit

Section 9(b) of the National Labor Relations Act directs the Board to “decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .” “[T]he selection of an appropriate bargaining unit lies largely within the discretion of the Board whose decision, ‘if not final, is rarely to be disturbed.’” *South Prairie Construction v. Operating Engineers Local 627*, 425 U.S. 800, 805 (1976)(citation omitted). There is nothing in the Act that requires the unit for bargaining be the only appropriate unit or the most appropriate unit – the Act only requires that the unit for bargaining be appropriate so as to assure employees the fullest freedom in exercising the rights guaranteed by the Act. *Overnite Transportation Co.* 322 NLRB 723 (1996); *Brand Precision Services*, 313 NLRB 657 (1994); *Phoenix Resort Corp.*, 308 NLRB 826 (1992). In defining the appropriate bargaining unit to ensure employees the fullest freedom in exercising the rights guaranteed by the Act, the key question is whether the employees share a sufficient community of interest. *Alois Box Co., Inc.*, 326 NLRB 1177 (1998); *Washington Palm, Inc.*, 314 NLRB 1122, 1127 (1994).

In determining whether employees share a sufficient community of interests to constitute an appropriate unit, the Board weighs various factors, including the similarity of skills, functions, and working conditions throughout the proposed unit; the central control of labor relations; transfer of employees among the Employer’s other construction sites; and the extent of the parties’ bargaining history. *P.J. Dick Contracting, Inc.*, 290 NLRB 150, 151 (1988), citing *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965). Also, the Board will consider a difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of similar or dissimilar qualifications, training and skills; differences in job functions; amount of working time spent away from the facility; and integration of work functions. *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962); *Banknote Corp. of America v. NLRB*, 84 F.3d 637, 647-648 (2d Cir. 1996).

It is clear that the unit petitioned for herein would, upon application of the foregoing community of interest factors, be found to be an appropriate unit for collective bargaining, in the absence of any consideration of the history of collective bargaining.

Thus, the record shows that the petitioned for unit constitutes a single employer unit consisting of all of the Employer's employees who are engaged in shared and clearly identifiable job functions, who have common supervision, and share the same terms and conditions of employment. The Intervenor's, however, contend that the petitioned-for unit is inappropriate because it is broader in scope than the historical bargaining unit in the 8(f) collective bargaining agreements between the Petitioner and the Employer. The Intervenor's, based upon the following language in the Board's decision in *John Deklewa & Sons*, 282 NLRB 1375, 1377 (1987), assert that the scope of the petitioned-for unit must be the same as that in the 8(f) agreement between the Petitioner and the Employer:

[S]uch agreements [8f] will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e). . . in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement. . . .

The Intervenor's assert that Board's decision in *P.J. Dick Contracting, Inc.*, 290 NLRB 150 (1988) supports its view that where there is a historical relationship under Section 8(f) of the Act, the Board's decision in *Deklewa* requires that the scope of the petitioned-for unit be the same as that found in the 8(f) agreement. In *P.J. Dick Contracting, Inc.*, the Board rejected the petitioning union's request for a unit covering 33 counties, finding that the petitioning union's alternative request for a unit confined to the 11 counties it had covered in its 8(f) agreements with the employer to be appropriate. In reaching that conclusion, the Board stated:

[T]he Board's traditional deference to bargaining history is generally applicable in the construction industry. Indeed based on the limited evidence presented, it is the determinative factor in finding in this case that the 11 county jurisdiction of the MBA agreement is the appropriate unit.
Id. at 151

While it is clear, based upon the foregoing, that bargaining history is a factor to be weighed and considering in determining whether a petitioned for unit is appropriate, I find that the Intervenor's reading of *Deklewa* language to be too restrictive. Bargaining history pursuant to 8(f) agreements is not the conclusive consideration in determining whether a petitioned-for unit is appropriate. The very language that the Board used in *Deklewa*, 282 NLRB 1375, 1377-78 (1987) "the appropriate unit *normally will be* the single employer's employees covered by the agreement" (emphasis added), clearly sets forth that 8(f) agreement unit is not necessarily conclusive as to the determination of the appropriate unit. Furthermore, the language in *Deklewa* cited by the Intervenor's was used by the Board to express its rejection of the merger doctrine in 8(f) situations, rather than to define the scope of single employer units. Under the merger doctrine, the employees of a single employer that belonged to a multi-employer bargaining association were merged into a multi-employer bargaining unit. As such, the employees of the single employer could only exercise their right to select their bargaining representative in conjunction with all the other employees of the other employers who were included in the multi-employer bargaining unit. In *Deklewa*, the Board rejected the merger doctrine's

application to representation petitions where the employees had been covered by multi-employer agreements under Section 8(f) of the Act in order to allow the employees of a single employer an opportunity to exercise their Section 7 rights to vote on whether to accept or reject the 8(f) bargaining representative. See *City Electric, Inc.*, 288 NLRB 443, fn. 9 (1988). Thus, it is clear that Board's language in *Deklewa*, cited by the Intervenor, was not meant to limit the scope of a single employer unit in the construction industry under Section 9(b) of the Act to the unit defined by the previous 8(f) bargaining agreement.

The Board's decision in *P.J. Dick Contracting, Inc.*, *supra*, also makes it clear that, while 8(f) bargaining history is a factor to be weighed in determining the appropriate unit, it is not conclusive. In finding the historical unit to be appropriate, the Board did not find that its decision in *Deklewa* compelled a finding that only the historical unit was appropriate. Rather, the Board made it clear that the broader unit sought by the petitioner might be appropriate; however, the Board found that the petitioner had failed to present any evidence to demonstrate its appropriateness. *P.J. Dick Contracting, supra*, at fn. 8.

While the Board gives substantial weight to bargaining history in furtherance of the statutory objective of stability in industrial relations, I find no basis on the record for giving the bargaining history involved herein weight over the other community of interests factors that make the unit sought by the Petitioner otherwise appropriate. For all intents and purposes, the Petitioner has been the collective bargaining representative of the Employer's employees for all purposes permissible under the Act. The historical geographical exclusions of the employees of the Employer when they work in certain counties from coverage of the 8(f) agreements between the Petitioner and the Employer has not had any discernable impact upon the employees and their community of interest. For the most part, it appears that the geographical exclusions, as a practical matter, have been ignored by the Employer and have made no difference to the employees of the Employer with regard to almost all of their terms and conditions of employment. It appears from the record that the only distinction that can be made, based upon whether the employees were working in the jurisdiction of the Petitioner or the Intervenor, has been an occasional administrative burden on the Employer and the various locals concerning where the money for the fringe benefit funds were to go.

On the other hand, to find as the Intervenor's contend, that the unit sought by the Petitioner must under Section 9(b) of the Act be confined geographically to the unit Petitioner represented under the 8(f) agreements only serves, on the facts herein, to perpetuate an arbitrary geographical division of employees into separate units based upon where they are working. The only basis on the record in the instant case for the historical geographical division of the units between the Petitioner and the Intervenor were political considerations of maintaining geographical integrity for the local unions without competition among the local unions regarding the representation of employees. The record evidence shows that the geographical divisions have little, if anything, to do with the terms and conditions of employees whom these locals represent. Herein, it is the same group of employees working under the same general terms and conditions of

employment whom the Intervenors' would divide into different units depending solely on what county that they happen to be working in.

It is the opinion of the undersigned, based upon the foregoing, that the 8(f) bargaining history between the parties herein is not entitled to controlling weight over the community of interests that exists in the unit sought by the Petitioner. In *A.C. Pavement Striping Company, Inc.*, 296 NLRB 206, 210 (1989), the Board adopted the decision of Acting Regional Director which set forth in relevant part:

“The Board has long given substantial, but not conclusive, weight to a prior history of collective bargaining. *General Electric Company*, 107 NLRB 70, 72 (1953). In *John Deklewa and Sons, supra*, the Board set forth that in making unit determinations where the employees in question were covered by 8(f) agreements, the appropriate unit will normally be the unit as defined in the agreements. Nevertheless, the Board has also long held that it will not give controlling weight to a history of collective bargaining ‘to the extent that it departs from statutory provisions or clearly established Board policy concerning the composition and scope of bargaining units.’ *Williams J. Keller, Inc.*, 198 NLRB 1144, 1145 (1972). Herein, the record shows no rational basis exists for the two historical units other than being purely historical accidents.”

In sum, the record herein demonstrates no rational basis for continuing the geographical division of units and, based upon the community of interests among the employees in the unit sought by the Petitioner, without regard to which county they happen to working in, I find the unit sought by the Petitioner to be an appropriate unit. Accordingly, as the petitioned-for unit has been found to be appropriate, I reject the Intervenors' request to dismiss the petition and its alternative request to limit the unit to its historical geographical basis. In doing so, I further note that the Board historically has not defined units in geographical terms as requested by the Intervenors. *P.J. Dick Contracting, supra* at fn. 10.

II. Voting Eligibility of Ronald P. Pilon

The Board has held that the child of a shareholder having a 50 percent or more ownership interest in a closely-held corporation will be excluded under Section 2(3) of the Act from the status of “employee” as an “individual employed by his parent or spouse.” *Campbell-Harris Electric*, 263 NLRB 1143, 1148 (1983). In these situation, the Board has pierced the corporate veil and has found that in these situations, the shareholder in fact is the actual employer of the employee. *Campbell-Harris Electric*, 263 NLRB 1143 (1983), *Cerni Motor Sales, Inc.*, 201 NLRB 918 (1973), *Foam Rubber City #2 of Florida, Inc., d/b/a Scandia*, 167 NLRB 623 (1967). As the record shows that Ronald P. Pilon is the son of Mrs. Pilon, a 50% shareholder in Pilon, Lath & Plastering, I find that he is ineligible to vote and thus must be excluded from the bargaining unit.

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There are approximately 6 to 10 employees in the unit found appropriate. Because the Employer is engaged in the construction industry, the eligibility of voters will be determined by the formula in *Daniel Construction Co.*, 133 NLRB 264 (1961) and *Steiny & Co.*, 308 NLRB 1323 (1992).

5/ International Union of Bricklayers & Allied Craftworkers, Locals 6, 56, and 74, AFL-CIO have indicated that with regard to the instant Employer they wish to appear on the ballot as one choice, e.g., if selected by the employees they would be the joint representatives of the unit. Accordingly, based upon Local 6's 8(f) agreement with the Employer and the desire of these three locals to appear as one choice on the ballot rather than competing with each other, as well as with the Petitioner, International Union of Bricklayers & Allied Craftworkers, Locals 6, 56, and 74, AFL-CIO will appear on the ballot as one choice, with the other choices being the Petitioner and neither.

400-7500; 420-1200;
420-1700; 440-3350