UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Lyon County and Elko County, Nevada)

M.G.M. CONSTRUCTION, INC.

Employer[1]

and

Case 32-RC-5189

SOUTHWEST REGIONAL COUNCIL OF CARPENTERS, a/w UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Petitioner[2]

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, and herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein 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, I find the following:

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

2. The Employer, a Utah corporation with an office in North Salt Lake, Utah and various job sites in the State of Nevada, has been engaged as a general contractor in the construction industry. During the past 12 months, in the course and conduct of its business operations, the Employer has provided services valued in excess of $50,000 directly to customers located outside the State of Utah. In such circumstances, I find that the assertion of jurisdiction herein is appropriate.

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[1] The Employer's name appears as stipulated at hearing.

[2] The Petitioner's name appears as stipulated at the hearing. The Petitioner is hereinafter called the Union.

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

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 Union seeks to represent a unit of all full-time and regular part-time "carpenter craft employees" employed by the Employer in Nevada within the Union's geographical jurisdiction, which includes all Nevada counties except Esmerelda, Clark, Nye and Lincoln counties. The Employer contends that many of its employees are dual-function employees who perform a significant percentage of carpentry work as part of their normal work and that these employees should be included in any appropriate unit found herein. The Employer further contends that the geographical scope of any unit found appropriate should also exclude certain counties in Nevada where it has not done and does not anticipate doing work, including Churchill, Storey and Douglas counties. These issues will be dealt with in order.

The Employer's operations

The Employer is a general contractor engaged in the building of commercial and institutional facilities. The Employer is licensed to do work in the State of Nevada and Utah. David Muhlestein is the Employer's president and owner. Donald Parker is the Employer's project manager and he works out of North Salt Lake, Utah. The Employer has three site superintendents, Jason Jeppsen, David Spires and Randy Schow.[3]

The Employer currently has four projects in Nevada at jobsites in Elko and Lyon Counties. The Employer oversees each project, subcontracting out some work but performing its own concrete work and miscellaneous specialties, such as installing hardware, doors and partitions. The Employer also does framing work on some of its projects. More than 90% of the Employer's projects are prevailing wage jobs and the Employer pays its employees the prevailing wage established by the State of Nevada according to the job classification of work performed by its employees. The primary job classifications utilized by the Employer are laborers, cement masons, carpenters and iron workers. The carpentry work performed by the Employer's employees includes framing and constructing forms for cement work, laborer and cement mason work includes pouring and leveling concrete work; and iron work includes placing rebar in foundation work. In the course of their daily work, the Employer's employees may and do work in several different classifications depending on the particular task they are performing. Employees are responsible for tracking their own time and each day they report on their time cards how much of their time was spent working in each job classification.

[3] The parties stipulated that site superintendents Jeppsen, Spires and Schow are statutory supervisors under Section 2(11) of the Act. Accordingly, these individuals are excluded from the unit herein found appropriate. The parties also stipulated that Vergal Sorensen is not a statutory supervisor.

The Employer's site superintendents are responsible for the hiring of employees and they typically hire general construction workers to perform the major tasks performed at the Employer's jobsites. The site superintendents do not hire employees to work in one particular classification but instead look for employees who can do the work required at the particular project and who can work in more than just one of the classifications. All employees are expected to have the same basic hand tools, including a nail belt, tape measure, hammer, pliers, chalk line, pencil, speed square, and mag float/hand trowel. Employees working on each project have the same supervisors, work the same hours, and take the same rest breaks and meal breaks. All employees receive the same orientation, are subject to the same rules and safety requirements, are hourly paid, earn the same wage rate when working in the same job classification, and receive the same holiday benefit. All employees are a common payroll system and are paid on the same day. The Employer has no history of collective bargaining.

The Employer's dual-function employees

At the hearing, the parties agreed that employees who work more than 50% of their time in the carpentry classification would be properly included in the unit and that employees Kirk Nylander, Mark Bernard, Darren Ficklin, Guy Ficklin, Garth Lefleur, John Thomsen, Paul Holdaway, Harrison Monticelli and Vergal Sorensen spend over 50% of their time performing carpentry work. According, Kirk Nylander, Mark Bernard, Darren and Guy Ficklin, Garth Lefleur, John Thomsen, Paul Holdaway, Harrison Monticelli and Vergal Sorensen are included in the unit herein found appropriate.[4]

The parties further agreed that any employees who work less than 18% of their time in the carpentry classification are properly excluded from the unit and that employees Jeff Lynch, Chad Reynolds, Mike Tuel, Jack Martini and Phil Spires, and former employees Wade Rosenlund and Troy Elder, spend or spent less than 18% of their time performing carpentry work. According, Jeff Lynch, Chad Reynolds, Mike Tuel, Jack Martini, Phil Spires, Wade Rosenlund and Troy Elder are excluded from the unit herein found appropriate.

Beyond these stipulations, however, the parties are in disagreement concerning the unit inclusion of employees who spend less than 50% but more than 18% of their time performing carpentry work. Specifically, the parties disagree concerning the inclusion of Modesto Brava and Mike Burke, who each worked approximately 50 % of their time in a carpentry classification; Aaron Patchett, who worked 47% of his time in a carpentry classification; Jeff Ford, who worked

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[4] The Union contends that Dave Rawdon, who works 93% of his time in a carpentry classification, should be excluded from the unit because he was formerly a supervisor. However, there is no evidence that Rawdon is currently a supervisor or likely to return to a supervisory position. Accordingly, Dave Rawdon is included in the unit herein found appropriate.

The Union also contends that Joshua Sorenson, a current employee who spends approximately 75% of his time in a carpentry classification, and Danny Gravley, a current employee who spends approximately 70% of his time in a carpentry classification, should not be included in the unit because they are recent hires. Their dates of hire would be relevant only with respect to their voting eligibility and has no bearing on whether they perform sufficient carpentry work to be included in the unit (which they clearly do). Accordingly, Joshua Sorensen and Danny Gravley are included in the unit herein found appropriate.

46% of his time in a carpentry classification; Chris Anderson, Rex Knight, Eulalio Martinez and John Morton, who each worked 41% of their time in a carpentry classification; Brian Maynard and Steve Nash, who each worked 39% of their time in a carpentry classification; and Jeff Nash, who worked 32% of his time in a carpentry classification.

It is well established that the Board may include dual-function employees in a unit if they regularly perform duties similar to those of unit employees in sufficient degree to demonstrate a substantial interest in the unit's wages, hours, and working conditions. *Berea Publishing Co.,* 140 NLRB 516 (1963). In determining whether dual-function employees regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in the unit's working conditions, the Board has no bright line rule as to the amount of time required to be spent in performing unit work. Rather, the Board examines the facts in each particular case. See, *e.g*., *Oxford Chemicals*, 286 NLRB 187 (1987) (employee who regularly performed unit work 25% each working day was included in the unit); *Davis Transport*, 169 NLRB 557, 562-563 (1968) (employees who spent less than 3 percent of their time performing unit work during 10-month time period were not included in unit); *McMor-Han Trucking Co*., 166 NLRB 700, 702 (1967) (employee who drove truck on 20 days during the year with no regularity, pattern, or consistent schedule, was excluded from unit of truck drivers).

Here, each of the employees in question worked between 32% and 50% of their time engaged in carpentry work. Board law establishes that the regular performance of 25% or more of an employee's time in a unit classification can be sufficient to demonstrate a substantial interest in the unit's wages, hours, and conditions of employment. *Medlar Electric Inc.,* 337 NLRB No. 133 (2002). See also *Oxford Chemicals*, *supra*. Given these circumstances, and the general community of interest shared by all of the Employer's employees, I find that Modesto Brava, Mike Burke, Aaron Patchett, Jeff Ford, Chris Anderson, Rex Knight, Eulalio Martinez, John Morton, Brian Maynard, Steve Nash and Jeff Nash are dual function employees properly included in the unit herein found appropriate.[5]

The geographical scope of unit

As noted above, the Employer does not dispute the appropriateness of a unit encompassing all of its operations in the State of Nevada, excluding the counties of Esmerelda, Clark, Nye and Lincoln where the Union does not have jurisdiction to represent employees. However, the Employer asserts that any unit found appropriate herein should also exclude the counties of Pershing, Churchill, Storey, Carson, Douglas and Mineral where it has not done and does not anticipate doing any work. At the hearing, the Union presented evidence related to potential future projects and areas of work in those counties, which it argues the Employer may decide to work in the future. However, on these facts, and in view of the Employer's work history, I find that the record is insufficient to establish the likelihood of future work for the Employer in those counties so as to warrant the inclusion of those counties in an appropriate unit. See *Oklahoma Installation Company*, 305 NLRB 812, 813 (1991). Since I can discern no logical basis to grant a

[5] The Union also contends that Jeff Ford should not be included in the unit because he is a recent hire. Ford's date of hire would be relevant only with respect to his voting eligibility and has no bearing on whether he performs sufficient carpentry work to be included in the unit (which I have found he does).

unit including a geographical area in which the Employer has never conducted business, I will exclude the counties of Pershing, Churchill, Storey, Carson, Douglas and Mineral from the unit found appropriate herein.

The eligibility of former employees of the Employer

Since the Employer is engaged in the construction industry, the voting eligibility of former employees is determined under the "*Daniel/Steiny*" formula, which holds that in addition to those employees hired and working on the appropriate eligibility dates, also eligible to vote are former employees who have been employed for 30 working days or more within the 12 months preceding the eligibility date for the election, or who had some employment during those 12 months and have been employed for 45 working days or more within the 24 month period immediately preceding the eligibility date, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. *Steiny & Co.,* 308 NLRB 1323 (1992); *Daniel Construction Co.,* 133 NLRB 264 (1967). See also *Johnson Controls, Inc.,* 322 NLRB 669, 673 (1996).

At the hearing, the parties agreed that any former employees who would be included in the unit by virtue of the amount of carpentry work they do but who do not meet the *Daniel/Steiny* formula would not be eligible to vote in the election. Consistent therewith, the parties agreed that the following former employees, who regularly performed a substantial amount of carpentry work during their employment, meet the *Daniel/Steiny* requirements and are therefore be eligible to vote in the election: Gary Harp, Randall Dodson, Larry Monticelli and Art Roeseler. The parties further agreed that the following employees do not meet the *Daniel/Steiny* requirements and therefore are not be eligible to vote in the election: Ryan Martin, Shane Bailey, Shane Cottam, Phil Griego and Kevin Patterson. The parties finally agreed that Chris Jeppsen, an occasional employee, and Dayle Goodine, a former employee who voluntary quit his employment, are also not eligible to vote in the election.

The parties, however, were in disagreement concerning whether former employees Jeff Cottam, Mike Snow, Randy Wilson and Rick Sorensen are eligible to vote under the *Daniel/Steiny* formula. During the hearing, David Muhlestein, the Employer's owner and president, testified that neither Randy Wilson nor Mike Snow worked 30 days within the prior 12 month period; however, it is unclear whether they might have worked for a sufficient period of time under the second prong of the *Daniel/Steiny* formula. The payroll records relating to Jeff Cottam and Rick Sorensen indicate that they each worked only 12 days during the prior 12 month period. However, since the payroll records in evidence do not cover an entire 12 month period, there is not enough evidence to determine whether either Cottam or Rick Sorensen in fact meet one or both of the *Daniel/Steiny* eligibility prongs. Accordingly, I cannot make any findings at this time concerning their eligibility to vote in the election directed herein and they will be allowed to vote only under challenge.

In light of all of the above, I find that the following employees of the Employer constitute an appropriate unit within the meaning of Section 9(b) of the Act and that it is appropriate to direct an election in such a unit:

> All full-time and regular part-time carpenter craft employees employed by the Employer in the State of Nevada, excluding Pershing, Churchill, Storey, Carson, Douglas, Mineral, Esmerelda, Clark, Nye and Lincoln counties; excluding all other employees, guards, and supervisors as defined in the Act.

There are approximately 24 current employees in the unit.

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.[6] Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the 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 Government 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 to vote shall vote whether or not they desire to be represented by SOUTHWEST REGIONAL COUNCIL OF CARPENTERS, a/w UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA.

LIST OF VOTERS

In order to ensure 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 in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior*

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[6] Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

Underwear, Inc., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employers with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before **October 17, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by **October 24, 2003**.

DATED AT Oakland, California this 10th day of October, 2003.

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Alan B. Reichard
Regional Director
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Region 32
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