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

DAVE PHILLIPS MASONRY CO., INC.

Employer

and

Case 7-RC-22824

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 9 MICHIGAN, AFL-CIO

Petitioner

APPEARANCES:

Dean E. Westman, Attorney, of Akron, Ohio, for the Employer
John Adam, Attorney, of Royal Oak, Michigan, for the Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations 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,[1] the undersigned finds:

1. The hearing officer's ruling 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.

[1] Neither the Employer nor the Petitioner filed a brief.

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

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

Overview

The Petitioner seeks to represent a unit of all full-time and regular part-time bricklayers working in the state of Michigan employed by the Employer, excluding office clerical employees, managerial employees, confidential employees, and guards and supervisors as defined in the Act. The Employer, based in Ohio, asserts, first, that an election is not appropriate because it expects to complete its only project in Michigan by the end of February 2005. Second, the Employer argues that the only appropriate unit is all full-time and regular part-time bricklayers employed by the Employer, without geographical limitation. The Employer also did not stipulate that its job superintendents are supervisors as defined in the Act.

I find that, in view of the imminent completion of the Employer's only construction project in Michigan, no useful purpose would be served by conducting an election in the petitioned-for unit. Second, even if the completion of the project was not imminent, the petitioned-for unit is not appropriate because there is an insufficient separate community of interest among the Employer's employees working in Michigan to justify a unit limited to that state. I find that an Employer-wide unit is the only appropriate unit. I also find that the job superintendents are supervisors.

The Employer's Operations

The Employer is an Ohio corporation engaged in the building and construction industry as a masonry contractor from its facility located at 144 Kelly Drive, Akron, Ohio. The Employer typically engages in masonry construction projects in Ohio. In its 15 years of existence, the Employer has engaged in projects outside Ohio only twice, including its current project at a new PETsMART store in Lansing, Michigan. At the time of the hearing in late January, the Employer employed approximately 15 bricklayers. The Employer also employs about 10 to 12 laborers, who are not at issue.

Supervision

Owner and President Dave Phillip oversees the Employer's entire operation. Reporting to him is his son, Matthew. At each of its jobsites, the Employer designates one individual as a job superintendent. The parties stipulated that the job superintendent

position is supervisory. However, because the job superintendents do not always perform in that position, the Employer did not stipulate that they are supervisors.

The Employer employs three individuals who serve as job superintendents while working at certain jobsites, but who work as bricklayers, with no supervisory authority, at other jobsites. Over the past year, Scott Phillips, Candelario Cantera, and Roberto Pontero performed as job superintendents between 80 and 90 percent of their work time. The remainder of their work time, they worked as bricklayers. At the Michigan jobsite, Scott Phillips has been the Employer's sole job superintendent. His role as job superintendent at that site does not differ in any significant respects from the role of job superintendent at any other worksite.

The Michigan Project

In November 2004, the Employer entered into a subcontract agreement with general contractor O'Brien Construction, Inc., of Solon, Ohio, to perform the masonry work at the Lansing site. Around November 15, 2004, the Employer began work at the site. According to O'Brien's construction schedule, the Employer was to complete the masonry work by December 27, 2004, and O'Brien was to complete the entire project by February 15, 2005.

Because of inclement weather, the Employer did not meet its completion deadline. At the time of the hearing, Employer estimates indicated that it had 6 to 14 working days left at the site to complete its contract obligations. Before it can finish its work, the Employer needs to wait for other contractors to complete certain other tasks at the site. The Employer estimated that it would complete its work at the site by the end of February 2005. The entire project should be finished by mid-April.

From about November 15, 2004, through January 25, 2005, the Employer employed a total of 11 bricklayers at the Lansing site. Eight of those bricklayers were regular employees of the Employer and resided in Ohio. The remaining three bricklayers were hired at the Lansing jobsite, after approval by managers at the Employer's Akron facility, and were hired only for the duration of work at the Lansing site. Two of those employees, Richard Monroe and Douglas Perry, are Michigan residents and were hired as bricklayers. The third employee, Lee Ladd, worked about three days. The Employer asserts that it hired Ladd as a casual laborer, but admits that he performed bricklayer work. At any given time, the Employer has employed between five and seven bricklayers at the Lansing site, three to five Ohio-based bricklayers and between one and three of the bricklayers it hired at the jobsite. Typically, the Employer's Ohio-based employees scheduled to work at the Lansing site meet at the Employer's facility in Akron at the beginning of the work week, drive by carpool to the Lansing site, and return to Ohio for the weekend. The Employer has paid for lodging and provided a food allowance for its Ohio-based employees. At the time of the hearing, only one bricklayer was working at

the site. The Employer had laid off Monroe due to lack of work. The record is not clear as to the job status of Perry.

Upon the completion of the masonry work at the Lansing site, the Employer will have no further projects in Michigan. Additionally, the Employer does not contemplate engaging in any other construction projects in Michigan. The Employer's Ohio-based employees will return to work at the Employer's Ohio jobsites. There is no history of collective bargaining between the Employer and Petitioner.

Appropriate Unit

The wages and benefits of bricklayers employed by the Employer do not vary based on the location of the jobsite. In fact, during the Lansing project, certain bricklayers have spent work time at both the Lansing site and at jobsites in Ohio without any difference in compensation. Moreover, bricklayers working at Ohio sites that require overnight stays receive lodging and a food allowance identical to that received by the Ohio-based bricklayers working at the Lansing site.

The Employer's bricklayers employed at the Michigan jobsite possess skills and perform work that does not differ from bricklayers employed at the Employer's Ohio jobsites. As already noted, some of those bricklayers are the same. There is also common supervision, as Scott Phillips also supervises jobs in Ohio.

Analysis

Imminent Completion of Work in Michigan

The Petitioner seeks to represent the Employer's bricklayers working in Michigan. Employer estimates indicate that only 6 to 14 days of work remain at the Michigan site, and that it will complete that work by the end of February 2005. It also has no further work scheduled or contemplated in Michigan.

The Board has consistently held that when a job is scheduled for completion within four months, no useful purpose is served by determining representation. ***NLRB v. Engineering Constructors, Inc.***, 756 F.2d 464, 467 (1985), citing numerous Board decisions; see also, ***Davey McKee Corp.***, 308 NLRB 839 (1992); ***M.B. Kahn Construction Co., Inc.,*** 210 NLRB 1050, 1050 (1974). Here, even if the Employer were to incur further weather delays, clearly less than four months remain for completion of its work at the Michigan site. Thus, I decline to direct an election for the petitioned-for unit.

Appropriate Unit

While I have concluded that an election in the petitioned-for Michigan unit is not appropriate because of the near completion of the Employer's sole Michigan job, I also find that the petitioned-for unit is not appropriate.

The Act does not require that the petitioned-for unit for bargaining be the only appropriate unit, or the most appropriate unit; the Act requires only that the unit be appropriate. ***Overnite Transportation Co.***, 322 NLRB 723 (1996); ***Vincent M. Ippolito, Inc.***, 313 NLRB 715, 717 (1994); ***Morand Bros. Beverage Co.***, 91 NLRB 409, 418 (1950), enfd. 190 F.2d 576 (7th Cir. 1951).

In determining whether employees are properly included in a bargaining unit, the Board looks to whether the employees share a community of interest. The Board, in evaluating the community of interest of employees, considers the nature and skill of employee functions, the situs of the work, the degree of common supervision, working conditions, benefits, interchange and contact among employees, the functional integration of the facility, and bargaining history. ***Kalamazoo Paper Box Corp.***, 136 NLRB 134, 137 ((1962); see also, ***P.J. Dick Contracting, Inc.***, 290 NLRB 150, 151 (1988), citing ***Metropolitan Life Insurance Co.***, 380 U.S. 438 (1965).

The Employer employs a core group of Ohio bricklayers from its facility in Akron. These bricklayers are used first because of their expertise and experience working for the Employer. They are supplemented by other bricklayers who may be local to the region of a particular jobsite. That procedure was followed at the Lansing jobsite.

In a recent case, the Board stated, "[w]e start with the basic proposition that where an employer uses a core group of employees to work at its various worksites regardless of job location, the proper unit description is one without geographic limitation." ***Premier Plastering, Inc.***, 342 NLRB No. 111, slip op. at 2 (Sept. 16, 2004). Thus, a unit limited to the Michigan jobsite is not appropriate. There is insufficient separate community of interest for the employees at that site. Rather, a unit consisting of the Employer's bricklayers without geographic limit is the only appropriate unit for collective bargaining purposes. That unit constitutes a clearly identifiable group consisting of the Employer's bricklayers who are engaged in shared and clearly identifiable work and share the same terms and conditions of employment regardless of where the work is performed. ***Alley Drywall, Inc.***, 333 NLRB 1005, 1006 (2001). In addition, those employees have a continuity of employment from job to job with the Employer. ***Id.***

Supervisory Status of Job Superintendents

The test to determine whether part-time supervisors are excluded from an appropriate unit as supervisors is whether they spend a regular and substantial portion of

their working time performing supervisory tasks. ***Aladdin Hotel***, 270 NLRB 838, 840 (1984) (dealers who spent approximately 10% or more of their work as supervisors were excluded). Phillips, Cantera, and Pontero clearly spend a regular and substantial portion of their working time, 80 to 90 percent, as supervisors. Thus, they are excluded from the unit.

5. Based on the foregoing, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and I hereby direct an election therein:[2]

> All full-time and regular part time bricklayers employed by the Employer working at or out of its facility in Akron, Ohio; but excluding office clerical employees, managerial employees, confidential employees, guards and supervisors as defined in the Act, and all other employees.

Those eligible to vote shall vote as set forth in the attached Direction of Election.[3]

Dated at Detroit, Michigan, this 10th day of February 2005.

"/s/[Stephen M. Glasser]."

(SEAL) /s/ Stephen M. Glasser
Stephen M. Glasser, Regional Director
National Labor Relations Board
Seventh Region
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, MI 48226

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[2] As a larger unit than petitioned for was found appropriate herein, the Petitioner, which indicated a desire to go to an election in a larger unit, is accorded a period of 14 days from the date of this Decision and Direction of Election in which to submit to the undersigned an additional and sufficient showing of interest. If insufficient additional showing of interest is submitted, the petition will be dismissed. In the event the Petitioner does not wish to proceed with the election, it may withdraw its petition without prejudice by notice to the undersigned within 14 days from the date of this Decision and Direction of Election. If the Petitioner submits a sufficient showing of interest, this case will be transferred to Region 8 of the NLRB in Cleveland, Ohio for further processing.

[3] The parties did not stipulate not to use the construction industry eligibility formula set forth in ***Daniel Construction Co.***, 133 NLRB 264 (1961) as modified in 167 NLRB 1078 (1967) and ***Steiny & Co.***, 308 NLRB 1323 (1992). Absent a stipulation not to use the ***Daniels/Steiny*** eligibility formula, the formula applies to all construction industry elections. ***Signet Testing Laboratories***, 330 NLRB 1 (1999), citing ***Steiny & Co***. Thus, the Daniels/Steiny eligibility formula will apply, as noted in the attached Direction of Election.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction and supervision of this office among the employees in the unit(s) 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. Eligible to vote are those employees in the unit(s) 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 ill, on vacation, or temporarily laid off. Also eligible to vote are all employees who have been employed for 30 working days or more within the 12 months preceding the eligibility date or if they have had some employment in those 12 months and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date. Ineligible are those employees who had been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. Employees engaged in an 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 a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Employees who are otherwise eligible but who are in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who quit or are discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike, who have quit or been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 9, MICHIGAN, AFL-CIO

LIST OF VOTERS[4]

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 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); ***North Macon Health Care Facility***, 315 NLRB 359 (1994). Accordingly, it is hereby directed that **within 7 days** of the date of this Decision **2** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned

[4] If the election involves professional and nonprofessional employees, it is requested that separate lists be submitted for each voting group.

who shall make the list available to all parties to the election. The list must be of sufficient clarity to be clearly legible. The list may be submitted by facsimile transmission, in which case only one copy need be submitted. In order to be timely filed, such list must be received in the **DETROIT REGIONAL OFFICE** on or before **Thursday, February 17, 2005.** 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, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570.** This request must be received by the Board in Washington by**, February 24, 2005**.

POSTING OF ELECTION NOTICES

a. Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sundays, and holidays.

c. A party shall be stopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. */

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

*/ Section 103.20 (c) of the Board's Rules is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.