

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

MAINTENANCE UNLIMITED, INC.

Employer

and

**OPERATIVE PLASTERERS' AND CEMENT
MASONS' INTERNATIONAL ASSOCIATION,
LOCAL UNION NO. 404**

Petitioner

Case No. 8-RC-16336

and

**BRICKLAYERS AND ALLIED CRAFTSWORKERS LOCAL
UNION NO. 16**

Intervenor

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.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.¹

The following employees 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 employees of the Employer performing cement mason work including journeymen and apprentices; excluding all office clerical employees, professional employees, guards

¹ The Petitioner and Intervenor filed post-hearing briefs that were duly considered. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby 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 herein. The labor organizations involved claim to represent certain employees of the Employers. A question affecting commerce exists concerning the representation of certain employees of the Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

and supervisors as defined in the Act, and all other employees.

Issues

There are two issues to be determined in this representation proceeding. First, is the Employer party to any Section 9(a) contracts that present a bar to the instant proceeding. Second, must the unit be limited geographically in order to be deemed appropriate.²

Decision Summary

The Petitioner seeks a unit of cement mason journeymen and apprentices employed by the Employer. The Intervenor asserts that the Petition is barred by a Section 9(a) contract applicable to a substantial number of unit employees. In the alternative, the Intervenor argues that the unit should be geographically restricted to Cuyahoga County. The Employer takes no position on the contract bar issue or on the composition of the unit.

I do not find a contract bar to the instant representation proceeding. Further, I find the petitioned-for unit appropriate and direct an election in that unit.

Facts

The Employer is an Ohio corporation engaged in construction including site utilities, interior renovation, and some concrete work. Its principal office and place of business is located in Strongsville, Ohio. The Employer has a core group of employees

² The record shows some emphasis by the parties upon the Employer having only one “more regular” cement mason. Application of the formula set forth in **Daniel Construction Co., 133 NLRB 264 (1961)** and **Steiny & Co., 308 NLRB 1323 (1992)** clearly results in more than one eligible voter. The information included in footnotes 3 through 7, *infra*, shows at least five (5) employees who are eligible to vote in any election directed herein.

who work for the company performing a variety of construction work. Cement masonry makes up approximately 2-3% of the Employer's work, so it employs cement masons on an as needed basis.

There were a total of 35 cement masons who worked for the Employer in 2000 and 45 who worked for the Employer in 2001. Each of the cement masons working for the Employer in 2000 and 2001 was a member of the petitioning Union. These cement masons were hired on a random basis through the Petitioner's hiring hall, or were Local 404 members who had worked for the Employer in the past. Only one cement mason, Don McKenney, works for the Employer on a more regular basis, and he is a member of the petitioning Union. Although McKenney does not work for the Employer continuously, he performs more work for the Employer than any other cement mason.³ The employees with the next highest number of hours with the Employer in 2000 are Raymond Anthony⁴ and Charles Mullen.⁵ In 2001 the next highest hours were worked by Curtis Kozak⁶ and Steve Miklavcic.⁷ In 2000, the Employer's cement mason hours were 4072.5 regular and 400.5 overtime hours. The hours were 4271.25 regular and 541 overtime hours in 2001. McKinney works well over a third of the total cement mason hours logged by the Employer, with various cement masons working the remaining two thirds of the hours.

The majority of the jobs obtained by the company are within Cuyahoga County, Ohio, but the Employer bids on and accepts work in surrounding counties. In the last two

³ The Employer's business records show that McKenney worked in all four quarters of 2000 for a total of 1565.5 regular and 138 overtime hours. In 2001, McKenney worked 1503 regular and 193 overtime hours for the employer.

⁴ Anthony worked 442.5 regular and 45.5 overtime hours for the Employer in 2000.

⁵ Mullen worked 576 regular and 60.5 overtime hours for the Employer in 2000.

⁶ Kozak worked 442 regular and 32 overtime hours for the Employer in 2001.

years, the Employer has worked on projects involving cement mason work in Lorain, Lake, Portage, Trumbull and Summit Counties. During an undisclosed period in the past, the Employer also has performed work in Medina, Sandusky, Toledo, and Youngstown, as well as several counties in Indiana. The evidence did not show whether those jobs included cement mason work. The Employer has used McKenney and the Petitioner's other members to work on the cement mason jobs regardless of the county in which the job is located.

The Employer has contracts covering cement mason work with at least three unions. First, is the Petitioner's agreement with three Ohio area employer associations effective from May 1, 1997 to April 30, 2001 and on a yearly basis thereafter. The Employer agreed to be bound by the Association agreement by signing an Acceptance of Agreement form. The Employer recognized the Petitioner as the employees' Section 9(a) representative by signing a voluntary recognition agreement in 1997. The Petitioner's Association agreement with the Employer is limited to the Cuyahoga County, while the Petitioner and Employer's Acceptance of Agreement form includes Cuyahoga and Lorain Counties.

The Employer has also signed an Assent of Participation document thereby agreeing to abide by the Intervenor's collective bargaining agreement with the Northeast Ohio Contractors Association, effective from May 1, 1999 to April 30, 2002. The Employer has executed an Agreement for Voluntary Recognition with the Intervening

⁷ Miklavcic worked 339 regular and 21 overtime hours for the Employer in 2001.

union as well.⁸ The Intervenor's agreement sets forth the Intervenor's geographical jurisdiction as including Ashtabula, Lake and Geauga Counties of Ohio.

In addition, the Employer has an agreement with Operative Plasterers' and Cement Masons' International Association Local Union No. 109, effective from June 1, 2001 to June 1, 2006. This agreement covers Carroll, Homes, Medina, Portage, Stark, Summit, Tuscarawas, and Wayne Counties of Ohio.⁹ The recognition clause of the contract provides, in part, that "[t]he Employer further acknowledges that the Union has established to the satisfaction of the Employer that the Union represents a clear majority of the Employer's employees who perform work covered by this agreement."

The Petitioner seeks a unit that includes all of the Employer's journeymen and apprentice cement masons. The Employer does not dispute the propriety of the petitioned for unit. The Intervenor first alleges that the Petition is barred by the Employer's contract with Local 109. If the Petition is not barred, the Intervenor argues that the unit should be restricted to Cuyahoga County.

Contract Bar

The Board recently refined the circumstances under which a recognition agreement or contract provision will establish a union's Section 9(a) status. Under the Board's decision in **Staughton Fuel & Material, Inc., 335 NLRB No. 59 (2001)**, a recognition agreement or contract provision will be independently sufficient to establish a Union's 9(a) status where the language unequivocally indicates that (1) the Union requested recognition as the majority or Section 9(a) representative of the unit

⁸ In my decision in **Gash Concrete Construction Co., 8-RC-16332**, I found this same contract to be a Section 9(a) contract, and I am satisfied that this Employer and the Intervenor's contracts meet the criteria for Section 9(a) agreements as set forth in **Staughton Fuel & Material, Inc., 335 NLRB No. 59 (2001)**.

employees; (2) the employer recognized the union as the majority or Section 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support.

In the instant case, the Employer's voluntary recognition agreement with Petitioner reflects that the Employer recognized the Petitioner after an examination of authorization cards established that it possessed majority support within the unit. Clearly, under the principles expressed in **Staughton Fuel, supra**, the Petitioner has a 9(a) relationship with the Employer.¹⁰ The Employer's relationship with the Intervenor is also a Section 9(a) relationship based upon the language of its voluntary recognition agreement. That agreement does not block the processing of the Petition since the expiration date of the Intervenor's contract with the Employer is April 30, 2002. The Petition was filed on February 15, 2002, well within the 60 to 90 day window period permitting such filings. **Leonard Wholesale Meats, 136 NLRB 1000 (1962)**.

As for the Employer's collective bargaining agreement with Local 109, I find that the recognition language is insufficient to establish Section 9(a) status under **Staughton Fuel** because it does not unequivocally state that the employer's recognition was based on the union showing, or having offered to show, evidence of majority support. Accordingly, I find that Local 109's contract is an 8(f) contract and consequently is not a bar to the instant petition. **John Deklewa & Sons, 282 NLRB 1375, 1387 (1987)**; **Staughton Fuel**. Thus, I find there is no contract bar to this representation proceeding.

⁹ Local 109 did not appear at the hearing. On March 26, 2002, I sent a letter by facsimile to Local 109 advising it that if it wished to intervene in this proceeding it should so indicate by the close of business on Monday, April 1, 2002. No response was received from Local 109.

¹⁰ A petition involving a recognized bargaining representative seeking certification during the term of its Section 9(a) agreement presents a long recognized exception to contract bar rules. **General Box Co., 82 NLRB 678 (1948)**.

Unit Scope

As noted, Petitioner seeks a unit with no geographic limitation and the Employer does not dispute the propriety of such a unit. The Intervenor seeks a unit limited to Cuyahoga County. I find the petitioned-for unit appropriate for several reasons.

First, the Petitioner need only seek an appropriate unit, not the most appropriate unit. **Overnite Transportation Co., 322 NLRB 723 (1996)**. Second, the petitioned for unit is within the parameters set by the Board when examining the geographic scope of units in the construction industry. Finally, the Intervenor has failed to establish that a geographical limitation is warranted in this case.

When the Board has addressed the appropriate geographic scope of construction bargaining units, it has examined (1) whether there is a core group of employees who travel from place to place, and (2) the history of where the core group has worked or reasonably foresees working in the future. **Alley Drywall, Inc., 333 NLRB No. 132 (2001)**; **Oklahoma Installation Co., 305 NLRB 812 (1991)**(geographic scope limited to places where employer has actually conducted business or there is some “likelihood” that it will in the future; areas excluded where employer said it has no intention to bid in the future). The Board has been amenable to limiting units on a geographic basis when the petitioner requests it. **Dezcon, Inc., 295 NLRB 109 (1989)**. Where another party seeks to exclude a county or other geographic area sought by a petitioner, it must show that the employer involved has never done business in that area and there is no basis for concluding that it will do business there in the future. **Oklahoma Installation Co., 305 NLRB 812 (1991)**.

The evidence establishes that the Employer obtains cement masons from either the Petitioner's hiring hall or from a list of cement masons having worked for the Employer in the past. The Employer used the same sources for cement masons in all the counties in which it worked in the past 24 months. The record shows that the Employer has performed work in at least six counties in the past 24 months, in addition to performing work in several other Ohio counties and Indiana on other occasions. In fact, the Employer does not limit its bids for work to any particular area and has expressed the intention of bidding for work wherever it has a likelihood of obtaining work.

The Intervenor argues for a geographic limitation to Cuyahoga County. Any geographic limitation, however, would bear no relationship to the manner in which the Employer conducts its business; i.e., using the same source of employees on most, if not all, of its jobs regardless of the location. The Board noted recently that geographic limitations in Section 8(f) agreements, which bear no relationship to the manner in which the employer actually conducts its business, should not be given controlling weight in making unit determinations. **Alley Drywall, Inc., 333 NLRB No. 132 (2001)**. Therefore, the Intervenor's position that the unit be limited to Cuyahoga County cannot stand given the Employer's practice of using its core group on jobs outside Cuyahoga County. Furthermore, the Intervenor has failed to show that the Employer has never conducted business outside Cuyahoga County or that it will not do so in the future. In light of the record evidence that the Employer moves the same core group of cement masons from job site to job site, and has no intention of geographically restricting its bids for future work, I deem it appropriate to direct an election in a unit without geographic restrictions.

Since the Employer is engaged in the construction industry and the record reflects that the number of unit employees varies from time to time, the eligibility of voters will be determined by the formula in **Daniel Construction Co., 133 NLRB 264 (1961)** and **Steiny & Co., 308 NLRB 1323 (1992)**.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who 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.

Also eligible to vote are those employees who have been employed for a total of 30 working days or more within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have

been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Those eligible shall vote whether or not they desire to be represented by: (1) Bricklayers and Allied Craftworkers Local Union No. 16; or (2) Operative Plasterers and Cement Masons International Association Local Union No. 404; or (3) Neither.

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc.**, 156 NLRB 1236 (1966); **N.L.R.B. v. Wyman-Gordon Co.**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility**, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

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 May 8, 2002.

Dated at Cleveland, Ohio this 24th day of April 2002.

/s/ Frederick J. Calatrello

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

440-1700