

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Indianapolis, IN

D & B CATV CONSTRUCTION, INC.¹

and

Case 25-RC-10143

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL NO. 561, a/w
LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO²

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 on September 30 and October 1, 2002, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.³

I. ISSUES

Local Union No. 561, Laborers' International Union of North America, a/w Laborers' International Union of North America, AFL-CIO (herein called the Petitioner) seeks an election within a unit of approximately five employees who comprise the "underground" crews of D & B

¹ The name of the Employer appears as stipulated by the parties.

² The name of the Petitioner has been corrected to reflect its full legal name.

³ Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
- b. 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.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. 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.

CATV Construction, Inc. (herein called the Employer). These include employees who work as machine operators, locators and flagmen. The Employer contends that the only appropriate unit is a wall-to-wall unit encompassing all of its field employees. This would include the two underground crews as well as six aerial crews, five splicers, and one mechanic, for a total of approximately 21 employees. Additionally, the Employer maintains that its three working foremen should be included in the unit on grounds that they share a community of interest with unit members. The Petitioner contends that the working foremen are supervisors within the meaning of Section 2(11) of the National Labor Relations Act (hereinafter referred to as the Act) and therefore must be excluded from the unit. The Petitioner also contends that Roger Blair, working foreman of the underground crews, and Michael Scott Dotson, working foreman of the aerial crews, should be excluded from the unit on grounds that they are brothers of the two owners of the Employer, and therefore their interests are aligned with management rather than unit members.

II. DECISION

For the reasons discussed below, it is concluded that the petitioned-for unit of underground employees does not constitute a unit appropriate for purposes of collective bargaining. Rather, it is concluded that the appropriate unit is one comprised of all field employees, including members of the underground crews, aerial crews, splicers and mechanic.

It is also concluded that the record fails to establish that working foreman are statutory supervisors, and therefore they shall be included in the unit found appropriate herein.

Lastly, since the record evidence is insufficient to determine whether the interests of working foremen Roger Blair and Michael Scott Dotson are aligned with management or with unit members, they shall be permitted to vote subject to challenge, and a final determination regarding their eligibility to vote shall be made, if necessary, in post-election proceedings.

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:

All full-time and regular part-time field employees employed by the Employer at its Newburgh, Indiana facility, including operators, locators, groundmen, linemen, splicers, flagmen and mechanics; BUT EXCLUDING all office clerical employees, guards and supervisors as defined in the Act.

The unit found appropriate herein consists of approximately 21 employees for whom no history of collective bargaining exists.

III. STATEMENT OF FACTS

A. General Facts

The Employer is an Indiana corporation engaged in the installation, repair, and retrofitting of coaxial and fiber optic cable, both underground and aerial. Its office and shop are located in Newburgh, Indiana and it performs work in Indiana and neighboring states. The Employer was incorporated in 1998 following the merger of Dotson Electronics, owned by Melvin (Sonny) Dotson, and Blair Trenching, owned by Kevin Blair. It employs a total of approximately 27 employees, which include the two owners (President Sonny Dotson and Vice President Kevin Blair), General Manager Royce Fitzpatrick, Project Manager Scott Miller, two secretaries, a mechanic and 20 field employees. Included among the field employees are three working foremen.

The Employer constructs the infrastructure for coaxial and fibre optic cable, including activation of the cable but excluding the hook up of the cable to residential or other buildings. The supervision of projects is shared among the owners, the General Manager, and Project Manager.⁴ The General Manager provides overall supervision of all Company projects. He determines the work to be accomplished on each job each day and visits in-state job sites on a daily basis. Projects located out of state or at a substantial distance from the facility are overseen by either a working foreman or the Project Manager. Such jobs may be visited by the General Manager weekly or bi-weekly. In addition, the General Manager telephones the working foreman/ Project Manager on such jobs each morning to discuss the work to be accomplished each day and other work-related matters.

Although the Employer does not have formal job classifications, field employees are known by specific titles which encompass specific tasks. Each of the two underground crews are comprised of a machine operator and a locator. The employees operate one or more pieces of equipment, including a directional boring machine, ditch witch, backhoe, and trencher. The directional boring machine shoots conduit or cable under ground without disturbing the ground's surface. The employee designated as the locator locates underground utilities such as electric and gas lines. The locator on the directional boring machine also locates the head of the bore to ensure its proper placement. Underground crew members also use shovels to dig manually to perform such tasks as the restoration (clean up) of work areas after they have finished their work. Although underground crew members pull coaxial cable underground, it is the linemen from aerial crews who pull fibre optic cable through the conduit after the underground crews have "shot" the conduit. The working foreman of the underground crews distributes the day's work to his crews each morning; contacts local utility companies to determine the underground location of utilities lines; and generally operates the trencher machine. He completes two types of paper work each day: records of employees' work hours and records of the number of feet of cable laid each day.

⁴ Neither party contends that persons in these positions are not supervisors, and since the record indicates they possess the power to hire and hire, it is concluded that the individuals in these four positions are statutory supervisors.

Aerial crews consist of a lineman and groundman. As their titles denote, linemen attach coaxial and fibre optic cable to existing telephone poles, generally from bucket trucks, while the groundmen provide assistance from the ground. Linemen also remove and replace outdated cable. Included among the work of groundmen is the installation of anchors. Each time a strand is terminated it is attached to an "anchor," which is a six-foot tall rod embedded in the ground next to the telephone pole. The Company currently employs six aerial crews comprised of seven linemen and two groundmen. Michael Scott Dotson is the current working foreman of the aerial crews.

Five splicer-employees connect and activate the cable laid by the underground and aerial crews. Splicers normally work alone. Both the underground crews and splicers install the pedestals inside of which the splicers join and activate the cable. The current splicer working foreman is Jeff Hubbs, although the record indicates he does not always serve as a working foreman.

Flagmen are used to control traffic when necessary, and any field employee may be assigned to serve as a flagman. One mechanic services all of the vehicles and machinery used in the installation of cable. Although the majority of his work is done in a garage area at the facility, he repairs equipment on job sites when breakdowns occur and the immediate repair of machinery is necessary. The mechanic may also be assigned to serve as a flagman when needs dictate.

The working foremen report to the General Manager and owners. The mechanic is also supervised by these individuals. None of the disputed positions require the completion of an apprenticeship program or any formalized coursework. All training occurs on the job.

The normal working hours for office and field employees are 6:30 AM to 4:30 PM. Some underground crew members earn an hourly rate between \$9 and \$10, while two earn a rate of \$14 per hour. The working foreman of the underground crew earns \$16 per hour. The mechanic earns \$14 or \$15. Aerial crews and splicers are paid a piece rate, based upon the number of feet of cable installed.⁵ When performing work other than aerial and splicing, however, they are paid an hourly rate of approximately \$12. When working on an out-of-town job which requires overnight lodging, all employees, including underground crew members, are paid an additional piece rate based upon the number of feet of cable installed. This additional piece rate is paid in lieu of a per diem for expenses incurred by living out of town. The Employer offers all of its employees life insurance and group health and dental insurance. All field employees report to the Employer's facility in the morning if they are working on job sites within a 60-mile radius of the Employer's facility. Those working out of town report directly to their job sites.

Company personnel policies apply to all field employees. Such policies include a absenteeism and tardiness policy, an alcohol and drug policy, a FMLA leave policy, and a vehicle use policy. The General Manager, the Project Manager, the working foremen, and "on

⁵ The record does not identify the piece rate paid the aerial crews and splicers.

call” employees are assigned company-owned vehicles on a daily basis. Splicers are normally “on call.” Uniforms are available for purchase by all employees on an optional basis.

A weekly safety meeting is conducted at the facility for crews working within a 60-mile radius of the facility. All field employees attend these meetings which are generally conducted by the working foreman of the underground crew. Safety meetings for crews working out-of-state or on job sites located a substantial distance from the facility are conducted by the Project Manager or other person in charge of the project.

While some projects involve only underground cable or aerial cable, other jobs require both. Thus, cable may be strung on poles for a certain distance, then, due to the absence of poles or due to utility regulations, may be dropped to the ground and laid underground for another distance. Record testimony indicates it is not uncommon for underground and aerial crews to work on the same project, at times working only a street apart. Although employees are not cross-trained, the record indicates that employee interchange occurs with some frequency. For example, in 2001 the Employer completed a year-long project which required solely underground installation. However, a lineman and a groundman from an aerial crew worked on this project pulling fiber optic cable through conduit which was installed by an underground crew. Splicers also worked on this project. On other underground jobs splicers have operated machinery such as the trencher. And, as previously mentioned, linemen pull all fibre optic cable through conduit installed by the underground crews, and anyone may be assigned to work as a flagman. Since 1999 at least two permanent transfers have occurred from aerial to underground crews and vice versa.

B. Additional Facts Regarding the Supervisory and Relative Issues

As mentioned previously, Roger Blaire, brother of owner and Vice President Kevin Blair, is the foreman of the underground crew. Michael Scott Dotson,⁶ brother of owner and President Sonny Dotson, is foreman of the aerial crew. Neither foreman own any interest in the Company. Jeff Hubbs works periodically as a foreman of the splicers and is not related to either owner.

The working foremen report to the General Manager (or Project Manager if they are working at a remote location). The working foremen spend most of the workday performing the same work as members of the unit found appropriate herein. For example, Roger Blair operates the boring machine and trencher. Dotson performs work as part of an aerial crew. The foremen are provided blueprints for each project and at the beginning of each day, they map out the cable to be installed that day. Before digging is begun, the underground foreman also calls to determine the location of utility lines. Foreman complete daily records of footage laid and employee work hours.. They work the same work hours and take breaks with the rest of their crews, staying at the same motels when out of town, and receiving the same fringe benefits as crew members.

⁶ He is referred to as "Scott" Dotson throughout the hearing.

The foreman of the underground crews earns \$2 more per hour than the highest paid member of his crews. The record does not disclose the rate of pay of the aerial foreman. When serving as foreman, the splicer foreman receives approximately \$200 per week in addition to a piece rate earned for splicing.

The foremen have keys to the shop area of the facility as does the mechanic. The clerical employees have keys to the office area. The aerial foreman drives a company-owned vehicle home because he is on call at all times. The underground foreman drives his personal vehicle to and from work. When on "call" status, all employees are permitted to take company-owned vehicles home. Working foremen are provided a company credit card and may purchase fuel and other inexpensive job-related items without having to secure prior approval. Working foremen are provided radios or cellular phones so they can contact superiors at all times.

While working foremen may participate in the interview of employment applicants, final hiring and firing decisions are made by the General Manager or owners. Upon occasion when no superior has been available to interview an applicant, a working foreman has interviewed the individual alone. The record does not indicate, however, whether recommendations made by foreman under these circumstances have been adopted consistently. Working foremen have recommended crew members for raises, but the owners have denied raises when they felt the Company could not afford them. Only the General Foreman and/or owners possess the authority to assign employees to crews; to transfer employees between crews; and to layoff employees. According to the General Manager, he has given advance authority to working foremen to send an employee home if s/he is ill, but the foreman must notify the General Foreman that this has occurred. Employees are evaluated annually by the General Manager who consults with the foreman in preparing the evaluations. According to the General Manager, he gives greater weight to the opinion of a foreman who has been working out of town, about the performance of crew members, since he is not able to observe the employees' performance himself. Whether foremen have made recommendations which resulted in wage increases for employees or which otherwise affected their terms of employment, is not known. Working foremen can shut down jobs when weather conditions or other hazards imperil the safety of their crews.

Foremen report employee misconduct to the General Manager or owners, but it is unclear whether they can issue discipline without prior approval. The record reflects two instances where a foreman issued a written warning to an employee, but the record does not indicate whether the foreman did this without prior approval from a superior. The only noted exception is when an employee poses a safety hazard to himself or others; under these circumstances the foreman may remove the employee from the job site.

IV. DISCUSSION

A. The Unit Issue

Under Section 9(b) of the Act, the Board has broad discretion to determine "the unit appropriate for the purposes of collective bargaining" in each case "in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act," NLRB v. Action

Automotive, Inc., 469 U.S. 490, 494-97 (1985). In the instant case, the Petitioner argues that the appropriate unit should only include the approximately five employees who work in the underground crews, excluding their working foreman. The Employer argues that the appropriate unit should include all of its approximately 21 field employees, which include workers in the aerial and underground crews, the mechanic, and all three working foremen.

The Petitioner argues that the underground crews constitute a craft unit worthy of separate representation. The Board has recognized that in the construction industry a craft unit is one consisting of a distinct and homogeneous group of skilled journeymen craftsmen who, together with their helpers or apprentices, are primarily engaged in the performance of tasks which are not performed by other employees and which require use of substantial craft skills and specialized tools and equipment. Burns and Roe Services Corporation, 313 NLRB 1307 (1994). In determining whether a group of employees constitutes a craft unit, the Board considers such factors as whether the petitioned-for employees have participated in a formal training or apprenticeship program; whether the work performed by the employees is functionally distinct from that performed by others; whether the employer assigns work based upon craft jurisdictional lines; whether there is an absence of overlap between the functions performed by the petitioned group and other employees; and whether the petitioned-for employees share distinct supervision or other terms or conditions of employment.

In the case at hand, the Employer does not require that the underground workers complete an apprenticeship program or that they complete any specialized formal training before or after hire. Nor are underground crew workers not required to possess any specific license or certification. Additionally, there is no evidence that the Employer requires substantial work experience before hiring people for the underground crews. After hire employees receive only on-the-job training. Based upon the foregoing, it is concluded that the underground crews do not constitute a craft unit.

Nor does the evidence support a finding that members of the underground crews constitute a distinct, homogeneous group of employees with an identity separate from that of other field employees. In determining an appropriate bargaining unit, the ultimate question is whether the employees share a sufficient community of interest to require their joinder within one unit. Alois Box Co., Inc., 326 NLRB 1177 (1998); Washington Palm, Inc., 314 NLRB 1122, 1127 (1994). In determining whether employees share such a community of interest, the Board weighs a variety of factors, including whether there is a similarity in wages or method of compensation, work hours, employment benefits, and supervision; as well as the degree of similar qualifications, training, and skills; similarities in job functions; the integration of work functions; the degree of interchange between employees, as well as the degree of employee contact, NLRB v. Action Automotive, Inc., 469 U.S. 490, 494-97 (1985); Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962).

While underground employees operate different equipment and are compensated on a different basis than other field employees, they share far more characteristics in common with other field employees than differences. All field employees share common supervision; work similar hours; receive the same fringe benefits; and are subject to the same personnel policies. Although employees are not cross-trained, interchange among employees does occur. Thus,

aerial employees and splicers have worked on underground crews with some frequency. Field employees also experience frequent contact since they report to the Employer's facility each morning; attend weekly safety meetings; and often work together on the same projects. Also weighing in favor of a single unit is the degree of functional integration of the Employer's operations. The work of each group of employees is dependent upon that of the other, and absent their mutual collaboration, the work of the Employer could not be accomplished. The Board has found it appropriate to place two groups of employees in the same unit where, as here, no unique skills separate the two groups and a high degree of functional integration exists, Phoenix Resort Corporation, 308 NLRB 826 (1992). Thus it is concluded that the appropriate unit is one comprised of all field employees.

Although the mechanic performs the majority of his work in the Employer's shop, his work is also integrally related to the work of the field employees, and the mechanic performs some of his work on job sites in the field. Further, since the Board does not find a one-man unit appropriate for collective bargaining, the mechanic would be denied the right of representation were he excluded from the present unit, Luckenbach Steamship Co., 2 NLRB 192 (1936); Copier Care Plus, 324 NLRB 785(1997). Therefore, the mechanic shall be included within the unit found appropriate herein.

B. The Status of the Working Foremen

Section 2(11) of the Act defines a supervisor as a person who independently exercises any of the twelve powers listed therein, or who possesses the authority to effectively recommend such personnel actions, if in doing so, s/he exercises independent judgment. Section 2(11) is interpreted in the disjunctive, so the possession of any one of its enumerated powers confers supervisory status, NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571 (1994); Ohio Power Co. v. NLRB, 176 F.2d 385, 24 LRRM 2350 (6th Cir., 1949) cert. denied 338 US 899 (1949); Queen Mary, 317 NLRB 1303 (1995). In representation proceedings the burden of proving that an individual is a statutory supervisor rests upon the party making the assertion, Northcrest Nursing Home, 313 NLRB 491, 496 fn. 28 (1993) and cases cited therein. In determining whether an individual is a statutory supervisor, the Board and the courts are reluctant to interpret Section 2(11) with an expansive approach since the finding of supervisory status denies the individual the rights and protections of the Act, Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996). To this end, the Board closely examines the record in its determination of supervisory status, and conclusionary statements made by witnesses without supporting evidence are insufficient to establish supervisory authority, Sears, Roebuck & Co., 304 NLRB 193 (1991).

In the present case, the record fails to show that the working foremen are statutory supervisors. Although the foremen may upon occasion interview job applicants, there is no evidence that the General Manager or owners followed their recommendations without an independent evaluation of the applicants. The foremen's assignment of work to members of their crews is essentially a ministerial duty, requiring little or no independent judgment. The placement of cable is dictated by blueprints; crews consist of no more than three individuals, each of whom performs different functions. Thus, the distribution of work requires little, if any, independent judgment. In respect to discipline, the foremen lay a reportorial function which is

not indicative of supervisory status. The record is insufficient to support a finding that foremen possess the power to discipline employees except in circumstances where an employee poses a threat to his own safety or the safety of others, and in such a case the foreman may remove the employee from the jobsite. The authority to remove employees from job sites or to shut down site circumstances pose a safety hazard is not indicative of true supervisory authority, absent the possession of any other supervisory characteristic. Two employees testified that they regarded the foreman of the underground crew as their supervisor. Employees' subjective opinions of an individual's status is a secondary indicia of supervisory status and cannot create supervisory status absent the possession of one of the criteria enumerated in Section 2(11). Finally, while not determinative, if the foremen were found to be supervisors, it would create the abnormally high ratio of one supervisor for every three employees.

C. The Status of Roger Blair and Michael Scott Dotson as Relatives of Management

The Petitioner also seeks the exclusion of Roger Blair and Michael Scott Dotson from the unit found appropriate on grounds that as relatives of the owners of the Company, their interests are aligned with management rather than unit members. The Board has long hesitated to include the relatives of management in bargaining units when their interests are sufficiently distinguished from those of other employees. See NLRB v. Action Automotive, 469 U.S. 490, 494-495 (1985). The Board, however, does not exclude an employee simply because he or she is related to a member of management. Rather, the Board considers a variety of factors to determine whether an employee's familial ties are sufficient to align his interests with management and thus warrant his exclusion from the bargaining unit. A relative of management who receives special job-related benefits such as high wages or favorable working conditions may be excluded from the unit, *Id.* In the present case, the evidence is insufficient to determine whether Blair and Dotson's interests are so aligned with management that they should be excluded from the unit. Since they constitute slightly less than 10% of the number of employees in the appropriate, in order to effectuate the purposes of the Act through expeditiously providing for a representation election, Roger Blair and Michael Scott Dotson shall be allowed to vote subject to challenge and their eligibility to vote shall be determined, if necessary, in post-election proceedings.

V. SHOWING OF INTEREST

At hearing the Petitioner indicated its willingness to participate in an election in a unit larger than that sought by its petition, if a broader unit were found appropriate. Since the unit found appropriate herein is broader than that sought by the Petitioner, the Petitioner shall have ten (10) days from the date of this Decision in which to submit to Region 25, a showing of interest in the unit found appropriate herein, Brown Transport Corp. 296 NLRB 1213 (1989); Casale Industries, Inc., 311 NLRB 951 (1993).

VI. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit 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 who:

- (a) were employed within the above unit 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, or
- (b) have been employed for a total of 30 working days or more within the above unit within a period of 12 months immediately preceding such eligibility date, or
- (c) have been employed within the above unit during the 12 months immediately preceding such eligibility date for less than 30 days, but for at least 45 working days during the 24 months immediately preceding such eligibility date, and
- (d) have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Those in the unit who are in the military services of the United States may vote if they appear in person at the polls. In addition to those employees who have been terminated for cause or voluntarily quit, also ineligible to vote are those 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 Local Union No. 561, Laborers' International Union of North America, a/w Laborers' International Union of North America, AFL-CIO

VII. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices, Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VIII. LIST OF VOTERS

To insure that all eligible voters 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 directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. North Macon Health Care Facility, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 25's Office, Room 238, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204-1577, on or before **November 4, 2002**. 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. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

IX. 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, DC 20570. This request must be received by the Board in Washington by November 11, 2002.

DATED AT Indianapolis, Indiana, this 28th day of October, 2002.

/s/ Roberto G. Chavarry

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