

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

J.A. TADDEI CORP.¹

Employer

and

Case 4-RC-20368

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL
UNION NO. 542, AFL-CIO²

Petitioner

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 before a hearing officer of the National Labor Relations Board, herein called 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:

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. The labor organization involved claims 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.

¹ The Employer's name appears as amended at the hearing.

² The Petitioner's name appears as amended at the hearing.

5. The Employer is engaged in the civil construction business with an office located in King of Prussia, Pennsylvania. The Petitioner seeks to represent a unit of full-time and regular part-time equipment operators, apprentice equipment operators and mechanics.³ The Employer contends that its drivers, working foremen, Robert Reynolds, who works for the Employer for seven months a year, and Joseph Stanley, a full time equipment operator hired on February 4, 2002, should be included in the unit. The Petitioner would exclude the working foremen from the unit as supervisors. The Employer, contrary to the Petitioner, would exclude Eric Povenski and Rick Sozio from the unit as either temporary employees or as being covered by a union contract that bars their inclusion in the unit. The Petitioner takes no position on the unit placement of Stanley.

The Employer, which primarily performs commercial site contracting work, including excavation and concrete paving, employs approximately 25 to 27 full-time field employees, including equipment operators, apprentice equipment operators, working foremen, drivers, mechanics and laborers.⁴ John Taddei, the Employer's president and owner, generally oversees the operations of the company. John Taddei Sr. is the roving superintendent, Regina Taddei (John Taddei's sister) is the project administrator, and Jeffrey Weiss is the project manager and estimator.⁵ The Employer typically performs between six and nine jobs simultaneously with four to six employees on each job, including a working foreman, an equipment operator, an apprentice operator and several laborers. The equipment operators and apprentices operate a backhoe, excavator, bulldozer, scraper pan, and wheel loader, as well as a pickup truck.

Equipment operators and working foremen are paid between \$26 and \$30 per hour, apprentices are paid between \$20 and \$22 per hour, and drivers and laborers are paid between \$18 and \$21 per hour. The equipment operators typically excavate trenches, install pipes, and perform grading work. All of the equipment operators, apprentice equipment operators, and working foremen perform maintenance work on the heavy equipment, while the mechanic is responsible for the more advanced repairs.

The Employer employs four full-time drivers who hold commercial driver's licenses (CDLs). They spend approximately 85 to 90 percent of their time transporting equipment and materials in tractor-trailers to and from job sites. The remaining 10 to 15 percent of their time is spent performing laborer functions.⁶ The drivers are also responsible for cleaning and performing maintenance work on their vehicles at the Employer's yard. The drivers do not normally operate the equipment they transport, although they occasionally help load and unload equipment when an equipment operator is unavailable. Unloading equipment at a job site takes approximately 10 minutes.

³ The parties stipulated that apprentice equipment operators David Bireley, Leo Martin and David Taylor, equipment operators Mike Arbolino, Robert DiRocco, Albert Everitt, Jim Mullens, and David Patterson, and mechanic Ken Kochersperger should be included in the unit.

⁴ The parties stipulated that laborers should be excluded from the unit.

⁵ The parties agree that John Taddei, John Taddei, Sr., Regina Taddei and Jeffrey Weiss should be excluded from the unit.

⁶ When hiring drivers, the Employer runs advertisements for "driver/laborer" positions.

Like equipment operators, drivers fill out time sheets. The working foremen generally sign off on the equipment operators' time sheets, while John Taddei signs off on the drivers' time sheets. The drivers have the same healthcare coverage and fringe benefits as the equipment operators. They have similar work schedules, although they may start their workday a half-hour earlier than the operators in order to get to the job site on time.

As the Board recently stated in *Bartlett Collins, Co.*, 334 NLRB No. 76 (2001), the Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative unit proposals of the parties. See, e.g., *Overnite Transportation Co.*, 331 NLRB No. 85, slip op. at 2; *NLRB v. Lake County Assn. for the Retarded, Inc.*, 128 F.3d 1181, 1185 fn. 2 (1997). The Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employee classifications. See, e.g. *R&D Trucking, Inc.*, 327 NLRB 531 (1999); *State Farm Mutual Automobile Insurance Co.*, 163 NLRB 677 (1967); enfd. 411 F. 2d 356 (7th Cir. 1969). In determining whether the employees possess a separate community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. *Ore-Ida Foods, Inc.*, 313 NLRB 1016 (1994); enfd. 66 F. 3d 328 (7th Cir. 1995). It is well settled that the unit need only be an appropriate unit, not the most appropriate unit. *Morand Brothers Beverage Co.*, 91 NLRB 409, 419 (1950), enfd. on other grounds, 190 F.2d 576 (2d Cir. 1951).

Considering the above factors, I find that the drivers share a community of interest that is sufficiently separate and distinct from the petitioned-for employees to warrant their exclusion from the unit. These two groups of employees perform significantly different job functions, possess different skills, and have minimal interaction with one another. Equipment operators spend their entire day at the job site, whereas drivers spend the vast majority of their time on the road delivering materials and equipment to and from those sites. When drivers work at the job sites, they perform laborer work, and the parties agree that laborers are excluded from the unit. All employees have the same health care coverage and fringe benefits, but the drivers are paid at the same rates as the laborers and less than the equipment operators and apprentices. Unlike equipment operators, the drivers are required to possess CDLs. Although the equipment operators cannot perform their work without the drivers' deliveries, their jobs are not so closely integrated as to require their inclusion in the same unit. Accordingly, I shall exclude the drivers from the unit. *Rinker Materials Corp.*, 294 NLRB 738 (1989).

The six working foremen spend 35 to 50 percent of their time operating equipment. The remainder of their time is spent picking up materials, filling out daily logs, checking employees' time sheets for accuracy, directing equipment operators' work, reviewing daily construction schedules and helping laborers install pipe. They also attend job meetings with customers, along with John Taddei and Project Manager/Estimator Weiss. The foremen's logs list the equipment and employees on each job and their work hours. The employees complete time sheets on a weekly basis, and the foremen check to see if they are accurate. If a time sheet is accurate, the foreman signs off on it and sends it to the Employer's office. If the time sheet is not accurate,

the foreman notifies John Taddei, who makes the necessary adjustments. The foremen also conduct weekly safety meetings based on a list of topics created by John Taddei.

John Taddei visits each job site at least once a week, more frequently at the beginning and end of the jobs and on major projects. Taddei Sr. and Weiss visit the job sites several times a week. Foremen are required to report to John Taddei twice each day to review the work that has been accomplished and the construction schedule for the following day. The construction schedule lists all active projects and indicates which employees are scheduled to work on each of those projects. John Taddei creates the schedules and faxes them to the foremen's homes each night.⁷ According to Taddei, foremen do not have authority to make any changes to the construction schedules or to assign work. Taddei stated that although the foremen tell employees what to do, he personally "establish(es) who does what." Taddei testified that at the start of a job, foremen may have to instruct the employees regarding their work tasks but that their tasks need not be assigned on a daily basis, and the equipment operators generally know what they have to do without being told. If an employee is sick, he may call John Taddei directly or contact the foreman on the job. If a foreman has a disciplinary or performance problem with an employee at the job site, he is expected to contact Taddei to deal with it. The foremen receive the same fringe benefits as the equipment operators and similar wages. John Blevins worked for the Employer for about one year as an equipment operator, and he received a pay raise of \$1 per hour when he became a foreman about three months ago. Terry Trevisan worked for the Employer for about eight months as an equipment operator but did not receive a pay raise when he became a foreman about two months ago.⁸

John Taddei testified that although his father, his sister and Jeff Weiss have some say in assigning work and levying discipline, he is personally responsible for hiring, firing, wage increases, fringe benefits, discipline, layoff, recall, suspensions, rewards, promotions, and demotions. Foremen have referred individuals for employment, some of whom Taddei ultimately decided to hire. Taddei also accepts referrals from other employees, but he personally makes the final hiring decisions. A foreman may suggest the need for overtime work on occasion, but all such recommendations are subject to Taddei's approval. The working foremen may bring home company pickup trucks that they use to deliver materials, but they are not permitted to use the trucks for personal business.

A finding of supervisory status is warranted only where the individual in question possesses one or more of the indicia set forth in Section 2(11) of the Act. *The Door*, 297 NLRB 601 (1990); *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989). The statutory criteria are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Juniper Industries*, 311 NLRB 109, 110 (1993). The statutory definition specifically indicates that it applies only to individuals who exercise "independent judgment" in the performance of supervisory functions and who act in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994). The sporadic, routine, clerical or perfunctory exercise of supervisory authority is not sufficient to transform an

⁷ The Employer supplies the foremen with fax machines for their homes, but they are not permitted to use the machines for personal matters.

⁸ The record does not indicate why Blevins, but not Trevisan, received a pay raise when he became a foreman.

employee into a supervisor. *Alois Box Co.*, 326 NLRB 1177 (1998), *enfd.* 216 F.3d 69 (10th Cir. 2001); *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). Mere paper titles and/or hypothetical grants of authority are not determinative. *MJ Metal Products, Inc.*, 325 NLRB 240 (1997); *Store Employees Local 347 v. NLRB*, 422 F.2d 685 (D.C. Cir. 1969). Nor do conclusory statements regarding the asserted exercise of supervisory indicia without record evidence to support such assertions establish supervisory status. *Oregon State Employees Assn.*, 242 NLRB 976 fn. 12 (1979). Only individuals with ‘genuine management prerogatives’ should be considered supervisors, as opposed to ‘straw bosses, leadmen and other minor supervisory employees.’ *Azusa Ranch Market*, *supra*, 321 NLRB at 812. The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the protection of the Act. *Azusa Ranch Market*, *supra*. The burden of establishing supervisory status is on the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Fleming Companies, Inc.*, 330 NLRB 277 fn. 1 (1999). Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Evidence of the exercise of secondary indicia of supervisory authority is not sufficient to establish supervisory status in the absence of primary supervisory indicia of supervisory authority. *Billows Electric Supply of Northfield, Inc.*, 311 NLRB 878 (1993); *First Western Building Services*, 309 NLRB 591, 603 (1992).

The record shows that working foremen have no authority to hire, discharge, layoff, recall, discipline, reward or promote employees. The Petitioner’s claim of supervisory status rests on its assertion that the working foremen assign and direct work. The record fails to establish, however, that the foremen exercise independent authority when directing employees. John Taddei personally makes the decisions regarding the employees’ work tasks by creating the construction schedules and reviewing the details of the job with the working foremen on a daily basis. Although Taddei is not physically present at each job site every day, he speaks to the foremen frequently to discuss the work that needs to be done on each active project. Management employees Taddei Sr. and Weiss also visit each job site regularly. The foremen’s role in filling out daily logs, verifying time sheet entries, guiding the operation of equipment, running safety meetings using an outline prepared by Taddei, and reviewing construction schedules, are routine tasks that do not require independent judgment and are insufficient to establish supervisory status. *John N. Hansen Co.*, 293 NLRB 63, 64 (1989). The working foremen’s assignment and direction of employees entails precisely the type of “routine decisions typical of leadmen positions that are found by the Board not to be statutory supervisors.” *S.D.I. Partners, L.P.*, 321 NLRB 111 (1996); *Weyerhaeuser Timber Company*, 85 NLRB 1170 (1949). Based on the foregoing, I find that the Petitioner has not carried its burden of establishing that the working foremen are statutory supervisors. As they work closely with the employees in the petitioned-for unit, are jointly supervised by John Taddei, and spend significant time directly operating equipment, they share a community of interest with unit employees and I shall therefore include them in the unit. *First Western Building Services, Inc.*, *supra*, 309 NLRB at 600-603 (1992); *Tri-County Electric Cooperative*, 237 NLRB 968, 969 (1978).

Eric Povenski and Rick Sozio are equipment operators who were referred to the Employer by the Petitioner pursuant to a private settlement agreement reached between the

parties to resolve an unfair labor practice charge.⁹ The settlement agreement stated, inter alia, that the parties would enter into project agreements for two of the Employer's projects, the "Boone project" and Phase 1 of the "Northampton project,"¹⁰ and that the Petitioner would refer one employee to each of these projects. The agreement further indicated that each project was expected to last for six months. The Petitioner referred Povenski to the Boone project on about November 5, 2001. At the time of the hearing, the Employer had temporarily ceased working on the project, but Taddei expects work on the project to resume in early April and last for about another month.¹¹ The Petitioner referred Sozio to work on Phase 1 of the Northampton project on November 19, 2001. Although the settlement agreement indicated that this phase of the project was expected to last for about six months, Taddei testified that it would be completed by February 22, 2002. The project agreements bind the parties to the Petitioner's standard collective-bargaining agreement for these two employees and obligate the Employer to remit dues and make contributions to the Petitioner's benefit funds on their behalf.¹² Sozio and Povenski are subject to the same discipline and work rules as the other equipment operators, they perform very similar work, and they share common supervision. Pursuant to the collective-bargaining agreement, they receive premium pay for an hour a day for oiling their equipment. Unlike the other equipment operators, Sozio and Povenski do not have company cell phones, and they are not covered under the same insurance programs and bonus plans. Sozio and Povenski have both worked for the Employer on their respective projects for more than 30 days. Taddei testified that the Employer will terminate both of them after the projects are complete.

The *Daniel/Steiny* eligibility formula provides, inter alia, that employees of construction industry employers are eligible to vote in Board elections if they have worked for their employer for at least 30 days during the 12 months preceding the eligibility date for the election, or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date. *Steiny & Co., Inc.*, 308 NLRB 1323 (1992); *Daniel Construction*, 133 NLRB 264 (1961), modified in 167 NLRB 1078 (1967). The Employer contends that the formula should not apply to Sozio and Povenski because, unlike the Employer's other equipment operators, they were referred pursuant to a settlement agreement, and they are temporary employees whose tenure of employment is limited by the agreement to specific projects which are expected to end soon. This contention is without merit. In *Steiny*, supra, the Board unequivocally stated that the formula applies to *all* construction industry elections. The Board indicated that it would not analyze whether the formula should apply to a particular employer, but would apply it in every construction industry case.¹³ Thus, regardless of the circumstances pursuant to which Povenski and Sozio were

⁹ The agreement, signed by the parties on November 2, 2001, settled an unfair labor practice charge that the Petitioner filed against the Employer in Case 4-CA-30342.

¹⁰ The settlement agreement indicated that if the equipment operator were to leave the project prior to its completion, the Petitioner would refer another qualified equipment operator. Sozio and Povenski have missed a total of five or six days of work for the Employer.

¹¹ The record does not indicate how long it has been since work ceased on the project.

¹² The collective-bargaining agreement was not included in the record. At the hearing, the parties stipulated that it is a Section 8(f) agreement, and neither party contends that the contract has been converted to a 9(a) agreement. The project agreements require the Employer to make contributions to the following funds for Sozio and Povenski: the Health and Welfare Fund, the Pension Fund, the Apprenticeship Fund, and the Supplemental Unemployment Fund.

¹³ The only exception to this rule is except where the employer clearly operates on a seasonal basis. *Dick Kelchner Excavating Co.*, 236 NLRB 1414, 1416 fn. 10 (1978).

employed, the Daniel/Steiny formula governs their eligibility. Accordingly, as both Sozio and Povenski have worked for the Employer at least 30 days in the last 12 months they are eligible to vote.

The Employer further asserts that the underlying collective-bargaining agreement bars the petition with respect to the eligibility of Sozio and Povenski. It is well settled, however, that a Section 8(f) prehire contract cannot bar an election petition. *VFL Technology Corporation*, 329 NLRB 458, 459 fn. 8 (1999); *John Deklewa & Sons, Inc.*, 282 NLRB 1375, 1377, (1987), enfd. 843 F. 2d 770 (3rd Cir. 1988), cert denied, 488 U.S. 889 (1988). Accordingly, I find that the contract does not bar the petition in this case in any respect.

Robert Reynolds has been employed by the Employer for the last year-and-a-half. During this time period, he worked as a foreman for a landscaping company for two months during the fall and three months during the spring. The landscaping company is owned and operated by John Taddei. Reynolds works as an apprentice equipment operator for the Employer the remaining months of the year.¹⁴ He attends the same apprenticeship training classes as the Employer's other three apprentices,¹⁵ and shares common supervision, works under the same terms and conditions of employment, and operates the same equipment. Reynolds uses his landscaping company vehicle when working as an operating apprentice for the Employer, but his landscaping responsibilities do not overlap with his apprenticeship training or field work, and each company pays him separately. As Reynolds shares a community of interest with the other apprentices, although he does not work for the Employer on a year-round basis, he shall be included in the unit. Cf. *Tri-State Transportation Co., Inc.*, 289 NLRB 356 (1988) (regular employment elsewhere insufficient to justify employees' exclusion from the unit where they worked continually and regularly for the Employer and had an expectation of continued employment); *Mid-State Distributing Co., Inc.*, 276 NLRB 1511, 1559 (1985).¹⁶

The record shows that Joseph Stanley works under the same terms and conditions of employment as the other equipment operators, has the same responsibilities and supervision, and is subject to the same work rules. Accordingly, I find that Joseph Stanley shares a sufficient community of interest with unit employees to warrant his inclusion.

Accordingly, I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

All full-time and regular part-time equipment operators, apprentice equipment operators, mechanics, and working foremen employed by the Employer, excluding all other employees, drivers, laborers, office clerical employees, guards and supervisors as defined in the Act.

¹⁴ The Petitioner asserted during the hearing that there is a supervisory issue with respect to Reynolds, but it did not provide evidence on this issue, nor address Reynolds' status in its brief.

¹⁵ The Employer provides training approved by the Pennsylvania Department of Labor and Industry through an outside contractor in its own office classroom as part of a five-year apprenticeship program. Classes are given every Monday for about three-and-a-half hours.

¹⁶ As the Employer is not a seasonal employer, I find the seasonal employee analysis suggested by the Employer to be inapplicable.

The Petitioner stated at the hearing that it is unwilling to proceed to an election in any unit found appropriate by the Regional Director, but did not specify in which units it would be willing to proceed. Accordingly, the Petitioner will be given the opportunity to proceed to an election in the unit set forth above. The Petitioner's showing of interest may now be inadequate due to the additional employees included in the unit as a result of this Decision. Accordingly, the Petitioner has 10 days from the issuance of this Decision to augment its showing of interest, if necessary. If the Petitioner fails to submit an adequate showing of interest within this period, the Petition will be dismissed without further order. The Direction of Election set forth below is thus conditioned on the Petitioner having an adequate showing of interest.

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,¹⁷ 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 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. Additionally, eligible are those employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months, or who have had some employment in that period and have been employed for a total of 45 working days within the 24 months immediately preceding the payroll period ending immediately preceding the date of this Decision, and also 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 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 UNION NO. 542, AFL-CIO**

LIST OF VOTERS

In order to assure 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); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759

¹⁷ Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

(1969). Accordingly, it is hereby directed that an election eligibility list, containing the *full* names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region Four within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **April 8, 2002**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of **3 copies**, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall, or by department, etc.). If you have any questions, please contact the Regional Office.

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., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **April 15, 2002**.

Signed: April 1, 2002

at Philadelphia, PA

/s/

DOROTHY L. MOORE-DUNCAN

Regional Director, Region Four

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