

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

Green Bay, WI

TRIPLE P, INC. d/b/a PETERS CONCRETE CO.¹

Employer

and

Case 30-RC-6461

**INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 139, AFL-CIO²**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act (Act), as amended, a hearing was held before a hearing officer of the National Labor Relations Board (Board).

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.³

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time pit and quarry equipment operators employed by Triple P, Inc. d/b/a Peters Concrete Co.; excluding on site equipment operator employees,

¹ The name of the Employer appears as amended at the hearing. Additionally, the transcript in this matter is hereby corrected to reflect the correct name of the Employer as Triple P, not “PPP” as it appears throughout the record, including on the cover page of the transcript.

²The name of the Petitioner appears as amended at the hearing.

³The Employer and Petitioner filed post-hearing briefs that were duly considered. The hearing officer's rulings made at the hearing were free from prejudicial error and are affirmed. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. The Petitioner, a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer. 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.

office employees, truck drivers, guards and supervisors as defined in the Act and all other employees.

ISSUES

- 1) Whether employees Chris Allen and Robert Welsing should be excluded from the unit because they are part-time and have no community of interest with other employees.
- 2) Whether Brian Jones, Al Caelwaerts and Dan Borkowicz should be excluded from the unit because they spend a majority of time on the highway crew.
- 3) Whether Joshua Beyer and Luke Jaworski are summer help.

International Union of Operating Engineers, Local 139 (Union) contends in essence that the following employees should be excluded from the unit: (1) Allen and Welsing because they are part-time and work for Brown County; (2) Jones, Caelwaerts and Borkowicz because they are already in an established unit of road crew employees; and (3) Beyer and Jaworski because they only work during the summer season. To the contrary, Triple P, Inc. d/b/a Peters Concrete Co. (Employer) contends that all of the employees named above should be included in the unit.

DECISION SUMMARY

Based on the record, I find that Allen and Welsing should be included in the unit despite their employment with Brown County; and Jones, Caelwaerts and Borkowicz have worked enough hours in the pits and quarries to demonstrate a community of interest sufficient to justify inclusion in the unit. I also find that Beyer is an included seasonal employee and Jaworski has a sufficient community of interest to be included in the unit.

BACKGROUND

The Employer operates a ready mix concrete business from a facility located in Green Bay, Wisconsin. The Employer also owns, leases and operates various stone quarries and gravel pits located within the Green Bay area. James Peters is in charge of the Employer's entire quarry and stone operation. Generally two to five employees, including a working foreman, are assigned to work in a particular quarry or pit. In addition to working in the stone quarries and gravel pits many employees also spend time repairing equipment and working in other areas of the Employer's operations such as the road crew. There are approximately 18 employees included in the unit found appropriate herein, including the 7 disputed employees discussed herein.

The Employer has employed Chris Allen as an operator for five to six years. Allen, who works approximately thirty hours a week on a crew operating a crushing machine, also works on road jobs, and operates heavy equipment such as a bulldozer or backhoe. Robert Welsing has been employed for fourteen years as an operator. Due to a rainy spring season this year, Allen and Welsing began working in late April. They do not work for the Employer during the winter months. Allen and Welsing typically work Monday through Saturday from around 4:00 p.m. until dark, which is usually around 9:00 p.m. In addition to their employment with the Employer, Allen and Welsing work for the Brown County Highway Department.

Employee Dan Borkowitz spent 68% of his time working in the Employer's crushing and washing operations and 32% performing "utility" work, which entailed performing various assignments as needed. Alan Caelwaerts has spent 75% of his hours

working on the Employer's crushing and washing operations and the other 25% performing repair work on the crushing plant in the shop. Brian Jones has worked roughly 40% of his time in the crushing and washing operations, 40% working on the road crew, and the remaining time performing various jobs.

Joshua Beyer has worked at the Employer for three consecutive summers. Last summer he worked the months of June, July and August loading trucks in the quarry; he is performing the same tasks this summer. It appears that Beyer will work this summer until he leaves for the armed services or until the Employer no longer needs his services. Luke Jaworski is a recently hired employee. During his three weeks of employment, Jaworski has worked fifty and one-half hours operating a loader.

All the employees in the unit: (1) are covered by workers compensation; (2) receive the same benefits with regard to vacation time and paid holidays; (3) spend time working in the gravel pits and stone quarries; and (4) receive the same supervision.

ANALYSIS

ISSUE 1: Chris Allen and Robert Welsing

The Union asserts that Allen and Welsing should be excluded from the unit because they also work for the Brown County Highway Department. However, the mere fact that Allen and Welsing have full-time employment with Brown County does not justify their exclusion from the bargaining unit. See *Tri-State Transportation Co., Inc.*, 289 NLRB 356, 357 (1988) and *Ironton Publications, Inc.*, 321 NLRB 1048, 1068 (1996). The Union further asserts that Allen and Welsing should be excluded from the

unit because they only work at the Employer for the extra income and “are not looking for benefits or full-time employment.” However, status as a part-time employee is not determined by the employee’s subjective motivations for employment, but rather in part by that employee’s community of interest with the other employees. See e.g. *Tri-State Transportation Co., Inc.*, supra at 357 and *Ironton Publications, Inc.*, supra at 1068. See also *Town & Country Electric, Inc.*, 516 U.S. 85, 97, 116 S.Ct. 450 (1995).

The evidence reveals that Allen and Welsing share a sufficient community of interest with the other unit employees to warrant inclusion in the bargaining unit. Along with the other fifteen employees listed in Employer Exhibit 1, Allen and Welsing operate the equipment used in the Employer’s crushing and washing operations. They are covered by the same workers compensation, receive the same benefits with regard to vacation time and paid holidays and work under the same supervision. Allen and Welsing also receive wages comparable to their co-workers. For the reasons described above, the evidence demonstrates that despite their employment with the Brown County Highway Department, Allen and Welsing should be included in the bargaining unit.⁴

ISSUE 2: Brian Jones, Al Caelwaerts and Dan Borkowitz

The Union asserts that Jones, Caelwaerts and Borkowitz should be excluded because they work on the road crew and spend an insufficient amount of time working in the crushing and washing operations. The evidence reveals that even though Jones, Caelwaerts and Borkowitz perform more than one job for Employer they have spent a sufficient period of time working in the pits and quarries to demonstrate a community of

⁴ As noted, it is clear that Allen and Welsing are dual function employees properly included in the bargaining unit.

interest. The Board has held that an employee who performs more than one function for the same employer should be included in the unit as long as that employee performs unit work for a sufficient period of time to demonstrate a substantial interest in the unit's terms and conditions of employment. See e.g. *Berea Publishing Company*, 140 NLRB 516, 518-19 (1963) and *Ansted Center*, 326 NLRB 1208 (1998).

Contrary to the Union's contention the evidence has failed to establish that Caelwaerts has performed any work on the road crew. Jim Peters testified that Caelwaerts spends 75% of his time operating the crushing and washing equipment, and the other 25% percent repairing that equipment in the shop. See *Wayside Press*, 104 NLRB 1028 (1953) (An employee who performed no maintenance work and spent only 20% of her time performing production work was included in a unit of maintenance and production employees).

Peters further testified that Jones spends roughly 40% of his time working on the Employer's crushing and washing operation, 40% working on the road crew, and his remaining time performing various tasks. It should be noted that the Union has not sought to exclude Robert Welsing from the unit on this basis. Like Jones, Welsing also spends nearly 40% of his time working on the Employer's crushing and washing operation, and the remaining 60% performing other tasks.

Borkowitz spends 68% of this time working in the crushing and washing operations and the remaining 32% performing other tasks. The Union presented evidence that it saw Borkowitz flagging traffic for roughly one hour and performing laboring work on another day for roughly one hour. However, that evidence merely confirms that the

majority of the Employer's employees perform tasks other than operating the crushing and washing equipment. For example, only three of the eighteen employees listed on Employer Exhibit 1 work solely in the crushing and washing operation.

Moreover, the evidence has failed to establish that the terms and conditions of employment for Jones, Caelwaerts and Borkowitz differ in any manner from those of the other bargaining unit employees. In fact the evidence reveals that all the employees listed on Employer Exhibit 1, which includes Jones, Caelwaerts and Borkowitz are covered by workers compensation and receive the same benefits with regard to vacation time and paid holidays. In addition, all employees receive common supervision. Therefore, the evidence has shown that Jones, Caelwaerts and Borkowitz have spent a sufficient period of time performing pit and quarry work to establish a community of interest sufficient to justify inclusion in the unit.

ISSUE 3: Joshua Beyer and Luke Jaworski

The Union asserts that Beyer should be excluded because he is “only summer help” and may end his employment with Employer to join the military. However, The evidence reveals that Beyer is a seasonal employee and should be included in the bargaining unit. When determining whether an employee is seasonal the Board will look to factors such as the expectation of future employment with that employer and whether the employee shares a community of interest with their co-workers sufficient to warrant inclusion in the bargaining unit. See *Baumer Foods, Inc.*, 190 NLRB 690 (1971) and *L & B Cooling, Inc.*, 267 NLRB 1,3 (1983).

The evidence has shown that Beyer has worked for three consecutive summers. Last summer Beyer worked the months of June, July and August loading trucks in the quarry. He is performing the same work this summer. The history of his employment with the Employer is one of continuous employment during the last three summers. See *Macy's East*, 327 NLRB 73 (1998) (The presence of a practice or policy of recalling former employees from season to season is considered evidence that those employees are seasonal). Other than Beyer's apparent commitment to joining the armed forces, there is no evidence that the Employer does not expect him to return next summer. Moreover, since Beyer recently graduated from high school, his employment status could be viewed as indefinite as opposed to seasonal. In addition, there is no evidence showing that Beyer's terms and conditions of employment vary in any manner from those of his co-workers. See *F.W. Woolworth Co.*, 119 NLRB 480, 484 (1957) (The receipt of different benefits constitutes evidence that an individual is a casual employee as opposed to a seasonal employee).

The Union further asserts that Beyer should be excluded from the bargaining unit because he is the grandson of the Employer. Even if Beyer is the grandson of the Employer, Board law does not require automatic exclusion. See *T.K. Harvin & Sons, Incorporated*, 316 NLRB 510, 533 (1995) (Close relatives of the manager or owner of a closely held company are not automatically excluded from the bargaining unit; instead the Board will apply the community of interest standards). Assuming that Beyer is the grandson of the Employer, no evidence has been presented to establish that he receives any special job related benefits or that his interests are so aligned with management as to warrant exclusion from the unit. See *T.K. Harvin & Sons, Incorporated*, *supra* at 533

(Discussing “whether the Board’s practice of excluding some relatives who do not enjoy special job benefits has a reasonable basis in law”). Based upon the foregoing discussion, Beyer should be included in the bargaining unit despite his familial relationship with the Employer.

The Union also contends that Luke Jaworski should be classified as summer help because he “may be going back to school this fall.” The record establishes that Jaworski has only been employed for three weeks. During that time he has worked fifty and one-half hours operating a loader in the pits and quarries. Jaworski works under the same terms and conditions of employment as his co-workers. His employment has an indefinite duration. There has not been any indication by the Employer that his employment is to be considered seasonal. I find the evidence supports a conclusion that Jaworski is at least a regular part-time employee, and that he shares a sufficient community of interest with his co-workers to warrant inclusion in the unit.

DIRECTION OF ELECTION⁵

An election by secret ballot shall be conducted by the undersigned among 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 were employed during the payroll period ending immediately preceding the date of this

⁵ The Union indicated on the record that it would not proceed to an election if the disputed employees were included in the unit. If the Union reconsiders its position it will be necessary for the Petitioner to submit to the Regional Office an adequate showing of interest in the above described unit. Accordingly, the Petitioner should advise the undersigned as to whether or not it wishes to proceed to an election in the unit found appropriate here. If the Petitioner does desire to do so, and has not already submitted a showing of interest for the unit found appropriate, the Petitioner shall submit its additional showing of interest for the unit found appropriate within 14 days from the date of this Decision. See Casehandling Manual Section 11031.2. Failure to submit any required additional interest showing or, alternatively, a request to withdraw the petition, within the time provided, will result in the dismissal of the petition.

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 International Union of Operating Engineers, Local 139, AFL-CIO.

LIST OF VOTERS

In order to ensure 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 the 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*, 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer shall file with the undersigned, **two** copies of an election eligibility list, containing the **full** names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized. **In order to be timely filed,**

such list must be received in the Regional Office, Suite 700, Henry S. Reuss Federal Plaza, 310 West Wisconsin Avenue, Milwaukee, Wisconsin 53203 on or before July 19, 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.

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, 1099 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington by July 26, 2002.**

Signed at Milwaukee, Wisconsin on July 12, 2002.

Joyce Ann Seiser, Acting Regional Director
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