A. C. Pavement Striping Company, Inc., Employer-Petitioner *and* General Teamsters, Chauffeurs, Sales Drivers and Helpers Local Union Number 673, affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and Painters District Council Number 14 of the International Brotherhood of Painters and Allied Trades, AFL-CIO. Case 13-RM-1511

August 21, 1989

ORDER DENYING REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND HIGGINS

On December 30, 1988, the Acting Regional Director issued a Decision and Direction of Election in the above-entitled proceeding in which he found that the only appropriate unit included all employees of the Employer engaged in pavement coatings and pavement markings. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Painters District Council Number 14 of the International Brotherhood of Painters and Allied Trades, AFL-CIO (Painters) filed a timely request for review of the Acting Regional Director's decision. The Employer filed a timely opposition to the request for review.

We have carefully considered the arguments of the parties and, for the reasons set forth by the Acting Regional Director,[1] we deny the Painters' request for review of the Acting Regional Director's decision.[2]

Accordingly, as we believe that the Acting Regional Director properly applied precedent of the Board, we deny the Painters' request for review. Painters' request for a stay of the election is also denied.

MEMBER CRACRAFT, dissenting.

My colleagues deny review of the Acting Regional Director's decision to hold an RM election in the petitioned-for overall unit because in the absence of distinct employee groupings it is the only appropriate unit. I would grant review and dismiss the petition.

The Employer performs pavement coating and marking on various projects. It has had 8(f) agreements with the Painters since 1975 and with the Teamsters since 1976. Apparently in midcontract, the Employer petitioned for an election in a unit of all employees who do pavement coating and marking work. The Employer contends in its brief that it received written demands for recognition from both the Painters and Teamsters.

The Regional Director found that the overall unit is the only appropriate unit because of the absence of distinct employee groupings. Although there is overlapping work, there is also a history of separate units.

When there is an incumbent union, an RM petition is a vehicle to test whether the union represents a majority in the recognized unit. *K. Van Bourgondien & Sons*, 294 NLRB 268 (1989). If this were a decertification petition for the overall unit, it would be dismissed. I would apply the same standards herein.

That the relationships are Section 8(f) should not change matters. *John Deklewa & Sons*, 282 NLRB 1375, 1377 (1987), states that in processing petitions "the appropriate unit normally will be the single employer's employees covered by the agreement." *Deklewa* thus clearly supports finding two separate units appropriate herein, and there is no sufficient justification for departing from its teachings. That each Union may have demanded recognition does not require the Board to view this case as one of initial organization. *Deklewa* at 1387, gives 8(f) unions limited 9(a) status for the purpose of enforcing 8(f) agreements. If the Employer had withdrawn recognition from either Union, the Employer would violate Section 8(a)(5). If the units are viable for 8(a)(5) purposes, they should also be viable for testing majority status.

The Board is reluctant to disturb a unit established by bargaining unless the unit is repugnant to Board policy or so constituted as to hamper employees in exercising their rights. *Fraser & Johnston Co.*, 189 NLRB 142, 151, fn. 50 (1971); *West Virginia Pulp & Paper Co.*, 120 NLRB 1281, 1284 (1958).

The recognized units are not repugnant to Board policy. A unit of painters is not inappropriate per se. The unit of teamsters is also not inappropriate per se. They are at least a residual unit.

If this were an initial organizational attempt, the facts might not warrant finding appropriate separate Painters and Teamsters units, but the critical fact remains that this is *not* a case of initial organization. Nevertheless, the majority treats it as if it were one by affirming the Acting Regional Director's reliance on the failure of the evidence to show that painters and teamsters exclusively perform

[1] We have attached the relevant portions of the Acting Regional Director's decision.

[2] The Acting Regional Director's decision makes plain that, contrary to the contentions of our dissenting colleague, the Acting Regional Director carefully considered the record facts and determined that separate units of painters and teamsters were not appropriate We have not, as stated by the dissent, simply based our finding on "the failure of the evidence to support separate units." Rather, in agreement with the Acting Regional Director, we have found that the Employer demonstrated that separate units were not appropriate pursuant to any analysis under Board precedent

their own work or that the painters are a craft or do distinct work. Far more significant, in my view, is the fact that the evidence fails to show that the recognized, historical units do not remain appropriate; i.e., the evidence fails to show that the painters do not do primarily painter work.

Painters do painter work. Some of the overlap may be to resolve jurisdictional disputes. The units have, so far as we can tell, functioned smoothly. And the employees are likely to have separate interests through separate benefit funds.

The majority relies on the failure of the evidence to support separate units. I would rely on the failure of the evidence to show the separate units are contrary to Board policy.

APPENDIX

The record reveals that prior to engaging in the construction of public works projects in 1975, the Employer entered into a Section 8(f) agreement with Painters District Council Number 14 of the International Brotherhood of Painters and Allied Trades, AFL–CIO (herein called "Local 14") covering employees performing work over which that Union has jurisdiction. Subsequently, the Employer hired its workers, and one or two employees became members of Local 14 pursuant to the agreement. Based upon the foregoing, I find that the Employer's collective bargaining agreement with Local 14 is of the type permitted by Section 8(f) of the Act. An 8(f) contract is one entered into when, inter alia, the majority status of the labor organization has not been established under the provision of Section 9 of the Act prior to the making of such agreement. The record indicates that when the Employer and Local 14 executed their first collective bargaining agreement, Local 14 did not then or any time thereafter demonstrate its majority status so that the bargaining relationship became recognizable under Section 9 of the Act.

The record reveals that the Employer also became signatory to an 8(f) agreement with General Teamsters, Chauffeurs, Sales Drivers and Helpers of America Local Union Number 673, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (herein called Local 673) in 1976, subsequent to engaging in public works projects over which that union has jurisdiction. Thereafter, three employees who were then employed by the Employer and working in Local 673's jurisdiction became members of Local 673 pursuant to the 8(f) agreement.

Having found the separate collective bargaining agreements entered into by the Employer with Local 14 and Local 673 are of the kind permitted under Section 8(f) of the Act, I find that such agreements do not constitute a bar to the petition. Accordingly, I find that a question exists concerning representation of the Employer's employees in the unit found appropriate.

I also find that Employer's petition herein is supported by adequate objective considerations. The Board in *John Deklewa and Sons, Inc.*, 282 NLRB 1375, 1385 fn. 42, 1386 fn. 47 (1987), determined that an RM petitioner need only demonstrates that it is signatory to a 8(f) agreement to satisfy the requirement that it demonstrate "objective considerations" that the Union does not enjoy majority support. As I have found that the Employer is signatory to an 8(f) agreement with both Local 14 and Local 673, I find that the Employer has demonstrated sufficient "objective considerations" to support the RM petition herein.

The issues to be decided is the appropriate unit. The Employer submits that the appropriate unit should consist of all employees who perform work involved in pavement coatings and pavement markings. Local 14 contends that the employees classified as painters constitute a separate craft unit and seeks only to represent the painters as a separate craft unit. Local 14 contends that the separate craft unit consists of the following:

> All journeymen, apprentice and trainee painters, decorators, paperhangers, drywall tapers and applicators using tools of the trade to apply or remove materials used for, or preparatory to decorating, or protecting surfaces, who are employed to do such work by the present and future Employer members of the Association in that area of Chicago, Cook and Lake Counties, Illinois and whatever additional jurisdiction may be awarded the Union, and such other work over which the Union may hereafter acquire jurisdiction.

Local 673 seeks to represent employees covered in the following job classifications:

> All loading, travel, and on the job safety and barricade work, all types of pavement marking—cold, hot, tape, plural component, and all safety markings including preparation for same, cleaning, grinding, and blasting, water blasting, layout, priming, cutting slots, including all installation and relocating of barricades, temporary and permanent signs, and other traffic devices, all bridge deck membrane—preparation and installation, all protective coatings, membrane crack treatments, sealcoats, slurry seal coatings, and associated pump, air compressor, saw cut, roller and loading equipment operations associated with the above work.

The Employer provides pavement coatings and pavement markings in construction projects involving state, county and municipal work. The peak season is from July to October. The Employer employed 25–26 employees at the time of the hearing, in May, 1988, but expected to employ 37 employees by late June or early July. The record indicates that the Employer's workers will then consist of 13 employees who are members of Local 14 and 24 employees who are members of Local 673.

The Employer's pavement coatings operation consists of the slurry seal, protective coating and the waterproof membrane work. The slurry seal work involves a crew of 5–8 employees. A large truck with four separate bins is used. The functions performed by this crew includes employees who drive the truck or employees who act as helpers, setting cones or barricades to block off a street.

One employee squeegees the material used after it is applied to the street and another employee loads the truck. There are also employees who drive the trucks back and forth from the jobsite to the yard.

The protective coating operation involves a three member crew who use a truck equipped with a tank or drums on its back. The functions performed by the crew include during the truck, cleaning the pavement and spraying the material used on the pavement.

The waterproofing membrane operation utilizes a three member crew and involves the use of a truck which is equipped with drums and squeegees on its back. One crew member drives the truck. The other crew members clean the pavement and put down a cool tar and fiberglass membrane. An employee may also pull the membrane, as two other employees squeegees it to remove ripples or bubbles.

The pavement markings operation consists of epoxy paint stripping, thermal plastic striping, temporary tape striping and reflectors. The epoxy paint striping involves 4 to 5 employees who use a long liner truck and a hand applicator. On the truck are two tanks with lines from each running to the rear where the material is mixed at the point of installation on the pavement. The hand applicator is used to do hand work such as arrows, turn signs, cross-hatching or other things which can not be accomplished by using the truck. Three employees work on this truck, a driver, an operator who turns switches on or off, and an employee who sets cones or acts as a helper. One of the employees does beading by hand, while another moves the hoses.

There are four employees assigned to the thermal plastic operation. Either one or two employees do the layout, sweeping, beading, setting cones or traffic control. Another employee sweeps the pavement and helps the layout men. One employee handles the boilers. The thermal plastic is placed in the boilers located on the back of the truck to be heated. Another employee applies the heated thermal plastic to the pavement with a hand applicator.

The paint striping operation involves three employees. The employees use traffic paint and glass beads in this operation. One of the employees runs the hand painting machine. One or two employees perform layout and beading. One employee performs traffic control.

The reflector operation utilizes four to six employees. There is a truck driver who also operates the controls for a saw while inside the truck. The saw makes holes which are cleaned out with either a compressor or a blower. Three to four employees mix epoxy, pour it into the cleaned hole, and then set a marker in the hole.

The temporary tape striping operation involves putting a 360 foot roll of tape on the construction area and rolling the tape out on the pavement. Three employees perform this function. Two of the employees are on layout and one employee operates the paint machine.

All project work is performed by a particular crew. During peak periods the Employer has nine crews, each crew consists of three to seven employees. The crews include; a paint crew, universal crew, reflector crew, waterblasting crew, and epoxy crew. There are also two thermal and slurry crews. The employees are assigned to a crew based upon need, experience and compatibility with other members of the crew. There are no crews which consist solely of members of one particular union.

Each crew is headed by a crew chief. Six Local 14 employees and two to three Local 673 employees are regularly classified as crew chiefs. The crew chiefs are responsible for the operation of the crew. They direct and assign their crew members to perform particular tasks, such as operating the equipment. However, crew chiefs do not have the authority to hire or fire. The parties stipulated at the hearing, and I find, that the crew chiefs are not supervisors within the meaning of the Act.

According to Michael Kowalewski, Vice President of Operations, no specialized training or skills are required in order to obtain employment. Employees learn their work through on-the-job experience. Although the layout work requires the ability to read a blueprint, employees learn this skill through a trial-and-error process. The record indicates that ten of the thirteen Local 14 members who perform layout work read blueprints; and, four of the seventeen Local 673 members who perform this work read blueprints. Further, the employees elect to join either Local 14 or Local 673 when they are hired. An employee's choice of representative determines their wage rate and benefits package according to each respective contract. Holidays and days-off are the same for all employees.

Employees classified as painters or teamsters, according to their membership in Local 14 or Local 673 respectively, perform a variety of tasks in the Employer's pavement costings and pavement markings operations. According to Kowalewski, one teamster employee spends 100% of his time in the shop as a loader preparing the trucks for the next work day. Another teamster spends the majority of his time loading trucks or working as a mechanic. This employee has also worked as a flagger, coner and helped with layout. Four painters and nine teamsters perform the primary functions of helpers. Helpers are assigned to the crews to perform such tasks as layout, loading boilers and materials, beading and moving hoses. Other employees may at various times perform different jobs on a project. For example, eight painters and three teamsters have operated the Kelly hand paint applicator. The hand paint applicator controls the application of regular paint to the surface for arrows, "only" signs and other markings which can not be painted with the paint truck. Nine painters and seven teamsters have operated the spray applicator on trucks equipped with the paint long liner machine. Two painters and three teamsters have driven the long liner paint trucks. Two teamsters drive the slurry seal truck. Five teamsters have driven a truck during some aspect of a construction project.

All of the employees who are classified as painters and seventeen of the employees classified as teamsters perform layout work. Layout work involves identifying an area that has to be striped. At the hearing, a painter testified that he spends approximately 80% of his time in layout or operating a paint machine.

The record further reveals that the painters and teamsters have performed similar tasks on projects. For exam-

ple, six teamsters have worked on grinder crews and five painters have operated a hand grinding used to remove old marks from highways. The record indicates that painters and teamsters have both worked in the Employer's sandblasting and waterblasting operation. The Employer first began using sandblasting and waterblasting in 1987 to prepare pavement for the epoxy coating operation. Five painters and three teamsters run the waterblasting operation. One painter and one teamster operate the saw used in the reflector operation, which is operated by controls located inside the truck. Three painters and four teamsters work on the reflector crew performing reflector installation. Eight painters and eight teamsters have performed traffic protection duty which included coning. Coning is performed from the back of a truck and it involves placing cones on the street as barricades. Two painters and four teamsters have performed traffic control functions. One painter has worked in the temporary tape striping operation by installing tape around the construction area and on the pavement. Six painters and six teamsters have served as boiler people on the thermal plastic crew which involves heating solid thermal plastic in the boilers located on the back of the truck in order to apply the paint to the roads. Two painters and eight teamsters have cleaned and prepared the pavement for the operation. One painter and two teamsters have worked in the waterproofing membrane operation which involves squeegeeing the cool tar and fiberglass membrane on the roads. One painter has worked on the back of the truck in the slurry seal operation.

The record indicates that the equipment is provided by the Employer. Trucks and other equipment are not designated for use by any particular member of either union. According to Kowalewski, approximately 80% of the Employer's construction work does not involve driving as a primary function. The Employer has eighteen trucks and each crew is assigned one or more trucks. The crew chief decides which members of the crew will operate the trucks. The crew chief may either drive the truck himself or assign a crew member to drive.

A driver's license does not appear to be a condition of employment. The Employer's does not verify the current license status of its employees. The record indicates that two teamsters do not have driver's licenses. Only one of the painter's did not have a driver's license in 1987. Although painter's are not required to have a chauffeur's license or a Class C license, three painters who have driven the long liner paint trucks have Illinois Class C Chauffeur's licenses.

The record indicates that one painter has driven the marker installation truck. Two teamsters have driven the slurry seal truck. One teamster has driven the oil truck from the job site to the yard. Five painters have driven a truck back and forth from the job site to the yard. The record indicates that in 1987, a painter drove the truck back and forth, as indicated above, for a two to three month period during the Employer's peak season. Seven painters and five teamsters have driven trucks at various times or during some aspect of a construction project.

The Employer has an apprenticeship program with Local 14. Local 673 does not have an apprenticeship or training program with the Employer. Two painters are currently enrolled in the apprenticeship program operated by the Painter's Union Local 14 in the pavement striping industry. The apprenticeship program consists of on-the-job training conducted by the Employer. During the training period, the apprentice painter receives 40% of the journeyman painter wage rate. After completing the required 5000 hours of training the apprentice painter's wage rate is increased to the journeyman wage rate. A painter named Albert Hernandez trains the painter apprentices. One other journeyman painter completed the apprenticeship training two years ago, while employed by the Employer.

The parties stipulated at the hearing that the Employer makes payments to Local 14's fringe benefit funds on behalf of the employees who are members of that union, and to Local 673's fringe benefit funds on behalf of the employees who are members of that union.

The Board has held that units in the construction industry may be appropriate on the basis of either a craft or departmental unit or so long as the requested employees are a clearly identifiable and homogeneous group with a community of interest separate and apart from other employees. *R. B. Butler, Inc.*, 160 NLRB 1595 (1966); *Del-Mont Construction Co.*, 150 NLRB 85 (1964).

Based on the foregoing and the entire record, I find that the only appropriate unit herein is the over-all unit petitioned for by the Employer. The record does not show that there is a smaller appropriate craft unit or other homogeneous grouping of employees with a community of interest sufficiently distinct from other employees in the petitioned over-all unit to constitute the separate units sought by either Local 14 or Local 673. All the employees in the petitioned-for-unit share a community of interest. Regardless of their designation as either a painter or a teamster, employees employed by the Employer perform similar tasks on the construction projects. No particular job classification has exclusively one type of job function on a project. All employees assigned to a particular crew have frequent contact with one another while working and perform a variety of tasks whether they are classified as painters or teamsters. Both painters and teamsters operate the paint equipment, perform layout functions and drive the trucks used during the course of a construction project. All employees on a crew are under the same supervision structure. The crew chief who assigns directs the tasks during an operation may be either a painter or a teamster. There is no separate supervision over employees based on their union affiliation. *Brown S. Root, Inc.*, 258 NLRB 1002 (1981); *Dick Kelchner Excavating Co.*, 236 NLRB 1414 (1978). Cf. *Kind S. Knox Gelatin Company*, 104 NLRB 1034 (1953).

The record indicates that no particular skills are required for the job. All new employees receive on-the-job training. Painters are not hired due to their skills as painters but are designated as such based on their union designation rather than level of expertise in the craft. The record indicates that some painters receive journeyman status through an apprenticeship program. However, no specific painter skills or experience is a controlling factor of employment. Further, although painter and

teamster employees receive different wages and benefits, the different wage scales are based upon union affiliation and contractual mandates rather than an employer's assessment of an employees' skill or aptitude for the job. Cf. *ECM, Inc.*, 264 NLRB 1077 (1982).

The evidence indicates, and I find, that the employees in the petitioned-for-unit work in an integrated process. The evidence indicates that the Employer's work crews work together and function as a team with respect to the job operations. Regardless of their work assignment on a crew, the employees work together in close proximity in an interrelated process. *The Longcrier Company*, 277 NLRB 570 (1985); *Atlanta Division of S.J. Groves and Sons Company*, 267 NLRB 175 (1983); *Brown S. Root, supra*; *Sunray Ltd.*, 258 NLRB 517 (1981).

I do not find that the collective bargaining history of the Employer-Petitioner and the two unions involved herein requires a finding that the two historical units constitute the appropriate units herein. The Board has long given substantial, but not conclusive, weight to a prior history of collective bargaining, *General Electric Company*, 107 NLRB 70, 72 (1953). In *John Deklewa and Sons, supra*, the Board set forth that in making unit determinations where the employees in question were covered by 8(f) agreements, the appropriate unit will normally be the unit as defined in the agreements. Nevertheless, the Board has also long held that it will not give controlling weight to a history of collective bargaining "to the extent that it departs from statutory provisions or clearly established Board policy concerning the composition and scope of bargaining units." *William J. Keller, Inc.*, 198 NLRB 1144, 1145 (1972). Herein, the record shows no rational basis exists for the two historical units other than being purely historical accidents. The employees in the two units have interchangeable job functions, work closely together on a day-to-day basis, and work together in a highly integrated process. The record reveals no identifiable characteristics which would separate and identify employees in one unit from thsoe in the other unit in terms of job functions and characteristics. Any differences that do exist are solely the result of differences in benefits set out in the collective bargaining agreements. Accordingly, I find that the two historical bargaining units depart from clearly established Board policy concerning the scope of the units as each unit does not constitute a clearly identifiable and homogeneous group with a community of interests separate from other employees. *R.B. Butler, supra*; *Del-Mont Construction Co., supra.*

I also find tht the cases cited by Local 14 in support of its position that the painters constitute an appropriate separate bargaining unit are distinguishable from the instant case because the cases cited all involved clearly identifiable and homogeneous groupings of employees with separate communities of interests, and no such finding can be made herein.