

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

HARDER MECHANICAL CONTRACTORS, INC.

Employer

and

PLUMBERS & STEAMFITTERS LOCAL 290, UNITED
ASSOCIATION OF JOURNEYMAN AND APPRENTICES
OF THE PLUMBING AND PIPEFITTING INDUSTRY
OF THE UNITED STATES AND CANADA, AFL-CIO

Case 36-RC-6116

Petitioner

and

PACIFIC NORTHWEST REGIONAL
COUNCIL OF CARPENTERS

Intervenor

and

OREGON COLUMBIA CHAPTER OF THE
ASSOCIATED GENERAL CONTRACTORS
OF AMERICA

Intervenor

DECISION AND TENTATIVE DIRECTION OF ELECTION

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

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

Upon the entire record¹ in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ Briefs submitted by the Employer, Petitioner, Intervenor Carpenters Union and Intervenor AGC were duly considered.

3. The labor organizations involved claim 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.

All millwrights, carpenters, pile drivers, apprentices and working foreman employed by the Employer within the United States, excluding all supervisors, guards, truck drivers, and clerical workers and all employees covered by other collective bargaining agreements.

The Employer, Harder Mechanical Contractors is an industrial construction contractor that performs equipment installations, piping and concrete work in various industries. Their clients range from pulp and paper mills to high tech companies. Harder performs contracts throughout the United States and in parts of Asia. Petitioner seeks to represent a unit of millwrights, apprentice millwrights and working foreman employed within Petitioner's geographic jurisdiction.

The Employer is party to a compliance agreement with the United Brotherhood of Carpenters and Joiners of America ("UBC"), tying it to compliance with certain terms of UBC affiliates' master agreements applicable in whichever region of the United States it happens to be employing carpenters and millwrights at any given time. In the general area of Petitioner's geographic jurisdiction, the Employer agrees to be bound by all the terms of a Master Agreement ("Master Agreement") between the Oregon Columbia Chapter of the Associated General Contractors of America ("AGC"), a multi-employer association, and the Pacific Northwest Regional Council of the United Brotherhood of Carpenters and Joiners of America ("Carpenters").² However, the Employer is not a member of the AGC and has not assigned it bargaining rights to them or any other organization. The Master Agreement covers a unit of

²The Carpenters have not provided any proof of majority status to the Employer. Accordingly, the relationship between the Employer and the Carpenters is governed by Section 8(f) of the Act.

carpenters, millwrights, and pile drivers³. The term of the Master Agreement is from June 1, 2000 through May 31, 2002. The record does not reflect its geographic scope. The Carpenters intervened as a party to the proceeding. AGC intervened as a party-in-interest.

Positions of the Parties

Petitioner contends that under a traditional community of interests analysis, the proposed millwright unit is appropriate. It asserts that because the bargaining relationship involved is an 8(f) relationship, any bargaining history between the parties is irrelevant, and *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966), in which the Board set forth the principles governing craft severance, does not apply. Further, even if *Mallinckrodt* were to be found applicable, Petitioner maintains that the unit sought is an appropriate unit. Additionally, Petitioner contends that working foreman are not supervisors under Section 2(11) of the Act, and should be included in the unit. Petitioner will participate in any election in any unit found appropriate by the Region.

The Employer, Carpenters, and AGC assert that this case is governed by *Mallinckrodt*. They argue that the long bargaining history between the parties, the potential for resulting instability in labor relations, the shared community of interests between the carpenters and the millwrights, the integration of the Employer's operations, and Petitioner's lack of experience in representing millwrights all warrant a finding that severance is inappropriate, and the petition should be dismissed. They do not contend that the Master Labor Agreement creates a contract bar. Additionally, the Employer maintains that working foreman are supervisors under Section 2(11) of the Act. Neither the AGC nor the Council took a position regarding the inclusion of working foreman. Carpenters seek inclusion on the ballot in any election directed.

Petitioner seeks a unit co-extensive within the geographic scope of its UA jurisdiction. Carpenters, Employers and AGC did not take a position on geographic scope.

³ The Employer has not employed pile drivers since about 1982.

Findings of Fact

As noted above, the Employer is an industrial contractor engaged in the installation of equipment/machinery in various industries. A typical job has a superintendent, who oversees the entire operation. Reporting to the superintendent are various general foremen, each representing a different craft. Classifications -- beyond millwrights and carpenters -- present at the Employer's worksites include plumbers, pipefitters, ironworkers, laborers, and boilermakers. Reporting to the general foreman and the superintendent are working foreman. Most of the time, carpenters on a job are overseen by a carpenter foreman, and millwrights on a job are overseen by a millwright foreman. Occasionally, a carpenter foreman oversees the millwrights. The Master Agreement covers both general foreman and working foreman. No evidence was presented describing the wages of the general foremen and working foremen, or differences therein.⁴ Petitioner is not seeking the inclusion of general foreman in the unit.

The Employer president, Steve Harder, testified that on smaller projects, working foreman as well as general foreman are assigned as overseers, instead of a superintendent. This practice is owing in part to the Employer's retention of a core staff of about 10 superintendents and 20 foremen. These core individuals are promoted up or down the chain of hierarchy of journeyman craftsmen, working foreman, general foreman and superintendents to meet the staffing needs of the various sized projects that might be running. Harder testified that once or twice a year, there are projects large enough to require these adjustments in class. Whoever is running the project has the authority to hire and fire, discipline and assign work to employees, including working foreman. No specific examples of an exercise of authority by working foremen were provided.

⁴ Schedule A in the Master Agreement describes "Foreman A" who are to receive 10% above journeyman wages, and "Foreman B" who are to receive 8% above journeyman wages. However, no testimony was offered illuminating these classifications.

The Employer employs millwrights to perform equipment installation and repair on construction projects involving a variety of types of equipment. In the Oregon/Greater Portland area, the number of millwrights employed by the Employer varies from 1 to 100, depending on the number and size of projects it has. Typically, millwrights' role in installing machinery includes laying out the lines on the foundation, setting the plates, erecting, aligning and leveling the machinery, and making it ready to run. Harder also uses carpenters for equipment installations; their role includes building the foundation for the equipment, setting the anchors, and opening access holes in roofs or walls. Additionally, carpenters will build scaffolding, tables and stairs so that the millwrights have access to their work. Usually they will work in stages, e.g., the carpenters build the foundation, the millwrights lay out the lines and set the plates, the carpenters pour the foundation, the millwrights install, align and level the equipment. At times, they will work in conjunction with each other to assure that the work is laid out properly. Often, millwrights and carpenters work in proximity to each other on a job site.

Petitioner presented two witnesses who have worked as working foreman. Ron Booth testified that he worked as a working foreman for a short period during the summer of 2001. A superintendent and a general foreman were also assigned to that job. Booth testified that he received no instructions that he had any authority to hire, fire, or discipline employees, and that he did not believe he possessed any such authority. Dennis Cozart testified that he worked as a foreman for Superintendent Mark MacInally in 2001. As such, he testified that he could not hire or fire. On one occasion, he recommended that a person be laid off. MacInally chose to keep that person on longer, believing they would be shorthanded. A few days later, at the first significant layoff, that person was among the first to be let go.

The geographic territory of Carpenters' Master Agreement covers all of Oregon and five southwest counties of Washington. Six hundred local contractors are signatory to the Master Agreement. There are approximately six thousand members of the UBC in the area covered by

the agreement, three to four hundred of whom are millwrights. The Employer has operated under "carpenters" master agreements of one sort or another since 1969. This National Agreement has been in effect since at least 1989. Nationally, UBC has represented millwrights for many decades in the construction industry as part of a multi-classification (carpenters, millwrights, pile drivers) bargaining unit.

Under the Master Agreement, carpenters and millwrights have the same pension, health care coverage, paydays, holidays, vacations, hours of work, grievance procedure and lunch periods. The Master establishes a joint labor/management apprenticeship program to train carpenters and millwrights, and sets the same pay and benefit rates for carpenter and millwright apprentices. The apprenticeship program has been in existence for decades. The Master Agreement includes special provisions for millwrights. Pursuant to these, millwrights must carry certain tools not required of carpenters. Additionally, the special provisions allow for the dispatch of millwrights through Millwright Local 711, an affiliate of UBC and Carpenters. However, since the beginning of this year, both millwrights and carpenters are dispatched by calling Carpenters. Steve Harder testified that on occasion, Carpenters runs out of millwrights, and has dispatched carpenters to do millwright work. Harder, however, did not provide specifics as to how often this occurred, or which tasks carpenters performed, his only elaboration being "[t]here are aspects of the millwright work that a carpenter is capable of doing."

The record establishes that typically, the millwrights on the job will be assigned a steward from Local 711, and the carpenters on the job will be assigned a steward by Carpenters. Carpenters represents both millwrights and carpenters in grievance procedures at the Employer. Carpenters arbitrated a grievance filed against the Employer, on behalf of the millwrights, over an issue that occurred at one of the Employer's projects in 2001. Prior to negotiation of the current Master Agreement, Carpenters contacted millwrights employed by the Employer through job site visits and surveys to gain their input into negotiations. Ace Guffey,

currently employed by Petitioner, is a former millwright, and previously worked as a business representative for the Oregon District Council of Carpenters, a predecessor to Carpenters. During his tenure, Guffey was one of the negotiators for Carpenters in bargaining over the local master agreement. At the national level, at least two millwrights have risen to the position of UBC president. Currently, a millwright is the first vice president of the UBC. Employees in millwright classifications have the power to vote and send delegates to the UBC convention.

Guffey, in the spring of 2001, began an organizing effort that encompassed unrepresented and represented millwrights, including millwrights employed by the Employer.⁵ Petitioner's efforts to "reorganize" millwrights involve contacting other employers as well as the employees about the possibility of Petitioner representing that classification. Petitioner has begun negotiations with one company, and is actively trying to initiate interest among others. Guffey acknowledged that in response to the efforts to reorganize millwrights, a number of concerns have been raised. These include "portability", which relates to the problem that would be posed if millwrights were members of Petitioner, and the Employer wanted to transfer one of Petitioner's millwrights to a job outside of Petitioner's jurisdiction, such as to Tacoma or Seattle, where a millwright covered by some other carpenter master agreement would be required. Under such a scenario, if a Petitioner-represented millwright were to work outside Petitioner's geographic jurisdiction, UBC would claim lost wages on behalf of UBC millwrights covered under the applicable local master agreement. Other difficulties include the lack of an apprenticeship and testing program, and Petitioner's inability to guarantee a supply of trained journeymen through a hiring hall.

Historically, Petitioner has represented plumbers and pipefitters in collective bargaining, and is party to a master labor agreement covering plumbers and pipefitters. That master labor agreement provides for an apprenticeship program for plumbers and pipefitters. Currently,

Petitioner does not have a labor agreement representing millwrights with any employer.⁶

Petitioner does not have an apprenticeship program for millwrights.

As noted, the Employer is signatory to a single-employer, national agreement with UBC. The document is signed by representatives of the Employer and UBC. There is no evidence of any collective bargaining agreement directly between the Employer and Carpenters.

The UBC Agreement provides that the Employer will “recognize the jurisdictional claims of” UBC, and will “comply with the contractual wages, fringe benefits, hours and other working conditions” established in the relevant agreement between any UBC affiliate and the relevant multi-employer association in whatever locale the Employer might operate. It provides for paying the contractual fringes to the relevant trust funds set forth in such local agreement, or to other trust funds in various circumstances. There is a union signatory subcontracting clause. UBC agrees to supply workers at the Employer’s request, via the relevant local hiring hall in which the Employer might be operating, but the Employer may hire “off the street” if UBC cannot fill the jobs within 2 work days. The Employer may bring up to two key employees from outside the relevant local’s jurisdiction, on a one-for-one basis with local dispatchees. The National Agreement requires that “there shall be no strike or lockout pending any dispute being investigated and all peaceable means taken to bring about a settlement”; but it is not clear from the record if the relevant local agreement’s contractual grievance/arbitration procedures must be utilized. The National Agreement is for 3 years, with 3-year rollover unless terminated; the Carpenters’ Master Agreement has differing renewal provisions.

⁵ The record reflects that this effort was preceded by the withdrawal of UBC from the AFL-CIO. Petitioner referred to the effort aimed at represented millwrights as “reorganizing”.

⁶ Petitioner entered into the record a signed “Compliance Agreement for a Master Labor Agreement” between Petitioner and Morgan Industrial, a mechanical contractor, and a corresponding “draft” of a master labor agreement with a nonexistent employer association. The draft master labor agreement purportedly covered “machine installers” (often used interchangeably with “millwrights”). Neither of these documents appears to establish Petitioner as the representative of any millwrights; if they do, it is for a single employer, with a very brief history of bargaining.

The National Agreement does not refer to the Employer being bound to the entire local agreement, or that the Employer must “adopt” the local agreements, or become “signatory” to them. The employer plays no role in the negotiation of the local agreements, and is not a member of any signatory multi-employer association.

Analysis

As a general proposition, when - as here - there is a substantial history of collective bargaining, the established unit becomes the appropriate unit for any petition. That established unit cannot be altered except by mutual agreement. There is one limited exception, referred to as “craft severance”, where bargaining history cannot be controlling.⁷

When a petitioner seeks to carve out a craft, whether in an initial organizing campaign, or by severing it from an established unit, the Board will look to all relevant factors in determining the appropriateness of the unit. *DuPont de Nemours and Company*, 162 NLRB 413 (1966), *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966). The Board considered bargaining history to be a *relevant* factor in assessing the appropriateness of a unit, but not a conclusive one in a craft context. *Mallinckrodt*, above. The standard announced in *Mallinckrodt* is applied in *all industries*. *Mallinckrodt*, above, at 398. In *Dupont*, a case that issued the same day as *Mallinckrodt*, the Board applied the *Mallinckrodt* analysis to an initial organizing situation in which a petitioner sought to establish a craft unit of electricians, apart from a larger, integrated production and maintenance group at the Employer’s facility. Noting at the outset the absence of any history of collective bargaining, the Board proceeded to analyze the case in accordance with the newly announced standard outlined in *Mallinckrodt*, considering all relevant facts. *Dupont* makes clear that an analysis under *Mallinckrodt* is triggered *whenever* a petition is filed seeking the creation of a separate craft unit. There is nothing in Section 9(b) (or Section 8(f)) to

indicate that the general-bargaining-history controls rule will not apply in 8(f) cases, but will in 9(a) cases; to the contrary, 9(b) speaks only of “craft unit”, without distinction. No case has been cited to support any such distinction. Here, the Petitioner is seeking to sever the millwrights from a broader unit, itself made up of various crafts⁸ - arguing that millwrights traditionally comprise a separate and distinct craft. On these facts, application of *Mallinckrodt* to the petition at issue is consistent with Board precedent.

In *Mallinckrodt*, the Board set forth the following criteria to establish the appropriateness of severance of a craft or departmental unit:

1. Whether the proposed unit consists of a distinct and homogeneous group of skilled journeymen craftsmen, performing the functions of their craft on a non-repetitive basis, or of employees constituting a functionally distinct department, working in trades or an occupation for which a tradition of separate representation exists.
2. The history of collective bargaining of the employees sought, at the plant involved, and at other plants of the employer, with emphasis on whether the existing patterns of bargaining are productive of stability in labor relations, and whether such stability will be unduly disrupted by the destruction of the existing patterns of representation.
3. The extent to which the employees in the proposed unit have established and maintained their separate identities during the period of inclusion in a broader unit, and the extent of their participation or lack of participation in the establishment and maintenance of the existing pattern of representation and the prior opportunities, if any, afforded them to obtain separate representation.
4. The history and pattern of collective bargaining in the industry involved.
5. The degree of integration of the Employer's production processes, including the extent to which the continued normal operation of the production processes is dependent upon the performance of the assigned function of the employees in the proposed unit.
6. The qualifications of the union seeking to "carve out" a separate unit, including that union's experience in representing employees like those involved in the severance action.

⁷ Section 9(b) provides that the Board shall decide the appropriate bargaining unit, provided that the Board shall not “decide that any craft unit is appropriate for such purposes on the grounds that a different unit has been established by a prior Board determination...”

⁸ Carpenters, millwrights and pile drivers. I assume for purposes of this decision, that each of these three groups is a separate craft, even though they are routinely represented in one combined unit by a single labor organization.

Applying these factors to the facts of the instant case, I find that Petitioner has not met its burden in establishing the appropriateness of a millwrights unit. The record establishes that there is a long and stable history of collective bargaining with the employees in the established unit or, stated alternatively, “a long lack of concern”⁹ for separate representation of millwrights from carpenters. While there is some evidence that the millwrights and the carpenters have maintained their separate identities while being included in the broader, multi-craft unit, these differences do not constitute a compelling argument to disturb a 30-year history of continuous bargaining and successful representation of the millwrights in the broader unit.

There are also great similarities between the two groups. The pay, fringe and *most* other contractual matters are identical; there is a common apprenticeship program. The operations of the carpenters and millwrights are integrated to a significant degree with the Employer. They sometimes work together, and carpenters build platforms and stairs to facilitate the work of the millwrights. The work of each group is sequentially dependent on completion of prior steps by the other. There is nothing that suggests that the millwrights have been denied full participation in the maintenance of the existing system of representation. Quite the contrary. Further, as evidenced by the six hundred contractors who are party to the Master Agreement, the established unit of carpenters and millwrights is common in the construction industry, locally. I take administrative notice that the combination is routine in the U.S. construction industry generally.

The record further establishes the likelihood that severance of the millwrights will have a disruptive effect on the Employer's operations, and on the stability of labor relations in the area. There would be difficulty in obtaining trained millwrights as needed – often, but sporadically, in

⁹ See *Mallinckrodt*, supra, at p.399.

large numbers – from Petitioner’s hiring hall¹⁰. Petitioner has no apprenticeship program, while Carpenters does. Traditional craft lines, long established, would be disturbed by re-alignment of craft lines to include millwrights with plumbers and fitters; this would likely lead to jurisdictional disputes, raids and counter-raids.

There exists a significant degree of integration of the Employer’s construction processes, such that the ongoing normal operation of the Employer’s processes is dependent on the continued employment of millwrights at issue in this proceeding. The millwrights’ and carpenters’ respective operations are sequenced in the project, often simultaneous, often side-by-side.

I note that UBC or its affiliates have “always” represented carpenters and millwrights together, and full participation of millwrights internally is permitted, notwithstanding their relatively smaller size. Petitioner has no meaningful experience in representation of millwrights.

For all of the foregoing reasons and on the evidence in the record as a whole, I find that it inappropriate to sever the millwrights from the overall unit as requested. There is an extensive history of combining them, the parties have made it work to the benefit of the Employer, UBC, millwrights and carpenters, and splitting the assigned two crafts apart would have detrimental impact overall.

Working Foreman

The Employer contends that working foreman should be excluded from the unit because they are supervisors under Section 2(11) of the Act. The evidence presented was conflicting to a degree, and their status fluctuated over time. Accordingly, I shall permit them to vote, subject to challenge.

¹⁰ It is well known that construction industry work tends to come available in peaks and valleys. Section 8(f)(4) of the Act was created in part to accommodate such peaks and to fill the need for a ready pool of workers to cover such peaks.

Geographic Scope of Unit.

No party addressed this issue on brief.

I have concluded that the millwrights may not be severed out from the existing carpenters/millwrights unit. Petitioner has indicated it is willing to proceed in a carpenter/millwright unit. The question is what is the appropriate geographic scope of that single-craft unit? The established unit is clearly a nationwide unit. Looking at the National Agreement and the overall circumstances, it is clear that UBC is the 8(f) representative in an Employer-wide unit; they represent all millwrights/carpenters wherever the Employer might employ them. The Employer has never established a collective bargaining relationship with Carpenters. Rather, Employer and UBC have agreed on certain basic terms and agreed that the Employer will match “wages, fringes, hours and other working conditions” of whatever the local carpenter multi-employer agreement might call for in the particular locale the Employer might be operating. While most conditions in the local agreement and the National Agreement are identical, it is no doubt important to UBC to have the Employer pre-organized everywhere, and to the Employer to have its wage costs preestablished everywhere, for predictability and to avoid whip-sawing. There also are no doubt benefits to the Employer in having the UBC exercise overall central control of labor disputes, rather than a myriad of locals or district councils. Thus, there is nothing strange about finding a nation-wide unit. Such nation-wide agreements are often found between construction “internationals” and large construction employees.

While *Mallinckrodt* holds that bargaining history may not *alone* control whether or not a craft must remain included with other classifications, it does *not* hold that a long-established unit may be carved up geographically. Put another way, while Section 9(b) states that while bargaining history alone may not control whether a craft unit can be separate or must remain combined with a larger conglomeration of classifications, it does *not* say that bargaining history

cannot control to the extent the issue is not which *classification* will be separate or combined, but rather what the geographic scope of such combinations of classifications will be. I conclude that the regular rules about bargaining history apply regarding this issue. Thus, any election herein must be co-extensive with the established Employer-wide Unit¹¹. Accordingly, I will direct an election in the Employer-wide Unit at an appropriate time, if any.

In accordance with established Board practice, I shall allow the Petitioner ten (10) days from the date of this Decision and Direction of Election in which to perfect its 30 percent showing of interest. In the event that Petitioner does not establish a proper showing of interest in the larger unit within the ten-day period, I shall dismiss the petition (without prejudice) unless it is withdrawn. Should the Petitioner not wish to participate in an election in the larger unit, it may withdraw from participation in the election without prejudice by giving notice to this effect to the Regional Director within ten (10) days from the date of this Decision and Direction of Election.

Ordinarily at this point, I would formally direct an election in the Employer-wide, carpenters/millwrights unit, and order production of an *Excelsior* list. However, inasmuch as I have vastly expanded the unit from that petitioned for, I deem it rather unlikely Petitioner will be able to satisfy its 30% showing. Thus, I shall not at this time undertake the substantial tasks¹² that such a direction would involve, unless and until Petitioner meets its showing requirement.

¹¹ Petitioner's unit request is based solely on its own internal geographic jurisdiction allocation. This is an arbitrary, irrelevant factor in any event.

¹² Creation of a voting eligibility formula, generation of *Excelsior* lists, establishing a mail ballot protocol and mailing of perhaps thousands of ballot packages.

In such case, I would formally direct an election.

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. This request must be received by the Board in Washington by April 2, 2002.

DATED in Seattle, Washington, this 19th day of March 2002.

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