

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

LEVY COMPANY

Employer

and

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

Petitioner

and

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

Intervenors

Case 13-RC-20539

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 record¹ 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.²

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.³

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 plasterers' apprentices employed by the Employer from its facility currently located at 3925 Commercial Avenue, Northbrook, Illinois, 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 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 the full names 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 full 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 22, 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 29, 2001**.

DATED March 15, 2001 at Chicago, Illinois.

/s/ Gail R. Moran
Acting Regional Director, Region 13

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

2/ The Employer is a corporation engaged in construction.

3/ The Parties stipulated that the International Union of Bricklayers & Allied Craftworkers, Locals 56 and 74, AFL-CIO were proper intervenors in these proceedings. Based upon the facts set forth *infra*, and in agreement with the parties, I find that they have an interest in this proceeding and may appear as a choice on the ballot.

4/ The Petitioner (herein referred to as Local 5) has a collective bargaining agreement 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. The 8(f) agreement was the result of a memorandum of understanding signed by the Employer which binds the Employer to the area-wide agreement between Local 5 and the Chicagoland Association of Wall and Ceiling Contractors (herein the Association). Due to agreements between the International Unions of the Petitioner (International Association of Operative Plasterers and Cement Masons, herein the "Operative Plasterers" and the Intervenor (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 8(f) collective bargaining agreements between the Petitioner and the Employer have not been applicable to plastering work performed by the Employer in DuPage County, 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. The record does not reflect how long the Employer has had 8(f) relationships with the Petitioner based upon its separate geographical jurisdiction. The Intervenor contends that the Employer, through its membership in the Association is bound to an 8(f) agreement negotiated by the Association on behalf of members of the Association. However, while the Employer is a member of the Association, the record indicates that the Employer has not assigned its bargaining rights to the Association, and no memorandum of agreement signed by the Employer binding the Employer to an 8(f) agreement with the Intervenor was introduced into the record. The record does show the Employer has employed plasterers that are members of the Intervenor and that in the past the Employer has made fringe benefit contributions to the Intervenor's funds.

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 to include DuPage County among other areas. 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. 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 Intervenor, 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 Intervenor asserts that petition must be dismissed, or alternatively, that the unit description be amended to exclude DuPage County from its scope to conform the unit to its historical scope. The Employer agrees with the Petitioner that the unit sought is appropriate, however, it asserts that the unit description should include the counties covered by the Petitioner's current geographic jurisdiction. The Petitioner objects to the insertion of any geographical limitation in the unit description.

FACTS

Levy Company Business Operations

The Employer is located in Northbrook, Illinois, and is engaged in performing plastering work in the Chicago metropolitan area. Fred Levy is the President and General Superintendent of the Employer. In his capacity as General Superintendent, Mr. Levy sets up rates for estimating, makes sales calls and has some field responsibilities including dispatching plasterers. The staff of managers also includes six field superintendents, 11 estimators, an office manager, a controller, and a computer technician. The Employer maintains a workforce of carpenters, painters, lathers, laborers and a regular staff of approximately 20 to 40 plasterers. Plasterers are not hired on a job basis, but are hired to go from job to job as long as there is sufficient work. At the date of the hearing, the report submitted by the Employer to the Petitioner showed that there were nine plasterers working of the Employer at that particular time.

About 99 percent of all work done by the Employer takes place in the metropolitan Chicago area. Specifically, the Employer has done work in Cook, Lake and DuPage Counties. When conducting a plastering job, all plasterers perform the same work and may work together on one 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. Fred Levy testified that the Employer will try keep employees on work sites as close to their homes as possible. Some of the plasterers are known as plasterer foremen who have more seniority and skills and who make minor decisions about the priority of the day's work. Generally, plasterers report to work at the job site to which they are assigned and not to the Employer's Northbrook, Illinois facility. They are commonly supervised. The Employer has utilized the Local 5 hiring hall and the Local 5 apprenticeship school for at least the past seven years, but has never consulted the Bricklayers Local 54 or 76 for the same services.

While the record is somewhat confusing and unclear as to the Employer's practices regarding the payment of wages and fringe benefits in the different union jurisdictions, Fred Levy testified that he believed that union dues and fringe benefit payments go to the local union that the employee is a member of rather than go to the

local union in whose jurisdiction the work was performed. While Fred Levy testified that the working conditions of the plasterers were the same regardless of where the work was performed, he did not specifically answer the question as to whether the rate of pay to the plasterers remained the same regardless of where the work was performed.

ANALYSIS

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 the opinion of the undersigned that the unit petitioned-for herein, upon application of the foregoing community of interest factors, is an appropriate unit for collective bargaining. 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 and share the same terms and conditions of employment.ⁱ

The Intervenors', 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 Intervenors, 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 Intervenors 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 Intervenors 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

ⁱ There is no contention herein that the plasterers do not constitute an appropriate unit apart from other construction trades as a clearly identifiable group of employees engaged in distinct job functions. *Laborers (R.B. Butler, Inc.)*, 160 NLRB 1595 (1966).

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 regardless of where the plasterers work. 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 no 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 made no difference to the employees of the Employer with regard to their terms and conditions of employment.

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 Intervenor's 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 exclusion of the same groupings of employees from representation by a local union based upon the particular county they are working in based upon local union jurisdictions. Accordingly, based upon the foregoing and the entire record herein, I find that the unit sought by the Petitioner is not limited to that previously covered under its 8(f) agreement with the Employer and that the unit may appropriately include plasterers working in DuPage County. Similarly, with regard to the Employer’s request at the hearing that the unit description should include the counties in Illinois within the Petitioner’s jurisdiction, the Board has long held that a union’s territorial jurisdiction and limitations do not generally affect the determination of the appropriate unit. *Groendyke Transport*, 171 NLRB 997, 998 (1968); *CCI Construction Co., Inc.*, 326 NLRB 1319 (1998). Accordingly, I find the unit sought by the Petitioner to be appropriate and I will not include either the geographical limitation regarding DuPage County sought by the Intervenors nor the Petitioner’s territorial jurisdiction as sought by the Employer in the unit’s description. Inasmuch as I have rejected both the Intervenors’ and the Employer’s geographical limitations in defining the unit; no party raises any other issues regarding the description of the unit’s scope; and the unit found appropriate encompasses all of the Employer’s plasterers who share a substantial community of interests regardless of job location and have a continuity of employment with the Employer from job to job, I find no basis to define the unit or limit the unit in any other geographical terms that might be appropriate in different circumstances. See, *Oklahoma Installation Co.*, 305 NLRB 812 (1991).

There are approximately are approximately 20 to 40 eligible voters in the unit found appropriate using the eligibility formula set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961) and *Steiny & Co.*, 308 NLRB 1323 (1992).

5/ International Union of Bricklayers & Allied Craftworkers, Locals 56 and 74, AFL-CIO have indicated at the hearing 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, these two locals will appear as one choice on the ballot rather than competing with each other, as well as with the Petitioner. Thus, International Union of Bricklayers & Allied Craftworkers, Locals 56 and 74, AFL-CIO will appear on the ballot as one choice, with the other choices being the Petitioner and neither.

401-7550; 420-1227;
420-1787; 440-3350