

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SUBREGION THIRTY-THREE

NATIONAL WELDING SUPPLY CO., INC.

Employer

and

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES  
OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE  
UNITED STATES AND CANADA, AFL-CIO, LOCAL 99

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Case 33-RC-4631

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<sup>1/</sup>, 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.<sup>2/</sup>

3. The labor organization involved claims to represent certain employees of the Employer.<sup>3/</sup>

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:<sup>4/</sup>

All full-time and regular part-time route drivers, warehousemen, dock attendants, shipping and receiving employees and plant operators employed by the Employer at its Bloomington and Lexington, Illinois facilities, but excluding office clericals, sales department employees, guards and supervisors as defined in 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.<sup>5/</sup> 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. 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 United Association of Journeymen and Apprentices of the Plumbing and Pipe-Fitting Industry of the United States and Canada, AFL-CIO, Local 99.

## 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).<sup>6/</sup> Accordingly, it is hereby directed that within 7 days of the date of this Decision *two* copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the Officer-in-Charge for Subregion 33 who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the *33rd Subregion, Hamilton Square, 300 Hamilton Boulevard, Suite 200, Peoria, Illinois, 61602*, on or before October 18, 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, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by October 25, 2001.

Dated October 11, 2001  
at: Peoria, Illinois

/s/ Ralph R. Tremain  
Ralph R. Tremain, RD – Region 14

1/ I have carefully considered the record evidence, the parties' briefs as well as their statements and arguments on the record.

2/ The Employer is an Illinois corporation engaged in the business of the sale of welding supplies, fire extinguishers and gases at its Bloomington and Lexington, Illinois facilities. During the past twelve months, a representative period, the Employer has purchased and received goods valued in excess of \$50,000 directly from vendors located at points outside the State of Illinois. During same period of time, the Employer received gross annual revenues in excess of \$500,000. There are approximately eight employees within the unit found appropriate herein.

3/ The parties stipulated, and I so find, that the Petitioner is a labor organization within the meaning of the Act.

4/ The parties are in agreement as to the scope of the bargaining unit herein and stipulated to the unit description. The unit found appropriate herein comports with the parties' unit stipulation. The parties also stipulated that Fred Schoening, John Schoening, Mike Westfall and Dale Knapp have the authority to hire and fire and are supervisors within the meaning of the Section 2(11) of the Act and I so find.

The only issues raised by the hearing concern three employees; Aric Schoening, Tom Ragusa and Randy Woith and whether they should be included in the unit found appropriate herein. The Petitioner, contrary to the Employer, seeks to exclude Aric Schoening as the son of a substantial stockholder in a closely-held corporation. The Petitioner, contrary to Employer, would also exclude Tom Ragusa as not having a sufficient community of interest with the employees within the unit found appropriate herein. Finally, the Employer, contrary to the Petitioner, would exclude Randy Woith as a casual employee.

## BACKGROUND

The Employer sells and services welding equipment, industrial and medical gases, safety supplies and provides a fire extinguisher service at and from its Bloomington, Illinois facility. It also owns and operates a plant which produces and bottles acetylene in Lexington, Illinois. There is only

one employee, Bill Lauher, at the Lexington, Illinois plant. Lauher, the plant operator, is stipulated by the parties as included in the unit found appropriate herein and I so find.

The Employer's other employees are located at the Bloomington facility. The Bloomington employees involved in the instant case are located at or work out of two buildings facing each other with the Employer's driveway in between. The parties agreed and stipulated that Bloomington employees, Anthony Newman, Alan Kocar, Terry (T.J.) Roach, Jeff Barth, Ross Jobe and Terry Presley should be included within the unit found appropriate herein. In respect to these employees, I note briefly their duties. Newman and Kocar are route truck drivers with Newman engaged also in a small amount of light truck maintenance. Terry (T.J.) Roach acts a relief driver filling in for Newman and Kocar during vacations or sick days. He also has several routes of his own, one monthly and one periodically. He also performs some shipping and receiving duties, warehouse work and welder repairs. Finally, he fills in as a plant operator at sick or vacation times, and on occasion, will help a customer at the counter.

Jeff Barth's primary duties are in shipping and receiving. Barth receives and checks in UPS shipments, prepares customers' orders for loading, and operates a fork lift for large items brought by common carrier. Barth, too, will assist with customers at the counter and answer the telephone when needed. Ross Jobe loads and unloads trucks during most of his time. He also fills cylinders, carbon dioxide only. Terry Presley is the primary plant operator in Bloomington filling oxygen, nitrogen, argon, carbon dioxide and helium cylinders.

The Employer was originally owned by Fred Schoening and his brother, John Schoening. In 1996, a corporation, Bloomington/Normal Welding Supply Company, Inc., was created to effectuate a buy out of the Schoenings over a twenty year period by the two other stipulated supervisors, Michael Westfall and Dale Knapp. The agreement of the directors allocated the shares of the company in the following manner:

Fred Schoening	34
John Schoening	34
Michael Westfall	15
Dale Knapp	15
Aric Schoening	2

Fred Schoening serves as the Employer's President and manages the business. John Schoening is the Employer's secretary-treasurer. John Schoening supervises the clerical employees in the Employer's accounting office, but works only a few hours a day and does not play a meaningful role in the management of the company. He is not involved in corporate decision making. Fred Schoening testified that his brother did not want to be involved and that their relationship is "virtually nonexistent".

Dale Knapp is in charge of the Employer's sales department. There are three other "outside" salespersons in the department. As indicated above, employees in the sales department were excluded from the unit found appropriate through the stipulations of the parties.

Mike Westfall performs many of the same functions that Fred Schoening does. Fred Schoening testified that he and Westfall are "even" and "wear the same hat". However, it is clear from the record that Fred Schoening is ultimately in charge of the company. This testimony on cross-examination describes the situation well:

Q – What if you and Mike disagree? Would you not make the ultimate decision?

A – Mike and I have never disagreed.

Q – What if it happened?

A – Oh, I do not know. It has never happened.

Q – You are the President.

A – Yes.

Q – Of the corporation. Okay.

A – But I am trying.

Q – You are gradually, over 20 years --

A – I am trying to get out and I am trying to bring Mike up to take over the reins.

#### Aric Schoening

Aric Schoening spends a substantial part of his morning performing shipping and receiving work including the receiving of items through UPS deliveries. He often works with Jeff Barth and his functions are similar to Barth's except that Aric Schoening does not operate the Employer's fork lift. Any shipping and receiving work requiring the use of a fork lift is done by Barth. Aric spends a

substantial time in the afternoon preparing purchase orders. He also takes orders over the phone and periodically serves walk-in customers in the Employer's showroom.

Aric is the son of Fred Schoening, who is the President. Although the Employer does not have a formal hierarchy, it is clear from the record that Fred Schoening is in charge of the operation and serves in the capacity of managing owner. Fred Schoening owns 34% of the Employer's stock. Aric owns 2% (or two shares) of the Employer's stock. Accordingly, Fred Schoening and his son own the greatest portion of the stock in the closely held corporation. No other employee owns stock. As indicated above, John Schoening, Fred's brother and Aric's uncle, owns 34% of the Employer's stock. While the Employer maintains in its brief that the relationship between the brothers is "somewhat dysfunctional", there is nothing in the record that would indicate a struggle between them in regards to the control of the company. Fred testified that John did not participate in company decision-making and didn't want to. In the circumstances of this case, Fred Schoening not only is a substantial stockholder and managing owner, he effectively controls a majority of the stock.

In addition to his ownership of stock, Aric also holds the title of Assistant Vice-President. It appears from the record that the title is gratuitous and that Aric has no duties and receives no compensation related to the position. Aric lives, rent free, in a house owned by his father. The house is located adjacent to the residence of his father. Unlike all other employees except for Tom Ragusa, Aric is a salaried employee.

The Supreme Court in NLRB v Action Automotive, 469 U.S. 490 (1985), affirmed the Board's practice of excluding from a bargaining unit close relatives of the owners of a closely held corporation even in the absence of special job related benefits. Action Automotive also made it clear that a fifty percent ownership was not required to exclude from a bargaining unit a child or spouse of a substantial stockholder in a closely held corporation. Id at 497-499. Action Automotive approved the Board policy announced in Foam Rubber City #2 of Florida, Inc., 167 NLRB 623 (1967) of excluding the children and spouses of individuals who have substantial stock interest in closely held corporations. The Automotive court also cited Cerni Motor Sales, Inc., 201 NLRB 918 (1973) which explained that at least 50% ownership would be required to find the children or spouse of an owner to be not to be "employees" within the meaning of the Act. The Board went on to say that, under 9(b) of the Act:

“...even if we were dealing with children of a shareholder owning less than 50%, we would find sufficient evidence of a lack of community of interest with unit employees to warrant their exclusion. Thus, the challenged employees are the offspring of a substantial owner, who is active in the management of the operation and their uncle is the only other individual with an ownership interest in the business. Id at 918, 919.

In view of the above, I find that Aric Schoening is the son of a substantial shareholder of a closely held corporation and exclude him on that basis from the unit found appropriate herein. His interests are clearly closely aligned with management. In reaching that conclusion, I note that Aric's father not only is the owner of a substantial share of the Employer's stock, but is in charge of the Employer's operation and is in effective control of a large majority of the Employer's stock as well. Additionally, I note that Aric is partially dependent on his father in that he lives in a rent-free residence owned by his father and owns stock himself. See Coravelle Wood Products, Inc., 466 F. 2d 675, 678-679 (7th Cir. 1972).

#### Randy Woith

Randy Woith is a Bloomington, Illinois firefighter whose part-time duties for the Employer include the inspection of fire extinguishers either at the customer's site or the Employer's facility. Woith not only inspects the fire extinguishers, but also fills them and performs minor repairs and adjustments when they are needed. If a fire extinguisher needs repairs, Woith brings it into the plant. Woith repairs some of them, and some of them are sent out to be repaired. After the repairs are made, Woith returns the fire extinguisher to the customer. Woith is the only employee whose primary duties are working on fire extinguishers though other unit employees perform those duties on occasion.

In support of its claim that Woith is a casual employee, the Employer proffered testimony that he averages about 12 hours per week on a schedule of his own choosing. However, the testimony was clearly based on “guesses” without a check of the records. Other than such uncertain, conclusional testimony, there is no evidence as to the amount, frequency, or regularity of Woith's employment.

The mere fact that employees may accept or reject work based on personal choice and may vary the number of hours worked, is not determinative of the issue of unit inclusion of a part-time employee. Pat's Blue Ribbons, 286 NLRB 918 (1987). As the Board has instructed, the test for

whether an employee is a regular or casual part-time employee “takes into consideration such factors as regularity and continuity of employment, length of employment, and similarity of work duties. In short, the individual’s relationship to the job must be examined to determine whether the employee performs unit work with sufficient regularity to demonstrate a community of interest with remaining employees in the bargaining unit.” Id (Citations omitted.)

Based on the limited, conclusional, and uncertain testimonial evidence in the record, I am unable to determine whether Woith is a regular or casual part-time employee. Accordingly, he will be permitted to vote under the Board’s challenged ballot procedure.

#### Thomas Ragusa

Thomas Ragusa figures load sheets, establishes routes for the city driver Antonio Newman, assists in preparing the routes for out-of-town driver Alan Kocar, stocks shelves in the showroom, reorders stock, helps in the pulling and invoicing of orders, waits on walk-in customers and answers the telephone. Ragusa is also licensed to inspect fire extinguishers. Ragusa typically works in the warehouse from three to three and one-half hours a day receiving inventory from delivery trucks. The delivery trucks are unloaded by shipping and receiving employee Jeff Barth. Barth places the items which he unloads in a cart, after which Ragusa, with the assistance of Aric Schoening or Jeff Barth, opens the boxes, removes the packing slips, counts the stock received, and then places the stock on shelves in the showroom. Ragusa has frequent face-to-face contact with and assistance from unit employees when he is performing his various tasks through the day. Both T.J. Roach and Jeff Barth also wait on walk-in customers when needed, and all employees, when present in the building, appear to occasionally answer the telephone.

Ragusa shares a desk with drivers Newman and Kocar. His immediate supervisor is Fred Schoening. Ragusa works the same basic schedule as other employees, that is, 8:00 a.m. to 5:00 p.m., Monday through Friday. Ragusa also works from 8:00 a.m. to 12:00 p.m. every other Saturday. Although it does not appear that other employees in the bargaining unit found appropriate herein work every other Saturday, unit employees do, on occasion, work on Saturday. Ragusa receives the same benefits as do other employees and receives no bonus or commission. He is, however, salaried whereas other employees in the bargaining unit are paid on an hourly basis. The fact that Ragusa is a

salaried employee is a function of the circumstances of his hiring, during which the parties negotiated an annual salary. When Regusa's salary is converted to an hourly rate of pay, his rate of pay is in the same range as unit employees.

The Petitioner argues that Ragusa's work is part of the Employer's sales operation. The Employer's sales department consists of three salesmen who are supervised by Dale Knapp, Vice-President of Sales. Not only do the salesmen have a different supervisor than Ragusa but also the salesmen have routes and spend 90% of their time away from the Employer's facility.

In view of the above, I find that Ragusa's duties are characteristic of those performed by a plant clerical appropriately included in the unit stipulated to by the parties. In reaching this conclusion, I find it significant that Ragusa performs work in very close proximity to unit employees and that they are supervised by the same supervisor. Ragusa has significant contact with unit employees and his work is involved and integrated with the work of the drivers as well as the work of shipping and receiving. I conclude that Ragusa, although salaried, shares a close community of interest with unit employees based on his participation in dispatching, routing, and warehouse work and the substantial contact that he has with unit employees. See Lindberg Heat Treating Co., 245 NLRB 1133, 1134 (1979). Ragusa shares common supervision and benefits and other terms and conditions of employment with unit employees. See John N. Hansen Co., 293 NLRB 63, 65 (1989); Avon Products, 250 NLRB 1479, 1486 (1980); Hamilton Halter Co., 270 NLRB 331 (1984). His inside counter sales duties are not enough to make his interests more aligned with the outside salespersons than the unit employees with whom he has much more contact, shares common supervision and many duties of functions. Additionally, Ragusa performs a substantial amount of direct warehouse work, such as receiving and storing stock, in addition to his "sales" and "clerical" functions. Given the above factors showing a community of interest with other unit employee, I find him to be at the least a dual-function employee properly included within the unit. See, Oxford Chemicals, 286 NLRB 187 (1897). Accordingly, I include Ragusa in the unit found appropriate herein.

5/ Your attention is directed to Part 103, Subpart B, Section 103.20 of the Board's Rules and Regulations, Series 8, as amended, which provides, inter alia, that employers shall post copies of the Board's official Notice of Election in conspicuous places at least three full working days prior to 12:01

a.m. of the day of the election, that failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed, and that an employer shall be estopped from objecting to nonposting or late posting of Notices unless it notifies the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received the Notices. You may wish to review the above rule in its entirety so that you are fully aware of its complete contents and the obligations imposed by it.

6/ The full first and last names and addresses of all eligible voters must be filed by the employer. North Macon Health Care Facility, 315 NLRB 359 (1994).

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