

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

ELKHORN CONSTRUCTION, INC.

Employer,

Case No. 27-RC-8292

and

PIPELINERS LOCAL UNION 798, a/w
THE UNITED ASSOCIATION OF PLUMBERS
AND PIPEFITTERS OF THE UNITED STATES
AND CANADA, AFL-CIO

Petitioner.

DECISION AND ORDER

On November 3, 2003, Pipeliners Local Union 798 (the Petitioner) filed a petition under Section 9(c) of the National Labor Relations Act, as amended (the Act), seeking to represent a unit of employees of Elkhorn Construction, Inc. (Elkhorn), consisting of Elkhorn's rig welders throughout the Continental United States, excluding supervisors as defined in the Act, guards, office clericals, and all other employees.¹ On November 26, 2003, a hearing was held before a hearing officer of the National Labor Relations Board.

This case involves unit-determination issues relating to "rig" welders and "single-hand" welders that Elkhorn employs. The record evidence indicates that a rig welder is

¹ The Petitioner defined "rig welders" as those welders who own their own welding rig as a condition of employment, who lease their rig to their employer, and who must pass pipe x-ray and/or destructive tests.

a welder who owns and maintains his own welding rig, which consists of a welding machine and support equipment that is mounted on the back of a mobile pickup truck. A “single-hand welder” is a welder who does not own his own welding rig and, instead, uses a rig provided by his employer.

This case presents one issue to be resolved: whether Elkhorn’s rig welders are a craft or departmental unit or an otherwise clearly identifiable and homogeneous group with a community of interest separate and apart from other welders. The Petitioner contends that the rig welders share such a distinct community of interest. In contrast, Elkhorn and its wholly-owned subsidiary (HOAD, Inc.) contend that the Elkhorn rig welders are not a discrete group that is separate and apart from the other welders. More specifically, Elkhorn and HOAD contend that they are a single-employer and that the only appropriate unit for its welders is one that includes all rig welders and single-hand welders employed by Elkhorn and HOAD. In its brief, the Petitioner refers to HOAD as being a jointly run subsidiary of Elkhorn and argues that the two entities constitute a joint employer. The Petitioner contends that there is not such a strong community of interest between the Elkhorn rig welders and the HOAD welders as to require that the Elkhorn rig welders be included in the same unit with the HOAD welders. As I discuss further below, I conclude that the petitioned-for unit of Elkhorn’s rig welders is not appropriate for purposes of collective bargaining.²

² Petitioner did not indicate that it is willing to proceed in an election in an alternative unit in the event that its petitioned-for unit of Elkhorn rig welders was deemed to be inappropriate. To the contrary, its counsel stated at the hearing that the Petitioner desires to represent Elkhorn rig welders only and that it did not wish to represent anyone from HOAD. For the reasons discussed below, I find that any appropriate unit must, at a minimum, include Elkhorn’s single-hand welders. I find it unnecessary to

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. Elkhorn is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it is subject to the jurisdiction of the Board. The parties stipulated, and I find, that Elkhorn is a Wyoming corporation engaged in the construction industry throughout the United States, with its principal place of business in Evanston, Wyoming, at which location it annually purchases and receives materials valued in excess of \$50,000 directly from suppliers located outside the State of Wyoming.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. Based upon the record and for the reasons set forth below, no question affecting commerce exists concerning the representation of employees of Elkhorn within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

FACTS

Elkhorn is an industrial construction company with its primary focus in the petrochemical and oil and gas industries. Approximately 50 to 60 percent of Elkhorn's construction work involves natural gas processing plants and natural gas compressor stations. Elkhorn also performs construction work on other industrial projects, such as wastewater treatment and power plants. In less than five percent of its jobs, Elkhorn performs pipeline construction work. Elkhorn has offices in several states located in or

specifically find a unit that would be appropriate, or to determine whether Elkhorn and HOAD are a single-employer or a joint-employer.

near the Rocky Mountain area. It has three offices in Wyoming, two offices in Colorado, one office in Utah, one office in New Mexico, and one office in Texas. Most of Elkhorn's work is performed at job sites at its customers' locations, and it performs some fabrication work at Elkhorn facilities and HOAD facilities. At the time of the hearing, Elkhorn was working on approximately 30 to 40 different projects, primarily consisting of natural gas processing plants and gas compressor stations.

Approximately 10 percent of Elkhorn's work force consists of welders. At the time of the hearing, Elkhorn had approximately 100 welders. Elkhorn classifies all of its welders in the single job category of "welder." It acknowledges, however, that some of its welders own their own rigs and therefore may be considered to be rig welders, and that its other welders do not own their rigs and therefore may be considered to be single-hand welders.

When Elkhorn hires a rig welder, it enters into a rental agreement with the welder under which the welder agrees to lease his rig to Elkhorn for use on its jobs. The agreement states that the welder will be an employee of Elkhorn, and that the welder will use the rig in the performance of his duties as an employee of Elkhorn. Elkhorn pays the rig welders \$13 per hour for the lease of their rigs. A rig costs approximately \$40,000 to \$50,000, and the rig owner is responsible for the expenses associated with operating the rig, such as repairs, licensing, and insurance.

Elkhorn assigns its rig welders and single-hand welders to a variety of welding jobs. The rig welders and single-hand welders are responsible for welding all types of metal, primarily on pipe and occasionally on structural steel supports. The pipe often has to withstand high pressure, because the pipe can be used to move pressurized gas,

oil, and other fluids. To perform their assigned welding tasks, the rig welders and single-hand welders must know how to operate a welding machine in a safe manner at a level that ensures satisfactory completion of their assigned welding tasks. Both types of welders must pass tests that determine whether they are capable of welding according to established association codes for the projects on which they work. In performing their welding duties, both types of welders use welding machines, cutting torches, grinders, brushes, beveling machines, jack stands, and other related tools. With regard to equipment, the only difference between the two groups of welders is that rig welders provide their own rig while single-hand welders use Elkhorn-provided rigs. However, on occasion, when the need arises, Elkhorn's rig welders also use Elkhorn-provided rigs. For example, a rig-welder may use an Elkhorn-provided rig when his own rig breaks down or when his own rig does not fit into a particular workspace.

Elkhorn's rig welders and single-hand welders usually work in the field at locations where Elkhorn is performing work for its customers. The rig welders and single-hand welders are required to travel as part of their jobs. Both types of welders are paid the same per diem, the specific amount of which is determined on a project basis.

Elkhorn staffs some projects with both rig welders and single-hand welders. For example, Elkhorn assigned rig welders and single-hand welders to work on projects for Powder River Coal and Navajo Refining.³ On such projects, the rig welders and single-hand welders work next to one another and are required to pass identical tests prior to

³ The Powder River Coal project was located in northeast Wyoming. The record does not disclose the location of the Navajo Refining project.

commencing work on the job. They also attend the same daily safety meetings. When the rig welders and single-hand welders work together on projects, they have the same group of supervisors, consisting usually of the project foreman and/or the project superintendent.⁴ Those supervisors hire, fire, and promote the rig welders and the single-hand welders, determine their work schedules, assign work to them, determine whether they can take time off, and handle their grievances.

The Elkhorn rig welders and single-hand welders are paid the same hourly rates, which fall in the range of \$15 to \$23.50. They are covered by the same fringe benefits, including medical, dental, vision, life insurance, and retirement benefits. Additionally, they are subject to the same employment policies, including but not limited to the drug and alcohol policy, vacation policy, safety policy, conduct and disciplinary rules, and other policies set forth in an employee handbook that Elkhorn provides to the rig welders and single-hand welders at the time of their hire.

ANALYSIS

In determining an appropriate bargaining unit in the construction industry, as in all other settings, the Board's task is to determine not the most appropriate or comprehensive unit, but simply an appropriate unit. See *Dezcon, Inc.*, 295 NLRB 109, 111 (1989). The Board first seeks to determine whether the petitioned-for unit is appropriate. Id.; *Johnson Controls, Inc.*, 322 NLRB 669, 670, 672 (1996). The Board has long held that a unit in the construction industry may be appropriate on the basis of either a craft or departmental unit, or so long as the requested employees are a clearly

⁴ On Elkhorn projects for gas companies, all welders also are subject to "supervision" by inspectors who work for the gas companies.

identifiable and homogeneous group with a community of interest separate and apart from other employees. See Brown & Root Braun, 310 NLRB 632, 635 (1993); A.C. Pavement Striping Co., 296 NLRB 206, 209 (1989); Brown & Root, Inc., 258 NLRB 1002, 1003 (1981).

I conclude that the petitioned-for unit of Elkhorn's rig welders is not an appropriate unit. As discussed more fully below, I find that the petitioned-for Elkhorn rig welders are neither a craft nor a departmental unit, nor do they constitute an otherwise clearly identifiable and homogeneous group with a community of interest separate and apart from other employees. The record establishes that Elkhorn's rig welders and single-hand welders perform the same work, they have similar skills and qualifications, they work side-by-side with common supervision under the same policies, and they are covered by the same wage scale and benefits. The only difference between them that is clearly revealed in the record is that the rig welders own their own equipment and lease it to Elkhorn, while the single-hand welders use Elkhorn-provided equipment.

First, I find that the record evidence does not establish that Elkhorn's rig welders constitute a separate craft unit. A craft unit is one consisting of a distinct and homogeneous group of skilled journeymen craftsmen who are primarily engaged in the performance of tasks which are not performed by other employees and which require the use of substantial craft skills and specialized tools and equipment. See Burns & Roe Services Corp., 313 NLRB 1307, 1308 (1994). In determining whether a petitioned-for group of employees constitutes a separate craft unit, the Board looks at several factors: whether the petitioned-for employees participate in a formal training or apprenticeship program; whether their work is functionally integrated with the work of

excluded employees; whether their duties overlap with the duties of excluded employees; and whether the employer assigns work according to craft or jurisdictional lines. Id. In this case, there is no evidence showing that Elkhorn's rig welders participate in a formal training or apprenticeship program that is different from training received by the single-hand welders the Petitioner does not seek to represent. See North American Aviation, Inc., 162 NLRB 1267, 1270 (1967) (observing that, outside the aerospace industry, welders usually do not possess strong craft identity because they have skills that generally are not regarded as apprenticeable). Moreover, the evidence shows that on a number of Elkhorn projects, Elkhorn's rig welders' work is functionally integrated and overlaps with the work of its single-hand welders, i.e. they work side-by-side with each other, doing similar or identical work. With regard to whether Elkhorn assigns welding work on the basis of traditional craft or jurisdictional lines, the record does not demonstrate that it does so. Indeed, Elkhorn's District Manager/Construction Manager, Vincent Deister, testified that Elkhorn selects welders for job assignments based on a "first come-first call" system, apparently under which welders are sent out to jobs in the order they show up to receive work assignments.

Second, the record does not establish that the Elkhorn rig welders are a separate departmental unit. Rather, the evidence establishes that Elkhorn classifies its rig welders and single-hand welders in the same job category and that it does not maintain a rig welder department or other rig welder classification that is organizationally separate from single-hand welders.

Third, I conclude that the petitioned-for unit of rig welders does not otherwise constitute a clearly identifiable and homogeneous group with a community of interest

separate and apart from other excluded employees. Several factors support the conclusion that the Elkhorn rig welders by themselves do not constitute an appropriate unit. As discussed above, the record does not establish that the Elkhorn rig welders perform work that is so distinct from the work performed by the Elkhorn single-hand welders as to warrant placing the Elkhorn rig welders in their own separate unit. The evidence also reflects that many of the single-hand welders that the Petitioner seeks to exclude have qualifications that are similar to the petitioned-for welders, and that many of the excluded single-hand welders must take the same or similar tests and meet the same or similar certification standards. Furthermore, the record shows that the Elkhorn rig welders work side-by-side with Elkhorn single-hand welders. The petitioned-for Elkhorn rig welders and the welders the Petitioner seeks to exclude also share the same supervision on some projects, and are subject to the same policies governing significant terms and conditions of employment, including the drug and alcohol policy, vacation policy, safety policy, conduct and disciplinary rules, and the other policies set forth in the employee handbook. Also, the wage scale for both groups of Elkhorn's welders is the same, they receive the same per diem, and they are covered by the same medical, dental, vision, life insurance, and retirement benefits.

Finally, although the rig welders own their rigs and lease them to Elkhorn and the single-hand welders use Elkhorn-provided rigs, that difference by itself does not provide a sufficient basis upon which the Elkhorn rig welders may be placed in their own unit, separate from the Elkhorn single-hand welders with whom they have an overall community of interest. The Board has included in the same unit employees who supply their own equipment and other employees who receive equipment from the employer,

where those employee groups shared a community of interest. See, e.g., R. W. Bozel Transfer, 304 NLRB 200 (1991) (including employee tractor owner-operators in a unit with other employee drivers who were not owner-operators); Air Control Products, Inc., 132 NLRB 114 (1961) (including employee installers who owned their own trucks and tools in a unit with other production and maintenance employees). To be sure, the Board has treated ownership of equipment as a relevant factor in determining whether to place workers in a bargaining unit, but those cases typically involve the issue whether those workers are employees who may be included in a unit or are nonemployee independent contractors who cannot be included in a unit. See, e.g., BKN, Inc., 333 NLRB 143, 144 (2001); Roadway Package System, Inc., 326 NLRB 842, 851-852 (1998). In this case no party claims that the rig welders are independent contractors rather than employees and, accordingly, the cases that treat ownership of equipment as relevant to employee/independent contractor status have little bearing here.

Based on the foregoing, I conclude the Petitioner has failed to present sufficient evidence to countervail the overall community of interest between Elkhorn's rig welders and single-hand welders and thus the Petitioner's proposed unit consisting only of Elkhorn's rig welders is not an appropriate unit for the purposes of collective bargaining. See, e.g., Brown & Root Braun, 310 NLRB at 635-636 (record evidence failed to establish that the petitioned-for unit was so distinct and separate from other employees to warrant a separate appropriate unit); A.C. Pavement Striping Co., 296 NLRB at 209-210 (same); Brown & Root, Inc., 258 NLRB at 1003-1004 (same).

ORDER

Inasmuch as I have found that the only unit in which the Petitioner has indicated a willingness to proceed to an election is not appropriate for the purposes of collective bargaining, I shall dismiss the petition.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a Request for Review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. In order to be timely filed, this request must be received by the Board in Washington by **December 31, 2003**.

Dated at Denver, Colorado this 17th day of December 2003.

B. Allan Benson, Regional Director
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