UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

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| EUROTECH MILLWORK, INC.<br><br>Employer<br><br>and<br><br>NEW ENGLAND REGIONAL COUNCIL OF CARPENTERS<br><br>Petitioner | Case No. 34-RC-2063 |

**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 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 that: the hearing officer's rulings are free from prejudicial error and are 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; 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.

The Employer is engaged in the commercial and residential manufacture and installation of custom and architectural millwork, which consists primarily of cabinets, paneling and trim. The Employer employs two groups of carpenters to perform such work. One group of carpenters, herein called fabricators, work "inside" the Employer's shop at its facility in Waterbury, Connecticut (herein called the Waterbury facility) where they manufacture and finish the millwork. The other group of carpenters, herein called installers, work "in the field" at various job sites where they install the millwork manufactured by the fabricators.

The Petitioner seeks to represent a unit of seven full-time and regular part-time installers, including field carpenter foremen, field carpenters and field carpenter helpers. The Employer contends that a unit limited to the installers is not an appropriate unit for the purposes of collective bargaining, and that the only appropriate unit must include both installers and fabricators. The Petitioner, contrary to the Employer, would also include three recently laid off installers in the petitioned-for unit because they have a reasonable expectation of recall. For the reasons noted below, I find that the petitioned-for unit limited to installers is an appropriate unit for the purposes of collective bargaining, and that the three laid off installers have a reasonable expectation of recall and therefore are eligible to vote in the election directed herein.

As noted above, the Employer maintains its business office and a manufacturing shop at the Waterbury facility. In addition to the fabricators and the finisher, also employed at the Waterbury facility are the Employer's supervisors, managers, office and administrative staff, and draftsmen. Kurt Montagno is the Employer's President and sole shareholder. Reporting directly to Montagno is General Manager Gerry Gardner. Reporting directly to Gardner are two Project Managers who manage the Employer's field projects; the Head of the Drafting Department; and Production Foreman Kelly Williams. Williams is responsible for scheduling and coordinating the work performed by the fabricators at the shop and the installers in the field. Reporting directly to Williams are the Shop Carpenter Foreman and three Field Carpenter Foremen.

All employees work from 7 a.m. to 3:30 p.m., are eligible for the same benefits, including health care, a 401(k) plan, vacations and holidays, and are subject to the same disciplinary policies. All carpenters, whether hired to work as installers or fabricators, are hired on the basis of their carpentry skills and are paid within a similar wage range based on their skill and experience. The Employer does not maintain a seniority list.

1. Installers

As noted above, the installers are responsible for installing the finished millwork, including cabinets, paneling and trim, which are manufactured and assembled at the shop by the fabricators. At any given time the installers perform installation work at 2 to 3 different job projects. Such projects may last from several weeks to several months.

Although the installers are directly supervised by Production Foreman Williams, the record indicates that he rarely visits the job sites. As a result, the field carpenters and field carpenter helpers receive their work instructions from the field carpenter foremen.

On most days, the installers report directly to the job site for work, and the fabricators generally deliver the finished millwork to the job sites. On some occasions, however, an installer may report first to the shop at the Waterbury facility to pick up millwork needed for installation and then report to the job site with the millwork. On such occasions, a fabricator assists the installer in loading the millwork to be taken to the job site.

Installers rarely work in the shop fabricating millwork, and would only do so in order to help finish a particular product that is needed to complete an installation project. Moreover, in contrast to the fabricators, installers have been regularly laid off due to lack of work and later recalled when work picks up. Although President Montagno testified that he "would" put the installers to work in the shop, the record only reveals one instance in the last two years where an installer worked in the shop for one week instead of being laid off. Montagno admitted that most, if not all, installers do not want to work as fabricators in the shop and would rather be laid off.

In addition, the record reveals only two instances where a fabricator or "inside" employee was permanently transferred to an installer position. Laid off employee Ernest Delvecchio testified that he first started working for the Employer as a fabricator, but quit his employment to work for another company as an installer. A short time later, Delvecchio left his interim employment and re-applied for work with the Employer. Delvecchio applied for and was hired as an installer and has remained in that position for about three years. Former draftsman Ryan Wills was transferred to an installer position on about November 20, 2003 and, with the exception of one day, Wills has worked exclusively as an installer since that time.[1]

Installers are paid within a starting wage range of $9 to $24 an hour depending on experience. However, installers are paid the prevailing wage rate for public sector projects. Installers are also paid for travel time in excess of one hour between their homes and the job site.

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[1] There is no dispute that Wills is eligible to vote in the election directed herein.

2. Fabricators

The fabricators consist of the shop carpenter foreman, carpenters, carpenter helpers and the finisher. The finisher sands, stains and paints the assembled millwork. The fabricators report directly to Williams, whose work location is also at the shop. The fabricators spend the overwhelming percentage of their time working at the shop. In this regard, some fabricators deliver finished millwork to the Employer's job sites. Most of the time, the fabricators make the delivery to the jobsite and immediately return to the shop. As more fully discussed below in footnote 2, on infrequent occasions, a fabricator may stay at the job site and assist the installers for a few hours, and on rare occasions, for a few days. Similarly, the finisher may deliver millwork to a job site and on rare occasions remain at the site to perform additional finishing work. However, the record does not reflect that the fabricators or the finisher spend any significant or regular amount of time working in the field with the installers. In this regard, payroll records for the period November 10, 2003 to January 17, 2004 show only three fabricators performing installation work in the field.[2] As noted above, when an installer delivers millwork to a jobsite, fabricators assist the installer in loading the product at the shop.

Fabricators are also paid within a wage range of $9 to $24 an hour based on carpentry skills and experience. However, fabricators are not paid the prevailing wage rate if they are manufacturing or delivering product for a prevailing wage rate project. They would be paid the prevailing wage rate only if they stayed at the job site after a delivery and performed installation work. Fabricators are not paid for their travel time from home.

[2] Employees account for their work time by using payroll codes on their time sheets that indicate the nature of the work performed. Payroll code "55" indicates the employee was performing installation work. Payroll code "45" indicates the employee was performing delivery work to a job site. The payroll records show that the following three fabricators spent time working under code "55": Bladmir Rio on December 17, 2003, Mike Herens on December 20, 2003, and Joe Porciella on December 17, 18 and 19, 2003. Although the Employer asserted that on some occasions, work coded as "45" by the fabricators included installation as well as delivery work, there is no way to determine from the payroll records when or how often this occurred. Moreover, the Employer presented only limited testimony through which it attempted to identify those occasions when fabricators actually performed installation work even though their payroll records reflected they were performing delivery work under code "45". Furthermore, Montagno acknowledged that there was no way to tell from the face of the payroll records whether a fabricator was in fact performing installation work under code "45".

3. The Laid Off Installers

Unlike fabricators who work throughout the year and generally are not subject to lay off, installers are laid off when installation work slows down, and are recalled when installation work picks up. Several installers were laid off and recalled in 2003. The Employer, contrary to the Petitioner, would exclude three of these individuals, Marc Divito, Daniel Divito and Ernest Delvecchio who were laid off on January 8, 2004. All three have been laid off by the Employer in the past and were always recalled to work. In this regard, Ernest Delvecchio testified that he had been laid off and recalled by the Employer on three separate occasions in the past. Although Delvecchio was not provided with a recall date, as he had received in the past, when he was laid off on January 8, 2004, he has never been advised that he would not be recalled. The only other record evidence regarding the January 8 layoffs is President Montagno's testimony that although the Employer's past practice was to lay off and recall installers based on work fluctuations, he had no intention to recall the three disputed installers. In this regard, the record clearly indicates that he did not inform the three installers of their layoff or recall rights, and that he neither discussed his intentions with supervisors who had effectuated his decision or otherwise instruct them not to recall the three disputed installers. To the contrary, the record contains unrefuted hearsay testimony, to which there was no objection, that at least one of the three installers, Daniel Divito, had expected to be recalled in two to four weeks.

4. Analysis and Conclusion

a. The Appropriate Unit

The Board has long recognized that there is no statutory requirement that a unit for collective bargaining be the most appropriate unit. Rather, the Act only requires that the unit sought be "an" appropriate unit. Overnite Transportation Co., 322 NLRB 723 (1996). Therefore, a petitioner is not required to seek the "most" appropriate unit of employees, unless an otherwise appropriate unit does not exist. P. Ballantine & Sons, 141 NLRB 1103, 1107 (1963). However, the Board will not approve "fractured units" that are "too narrow in scope or that have no rational basis." Seaboard Marine Ltd., 327 NLRB 556 (1999). The essential inquiry is whether a particular grouping of employees share a community of duties and interests sufficiently distinct from other employees so as to warrant their establishment as a separate unit. In determining the appropriate

unit, the following community of interest criteria are considered: degree of functional integration, common supervision, employee skills, interchangeability, contact among employees, similarities in wages, hours, benefits and other terms and conditions of employment, and bargaining history. *Kalamazoo Paper Box Co*. 136 NLRB 134 (1962); *Franklin Mint Corp*., 254 NLRB 714 (1981).

Based upon the above and the record as a whole, I find that the Employer has failed to establish that the fabricators share a sufficient community of interest with the installers to require their inclusion in the petitioned-for unit. *Lundy Packing Co.*, 314 NLRB 1042 (1994). To the contrary, the evidence establishes that although they share common skills, similar wages and benefits, and the same direct supervision and overall management, the installers work away from the shop performing different work under entirely different conditions than the fabricators. See *Boudreaux's Drywall*, 308 NLRB 777 (1992*); Carpenters District Council of Miami (Bruchard Designs),* 238 NLRB 1683 (1978); *Dixie Spindle & Flyer Co., Inc.*, 84 NLRB 109 (1949). See also *Ore-Ida Foods, Inc.*, 313 NLRB 1016 (1994), enf'd. 66 F.3d 328 (7th Cir. 1995). In this regard, unlike the fabricators, the installers are regularly subject to layoff and recall, receive prevailing wage rates for work on certain projects, receive travel pay, and work in the field independent of direct supervision. Further, the mere fact that the fabricators may on occasion assist the installers at a job site does not undermine their separate work-related functions. See *Ore-Ida Foods, Inc.*, supra. Finally, there is very limited evidence of temporary or permanent interchange, or other work related contact, between the fabricators and installers. See *Dixie Spindle & Flyer Co., Inc.,* supra*.*

b. <u>Eligibility of Laid Off Employees</u>

In determining whether laid off employees are eligible to vote based on a reasonable expectation of recall, the Board examines the employer's past experience and future plans, the circumstances surrounding the lay off, and what the employees were told about the likelihood of recall. *Apex Paper Box Co.*, 302 NLRB 67 (1991); *Sol-Jack Co*. 286 NLRB 1173 (1987).

Based upon the above and the record as a whole, I find that the three laid off employees are eligible to vote because they have a reasonable expectation of recall. In reaching this conclusion, I note that the Employer has a well-established past practice of laying off and recalling installers based on fluctuations in work. Other than the

absence of a recall date being provided to the three installers who were laid off on January 8, and the unsubstantiated subjective intent of President Montagno not to recall the installers, the record is devoid of any evidence regarding the circumstances of the lay offs, the Employer's future plans, or that any of the three installers were informed at the time of their layoff that the layoff was anything other than what they experienced in the past. Therefore, based upon the above and the record as a whole, I find that Marc Divito, Daniel Divito and Ernest Delvecchio have a reasonable expectation of recall and are eligible to vote in the election directed herein. See *Ideal Macaroni Co.,* 301 NLRB 507 (1991); *Atlas Metal Spinning Co.*, 266 NLRB 180 (1983); *Musgrave Manufacturing Co.,* 124 NLRB 258 (1959); *American Oil Company*, 118 NLRB 229 (1957).

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time installers, including field carpenter foremen, field carpenters and field carpenter helpers, employed by the Employer at its Waterbury, Connecticut facility; but excluding fabricators, shop foremen, shop carpenters, shop carpenter helpers, draftsmen, finishers, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

## DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate herein at the time and place set forth in the notices of election to be issued subsequently.

**Eligible to vote**: those employees 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 in the military services of the United States, ill, on vacation, or temporarily laid off; and 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.

**Ineligible to vote**: 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 strike's commencement 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.

The eligible employees shall vote whether or not they desire to be represented for collective bargaining purposes by New England Regional Council of Carpenters.

To ensure that all eligible employees have the opportunity to be informed of the issues in the exercise of their statutory rights 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); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned, an eligibility list containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall 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, 280 Trumbull Street, 280 Trumbull Street, 21st Floor, Hartford, Connecticut 06103, on or before February 19, 2004. No extension of time to file these lists shall be granted 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, DC 20570. This request must be received by the Board in Washington by February 26, 2004.

Dated at Hartford, Connecticut this 12th day of February, 2004.

/s/ PBH
Peter B. Hoffman, Regional Director
National Labor Relations Board
Region 34

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