

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

UNITED RESTORATION, LLC,
d/b/a UNITED AIR COMFORT

Employer

And

Case 36-RC-6188

SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION,
LOCAL UNION NUMBER 16¹

Petitioner

**REGIONAL DIRECTOR'S 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, 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 record² in this proceeding, the undersigned makes the following findings and conclusions.³

SUMMARY

On January 30, 2003, the Petitioner filed the instant petition seeking a unit of heating, ventilation and air conditioning (HVAC) technicians.⁴ The Employer contends the petition should be dismissed or an election postponed because its complement of technicians is declining, due to the seasonal nature of the

¹ The name of the Union appears as amended in the hearing.

² Both parties filed timely briefs, which were duly considered.

³ 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 organization involved claims to represent certain employees of the Employer and 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.

⁴ The parties stipulated to the following unit: all technicians employed at the Employer's Portland, Oregon facility engaged in duct cleaning, service, repair and/or installation of heating, ventilation, and air conditioning systems, excluding office clericals, managers, guards and supervisors as defined by the Act.

Employer's operations, and, presently, does not consist a substantial and representative complement of employees to warrant holding an immediate election. Absent dismissal of the petition, the Employer contends that an election should be postponed until late fall or early winter of 2003 when the Employer's operations will hit its seasonal peak and when it expects to have a substantial and/or full complement of employees.

Contrary to the Employer, the Petitioner contends that the nature of the work performed by unit employees is not seasonal; rather, it is cyclical and that to dismiss the petition or to postpone the election would deny or unduly delay current employees, who represent a substantial and representative workforce, from exercising their Section 7 right to vote whether they wish to be represented by a labor organization.

In this matter, I find, in agreement with the Petitioner, that the employees employed at the Portland facility constitute a substantial and representative segment of the Employer's cyclical workforce. Accordingly, I shall direct an immediate election.

FACTS

1.) Background

The Employer is a State of Florida corporation engaged in the installation, service, and cleaning of heating, ventilation and/or air conditioning (HVAC) systems. The Employer has a principal place of business located in Ft. Lauderdale, Florida and operates out of 43 facilities located throughout the nation, including a facility located in Portland, Oregon. Only the Portland facility is at issue here.

The Employer's Portland facility performs duct cleaning and furnace tune-up services and services air conditioning systems for the general public. It has been in operation for approximately three years.⁵

The manager, James Combs, oversees the operations of the Portland facility, which consists of two rooms.⁶ The employees, who are at issue and who work in or out of the Portland Facility, are generally referred to as technicians or installers. Apparently, all these employees service furnaces and

⁵ No exact date, for commencement of the Employer's Portland operation, was proffered.

⁶ The parties stipulated to the statutory supervisory authority of manager Combs. For part of the year, the Employer has employed an assistant manager, John Schleihenmeyer. The duties of the assistant manager position appear to be limited to opening, closing and cleaning the office two days a week. The Employer pays Schleihenmeyer an extra \$50 a week for performing these assistant manager duties in addition to his duties as a technician. In short, the record reveals that the assistant manager does not possess indicia of supervisory authority as that term is defined in Section 2(11) of the Act. Accordingly, I shall include the position of assistant manager in the unit of employees.

ducts. However, only those employees, EPA certified to work with Freon, service air conditioning units.⁷

The Employer has a training facility in Ft. Lauderdale and offers a national satellite link-up with the Ft. Lauderdale facility in offering training, including Freon training. Managers at each of its facilities also offer training. The Employer also administers the EPA test for Freon certification. The Portland employees generally receive three days of on-the-job-training and, maybe, one or two videos. The record further indicates that the Employer also hires experienced HVAC employees. It is unclear whether the employees are offered any fringe benefits.

2.) Portland Facility Operations

The Portland facility employees are paid either on commission or by the number of units they work on. To receive assignments, the employees report to Manager Combs in the morning. After they report in, they are dispatched to a job by either Combs or by a dispatcher located at the Employer's Ft. Lauderdale facility. A full day's work generally consists of about three jobs. During the winter months, the Portland facility may receive as many as 130 requests for work a day. However, according to the Employer, requests for work dramatically decrease during the spring and summer months. Apparently, there is a high demand for furnace work in the winter but little demand for furnace work during the other months and little demand for air conditioning service at any time of the year due to the mild summers. Nevertheless, during the summer months, the Employer still services HVAC equipment. The Employer estimates that the amount of work it performs in the summer constitutes about 10 percent of its yearly work.

The Employer assigns work to employees on a first come, first served basis, which means that during low work periods some employees may not be assigned work. When periods of low work are prolonged, some employees may not report for assignments. If an employee fails to report for assignments on three consecutive days, the Employer considers that employee a "no call/no show" and completes an "exit report" for that employee—in effect, classifying the employee as terminated. Thus, the Employer does not lay off or terminate employees during prolonged periods of relatively little work. Rather, it appears that during declining or slow business most employees simply quit reporting for work, due to a lack of work, and, after three consecutive days of no call/no show, employees are terminated from the Employer's employment rolls.

⁷ Combs testified that his installers are different from his technicians. However, the only testimony concerning the difference between installers and technicians is limited to the method of payment: technicians are paid on commission and installers are paid on a piece rate. The Employer's Exhibit 4 indicates that all the petitioned-for employees work on furnaces and three of those employees also work on air conditioning units. It appears that there is no dispute over the stipulated unit including both technicians and installers. Accordingly, I have included both classifications in the Unit.

In September and with the anticipation that work will pick up in the fall, the Employer places advertisements for technician and installer positions in the Oregonian, the local newspaper. The Employer ceases advertisements when it meets its hiring needs.

In terms of hiring qualifications, Combs testified that he does not give any preference to applicants previously employed by the Employer at the Portland facility. Moreover, the Employer does not seek out former employees regarding hiring opportunities. Indeed, It appears that no employee, who has ceased working for the Employer at the Portland Facility, has been rehired and/or recalled to work by the Employer. However, the Employer is not opposed to rehiring former employees; it just turns out that former employees generally do not seek reemployment with the Employer.

The Employer currently employs 12 technicians/installers at its Portland facility. Their tenure runs from less than one month to one year. Combs initially testified that there were nine current employees. However, he later recalled that three employees had not been counted on the list of current employees: Laura Pruitt was in an accident and, since the accident, the Employer has not issued any paperwork terminating Pruitt; Todd Souls is on light duty work; and Jason Nichols is currently a duct technician.

The employment numbers for the Portland Facility indicate that the Employer employed a high of 31 employees in October 2002 and 35 employees during the months of November 2002 to January 2003. The only other time the Employer employed 35 employees was in March 2001.⁸ The comparable period from October 2001 to January 2002 shows 22 employees employed in October, 18 employees for both November and December, and 7 employees employed in January. It appears that the Employer's highest employment, for the two years proffered here, have consistently been in the period from October to December.

The Employer's lowest employment for the two-year span -- below 10 employees -- appears to be for the period from May to June and for February, where the Employer employed 5 to 9 employees. However, the figure for February 2003 does not include 3 employees admittedly still employed, which would bring the February 2003 figure to 12.

The record reveals no bargaining history at the Portland Facility and no other labor organization seeks to represent the petitioned-for employees.

⁸ There are no employment figures prior to March 2001. Thus, the employment history proffered by the Employer covers a period just short of two years. Employment for April 2002 is listed as unknown and employment for the months of July and August 2002 is merely listed as "Employees to Texas, Sacramento, Florida" without further explanation (Employer Exhibit 1).

POSITION OF THE PARTIES

The Petitioner contends an immediate election is warranted. In that regard, the Petitioner asserts that unit employees' work is cyclical, rather than seasonal, and that the 12 employees, currently employed by the Employer at the time of the hearing in this matter, represent a substantial and representative complement warranting an immediate election.

Contrary to the Petitioner, the Employer contends the petition should be dismissed or, alternatively, the election should be postponed. In particular, the Employer contends that its business operations are seasonal in nature causing its employee complement to decline to a current workforce of nine unit employees, which is not substantial and representative of its full complement of about 35 employees during the peak of its seasonal work. The Employer further contends that to conduct an election at this time would disenfranchise those employees who will be added to the Employer's work force to meet the peak needs of its seasonal business.

ANALYSIS

In determining whether to dismiss a petition or postpone an election where an employer maintains its operation on a year-round basis with peaks and valleys in its employment complement, the Board weighs the following: the advantage of an early election; the possibility that more employees may vote at a higher peak of employment; and the relative interest of those employed during the various peaks as determined by their rate of return. In such an industry as that here, where operations are year-round while employment is cyclical, the Board has directed immediate elections where employees permanently employed at the employer's facility constitute a substantial and representative segment of the workforce. *Elsa Canning Company*, 154 NLRB 1810 (1965); *Mark Farmer Company, Inc.*, 184 NLRB 785 (1970); *The Baugh Chemical Company*, 150 NLRB 1034 (1965); see also *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175 (D.C. Cir. 2000).⁹

As noted above, I find the current complement of 12 employees constitutes a substantial and representative complement of the petitioned-for unit and shall order an immediate election. The Board in *Elsa Canning Co.*, held that if an employer maintains its operation on a year-round basis while employment is cyclical, it is appropriate to conduct an election at any time when a substantial and representative complement of its employees, who are engaged in the

⁹ The Employer cites cases involving seasonal operations where the employers in those cases perform the work at issue only during specified seasons. The present situation differs from the typical situation of a seasonal employer in that the Employer's HVAC operation does not cease after the seasonal peak, but operates year round performing the same work.

employer's year-round operation, are on the payroll.¹⁰ In particular, the Board found that the postponement of an election until the employer's 200-employee peak in June, of the following year, would delay those employees, who are employed in the employer's year-round operation, in the exercise of their rights under the Act. Instead, the Board found that the 41 to 47 employees employed during the September and November months comprised a substantial portion of the complement of employees engaged in the employer's year round operation. Consequently, the Board declined to postpone the election until June of the following year.

In the instant case, concern over disenfranchising former employees is not a significant issue. The record reveals that the Employer does not offer any preference in employment to applicants it previously employed. Indeed, it has not rehired anyone who had left its employ. Thus, it does not appear that ordering an immediate election would disenfranchise those employees no longer employed by the employer because former employees do not have a reasonable expectation of reemployment. Cf. *Saltwater, Inc.*, 324 NLRB 343, 344 (1997).¹¹ Accordingly, there is no need to devise an eligibility formula, as is often the case in these types of situations, to protect former employees who have a reasonable expectation of recall. I, therefore, find that the standard eligibility formula, as set forth below, will suffice in these circumstances.

The record further reveals that the Employer maintains, during slow periods of work, a "skeleton crew" which has not reduced below 5 to 9 positions.¹² Given that the Employer only provided two years of employment history and not all the months between the two years are comparable, it is difficult to determine the expected demand for employment on a month-by-month basis with any degree of certainty. However, the record does indicate that for both of the years presented, the total complement of employees from November to December is its greatest complement -- between 18 and 35 employees. On

¹⁰ In this regard, I note that the Employer, at the time of the hearing, continued to keep employee Laura Pruitt on the payroll, due to her accident. Accordingly, I have counted Pruitt among the 12 employees on the Employer's employment roll as of the hearing in this matter.

¹¹ The Employer cites to *NLRB v. Bituma Corp.*, 23 F.3d 1432 (8th Cir. 1994) where the Court found a business only seasonal enough to warrant postponement of a representation election until the next seasonal peak when employment increases by at least 100 percent in the peak season. However, the 100 percent increase criterion is applied to seasonal operations; it does not define when an operation is seasonal. See *NLRB v. Broyhill Co.*, 528 F.2d 719, 722 (8th Cir. 1976). The consideration at issue in the Board's cases involving seasonal employees is that laid-off seasonal employees may have a reasonable expectation of employment and have an interest in the representation election. See, e.g., *Millbrook, Inc.*, 204 NLRB 1148 (1973). Here, unlike the seasonal nature of the operations in the above cases, the Employer operates year round performing the same work. Even so, it has not clearly established that its peak will indeed be at 35 employees instead of the 18 to 22 employees from the 2001 season. See also *MJM Studios of New York, Inc.* 336 NLRB No. 129 (2001) distinguishing business operations where there is a "fundamental change" in the employer's operations.

¹² The Employer contends that the anticipated decline will result in a skeleton crew of 3 to 5 employees. However, the Employer's submitted evidence for its contention, Employer's Exhibits 1 and 4, indicates a minimum crew of 5 to 9 employees.

this basis, I find the Employer's present complement of 12 employees is substantial and representative of both the year round complement and of the November-December complement of employees.

On the basis of the foregoing and the record as a whole, I shall direct an immediate election be held in the following appropriate unit:

All full-time and regular part-time technicians and installers, including the assistant manager, engaged in duct cleaning, service, repair and/or installation of heating, ventilation, and/or air conditioning systems at or out of the Employer's Portland, Oregon facility; excluding office clericals, managers, guards and supervisors as defined by the Act.

There are approximately 12 employees in the unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit described above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Sheet Metal Workers International Association, Local Union No. 16. The date, time, and place of the election will be specified in the notice of election that the Board's Subregional Office will issue subsequent to this Decision.

1. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike, who have retained their status as strikers but who have been permanently replaced as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

2. Employer to Submit List of Eligible Voters

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 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 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Subregional Office in Portland, Oregon, an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Subregional Office, 601 SW Second Avenue, Suite 1910, Portland, Oregon 97204, on or before March 17, 2003. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (503) 326-5387. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Subregional Office.

3. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

4. 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 5 p.m., EST on March 31, 2003. The request may **not** be filed by facsimile.

DATED at Seattle, Washington this 10th day of March 2003.

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