

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

VARSITY CONTRACTORS, INC.

Employer

and

CHAD ALTMAN, AN INDIVIDUAL

Petitioner

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 95, 95A, 950, AFL-CIO

Union

Case 6-RD-1622

ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Varsity Contractors, Inc., provides maintenance and janitorial services at various locations throughout the United States, including such services at two shopping malls in the Pittsburgh, Pennsylvania area, where it employs a total of five employees. Two of the employees are employed at Ross Park Mall ("Ross Park"), and three employees are employed at South Hills Village Mall ("South Hills").¹ The Union, International Union of Operating Engineers, Local 95, 95A, 950, AFL-CIO, has represented two bargaining units of the Employer's maintenance employees at these locations since August 2003, and the Union and the Employer have been parties to one three-year collective-bargaining agreement that expired on March 28, 2008.² The Petitioner, Chad Altman, filed a petition with the National Labor

¹ The Employer also employs employees at Century Three Mall, also in the Pittsburgh area, but those employees are not involved in the instant case.

² The expired collective-bargaining agreement covered the employees at both South Hills and Ross Park.

Relations Board under Section 9(c) of the National Labor Relations Act seeking to decertify the Union as the exclusive collective-bargaining representative of the represented employees at the South Hills location. A hearing officer of the Board held a hearing and the Union filed a timely brief with me.

As evidenced at the hearing and in the Union's brief, the parties disagree on the issue of whether the two bargaining units originally certified by the Board have been merged into one unit, thus rendering an election only at the South Hills location inappropriate. The Union contends that, following the certifications, the two bargaining units were merged together by the parties, and therefore the only appropriate unit in which a decertification election can be conducted would include the employees from both locations. The Employer also apparently takes the position that a merger combining the two bargaining units has occurred.³ Contrary to the Union and the Employer, the Petitioner contends that an election only at the South Hills location, as certified, is appropriate. The unit sought by the Petitioner has approximately three employees, while the unit the Employer seeks would include about five employees.

I have considered the evidence and the arguments presented by the parties on this issue. As discussed below, I have concluded that there was insufficient evidence of a merger of the two units and therefore an election only of the bargaining unit at South Hills is appropriate. Accordingly, I have directed an election in a unit that consists of approximately three employees.

To provide a context for my discussion of the issue, I will first provide an overview of the Employer's operations and a history of the relationship between the parties herein. Then, I will present in detail the facts and reasoning that support my conclusions on this issue.

³ When initially asked at the hearing whether the Employer's position with regard to the scope of the unit was in accordance with the Petitioner's position that it was one location or the Union's position that it was combined locations, the Employer's representative, Operations Director Gary Liston, stated "It is our position that it is combined." Later, when asked who was covered under the union vote that he attended, this same representative said it was his understanding that it was just South Hills. Then, when asked if he ever came to understand that the units were combined as the Union's representative had asserted, the Employer's representative stated that "I felt they were negotiating a contract for two different entities...." Because the Employer's representative's statements are ambiguous, the Employer's position on the scope of the unit is not clear.

I. OVERVIEW OF OPERATIONS

The Employer, as described above, provides janitorial and maintenance services at locations throughout the United States. In these operations, the Employer employs over 4,600 employees. The Employer's headquarters is located in Pocatello, Idaho, with regional offices in various locations around the United States.

One of the Employer's regional offices is located in Indianapolis, Indiana. Jim Ratliff is the Regional Vice President in the Indianapolis regional office. Reporting to Ratliff is the Regional Operations Manager. In the 1983 through early 1985 time period, when the election and contract negotiations took place in this matter, Jim Sorge held this position.⁴ There is an Operations Director at each of the locations in this matter who each report to the Regional Operations Manager; at Ross Park, the Operations Director is Timothy Bonidie, and at South Hills, the Operations Director is Gary Liston. The bargaining unit employees report to their respective Operations Director at each location.

II. HISTORY OF THE BARGAINING RELATIONSHIP

During the summer of 2003,⁵ the Union filed two petitions to hold representation elections among employees at South Hills and at Ross Park. Each election was held separately with its own observers and representatives from the Union and the Employer, but they were scheduled to take place on the same date and at the same time. When each election was completed, a separate tally of ballots was signed by the parties at each separate location, indicating that the Union had won a majority of the votes at each location to become the exclusive bargaining representative for each bargaining unit. A separate certification for each

⁴ Sorge left the Employer's organization about three years ago and was replaced by Billy Patton. Prior to holding the position of Regional Operations Manager, Patton held the position of Operations Director at Ross Park.

⁵ The exact date of these elections is not reflected in the record.

bargaining unit issued: on August 11, 2003 for South Hills and on August 12, 2003 for Ross Park.⁶

The unit description for the South Hills bargaining unit, as certified, is: “All full-time and regular part-time skilled maintenance employees and maintenance technicians employed by the Employer at its South Hills Village, Pittsburgh, Pennsylvania, jobsite; excluding office clerical employees, janitorial employees, housekeeping employees and guards, professional employees and supervisors as defined in the Act.” The unit description for the Ross Park bargaining unit, as certified, is: “All full-time and regular part-time maintenance employees employed by the Employer at its Ross Park Mall, Pittsburgh, Pennsylvania, jobsite; excluding office clerical employees, janitorial employees, housekeeping employees and guards, professional employees and supervisors as defined in the Act”.⁷

When the elections were scheduled, Union organizer Jack Wagner asked Business Agent James Carpenter to be the Union’s representative at the election at Ross Park, while Wagner would attend the election at South Hills. Although Carpenter was present at the tally of ballots and signed the document on behalf of the Union, he was under the (mistaken) understanding that the two locations were actually one unit.⁸ According to Carpenter, he was unaware of the two separate certifications until he was a witness at the hearing on the instant decertification petition.⁹

⁶ The petition in Case 6-RC-12238 was for a unit of employees at South Hills, while the petition in Case 6-RC-12239 was for a unit of employees at Ross Park.

⁷ At the hearing, Liston stated that all of the current employees at both Ross Park and South Hills are maintenance technicians.

⁸ Although Carpenter had participated in many Board elections, he had not filed the petitions in these cases, and assumed that, despite the separate tallies, the two locations would be one unit.

⁹ The Union did not present Wagner as a witness and thus there was no testimony as to why the Union chose to file two petitions for two separate bargaining units.

A few weeks later, Carpenter and Sorge engaged in some communications regarding a collective-bargaining agreement for the two bargaining units. According to Carpenter, he and Sorge had some telephone conversations shortly after the elections, wherein Sorge told Carpenter he would send him a copy of a contract that the Employer had signed with Service Employees International Union covering represented employees at Century Three Mall, to use as a starting point for their upcoming negotiations. This model was revised and discussed over a period of about 18 months, from about September 2003 until the final version was signed and went into effect on March 28, 2005.

In the "Scope of the Agreement" section of the model contract, the language describes the Union as the exclusive bargaining representative of all employees in the bargaining unit at the malls listed in an attached appendix.¹⁰ Thereafter, however, throughout the proposed agreement, there are references to "bargaining units".¹¹ In Article VI, which deals with seniority, the model contract states that seniority shall apply only at the location where the employee is working, and that vacancies are only to be posted at the location where the opening occurs. The final, signed collective-bargaining agreement herein takes out the term "bargaining unit" and "bargaining units", and states that "the Union shall be the sole representative of all bargaining unit employees (regular full-time and temporary employees) employed in the job classifications listed in the NLRB Certification in #6-CR-12238."¹²

The parties met in person seven or eight times during the period from September 2003 until March 2005, sometimes meeting at South Hills and sometimes at Ross Park. Carpenter

¹⁰ Underlining added.

¹¹ In the introduction, the agreement refers to "employees in those bargaining units"; in Article I, Section 1, just after it uses the term "bargaining unit", the agreement notes that "the sole purpose of this provision is to define the bargaining units covered by this Agreement"; and in Article XIII, Section I, it states that "supervisors are not included in the bargaining units".

¹² This reference is clearly erroneous as there are no certifications with the designation "CR", nor does it refer to the employees covered in the second certification.

attended the negotiations as spokesman for the Union, along with the stewards from each location and sometimes Wagner.¹³ Sorge handled the negotiations for the Employer, and was accompanied by Liston when the meetings were at South Hills and by Patton when the meetings were at Ross Park. The parties revised the initial model agreement at least three times before they agreed to the final version. The final agreement has “Exhibit A” as an attachment, which sets forth the hourly wage rates. This exhibit states that the minimum starting rate for the employees at Ross Park would be \$10.00 per hour, while the minimum starting rate at South Hills would be \$12.00 per hour. The introduction to the agreement defines the Employer as the contractor for the South Hills and Ross Park locations.

Carpenter’s recollection of the details of the negotiations is imprecise. He acknowledges that he did not have an exact recollection of many of the details of either conversations with Sorge, meetings to negotiate the contract, and/or ratification meetings with the bargaining unit employees. Carpenter asserts that the Employer, from the initial contact, wanted one unit.¹⁴ Since Carpenter already assumed that there was one unit, he did not object or question Sorge’s desire to have all of the employees under one contract.¹⁵ There was no documentary evidence either in the final version of the collective-bargaining agreement or in any correspondence to memorialize any explicit agreement between the parties to merge the two bargaining units into one.

Liston attended some, but not all, of the negotiations for the collective-bargaining agreement. He was also present at the end of the election at South Hills when the ballots were

¹³ It is unclear if both of the stewards attended all of the negotiations or only the negotiations that were held at the facility at which they were employed.

¹⁴ The ambiguities in the documentary evidence of the Employer’s desire are discussed above.

¹⁵ At different times in his testimony, Carpenter refers to the Employer’s request for one unit; at other times, he refers to the Employer’s desire for one contract. In fact, in one statement Carpenter testified, “...like I said, from day one, they [the Employer] wanted it as one unit, and that’s what we went with, one contract, should I say, for both malls.”

counted and the tally of ballots was signed. Liston states that he understood that the election was only for employees at South Hills, and also believed that they were negotiating for two separate entities when the contract was discussed. He based this belief on the fact that each entity had a separate election and each entity had its own wage rate in the contract. Thus, he believed that the two locations were separate, but were going to work under one contract.

Once the collective-bargaining agreement was in place, the two locations functioned separately, as they had always done. While all of the employees covered by the agreement received the benefits and protections therein, the two locations had different wage scales, separate supervision, separate equipment, and no contact or interchange between the employees. There are separate seniority lists and overtime assignments at each location. Discipline is handled at each location by the Operations Director. There is no contact between the employees at the two locations, which are about 14 miles apart.

Carpenter similarly does not have a precise recollection of a ratification of the collective-bargaining agreement. While he has no exact recollection, he “believes” he was involved in a ratification vote, but has no memory of doing so. He states that “more than likely” he would have gone to each location and conducted a ratification vote among the employees in each bargaining unit. His testimony in this regard appears to be extremely vague and not based on any clear recollection. However, Petitioner Chad Altman was unaware of any ratification vote taking place, never voted on the contract and states that he saw the collective-bargaining agreement for the first time after it was put into effect. Neither Liston nor Bonidie have any recollection of a ratification vote taking place at either South Hills or Ross Park. While these two individuals are management and thus would not be directly involved in a ratification vote, they both indicated that they would likely have been aware of such a vote taking place at their location.

III. ANALYSIS

It is well settled that the appropriate unit in a decertification election must be coextensive with the certified or recognized unit. The Green-Wood Cemetery, 280 NLRB 1359, 1360 (1986); Gibbs & Cox, Inc., 280 NLRB 953, 955 (1986); General Electric Company, 180 NLRB 1094, 1095 (1970), citing W.T. Grant Company, 179 NLRB 670 (1969). However, in certain circumstances the Board has applied what is known as the “merger doctrine” in cases where separately certified or recognized units have been treated as one unit by the parties. The merger doctrine has been applied when the parties have mutually agreed to extinguish the separateness of the previously certified or recognized bargaining units, and combine them into one unit. In such cases, the larger, merged unit is the only appropriate one for purposes of a representation election. Wisconsin Bell, Inc., 283 NLRB 1165 (1987); The Green-Wood Cemetery, supra at 1359.

The Board has stated that, in order to guarantee the Section 7 rights of employees in an overall unit and to further the statutory objective of maintaining industrial stability, the nature of the established bargaining relationship must be recognized. The Green-Wood Cemetery, Id. Thus, the merger doctrine is applied when, through a history of bargaining for separately certified or recognized units as one, an election in the originally certified unit is no longer appropriate. However, “the Board does not find a merger in the absence of unmistakable evidence that the parties *mutually* agreed to extinguish the separateness of the previously recognized or certified units.” Duval Corporation, 234 NLRB 160, 161 (1978), quoting Utility Workers Union of America, AFL-CIO, and its Locals Nos. 111, 116, 138, 159, 264, 361, 426, 468, 478 and 492 (Ohio Power Company), 203 NLRB 230, 239 (1973), enfd. 490 F.2d 1383 (C.A. 6 1974).

In Duval, the Board found that the evidence of a merger of units fell short of demonstrating a mutual and unmistakable intent to merge the separately certified units.¹⁶ In that case, the Board found a practice of centralized bargaining for separate bargaining units rather than a practice of bargaining for one overall unit. Duval, supra at 161. Thus, it must be absolutely clear that the parties actually combined the separate bargaining units into one, and did not just negotiate one contract for the separate units.

In the instant case, I find that the Employer and the Union have not demonstrated an unmistakable intent to merge the certified units into one, as opposed to applying one contract to two different units.¹⁷ Unlike some of the cases in which the merger doctrine was applied, there is no written acknowledgement of the merger, either in the collective-bargaining agreement or in any other document. See, e.g., Wisconsin Bell, Inc., supra at 1165; Albertson's, Inc., 307 NLRB 338 (1992). The Board has also applied the merger doctrine in cases where there was no explicit document verifying the mutually agreed-to merger, but the history of bargaining between the parties indicated a clear intent to merge the bargaining units. See, e.g., Gibbs & Cox, Inc., supra at 954-955; General Electric Company, supra at 1095.

The instant case presents neither of these circumstances. There is no explicit language in the collective-bargaining agreement to provide evidence of an unmistakable intent to merge the two bargaining units. Neither is there any written memorialization of a mutual agreement between the parties to merge. Rather, the agreement contains a separate wage scale for the two bargaining units. Inasmuch as this collective-bargaining agreement was the first one between the parties, there is likewise no lengthy bargaining history from which a mutually agreed upon merger can be deduced. In addition, the testimony of the witnesses who were present at the election and during the negotiations presented an imprecise and ambiguous

¹⁶ Underlining added.

¹⁷ As discussed in footnote 15 herein, Carpenter refers to combining the two locations into one unit, and in the same sentence, refers to combining them into one contract. Such imprecise testimony cannot provide the basis to prove that there was an unmistakable intent to merge the two bargaining units.

account of the events and conversations that took place. I cannot find an unmistakable intent to merge the units based upon such testimony.¹⁸

Moreover, while not dispositive of the issue, I note that the parties have conducted themselves in a manner consistent with a finding of two separate units. In this regard, there are union stewards for each separate location.¹⁹ The employees at each location report to separate local supervision, have separate seniority, use separate equipment and are paid different wage rates. They also have no interchange or contact with the employees at the other location. There is no evidence of joint meetings, either with the Union or the Employer. While they all work under the same collective-bargaining agreement, the two units are clearly kept separate. While these factors alone are not determinative of the issue, they support my finding that the evidence does not sufficiently support a conclusion that the two units have been merged.

Accordingly, I find that the Union and the Employer have not provided sufficient evidence to prove a mutual and unmistakable intent to merge the certified units. Neither party communicated to the employees an intent to merge the units, no documents reflect an unambiguous intent to merge, no decision regarding a merger was ever reduced to writing in any form, and the testimony of the individuals who were involved in the election and in the negotiations, was, as noted, vague and ambiguous concerning what was said and done relative to this issue. In such circumstances, the Petitioner is entitled to rely on the scope of the bargaining unit as it was certified.

¹⁸ In its brief, the Union cites a number of cases in support of its position that the merger doctrine should be applied herein. I have already discussed the substance of these cases. I also note that, in many of the cases cited by the Union, the circumstances involved a long-established unit to which a smaller, newly-certified unit was added. See, Albertson's, Inc., supra; The Green-Wood Cemetery, supra; Wisconsin Bell, Inc., supra; Gibbs & Cox, Inc., supra. That situation is entirely different than the one herein, where there are two bargaining units, newly certified, without any long bargaining history. Consequently, I find reliance on these cases unpersuasive with regard to the instant case.

¹⁹ In support of its position, the Union submitted a form sent by the Employer to the Union's Central Pension Fund. On this form, the Employer wrote that the "Jurisdiction Covered by This Agreement" was "South Hills Village & Ross Park Mall Locations". However, I find this document unpersuasive, as, without more, it could as easily describe two bargaining units as it could one merged unit.

IV. FINDINGS AND CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are 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 in this matter.
3. The Union 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 Section 2(6) and (7) of the Act.
5. 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:

All full-time and regular part-time skilled maintenance employees and maintenance technicians employed by the Employer at its South Hills Village, Pittsburgh, Pennsylvania, jobsite; excluding office clerical employees, janitorial employees, housekeeping employees and guards, professional employees and supervisors as defined in the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Union of Operating Engineers, Local 95, 95A, 950, AFL-CIO. The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. 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 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 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.

B. 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 seven (7) days of the date of this Decision, the Employer must submit to the Regional Office 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 Regional Office, Two Chatham Center, Suite 510, 112 Washington Place, Pittsburgh, PA 15219, on or before May 6, 2008. 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 412/395-5986. Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) full working days prior to 12:01 a.m. of the day 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 five (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 precludes employers from filing objections based on non-posting of the election notice.

VI. 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. 20570-0001.²⁰ This request

²⁰ A request for review may be filed electronically with the Board in Washington, D.C. The requirements and guidelines concerning such electronic filings may be found in the related attachment supplied with the Regional Office's initial correspondence and at the National Labor Relations Board's website, www.nlr.gov, under "E-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.

must be received by the Board in Washington by 5 p.m., EST (EDT), on May 13, 2008. The request may **not** be filed by facsimile.

Dated: April 29, 2008

/s/Stanley R. Zawatski

Stanley R. Zawatski, Acting Regional Director

NATIONAL LABOR RELATIONS BOARD

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