Fish Plant Services *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 469; Arizona State District Council of Carpenters including Millwrights, Local 1914; International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers, AFL–CIO, Local 627; Operative Plasterers and Cement Masons, Local 394; International Association of Heat and Frost Insulators and Asbestos Workers, Local 73; Operating Engineers, Local 428; International Association of Bridge, Structural and Ornamental Iron Workers, Local 75; Painters Local Union No. 86; Construction, Production and Maintenance Laborers Union Local 383; Sheet-Metal Workers' International Associations, Local Union No. 359, AFL–CIO, Joint Petitioner. Case 28–RC–4998

August 18, 1993

ORDER DENYING REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The National Labor Relations Board has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent portions of which are attached as an Appendix), as well as Joint Petitioner's opposition brief. The request for review is denied as it raises no substantial issues warranting review.[1]

[1] Review was requested of the Regional Director's findings that it is appropriate to conduct an election at this time; that the showing of interest is sufficient; that the petitioned-for unit of all the Employer's construction employees employed at any project within the State of Arizona and within that part of the Navajo Reservation within the State of New Mexico is appropriate; and that the eligibility formula in *Steiny & Co.*, 308 NLRB 1323 (1992), should be applied to the election in this case. Member Devaney, who dissented from the Board's earlier decision to direct an election, finds that the election was properly held, based on the additional evidence at the second hearing supporting the Employer's continuing presence in the relevant geographic area. Accordingly, Member Devaney joins his colleagues in denying review.

Member Devaney notes that no party has raised the issue of Board jurisdiction over employment in projects on the Navajo Reservation.

APPENDIX

DECISION AND DIRECTION OF ELECTION

[1] During the hearing, the Joint Petitioner amended its petition to name Fish Plant Services as the Employer, based upon representations of the Employer's counsel that the petitioned-for employees were employed by that entity, and not by Fish Engineering and Construction Partners, Ltd. (Fish Engineering), which had previously been named as the Employer. At the original hearing in this matter, held on February 6, 1992, the Employer stated that its correct legal name was Fish Engineering and Construction Partners, Ltd. However, at the second hearing, conducted on October 28, 1992, the Employer's counsel represented that Fish Plant Services was formed on July 1, 1991, and that since that date, it had been the entity which employed the construction employees on construction projects undertaken by Fish Engineering in the geographical area encompassed by the petition herein. The Hearing Officer sought further information concerning the relationship between Fish Engineering and Fish Plant Services, but the Employer's counsel was reluctant to provide such information. Fish Engineering and Fish Plant Services are jointly referred to herein as ''Fish'' or the Employer.

[2] The Employer sought to argue at the hearing, and did argue in its brief, that the showing of interest presented in support of the petition is deficient. The Hearing Officer's refusal to take evidence on this issue at the hearing is hereby affirmed. The showing of interest is an administrative matter not subject to litigation. *O. D. Jennings Co.*, 68 NLRB 516 (1946); *General Dynamics Corp.*, 175 NLRB 1035 (1969); *Allied Chemical Corp.*, 175 NLRB 235 (1967); *NLRB v. J. I. Case Co.*, 201 F.2d 597 (9th Cir. 1953). The Employer raised this issue administratively before the hearing and was administratively advised before the hearing that the showing was sufficient.

[3] Based upon counsel's representations, the parties stipulated that Fish Plant Services is a Texas limited partnership engaged in the business of general contracting in the building and construction industry, that during the past 12-month period it performed services valued in excess of $50,000 for customers located outside the State of Texas, and that it is engaged in interstate commerce within the meaning of the National Labor Relations Act. All of the testimony at the hearing concerning the ''Employer's'' operations came from the general manager of construction for Fish Engineering. Regarding Fish Plant Services, he testified that Fish Engineering bids jobs, and when it obtains contracts, it enters into an agreement with Fish Plant Services to perform the work. He also testified that the headquarters of Fish Plant Services is in Houston, Texas, as is the headquarters of Fish Engineering. The Employer's counsel represented that both partnerships have the same general partner. Inasmuch as the record does not make clear the details of the relationship between Fish Engineering and Fish Plant Services, if a certification of representative is issued as a result of this proceeding, and if later developments indicate that the Employer herein is Fish Engineering and not Fish Plant Services, I shall entertain a petition for amendment of certification to correctly identify the Employer.

[4] The Joint Petitioner seeks to represent a unit of all full-time and regularly employed part-time construction employees employed by the Employer at any project within the State of Arizona and within that portion of the Navajo Reservation within the State of New Mexico, excluding all other employees, including office clerical employees, professional employees, engineers, guards, and supervisors as defined by the Act. The petition herein was originally dismissed by me on the grounds that the petitioned-for unit would cease to exist within 2 months of the date of the original hearing, and that it was speculative whether the Employer would secure any additional work within the geographic boundaries of the petitioned-for unit. The Joint Petitioner requested review by the Board, and on September 17, 1992, the Board issued a Decision on Review and Order, reported at 308 NLRB 836

(1992), in which it concluded that based upon the Employer's ''past and current work and its bidding of future work within the unit sought by the Joint Petitioner . . . it would serve a useful purpose to conduct an immediate election after resolving the remaining unit issues.'' Id. at 836.

The Employer contends that the petitioned-for statewide unit is inappropriate, that only a unit limited to its current jobsite is warranted, and that an election should not be conducted herein because this job will be completed by January 24, 1993. In addition, the Employer argues that a unit of all construction employees would be inappropriate, but declined to state at the hearing or in its brief what grouping of employees it felt would be appropriate. The Employer also asserted that the eligibility formula set forth in *Steiny & Co.*, 308 NLRB 1323 (1992); and *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified 167 NLRB 1078 (1967), is not applicable to its operations.

The only witness at either the February or October 1992 hearings was the general manager of construction for Fish Engineering, Joseph Colquitt, whose testimony was uncontradicted. Unless otherwise noted, the following summary of the facts is based upon his testimony at both hearings.

Fish is engaged in the business of providing engineering procurement and construction services to clients in the petrochemical refining and gas processing and transmission industry. There has been no history of collective bargaining at any of its past or current jobs in the geographic area encompassed by the petition. All of its work in the relevant geographic area has been for El Paso Natural Gas Company, renovating compressor stations on natural gas pipe lines. During the past 24 months, it had projects in this area at Wenden, Flagstaff, and Dilkon, Arizona, and White Rock, New Mexico, all of which had been completed by the time of the October hearing. The Wenden project was completed in late February 1991, the Flagstaff job was completed in November 1991, and the Dilkon and White Rock jobs were completed in the spring of 1992.

At the present time, Fish has only one job in the area encompassed by the petition, another project for El Paso Natural Gas Company at the Navajo Compressor Station, approximately 10 miles south of Ganado, Arizona. This job was started in June 1992, and is scheduled for completion by January 24, 1993. It involves replacing old compressors, drivers, and ancillary equipment at a natural gas compressor station on a natural gas pipeline. As were the Dilkon and White Rock projects, the Navajo Compressor Station is on the Navajo Reservation.

Fish has also submitted bids for three jobs on compressor stations for El Paso Natural Gas Company at Alamo Lake, Arizona, at a site east of Lake Havasu, Arizona, and at the Williams Compressor Station west of Flagstaff, Arizona. None of these is on the Navajo Reservation. In the past, Fish has not always been the successful bidder for El Paso Natural Gas projects in this geographic area, and at the time of the October 1992 hearing, it did not know whether it would receive any of the contracts for these three upcoming jobs. It did not have any other outstanding bids for work in the area covered by the petition at the time of the October hearing. Colquitt stated that work would not begin until March 1993, if Fish got any of the jobs it had bid.

At the time of the hearing, Fish had approximately 82 construction employees on the Navajo Compressor Station project, down from a project high of 84. Colquitt estimated that by January 10, 1993, only 13 of these employees would remain on the job, and that all would be gone by January 24.

At the completion of each project, the construction employees are terminated, and they must fill out a new application when they seek employment on any other project for Fish. At the time of the February 1992 hearing, only 7 employees of the approximately 300 who had been employed as of that date on Fish's projects within the petitioned-for unit had worked on more than one project. However, at the present time, of the approximately 82 employees currently employed in the petitioned-for unit at the Navajo Compressor Station, 31 have worked for Fish on previous jobs. Since the Navajo Compressor Station job is on the Navajo Reservation, and pursuant to laws of the Navajo Nation, the Employer is obligated to give preference in hiring to Navajos for jobs on the Reservation. Of the 31 employees on this job who had been formerly employed by Fish, 29 had worked on other jobs on the Reservation.

The Employer does not have a nucleus of construction employees whom it consistently transfers from job to job, although some supervisors are moved from job to job. Occasional employee transfers do occur. For example, at the end of the White Rock and Dilkon projects, some employees were moved from one job to the other to complete a tie-in. In addition, foremen may tell good employees of jobs that will begin in the future, although the employee is still required to fill out a new application on the new project. Infrequently, employees may be laid off when a phase of a project is completed, and recalled to work when their skills are needed again in later phases. In this case, the employee is contacted at the last address and telephone number on file, and if he or she is not immediately available, someone else is contacted and offered the job. Employees do not accrue seniority. Previous experience with Fish is favorably considered when an employee applies for work.

The Employer's projects on the Navajo Reservation are organized somewhat differently from those off the Reservation because of the laws applicable on the Reservation. The Employer does not usually use written job descriptions, but it is required to do so for jobs on the Reservation. Fish Engineering prepared job descriptions which were used on all the projects on the Reservation. Pay rates for these jobs were negotiated by Joseph Colquitt with the office of Navajo Labor Relations (ONLR), and these same pay rates were used on all the jobs on the Reservation for 1991 and 1992. Usually the Employer allows qualified employees to cross crafts, but this was not allowed on the Reservation jobs because it was necessary for the Employer to adhere strictly to the negotiated pay rates. Fish Engineering also signed an affirmative action statement concerning Navajo preference which was required by ONLR for jobs on the Reservation.

Recruitment for jobs on the Reservation is carried out by contacting the Navajo Nation employment service, advertising in a Navajo newspaper and on a Navajo radio station, and accepting applications on the jobsite. The Employer then interviews and hires the most promising applicants. Recruitment for other jobs is similar, in that state employment services, word of mouth, and jobsite applications are used.

Pay rates for jobs off the Reservation are set by Colquitt, based upon a survey of area wages conducted under his supervision. Although the rates may differ from job to job based upon the wage survey, any variation is approved by Colquitt, not by the project superintendent for each job. Once the wage rates are set, any changes are made centrally, not by the project superintendent. For example, on the Dilkon job, the Navajo employees went on strike, and ''the home office'' authorized the increase of their benefit payment by 50 cents per hour for travel pay to settle the strike. The decision about what fringe benefits, if any, will be offered is made by the corporate headquarters, and this cannot be changed by project superintendents.

Colquitt provides a set of generic work rules to the project superintendents, and they, in turn, have the authority to modify the rules based upon the circumstances unique to their respective jobs. For example, the superintendents may differ as to whether they allow coffeepots or radios on the job, and whether there are formal breaktimes. The work rules also cover such things as the length of the workday and week and appropriate conduct on the job. However, there is one corporate policy regarding drugs and alcohol which applies on all jobsites, companywide.

Colquitt visits the jobsites three to five times each throughout their duration, and talks almost every day by telephone with each superintendent. In addition, he, himself, served as superintendent on the Flagstaff project. Colquitt assigns the senior supervision to each job, and participates in the initial review of each prospective job and the estimating and preparation of the bid on each job. He participates in the selection of subcontractors on each job, and monitors the progress of each job as to schedule, cost, and other factors.

Within these parameters, the project superintendent on each job represents the Employer in the enforcement of all Federal, state, and company safety regulations. He also controls the schedule, approves all costs for the project, and can institute overtime at his discretion. The superintendents have the authority to hire and fire employees, to grant time off, to discipline, evaluate, promote, demote, and lay off employees without checking with the home office. They are also responsible for safety on the job and for providing basic construction tools. They can move employees from one classification to another and effect a corresponding change in the employees' pay. They assign work. Internal records regarding hiring and discharge of employees are sent from the jobsite to the headquarters office, while other personnel records are kept at the jobsite.

Purchasing of equipment and instruments for all the jobs is handled by the Fish procurement department in the Fish home office, while the purchasing of bulk materials for each job is done on the construction site by the office material manager under the authority of the project superintendent. The payroll timesheets and the payroll are developed on the jobsite by the field office material manager and put into the jobsite computer, then transmitted by modem to the Fish home office. There the math or accounting is checked, and the payroll is then sent back to the jobsite. The paychecks are printed at the jobsite.

Job classifications vary from project to project, depending upon the work involved and whether particular tasks are subcontracted. As a general rule, the classifications include laborers, carpenters, concrete finishers, iron workers, rebar installers, ironworker steel erectors, riggers, equipment operators, millwrights, pipefitters, pipe welders, electricians, instrument fitters, scaffold builders, painters, and insulators. On its previous jobs in the geographic area included in the petition, the Employer used virtually all of these crafts on the Wenden, Dilkon, and White Rock jobs, and only laborers, pipefitters, and welders on the Flagstaff job. The current project uses electricians, instrument fitters, millwrights, heavy crane operators, hydraulic crane operators, riggers, pipe fitters, pipe welders, laborers, painter/sandblasters, and carpenters.

The Employer has usually subcontracted specialty work on these jobs, for example installing chain link fence, pile driving, drill shaft boring, and post well heat stress relieving. Other general construction work may or may not be subcontracted. Organization of the different crafts under specific foremen or general foremen depends upon the work done by the Employer on each jobsite and the available supervisors. The current Navajo Compressor Station job includes a civil craft superintendent with laborer, painter, and carpenter foremen reporting to him, and laborers, painters, sandblasters, and carpenters reporting in turn to those foremen. It has a pipe superintendent to whom the pipefitter foremen report, with pipe fitters and pipe welders reporting to those foremen. The rigging superintendent has rigger foremen and an equipment operator general foreman reporting to him, and riggers and equipment operators report to them. There is a millwright superintendent and a millwright foreman, with the millwrights reporting to them. Finally, two electrical/-instrument superintendents have electrical foremen and electricians and instrument fitters, in turn, reporting to them. The Winden job, on the other hand, did not have a civil craft group because the work was subcontracted, and these skills were not used. The Winden job also did not have a separate rigging group, but that work was done by Fish employees within the piping or mechanical group. Each job has had a piping group. The Flagstaff job did not include millwrights or an electrical group, because the work did not require those skills. Different crafts may be combined under one superintendent, or more than one superintendent might be appointed for a particular craft, depending upon the skills needed on the job and the availability of qualified supervisors.

On each job, there are employees with different craft skills and different pay rates. As earlier noted, formal written job descriptions are only used on jobs on the Navajo Reservation, and only on Reservation jobs are craft lines strictly observed. On other jobs, employees with appropriate skills may work across craft lines. On each job, the employees with different skills go through the same hiring process, and they work side by side with each other on the job. They normally work the same hours, but there is some selective overtime for particular crafts. All of the employees are paid on the same day. They are paid the same hourly compensation for travel expenses, but they do not receive any other fringe benefits. They all wear the same protective coveralls, but the color of the hardhats differ from craft to craft. All of the employees may use the same employee breakroom and portable restrooms on the jobsite. They are all hourly paid, although at different rates, and all construction employees on a jobsite are covered by the same work rules. There are no apprenticeship programs or formal lines of promotion for any of the crafts.

The Employer argues that no election should be conducted herein because of the imminent completion of its only current project in the relevant geographic area. However, I find, in accordance with the Board's prior decision in this matter, reported at 308 NLRB 836 (1992), that in view of the Employer's substantial prior work, its outstanding bids for additional work, and the fact that this project will be ongoing at the probable date of an election, it is appropriate to conduct an election at this time. The Employer cited *K-P Hydraulics Co.*, 219 NLRB 138 (1975), in support of its position. However, that case, which involved an expanding unit in the manufacturing industry, is inapposite to a construction industry situation, where jobs are usually of relatively short duration and more inclusive eligibility formulas are used.

The parties disagree about whether the unit should include all projects within the petitioned-for geographic area or whether it should be limited to the current jobsite. In determining whether a petitioned-for, multisite unit is appropriate, the Board considers bargaining history; functional integration of operations; the similarity of skills, duties, and working conditions of employees; central control of labor relations and supervision; and interchange, and/or transfers of employees among construction sites. *Oklahoma Installation Co.*, 305 NLRB 812 (1991).

As noted above, there is no bargaining history for the petitioned-for unit. Although each jobsite is a separate project, the wage rates and fringe benefits are set by Colquitt or employees under his direction, and the project superintendent has no authority to change them. When a change was made to settle the strike at the Dilkon project, it was made by Colquitt's office, not by the project superintendent. Pay rates and job descriptions for the projects on the Navajo Reservation were negotiated with the ONLR by Colquitt, not by the project superintendents. Fish Engineering, not Fish Plant Services, signed the equal employment statement for the Reservation projects. Colquitt is in almost daily telephone communication with the jobsites, and the jobsite and home office computers are also linked together. In addition, Colquitt appoints the top supervision on each job, and he makes several visits to each jobsite as the job progresses. On the other hand, hiring, firing, layoffs, discipline, and evaluation of employees are done by the various project superintendent or supervisors reporting to them. Colquitt's office provides generic work rules to the project superintendents, and the superintedents have discretion to modify them. Similar skills are used on each of the jobs the Employer has had within the geographic area covered by the petition, although the specific skills and the chains of command have varied somewhat because of differences in the jobs. Employees are occasionally moved directly from one job to another, and a substantial number of employees on the current project have worked for the Employer on other jobs within the petitioned-for geographic area. Some supervisors are moved by the Employer from job to job. Although the Employer currently has only one project in this area, as earlier noted it has had others in the recent past, and it has bid on more work in this area. In these circumstances, I find that employees on the separate projects share a community-of-interest, and that the petitioned-for, multisite unit is appropriate. *Oklahoma Installation Co.*, supra; *Dezcon, Inc*., 295 NLRB 109 (1989); *Wilson & Dean Construction Co.*; *Daniel Construction Co.*, 133 NLRB 264 (1961).

The Employer also argued that the petitioned-for unit of all construction employees is inappropriate, but declined to state what grouping of employees it did believe was appropriate. It does not contend that any other group of employees should be included with the construction employees. It is well established that a unit need be only an appropriate unit, and not ''the ultimate or the most appropriate.'' *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), enfd. 190 F.2d 576 (7th Cir. 951). Based upon the evidence that the construction employees are all hourly paid, are all subject to the same work rules on a given project, work side by side, normally work the same hours, receive the same travel expense compensation, share the same breakroom and restroom facilities, and wear the same coveralls, I find that a unit of all construction employees is an appropriate unit. The cases cited by the Employer in its brief, *Brown & Root, Inc.*, 256 NLRB 1069 (1981); and *R. B. Butler, Inc.*, 160 NLRB 1595 (1966), discuss the appropriateness of a construction industry unit limited to one craft, and not an overall unit like the one sought herein. In fact, in *R. B. Butler*, the Board commented that an overall unit is a presumptively appropriate unit (id. at 1599).

The Employer also asserts that the *Daniel Construction* eligibility formula does not apply to its operations. However, the Board stated in *Steiny & Co.*, supra, 308 NLRB 1323 (1992):

> We have decided that the *Daniel* formula is applicable in all construction industry situations. We find no reasonable, feasible, or practical means by which to distinguish among construction industry employers to deciding whether a formula inshould be applied.
>
> . . . .
>
> [W]e have decided to apply the *Daniel* formula regardless of the construction employer's method of operation [footnote omitted].

The Employer admitted at the October 1992 hearing that this engaged in the construction industry, and the evidence herein leaves no doubt that it is so engaged. Moreover, the Board left intact in *Steiny*, supra at fn. 17, its holding in *S. K. Whitty & Co.*, 304 NLRB 776 (1991), that the fact that a construction industry employer has no committed work at any given time does not establish that it will not secure work in the future or that its former employees did not have a reasonable expectation of future employment. Accordingly, I conclude that the *Daniel* formula should be used in this case.

The Employer also argued that the foremen are supervisors within the meaning of Section 2(11) of the Act, and as such should be excluded from the unit. The Petitioner declined to state a position on the eligibility of the foremen. Based upon the record herein, I am unable to determine their status, so I shall allow the foremen to vote subject to challenge.

In addition to employees meeting the standard eligibility criteria, i.e., employees hired and working on the election eligibility date, regardless of how long the employee previously worked for the Employer, I shall also find eligible other employees in the unit: (1) who have been employed for 30 working days or more within the 12 months preceding the eligibility date for the election, or (2) who 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. *Steiny & Co.*, 308 NLRB (1992); *Daniel Construction*, 133 NLRB 264 (1961), as modified 167 NLRB 1078 (1967).