

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

Milwaukee, WI

BOB COOPER GLASS & MIRROR COMPANY, INC.¹

Employer

and

JOE CLEMENTI

Case 30-RD-1494

Petitioner

and

**GLAZIERS LOCAL UNION NO. 941 OF PAINTERS AND
ALLIED TRADES, DISTRICT COUNCIL NO. 7, AFL-CIO²**

Union

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION³

The Employer is a construction contractor located in Madison, Wisconsin employing two

¹ The name of the Employer appears as amended at hearing.

² The name of the Union appears as amended at hearing.

³ Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended (“Act”), a hearing was held before a hearing officer of the National Labor Relations Board (“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, the undersigned finds as follows: (1) The hearing officer's rulings are free from prejudicial error and are hereby affirmed; (2) The Employer is a corporation engaged in the construction industry from its Madison, Wisconsin facility, and during the past calendar year, a representative period, the Employer purchased and received goods and/or services valued in excess of \$50,000 directly from suppliers located outside the State of Wisconsin. 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 Union is a labor organization within the meaning of the Act; (4) The Union is the collective-bargaining representative for the units described herein; (5) A timely brief from the Union has been received and considered. I find the cases cited therein to be unpersuasive because they are not sufficiently analogous to facts of this particular case.

glass workers and four glaziers. The Union represents both groups. The parties' current collective-bargaining agreements, which respectively are entitled Madison Glaziers Working Agreement and Madison Glassworkers Agreement, are both set to expire on May 31, 2008. On April 1, 2008, the Petitioner filed a timely petition to decertify the Union as the bargaining representative of "all full-time and regular part-time glass workers employed by the Employer at its Madison, Wisconsin location; [excluding] all glaziers, managers, and clericals, guards and supervisors as defined in the National Labor Relations Act, as [a]mended."

The Union claims the petition should be dismissed because it excludes the Employer's glaziers from the petitioned-for unit. In reviewing the evidence, it is uncontroversial that the parties historically have treated the glass workers and the glaziers as separate units, which is not repugnant to the policies of the Act. The record evidence fails to provide a basis for upsetting this 38-year collective bargaining history. I, therefore, direct an election to determine whether the employees in the petitioned-for two-person unit of glass workers want the Union to continue as their collective-bargaining representative.

II. FACTUAL SUMMARY

The Employer performs glass fabrication and installation for new commercial and residential construction. The Petitioner and another individual, Daniel Christensen, work in the Employer's shop fabricating materials (e.g., glass storefronts, entrances, etc.), which are then assembled and installed by one or more of the Employer's four journeyman glaziers out in the field. The terms and conditions of employment for the glass workers working in the Employer's shop are set forth in the Madison Glassworkers Agreement. The terms and conditions of employment for the glaziers working out in the field are set forth in the Madison Glazier's Working Agreement.

The parties have negotiated separate collective-bargaining agreements for the glass workers and the glaziers since at least 1970. In the past, prior to the expiration of the agreements, the Union has sent a letter to the Employer, citing the relevant reopener provisions in each agreement, and requesting to meet and commence bargaining. The parties then will meet and negotiate the agreements. Ronald Bambrough, an owner of the Employer, who has participated in contract negotiations with the Union since 1986, described the negotiations as follows:

We do sit down and talk about [the two contracts] at the same time. We address—typically we address the Glaziers contract first, talk about language, and then maybe we get down to wages and then we go on to the Glassworkers contract and discuss that separately, again with the language and then wage classifications or wages.

The “Recognition & Jurisdiction” language in the Madison Glaziers Working Agreement states:

On any contract work accepted by the Employer in connection with construction jobs within the territorial jurisdiction of Local 941, which obligates the Employer to provide jobsite installation labor, the Employer agrees the Union shall have sole jurisdiction over the fabrication, installation, and fastening into all types of materials of the following shall be done by Glazier’s. This work includes but is not limited to all types of the following: (1) glass and glass substitutes used in place of glass, pre-glazed windows, retrofit window systems, mirrors, curtain wall systems, window wall systems, Pilkington systems, suspended glazing systems, louvers, skylights, entranceway systems including revolving and automatic door systems, patio doors, store front systems including the installation of all metals column covers, panels and panel systems, shower doors, bronze or stainless steel materials used in facing, glass hand rail systems, decorative metals as part of the glazing system, and the sealing of all architectural metal and glass systems for weatherproofing and structural reasons. Also the installation of any and all other work or material recognized by the glazing industry as glaziers work, including driving of glazing installation trucks, and operation of all equipment complimentary and necessary to this trade.⁴

⁴ The term “installation” is defined under the Madison Glaziers Working Agreement “as carrying metals from the truck to the opening and putting the material in place. Materials, however, may be delivered and placed in designated storage areas by Glassworker Union members.”

The “Recognition” language under the Madison Glassworkers Agreement states:

The [E]mployer recognizes, acknowledges and agrees that Painters and Allied Trades, District Council No. 7, AFL-CIO and its affiliate, Glaziers, Architectural Metal Workers and the Glass Workers Union Local 941 is within the meaning of Section 9(a) of the National Labor Relations Act, the exclusive bargaining representative for all employees performing work covered by this Agreement. The Union is hereby recognized as the sole collective bargaining agent for those employees of the company working in the glass handling and fabrication departments, metal fabricators and assemblers, auto glass installers, and packing departments, all shop glazing, new and old sash, metal and plastic panels, shower doors, tub enclosures, insulated units, and truck drivers. Specifically, warehouse superintendents, janitors, watchmen, and maintenance workers are not included in this agreement.

Under each of these agreements, the employees receive an hourly wage plus an hourly contribution to the Union’s Health & Welfare Fund and the Union’s Apprenticeship Fund.⁵ The current wage and benefit package under the Madison Glassworkers Agreement ranges from \$20.07 to \$28.12 an hour, and the current wage and benefit package under the Madison Glaziers Working Agreement ranges from around \$20.00 to \$41.45 an hour. The employees covered under the Madison Glassworkers Agreement also receive holiday pay and vacation pay, whereas employees covered under the Madison Glaziers Working Agreement do not.

An employee working under the Madison Glassworkers Agreement can perform work in the field as a “Glazier Assist” as long as all journeyman glaziers and apprentices are being employed. This is addressed in Article VII (“Wage Classifications”), Section D, and in Article XXIII of the parties’ Madison Glassworkers Agreement, and in Article XXIII, B of the Madison Glaziers Working Agreement. Both agreements state that a “Glassworker union member

⁵ Employees under both agreements receive the same hourly contribution to the Union’s Health and Welfare Fund, but different hourly contributions made to the Union’s Apprenticeship Fund. The contribution under the Madison Glassworkers Agreement is \$.10 per hour. The contribution under the Madison Glaziers Working Agreement is \$.20 per hour. If a glass worker performs work described in the Madison Glaziers Working Agreement, that employee still will receive the \$.10 per hour contribution while performing that work.

performing Glazer Assist-Classification II work shall be paid at least \$2.00 per hour over their present total package.”⁶ As for the frequency of this happening, Daniel Christensen, who is one of two glass workers in the shop, testified without contradiction that there have “only [been] a couple of times” during his three years of employment that he has gone out into the field to assist the journeyman glaziers.

Conversely, Article VII, A of the Madison Glaziers Working Agreement states “All glazing and metal fabrication performed in the shop may be performed by glaziers or glassworkers at the discretion of the Employer at the employee’s normal rate of pay. Metal fabrication and assembly on the job shall be the work of the glaziers.” The record reflects that there have been instances in which a glazier will come into the Employer’s shop and perform cutting, drilling, or other work typically performed by one of the Employer’s glass workers. This occurs under one of two circumstances: when the glaziers need to go into the shop to cut or modify a part they need out in the field, or when they finish their work out in the field and need to work in the shop to complete their hours or shift. As for frequency, Christensen testified without contradiction that he has only seen glaziers “helping out ... on any of [his] work” maybe once every three to six months.

III. ANALYSIS

The Union contends the petition should be dismissed because the unit set forth therein is not co-extensive with the actual recognized unit, which, according to the Union, also should

⁶ Under the Madison Glassworkers Agreement, a Glazier Assist-Classification I is a Glassworker Union member who, without the supervision of a journeyman glazier, is qualified, willing, able and has the required tools to perform the job. A Glazier Assist-Classification II is a Glassworker Union member who, with the supervision of a journeyman glazier, is qualified, willing, able and has the required hand tools to perform the job.

include the Employer's four glaziers and another individual, Jason Bambrough.⁷ Based on the following, I reject the Union's contention and direct an election in the petitioned-for unit of glass workers, which consists of the Petitioner and Christensen.

The Union asserts that both agreements define the units based upon work performed, rather than on job classifications, and because all of the Employer's employees perform certain of the tasks under each agreement, the four glaziers and the two glassworkers should be eligible to vote in the election. I reject this assertion. As previously quoted, Article I of the Madison Glassworkers Agreement states the Union is the bargaining representative for those "working in the glass handling and fabrication departments, metal fabricators and assemblers, auto glass installers, and packing departments, all shop glazing, new and old sash, metal and plastic panels, shower doors, tub enclosures, insulated units, and truck drivers." The record establishes that the work described in Article I is predominately performed by those in the Employer's shop, not the journeyman glaziers who predominately perform assembly and installation work out in the field.⁸

⁷ The Union initially argued that both Dean Bakken and Jason Bambrough should be included in the unit along with the two glass workers and four glaziers. The parties later stipulated that Dean Bakken was ineligible because he is a Section 2(11) supervisor who has the authority to effectively recommend discipline. The Union, however, continues to contend that Jason Bambrough should be in the unit and eligible to vote, because he performs work in the shop and out in the field. Although Jason Bambrough has performed some bargaining unit work, and has joined the Union, I conclude he is not eligible to vote in the election. First, although its unclear as to the exact percentage, Jason Bambrough has an ownership interest in the Employer. Second, he is the son of one of the other two owners, Ronald Bambrough. See 29 U.S.C 152 (3) (statutory definition of "employee" excludes individuals "employed by his parent or spouse"); See also *Union Manufacturing Company*, 291 NLRB 436 (1988). Third, regardless of his ties to ownership, the evidence is insufficient to establish that he qualifies as a "regular part-time glass worker." According to the record, he spends approximately 80 percent of his time estimating/bidding on projects, and the remaining 20 percent of his time performing office work. And while there are periods during the year--typically in the early fall--where he may perform a higher percentage of bargaining unit work, there has been insufficient evidence presented that he has a substantial and continuing interest in the wages, hours, and working conditions of the employees working in the shop or in the field. See generally, *New York Display & Die Cutting Corp.*, 341 NLRB 930 (2004) and *Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003). As such, I conclude he is not eligible to vote in the election.

⁸ The argument that the glaziers should be eligible to vote because there are occasions in which they work in the Employer's shop is akin to asserting that they are eligible as dual-function employees. In *Berea Publishing Co.*, 140 NLRB 516, 519 (1963), the Board held that employees who perform more than one function for the same employer may vote, even though they spend less than a majority of their time on unit work, if they regularly perform duties

The Union contends it does not matter how frequently an employee performs the work described in the respective Recognition provisions. It asserts that if employees perform any work described in Article I of the Madison Glassworkers Agreement, they are part of that unit. I reject this contention as well. The parties repeatedly negotiated separate agreements for the separate units. If they intended for employees to be covered under both agreements because they may occasionally perform the other employees' work, there would be no need for separate agreements, with separate recognition provisions.⁹

The Union's argument is also akin to claiming the glaziers should be eligible because they share a sufficient community of interest with the glass workers. The Board applies the community-of-interest analysis when delineating units of previously unrepresented employees, but not when it is assessing historical units that have had long periods of successful collective bargaining. See *Canal Carting, Inc.*, 339 NLRB 969 (2003) (citing *Trident Seafoods Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996)); see also *Gold Kist, Inc.*, 309 NLRB 1 (1992). In

similar to those performed by unit members for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit. *Id.* at 518-519. The burden of proof rests on the party asserting dual-function status.

The Union has failed to introduce sufficient evidence to establish that the four journeyman glaziers perform the work described in Article I on such a regular basis for a sufficient period of time during each week or other appropriate calendar period as to demonstrate that they have a substantial and continuing interest in the wages, hours, and working conditions of the full-time glass workers performing the work described in Article I. See generally, *Trump Taj Mahal Casino*, 306 NLRB 294, 296 (1992), *enfd.* 2 F.3d 35 (3d Cir. 1993). As stated above, with regard to quantification, the only evidence is Christensen's observation that journeyman glaziers perform work in the shop once every three to six months, and there is no evidence as to which of the four glaziers perform work in the shop and how frequently. As such, I conclude there is insufficient evidence to prove that the four glaziers qualify as dual-function employees.

⁹ Further evidence that the parties intended separate units, even though there may be some crossover, is found in the rates of pay. When a glass worker is performing work out in the field as a Glazier Assist II, he or she earns two dollars more per hour than his or her glass worker rate. The lowest rate under the Madison Glassworkers Agreement \$19.27, so the employee would earn at least \$21.27 an hour while working under the Madison Glassworkers Agreement. Under the Madison Glaziers Working Agreement, the Glazier Assist II earns \$19.27 an hour. As a result, a glass worker will earn more than a glazier for doing the same job. If the parties intended for employees to be covered under both agreements, there would be no reason for separate wage rates. These provisions are in these agreements to cover the occasional, irregular situations in which one employee from a bargaining unit performs the work of another employee from the other separate bargaining unit.

cases of long-established bargaining relationships, such relationships will not be disturbed unless they are repugnant to the Act's policies, and the Board places a heavy evidentiary burden on a party attempting to show that historical units are repugnant.¹⁰ See *Ready Mix USA, Inc.*, 340 NLRB 946 (2003).

For at least the last 38 years, the Employer and the Union have negotiated separate collective-bargaining agreements: one setting forth the terms and conditions of employment for employees performing glass work in the Employer's shop, and one setting forth the terms and conditions of employment for employees performing glazier work out in the field. Both agreements historically have addressed situations in which employees in one unit will be allowed to perform the work of the other unit. There is no evidence the parties have sought to negotiate a single agreement covering both groups, or sought to modify or change the recognition or jurisdiction language under either agreement to encompass both groups.¹¹ As such, I find there is no basis on which to conclude that these historically separate units should be treated as one unit.

IV. CONCLUSION

Based on the evidence in the record, I conclude that petitioned-for unit of full-time and regular part-time glassworkers, which consists of two employees, is appropriate. The parties have treated these units as separate units for at least 38 years. The Union has failed to present evidence proving that the employees are part of one unit, or are included in both units. As such,

¹⁰ At the hearing, the Union stated that it does not contend that separate units would be repugnant to the policies of the Act.

¹¹ The Board has recognized certain instances in which historically separate units can be merged into one unit. Under the merger doctrine, the Board examines the parties' bargaining history to determine whether their intent was to "obliterate" separate appropriate units by "merg[ing] [them] into [one overall] unit." *General Electric Company*, 180 NLRB 1094, 1095 (1970). Where the record establishes that the parties agreed to merge separately certified or recognized units, a Board election can be conducted only in the merged unit. The Union has not directly asserted that the unit of glass workers has merged with the unit of glaziers. But even if it had asserted this proposition, I find there is insufficient evidence to establish that these two historically separate units have merged.

there is no basis on which to conclude that the glaziers should or must be included in the petitioned-for unit.

DIRECTION OF ELECTION

Based on the foregoing, an election by secret ballot shall be conducted by the undersigned among 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. Eligible to vote are those 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 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. Those in the military services of the United States 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 shall vote whether or not they desire to be represented for collective bargaining purposes by Glaziers Local Union No. 941 of Painters & Allied Trades, District Council No. 7, AFL-CIO.

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 to the election should have access to the 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*, 384 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, the Employer shall file with the undersigned, **two** copies of an election eligibility list, containing the **full** names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized. **In order to be timely filed, such list must be received in the Regional Office, 310 West Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53203 on or before May 23, 2008.** 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, DC 20570. **This request must be received by the Board in Washington by May 30, 2008.**

OTHER ELECTRONIC FILINGS

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically

filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlr.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

Signed at Milwaukee, Wisconsin on May 16, 2008.

/s/Irving E. Gottschalk

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