

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

ISAACSON CONSTRUCTION, INC.

Employer^{1/}

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 649, AFL-CIO

Petitioner^{1/}

DECISION AND DIRECTION OF ELECTION

Case 33-RC-4659

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, the undersigned finds:^{2/}

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.^{3/}
3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:^{4/}

All full-time and regular part-time excavating crew employees employed by the Employer at its Normal, Illinois and Peoria, Illinois facilities; but excluding footing crew employees, wall crew employees, flat work crew employees, truck drivers, boom truck operators, telebelt operators, office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

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.^{5/} 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 International Union Of Operating Engineers, Local 649, AFL-CIO.

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).^{6/} 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 March 1, 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, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by March 8, 2002.

Dated February 22, 2002
at: Peoria, Illinois

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

1/ The Employer's and the Petitioner's names appear as amended at the hearing.

2/ I have carefully considered the record evidence, the parties' statements of position on the record, arguments on the record and the briefs filed by the Employer and the Petitioner.

3/ The Employer is an Illinois corporation engaged in concrete contracting with offices and places of business in Normal, Illinois and Peoria, Illinois. During the last twelve months, a representative period, the Employer purchased and received goods and materials valued in excess of \$50,000 directly from outside the State of Illinois. During the same period, the Employer had gross revenues from its business operations in excess of \$1,000,000. There are approximately 7 employees in the unit found appropriate herein.

4/ The Petitioner seeks a unit composed of all full-time and regular part-time excavating crew employees employed by the Employer at its Normal, Illinois and Peoria, facilities performing work within the jurisdiction of the Operating Engineers, excluding all other employees of the Employer including footing crews, wall crews, flat work crews, truck drivers, office and clerical employees, professional employees, guards and supervisors as defined in the Act. The Employer maintains that the unit sought by the Petitioner is too narrow and is inappropriate. The Employer takes the position that the only appropriate unit would consist of 2 mechanics and 12 mobile heavy equipment operators which would include all excavating crew employees, telebelt operators and boom truck operators. Accordingly, the Employer maintains that the only appropriate unit would be described as all full-time and regular part-time operators of mobile heavy equipment and mechanics employed by the Employer at 1300 Fort Jesse Road, Normal, Illinois and 9603 N. Allen Road, Peoria, Illinois, excluding all other employees of the Employer, including footing crews, wall crews, flat work crews, truck drivers, laborers, office and clerical employees, professional employees, guards and supervisors as defined in the Act.

The Employer is a residential foundation company which digs basements and pours concrete foundations and floors. It has offices in Bloomington/Normal and Peoria, Illinois. David Isaacson is the President and sole owner of the Employer. Todd Isaacson is the son of

David Isaacson and is Vice-President. David Isaacson and Todd Isaacson are responsible for hiring and firing decisions. Mark Johnson is the Bloomington/Normal Area Supervisor and Scott Kalina is the Peoria Area Supervisor. Johnson and Kalina report directly to the Dave Isaacson. Ralph Cooper is the Bloomington/Normal Area Superintendent over walls, and Shane Wilcoxon is the Peoria Area Superintendent over walls. It appears that Cooper reports to Mark Johnson and that Wilcoxon reports to Scott Kalina. The Flat Work Supervisor is Ed Passini. He supervises the flat work in both Bloomington/Normal and Peoria. Passini, like Johnson and Kalina, reports directly to David Isaacson. Johnson and Kalina directly supervise the excavation crew employees, the truck drivers and mechanics. Passini supervises the flat work crew. All other employees, including the boom truck operators and telebelt operators, are directly supervised by either Ralph Cooper or Shane Wilcoxon. Although the parties did not stipulate that Mark Johnson, Scott Kalina, Ralph Cooper, Shane Wilcoxon or Ed Passini possess supervisory authority as defined in Section 2(11) of the Act, it is clear from the record that the parties are in agreement that Johnson, Kalina, Cooper, Wilcoxon and Passini are not to be included in the unit. The Employer employs from 60 to 90 construction employees, depending on the season. The construction employees employed by the Employer are assigned to one of several crews, namely, the excavating crew, the footing crew, the wall crew and the flat work crew.

The Employer's excavating crew initially comes to the Employer's jobsite and digs the hole for the basement. Excavating crew employees operate equipment including track loaders, skid steers, crawler loaders and crawler backhoes. After the excavating crew digs the hole, the footing crew then sets up the footing. The telebelt, a truck-mounted conveyor, is used to place gravel in the excavation site after the footing crew has formed up the footing. The telebelt is typically on the jobsite for several hours at a time. Occasionally, when an operator on the excavating crew is needed to get the telebelt into the job because of muddy conditions, an employee on the excavating crew will be on the jobsite at the same time as the telebelt operator. After the gravel has been placed in the hole by the telebelt, the boom truck

arrives with concrete panels which are set into the excavation after the footing has been poured and rocked. A boom truck is usually on the job no more than one hour. The boom truck is a large flatbed truck with a crane mounted on the rear of the flatbed. The operator of the boom truck drives this truck to the job, backs it into the jobsite or leaves it on the street, puts out the outriggers, gets on the crane, operates the crane to take the forms off the flatbed and places the forms into the hole. The boom truck operator then folds up the crane and drives away. To pour the foundation, the wall crew either dumps out of the concrete truck, orders a pump, or uses the telebelt to place concrete in the footings and wall forms. When the telebelt operator goes to a jobsite to move gravel down to the floor of the hole or pour concrete, the footing employees will be in charge of the job and help him set up and pour the footing.

A day or so after the walls have been formed, a wall form crew returns and, among other things, loads all of the concrete forms into baskets. The boom truck returns, and the boom truck operator uses the crane to put the form baskets back on the truck. Waterproofers then apply heated rubber. Approximately a week later, the excavating crew returns and backfills the foundation. After the foundation is backfilled and the plumbing is in the basement floor, the flat work crew comes to the jobsite and pours the basement floor, garage floor, driveway, walk and stoops. The telebelt may also be used to pour concrete for the floor. If the telebelt is used to pour concrete for the floor, the telebelt operator is under the supervision of the flat work crew. After the flat work is completed, the excavating crew returns and does a rough grade.

The boom truck operators, none of whom are considered by the Employer to be part of its excavating crew, report to Bloomington/Normal Area Superintendent Ralph Cooper or Peoria Area Superintendent Shane Wilcoxon. The boom trucks are operated by Mike Cooper, Jim Hummer and Marvin Gordon.

The telebelt operators, whom the Employer also does not consider to be part of the excavating crew, include Danny Rudolph, who is the regular operator of the telebelt, and

Marvin Gordon, who is the substitute operator. The telebelt is not assigned to a particular crew but does work for various crews.

The Employer employs two mechanics, Mark Barekman and John Culp. The mechanics are supervised by and report to Mark Johnson on a daily basis. Mechanics will be assigned to the Employer's Peoria location upon request from Scott Kalina or if something breaks down in Peoria. While in Peoria, the mechanics report to Kalina. The mechanics service and repair equipment used by all of the Employer's crews, including that used by the excavating crew. The record does not reflect the percentage of their time that is spent by mechanics working with, or on the equipment of, excavating crew employees, as opposed to their other duties. While the mechanics may, on occasion, go to the jobsite to do repair work, such as replacing chains and changing hydraulic lines on excavating equipment, most of their work is done at the shop. The mechanics do not regularly operate equipment on the jobsite other than in connection with the performance of maintenance work.

Employees on the excavating crew are responsible for the maintenance of the equipment they use. They perform the routine maintenance and some repairs on their trucks, low boys, and equipment. This includes changing the oil and greasing and washing their trucks and equipment. They service their equipment in the same shop in which the mechanics work. If there are tasks that the excavating crew employees cannot do or need help doing, the mechanics may assist them. Mechanics perform, or assist in performing, such tasks as changing hydraulic lines, changing tracks on the skids, changing tires on the skids, working on the backhoe, and removing buckets for welding. When a mechanic or operator needs physical help in performing their duties, they may assist each other. At times, equipment is taken to the dealer's facility for repairs to be made by the dealer. This may be done by either the mechanic or the operator of the equipment.

In the yard, there are several rubber tired loaders, a rubber tired backhoe and a crawler bobcat backhoe for loading rock and unloading trucks. The excavating crew employees rarely use the yard equipment. In contrast, it is common for the Employer's mechanics to use

that equipment in the yard to move materials, such as gravel, around the yard and load trucks. Mechanics also obtain parts needed for the repair and maintenance of the equipment, including parts used by the excavating crew.

On a typical morning, the mechanics go into their computer and get a repair list. They report with their repair list to Mark Johnson (or to Scott Kalina, as the case may be), to whom the excavating crew employees also report. Johnson (and Kalina) will give job assignments to both the excavating crew employees and the mechanics. When there is a piece of equipment operated by the excavating crew that needs to be fixed, Johnson coordinates with the mechanics and determines which piece of equipment gets fixed first. Johnson, the mechanic and the excavating crew employee discuss what needs repaired, and they determine the equipment which take priority over other equipment for repair work. Johnson assigns overtime to both the excavating crew employees and the mechanics.

The employees of the Employer are paid hourly. No one punches a time clock. Everyone reports their own time. Employees are paid every two weeks on a Friday, and they receive the same fringe benefits after a six month wait. The same employee handbook and safety rules apply to all employees. Currently the mechanics earn between \$9.50 and \$12 an hour, and employees on the excavating crew earn between \$12 and \$21 an hour. Every mechanic and operator is expected to obtain a CDL, and each receives a \$1 an hour raise when a CDL is obtained.

Employees performing excavating work are supervised by Bloomington-Normal Area Supervisor Mark Johnson and Peoria Area Supervisor Scott Kalina and receive their daily assignments from either Johnson or Kalina.. These employees are assigned to the excavating crew and are not generally assigned to work as part of the Employer's footing crew, wall crew or flat work crew. The employees' personnel records show that they are assigned to the excavating department/cost center.

DISCUSSION AND CONCLUSION

In deciding issues concerning the appropriateness of a proposed unit, the Board first considers the Union's petition and whether that unit is appropriate. P.J. Dick Contracting, 290 NLRB 150 (1988). In doing so, the Board has often held "that there is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be 'appropriate' ". Morand Bros. Beverage Co., 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951); See Federal Electric Corp., 157 NLRB 1130 (1966); Parsons Investment Co., 152 NLRB 192, fn. 1 (1965); Dezcon, Inc., 295 NLRB 109, 111 (1989). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees "unless an appropriate unit compatible with that requested does not exist." P. Ballantine & Sons, 141 NLRB 1103, 1107 (1963); See Bamberger's Paramus, 151 NLRB 748, 751 (1965); Purity Food Stores, 160 NLRB 651 (1966). Moreover, it is well settled that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. See, for example, General Instrument Corp. v. NLRB, 319 F.2d 420, 422-423 (4th Cir. 1963), cert. denied 375 U.S. 965.

The Board gives deference to the Union's petition and first considers whether that unit is appropriate. See Overnight Transportation Company, 322 NLRB 723 (1996); and P.J. Dick Contracting, 290 NLRB at 151. If it is an appropriate unit, the inquiry ends. If not, the Board will scrutinize the Employer's proposals. See Black and Decker Mfg. Co., 147 NLRB 825, 828 (1964); and Dezcon, Inc., 295 NLRB at 111.

Based on the above, the sole inquiry in the instant case is whether a unit consisting of the Employer's excavating crew employees is appropriate in the circumstances of this case. In reaching this determination, it is irrelevant whether another unit would also be appropriate, more appropriate or most appropriate. See Sears, Roebuck and Co., 261 NLRB 245 (1982). In reaching the question of the appropriateness of the petitioned-for unit, a petitioner must demonstrate that the employees in the petitioned-for unit share a sufficient "community of

interest” so as to constitute an appropriate bargaining unit. Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). To this end, the Board has enumerated several factors which it utilizes in determining whether a given group of employees have a sufficient community of interest to form an appropriate unit. These include: similarity in the scale and manner of determining earnings; similarity in employment benefits, hours of work and other terms and conditions of employment; similarity in the kind of work performed; the qualifications, skills and training of employees; frequency of contact and interchange among employees; integration of production processes; common supervision; determination of labor relations policy, and the history of collective bargaining. See Kalamazoo Paper Box Corporation, 136 NLRB 134, 137 (1962).

Based on the record herein and the considerations outlined above, I find that the petitioned-for unit is appropriate. In reaching this conclusion, I acknowledge that all of the Employer’s employees are subject to common policies, procedures and benefits. For the reasons set out below, I conclude that the excavation crew employees constitute an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act.

The nexus of the skills of the employees of the Employer in its excavating crew is their ability to operate equipment used in the excavation of basements, including track loaders, skid steers, crawler loaders and crawler backhoes. While excavating crew employees also may possess other skills possessed by the Employer’s mechanics and the boom truck and telebelt operators, such as the ability to perform routine maintenance on their equipment, the employees on the excavating crew are not interchangeable overall with the Employer’s mechanics or the boom truck and telebelt operators. In general, the skills possessed by the excavating crew members are in the operation of heavy equipment.

Interchange between employees on the Employer’s excavating crew with its mechanics and boom truck and telebelt operators is minimal. The record shows only a small degree of interchange between excavating crew employees and the Employer’s mechanics. The fact that former mechanic Jeff Jones may have operated equipment used by the

excavating crew does not make the petitioned-for unit an inappropriate unit. The amount of interchange is not sufficient to require a different result herein. Although there is some contact between employees on the excavating crew and the mechanics in the maintenance and repair of the equipment, the record does not demonstrate sufficient contact to require a different result herein. Furthermore, the routine maintenance work performed by the excavating crew employees on their own equipment is not their primary work and is only incidental to their primary task of operating excavating equipment. Likewise, the operation of excavating equipment is not the primary work of the mechanics or the operators of the boom trucks and telebelt. Not only do the excavating crew employees possess skills unique to their crew, that of operating the excavating equipment, but also these are not skills possessed by the mechanics or the operators of the boom trucks and telebelt.

The application of the traditional community of interest criteria to the instant case reveals that the petitioned-for unit of excavating crew employees is an appropriate unit, and I so conclude. In reaching that conclusion, I note that the mechanics and the boom truck and telebelt operators are subject to the same personnel policies and safety rules, receive the same benefits, and have contact with the petitioned employees. Such factors, although relevant as to whether an all employee unit would be appropriate, do not establish that the requested unit is inappropriate. See Omni International Hotel of Detroit, 283 NLRB 473, 476 (1987). Rather, there is substantial evidence in the record that indicates that the employees within the requested unit have a separate and distinct community of interest from the mechanics and the boom truck and telebelt operators.

Key to the determination of whether the petitioned-for unit is appropriate is whether or not the employees in question are “a clearly identifiable and functionally distinct group with common interests which are distinguishable from those of other employees.” Del-Mont Construction Co., 150 NLRB 85, 87 (1964). Here, the excavating crew employees have common supervision and share similar earnings and employment benefits and hours and other terms and conditions of employment. They also have similar qualifications and skills.

Furthermore, the petitioned-for unit constitutes a functionally distinct group of employees in that they perform excavating work, and it constitutes a separate administrative division of the Employer. The work performed by the Employer's various crews is sequential. The excavating crew employees have separate functions and different skills. Both the telebelt and boom truck operators, in contrast to the excavating crew employees, work with the footing and wall crews on a frequent basis and their work is integrated into the work of those crews. There little evidence of job progression between the mechanics and the excavating crew employees or between the boom truck and telebelt operators and the excavating crew employees. The excavating crew constitutes a distinct group of readily identifiable employees with common interests which are distinguishable from those of other employees. The excavating crew employees share a community of interest in the performance of their daily functions that is specifically related to the operation of excavating equipment. Based on the above and on the record as a whole, I find that the unit of employees in the excavating crew sought by the Petitioner herein is appropriate. See Brown & Root, Inc., 258 NLRB 1002 (1981); Longrier Co., 277 NLRB 570 (1985); R.B. Butler, Inc., 160 NLRB 1595 (1966).

The Employer cites Del-Mont Construction Co., 150 NLRB 85, in support of its argument that the mechanics and boom truck and telebelt operators should be included in the unit with the excavating crew employees. In Del-Mont, the petitioner Operating Engineers sought to represent "a unit of all operators of power driven equipment, such as crane, backhoe, shovel, bulldozer, compressor and pump-up operator and mechanics and apprentice oilers." At the same time that the Operating Engineers filed a petition, the Laborers also filed a petition in which they sought to represent a unit of laborers and truck drivers. Together, the two petitions encompassed all employee classifications of the employer except office clerical employees. The employer contended "that the only appropriate unit would be one including all its employees in a single unit and that since neither Petitioner has indicated a willingness to represent such a unit, the petitions should be dismissed" but did not argue that it would be

improper to include the mechanics in a unit of heavy equipment operators if such a unit was appropriate. The Board then included the mechanics in the unit with the operators of the employer's heavy equipment.

Del-Mont is easily distinguished from the current case. In Del-Mont, the union was seeking to represent the mechanics. Here, the Union is not seeking to represent mechanics. As I have stated above, the Act only requires that the unit be appropriate, and I find that the unit of excavation crew employees is appropriate. See Morand Bros. Beverage Co., 91 NLRB 409.

The Employer also cites A.C. Pavement Striping Co., Inc., 296 NLRB 206 (1989) in support of its position that the only appropriate unit would include excavating crew employees, mechanics and boom truck and telebelt operators. In A.C. Pavement Striping, the Board found that the record did not show that there was a smaller appropriate craft unit or other homogenous grouping of employees with a community of interest sufficiently distinct from other employees in the petitioned overall unit to constitute separate units sought by the petitioner and that the only appropriate unit was an overall unit. In that case, painters and teamsters, regardless of their designation, performed similar tasks on construction projects, operated paint equipment, performed layout functions and drove the trucks used during the course of a construction project. In the instant case, the employees sought by the Employer to be included in the unit are not interchangeable and their work is not integrated. Unlike the painters and teamsters, the excavating crew employees possess unique skills and have unique goals in the performance of their jobs.

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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