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

RK MECHANICAL, INC.

Employer,

and Case 27-RC-8401

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION 68

Petitioner.

DECISION AND ORDER

On August 12, 2005 (all subsequent dates to be 2005, unless otherwise noted), International Brotherhood of Electrical Workers, Local Union 68 (herein called the Petitioner) filed a petition under Section 9(c) of the National Labor Relations Act (herein called the Act) seeking an election among a bargaining unit described as follows:

> All Colorado state licensed electricians and registered Colorado apprentices employed by RK Mechanical working in the geographical jurisdiction of IBEW Local Union #68.

A hearing in this matter was held on August 25. The Petitioner contends that the requested unit is appropriate because electrical employees employed at the Employer's current construction project in Denver, Colorado have a reasonable expectation of continued employment. In contrast, the Employer argues that the requested unit is inappropriate and that the petition should be

dismissed because the electrical employees in the described unit are temporary employees with no reasonable expectation of continued employment. For the reasons set forth below, I find that the unit sought by the Petitioner is not appropriate and the petition must be dismissed.[1]

Under Section 3(b) of the Act, I have been delegated by the National Labor Relations Board (herein called the Board) its powers in connection with this case.

Upon the entire record in this case[2], I find:

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

2. 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.

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

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[1] The issuance of the Decision and Order herein has been postponed pending the investigation and disposition of unfair labor practice charges filed by the Petitioner herein in Cases 27-CA-19749 and 19764 on August 26 and September 1, respectively. Case 27-CA-19749, which alleged certain threats and coercive statements, was dismissed as lacking merit on October 31.

Case 27-CA-19764 alleged that on August 31, all four electricians, who are the subject of the instant petition, were laid off by the Employer in violation of Section 8(a)(3) of the Act. This charge was also dismissed on October 31, based upon evidence showing that the Employer laid off the four electricians after subcontracting the work previously being performed by these employees to an electrical contractor, based upon lawful business considerations and unrelated to the protected concerted activities of the employees. Neither dismissal action was appealed.

[2] At the conclusion of the hearing, the Hearing Officer set the date for the receipt of briefs as September 1. The Employer's brief was not received until September 2. Accordingly, the Employer's brief is rejected as untimely filed, and it has not been considered.

4. Based upon the record, no 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 for the reasons set forth below.

FACTS

The Employer is a Colorado corporation engaged in the construction industry in the State of Colorado as a mechanical contractor.[3] The Employer is currently engaged as a subcontractor to Hensel Phelps Construction Company at the Denver Convention Center hotel project. As a mechanical contractor, the Employer is responsible for performing the duct work, sheet metal work, piping and plumbing work associated with the project. The Employer's work on the project includes the installation of air handlers, pumps, boilers, chillers, and water heaters. Within the scope of its work is the installation of the temperature control system designed to control this equipment. The installation of the temperature control system, in turn, involves the installation of low voltage wiring. This low voltage wiring is performed by electricians.

The Employer's long established policy and practice has been to not directly employ electricians, but instead to subcontract any electrical work associated with its project work. Thus, Michael Shelstad, the Employer's vice-president of finance, testified that the Employer does not self-perform any work involving electricity. In addition, Donnie Hirschfield, the Employer's operations manager, testified that in the 11 years he has worked for the Employer it has

[3] Annually, the Employer purchases and receives at its Colorado facilities goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Colorado.

never bid on or performed an electrical contracting job. He also testified that there has never before been a time when the Employer has directly employed an electrician to perform electrical work, as opposed to using an electrical subcontractor.

The Employer has contracted with approximately 20 subcontractors on the Denver Convention Center hotel project. As a result of its established policy described above, one of these subcontractors was Honeywell Automation & Control Solutions (herein called Honeywell), which was responsible for performing the temperature control installation work associated with the hotel's heating and air conditioning systems. Initially, Honeywell utilized the services of a subcontractor, Tenn Pro-Tec, to install the electrical wiring associated with the installation of the temperature control system. At the commencement of their work on the project, the Tenn Pro-Tec employees attended the safety portion of an orientation class conducted by the Employer. The record evidence shows that all subcontractor employees are required to attend the safety portion of the Employer's orientation class.

By letter dated February 24, Honeywell notified the Employer that it (Honeywell) had terminated all contractual agreements with Tenn Pro-Tec, including work in progress on the Denver Convention Center hotel project. Honeywell stated that it would self-perform the electrical installation work called for in its subcontract with the Employer. The record indicates that Honeywell advised the Employer that it intended to employ the former Tenn Pro-Tec employees through referrals from Manpower, a temporary employment service

with whom Honeywell had a contract. Thereafter, in March, Honeywell informed the Employer that it was not able to employ one of the former Tenn Pro-Tec employees through Manpower because of a problem with his background check. Accordingly, Honeywell requested that the Employer place this one individual directly on the Employer's payroll so that he could remain on the project. The Employer agreed to this request.

In July, Honeywell again approached the Employer and requested that the Employer place the other four former Tenn Pro-Tec employees directly on its payroll so that it (Honeywell) could avoid the referral fees charged by Manpower. Pursuant to this request, the Employer placed the four additional electrical employees on its payroll effective July 11. At the time these employees were placed on the Employer's payroll, they attended an orientation session conducted by the Employer.[4] During this orientation session, all of the employees present were informed of the benefits offered by the Employer and when they would become eligible to receive these benefits.

Donnie Hirschfield, the Employer's operations manager, testified that the arrangement with Honeywell called for the Employer to deduct the direct labor costs associated with employing the five electricians from the Employer's contract with Honeywell through periodic contract change orders.[5] The record shows that the electricians have been supervised by Honeywell through Robert

[4] Approximately 15 employees attended this orientation session. Thus, there were approximately 11 employees present in addition to the four electrical employees at issue here.
[5] On about August 12, one of the electricians quit his employment. Honeywell advised the Employer of this quit several days later. Therefore, at the time of the hearing, there were four electricians remaining on the Employer's payroll.

Schlaack, a foreman referred to Honeywell by Manpower. The Employer does not supervise or direct the work of any of the electricians.

Hirschfield also testified that the Employer's work on the project was scheduled to be completed by September 15 with the exception of any punch list, or repair work, required to be done. This schedule required that all of Honeywell's work on the project was also to be completed by September 15. Accordingly, the electrical wiring work performed by the electricians at issue in this proceeding was necessarily to be completed by the same date. In this same regard, the temporary certificate of occupancy date for the entire project was set for October 24. Therefore, all work on the project was scheduled to be completed by no later than that date.[6]

According to operations manager Hirschfield, the Employer does not intend to employ the electricians after the completion of the Denver Convention Center hotel project. He also testified that the Employer has no intention of bidding on any electrical jobs in the future. As noted above, Hirschfield testified that in the 11 years he has worked for the Employer, it has never bid on or performed an electrical contracting job. He also testified that there has never before been a time when the Employer has directly employed an electrician to perform electrical work, as opposed to using an electrical subcontractor. Michael Shelstad, the Employer's vice-president of finance, testified that the Employer

[6] While it is not known if these completion dates, as testified to in the August 25 hearing were met, I take administrative notice of the fact that various media sources in the Denver area, including the Denver Post and the Rocky Mountain News, have widely reported that the hotel is scheduled to open for regular business on December 20, 2005. See, e.g., the Denver Post editions of November 3 and 18 and Rocky Mountain News editions of October 5 and November 10.

does not perform electrical contracting work, has no plans to start performing electrical contracting work, and has never bid any electrical contracting jobs. In addition, Shelstad testified that the Employer's personnel records show that, with the exception of the electricians involved in the instant project, it has never directly employed any electricians. Finally, according to Shelstad, the electricians involved in the instant project have never worked for the Employer on any other previous project or job.

FINDINGS

As noted above in footnote 1, based upon the evidence disclosed by the investigation of unfair labor practice charges filed by the Petitioner subsequent to the hearing in the instant representation case, it is apparent that the Employer has not employed the electricians at issue since August 31. The fact that the Employer has not employed employees in the petitioned-for bargaining unit for more than two months, especially when considered in light of the analysis set forth immediately below, provides a compelling basis for dismissal of the petition in this case.

Additionally, even assuming the Employer had not laid off the petitioned-for employees in late August, the record developed at the August 25 hearing discloses that they would have been laid off in the interim with no likelihood of future employment. Such a scenario would also warrant dismissal of the petition.

In deciding whether employees are temporary and, therefore, not included in an appropriate unit, the Board has applied essentially a two-pronged test. The Board finds temporary employees eligible to vote if their tenure of employment

remains uncertain on the eligibility date or if the employees in question have a reasonable expectation of continued employment. *New World Communications*, 328 NLRB 3 (1999). With regard to the "date certain" test, it ". . . does not require a party contesting an employee's eligibility to prove that the employee's tenure was certain to expire on an exact calendar date. It is only necessary to prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired." *Caribbean Communications Corp.*, 309 NLRB 712-13 (1992). In addition, the Board has found that when employment will terminate within three to four months, no useful purpose is served by directing an election. *Davey McKee Corporation*, 308 NLRB 839 (1992).

The undisputed evidence in the record shows that the Employer has a history of not self-performing electrical work and of not directly employing electricians. In spite of this history, the Petitioner contends that the electrical employees at issue here have a reasonable expectation of continued employment with the Employer. In support of this contention, the Petitioner simply argues that the electricians were currently on the Employer's payroll and employed by the Employer at the time of the hearing. However, there is no dispute regarding the unique circumstances which led to the Employer placing the electricians on its payroll.[7] Had Honeywell not terminated its contractual relationship with Tenn Pro-Tec, the electrical work associated with the installation of the temperature controls would have been performed by subcontractor employees consistent with the Employer's past practice (and the post-hearing

investigation of Cases 27-CA-19749 and 19764 reveals that this is exactly what the Employer did). Accordingly, this one temporary variation from the Employer's practice of not employing electricians is not sufficient to show that the electricians employed at the time of the representation hearing in this matter had or have a reasonable expectation of future employment.

In addition, the Petitioner argues that the electrical work performed by the electricians is part of the heating, ventilating and air conditioning work (HVAC) which the Employer will continue to perform as a mechanical contractor. While the record shows that the Employer will continue to perform HVAC work, the uncontradicted testimony of Employer managers Hirschfield and Shelstad shows that any electrical work associated with the HVAC functions will not be self-performed by the Employer, but instead will be subcontracted out as it has been in the past. Therefore, the Employer's continued performance of HVAC work is similarly not sufficient to show that the electricians have a reasonable expectation of continued employment with the Employer.

Finally, at hearing the Petitioner argued that the electricians had a reasonable expectation of continued employment because the hotel project might possibly last longer than anticipated. However, there is no record evidence to show that the Employer's projected completion date was not reasonably based. Nor is there any evidence to show that any contingencies exist which could prolong the length of the project. Importantly and as noted above, the Denver Convention Center hotel will open for regular business later this month, ensuring that all electrical work will have been completed by that time. In any event, the

[7] The fact that these employees attended the Employer's standard orientation is irrelevant.

Board does not require proof that an employee's tenure will expire on an exact date. See *Caribbean Communications*, supra.

In sum, it is apparent that the Employer has not employed the petitioned-for employees since August 31. Moreover, even assuming those employees had not been terminated on that date, the record evidence shows that the Employer's work on the Denver Convention Center hotel project was to be completed on or about September 15 and that, following the completion of this project, the Employer will no longer employ any electricians who are the subject of the instant petition. Further, the record evidence does not establish any reasonable likelihood that the Employer will employ the petitioned-for electricians at any time after completion of the Denver Convention Center hotel project.

ORDER

Inasmuch as I have found that the electricians employed by the Employer at the Denver Convention Center hotel project in Denver, Colorado were temporary employees, who have now been terminated with no reasonable expectation of future employment, it would serve no useful purpose to direct an election in this matter. I shall, therefore, dismiss the petition.[8] Under the foregoing circumstances, I find it unnecessary to resolve any other issues raised by the parties in this proceeding.

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[8] Under the provisions 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 Fourteenth Street, NW, Washington, D.C. 20570. In order to be timely filed, a request for review must be received by the Board in Washington by December 19, 2005.

Dated at Denver, Colorado this 5th day of December 2005.

____*/s/ B.* Allan Benson, Regional Director__
B. Allan Benson, Regional Director
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