

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

GENERAL TRADE CORPORATION

Employer

and

Case 6-UC-496

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL UNION 459, AFL-CIO

Petitioner

**REGIONAL DIRECTOR'S DECISION, ORDER AND CLARIFICATION
OF BARGAINING UNIT**

The Employer, General Trade Corporation, operates a coal receiving and processing facility in New Florence, Pennsylvania. The Petitioner, International Brotherhood of Electrical Workers, Local Union 459, AFL-CIO, which represents a unit of approximately 13 material handling workers employed by the Employer, filed this petition under Section 9(b) of the National Relations Act seeking to clarify the existing bargaining unit to include the Employer's approximately 11 construction employees.¹ A hearing was held before a hearing officer of the National Labor Relations Board. Following the hearing, the parties filed timely briefs.

The Petitioner contends that the construction employees at issue perform work previously performed by the bargaining unit material handling workers, and that they share a sufficient community of interest with the bargaining unit employees to justify their inclusion in the unit.

¹ The construction employees in dispute herein are: Chris Uncapher, Monty Hall, Donald Wynn, Steve Akins, Michael Detwiler, Rick Kinnan, Don Grimm, Tim Sheridan, Jeff Mundorff, Greg Hughes and Keith Mundorff.

The Employer argues that the petition should be dismissed as untimely filed. In this regard, the Employer asserts that the current collective bargaining agreement contains a clearly defined bargaining unit. The Employer further asserts that the construction employees should not be included in the existing unit because the parties have historically excluded temporary employees, the Union has never objected to the Employer's use of non-unit construction employees and the bargaining unit material handling workers have never performed solely construction work. Finally, the Employer asserts that the construction employees lack a sufficient community of interest with the represented employees.

I have considered the evidence and the arguments advanced by the parties. As discussed below, I have concluded that the unit clarification petition is not untimely. I have further concluded that the bargaining unit should be clarified to include the construction employees inasmuch as these employees perform the same basic functions as the functions historically performed by members of the bargaining unit. Accordingly, I will clarify the unit to include the construction employees.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that support each of my conclusions on the issues.

I. OVERVIEW OF OPERATIONS

The Employer, a Pennsylvania corporation, operates a truck coal receiving facility in New Florence, Pennsylvania, the sole facility involved in this matter. The Employer's facility is located along the Conemaugh River, between Johnstown and Blairsville, Pennsylvania, on land which once housed a coal preparation plant. The Employer's facility receives coal which is delivered by truck from various mines in Pennsylvania. The coal is then segregated and blended to specification for the Conemaugh Power Station.

In November 2003, the Employer entered into a contract with Key Con Fuels, a Division of Key Con Partners, to design, construct and operate a coal blending facility. Initially, the

design and construction portion of the project was projected to occur within 12 to 15 months, after which the Employer's operation of the facility would commence. The Employer's original plan involved constructing six hoppers in which coal would be deposited and blended. In 2004 the Employer hired its initial group of employees who were to construct the facility and then become employed in the coal processing operation. However, the designing and construction of the facility were delayed due to permit problems.

While the applicable permit applications were being reviewed by the Pennsylvania Department of Environmental Protection ("Pennsylvania DEP"), the Employer was permitted under its existing mining permit only to reconstruct certain portions of the site.

Within the first 12 months, before the Employer could begin any coal operations, the Employer's employees installed the first set of truck scales and constructed storage bins 2 and 3.² After the initial reconstruction, the Employer could operate at a reduced capacity to deliver coal to the power plant. Today, trucks delivering coal enter the Employer's site through the main entrance. The trucks then proceed over the inbound truck scales to the sampler and then unload the coal at bins 4 and 5. Coal unloaded there is taken by conveyor belt to the 10,000 ton storage silo and can be transported elsewhere by the A-belt conveyor belt extension. The coal trucks then proceed through the truck wash and outbound truck scales area to the exit.

Material handling workers receive the coal, handle the coal storage and processing and transfer it to the power plant. Their duties have also involved any reconstruction projects to make the facility operable, as well as operating heavy equipment and maintaining the Employer's equipment and facilities.

The facility is under the overall direction of Chief Operating Officer Allen S. Goldberg. Reporting to Goldberg is Craig Houston, who oversees both the material handling workers and the construction workers employed at the facility.³

² The bins are storage areas where delivery trucks unload the coal.

³ The parties stipulated, and I find, that Craig Houston is a supervisor within the meaning of Section 2(11) of the Act based on his authority to assign employees and responsibly to direct them.

II. BARGAINING HISTORY

In March 2004, the Union became the voluntarily recognized collective-bargaining representative of a unit of employees performing the reconstruction and operation of the Employer's facility, referred to in the record as the TCRF, or truck coal receiving facility. After negotiations, the parties entered into a collective-bargaining agreement effective from July 11, 2005 to July 10, 2010, in which the Employer's continued recognition of the Union as the representative of the full-time material handling workers at the facility, excluding all other employees, is embodied.

The collective-bargaining agreement contains Schedule B setting forth the various job classifications encompassed within the terms "material handling workers." In years one through three of the contract there were ten job classifications, including construction class-B and construction class-A.⁴ The duties of the construction class-B and construction class-A classifications set forth in Schedule B include welding, carpentry, cement finishing and layout. Familiarity with all of the tools of the trade and possessing the capabilities of a heavy equipment operator were also required.

In years four and five of the collective-bargaining agreement, the number of job classifications is reduced to five classifications. As set forth in Schedule B, the auger support and auger operator position were eliminated in years four and five of the contract due to automation and by the auger operator being trained to perform auger operator/technician duties, respectively. In addition, the positions of construction class-B and construction class-A were to become operator/maintenance class-B and operator/maintenance class-A after the completion of construction. The duties of operator/maintenance class-B and operator/maintenance class-A include proficiency at welding, carpentry, HVAC, cement finishing and layout. Familiarity and capability with all of the tools of the trade and equipment operation are also required.

⁴ The other eight classifications were: auger support, auger operator, auger/technician, labor, control room operator, control room operator/technician, heavy equipment operator class-B, heavy equipment operator class-A, construction class-B and construction class-A.

The record indicates that during negotiations for the collective-bargaining agreement the parties did not discuss whether there was a difference between new construction work and reconstruction work at the existing facility. As to placement of construction employees in or out of the unit, the record indicates no further discussion beyond the agreement that construction class-A and construction class-B employees would become maintenance class-A and maintenance class-B employees after the completion of the construction.

In early 2009, the Union asked the Employer why four employees had not yet joined the Union. The Employer's response was that these individuals had not yet completed their probationary period.⁵ Thereafter, the Union requested a listing of all employees who performed unit work. The Employer responded with a list of material handlers.

On March 23, 2009, and April 22, 2009, the Union sent dues deduction authorizations for 8 individuals and 4 individuals, respectively, and requested that the Employer begin deducting dues in April 2009. The Employer did not respond to these letters.

On April 6, 2009, unit employee and shop steward Steven Tombs filed a grievance claiming he should have been assigned overtime on April 4 and 5, 2009. The work in dispute involved the construction of the crusher building, cleaning up of the site and spreading gravel. At a grievance meeting on May 13, 2009, the Employer's representative informed the Union representative that one of the newer unit material handling workers, Donald Wynn, was being transferred to the construction side of the business. The Employer's representative also stated that the Union could represent the material handlers, but the Employer was hiring construction employees who were not part of the bargaining unit. The Union was also told that the Employer might decide to transfer the construction employees to the unit after the construction of the facility was completed. The Employer denied the grievance stating that overtime on construction work would not be offered to bargaining unit employees. Thereafter, the Union filed the instant petition.

⁵ The contractual probationary or "introductory" period is 120 days or 960 hours of employment.

III. DUTIES OF MATERIAL HANDLING WORKERS AND CONSTRUCTION EMPLOYEES

As noted above, despite plans to do so, the Employer could not design and construct its facility in 2004 because the Pennsylvania DEP did not accept the Employer's application for the required air quality permit. During the period when the Employer was waiting for the Pennsylvania DEP to modify its existing permit, which ultimately took place in October 2008, the Pennsylvania DEP allowed the Employer to reconstruct certain aspects of the site because the Employer had a mining permit and a contract with Key Con Fuels.

The record establishes that from the time the Employer began operations in 2004 until the parties entered into the collective-bargaining agreement in July 2005, the employees employed by the Employer worked on reconstructing the facility. The reconstruction projects which were performed between 2004 and July 2005 included such projects as installing the initial set of truck scales and constructing bins 2 and 3. After the collective-bargaining agreement was executed in July 2005, approximately six bargaining unit material handling workers continued to perform significant amounts of construction work as needed. During the period from July 2005 until April 2009, these unit employees installed a second set of scales, built bins 4, 5 and 6 and the A-belt extension. Certain unit employees were also assigned to install the base of the crusher building. The unit employees also performed the coal handling duties and operated and maintained equipment inasmuch as the Employer's reconstruction projects were intermittent. It appears from the record that some material handling employees devote the majority of their work time to non-construction duties. For example, one material handler is the designated auger operator on dayshift. On the evening shift, one material handler acts as a laborer and the other operates the loader.

The record reflects that since 2007, the Employer has contracted with outside construction contractors whose employees have assisted the Employer's employees in various construction projects. The record further reflects that since 2007 the Employer also directly

employed what it characterized as temporary construction employees to assist with these projects. In this regard, the Employer contends that new or pure construction work is distinguishable from reconstruction work performed by material handling workers, and that since 2007 the Union did not object to the employment of the temporary construction workers.⁶

In 2007, at least seven employees were hired for construction work. None of these individuals remained employed beyond the contractual probationary period. In 2008 and 2009, the Employer hired approximately 15 construction employees to complete the construction work at the facility, which is projected to be completed in the next 12 months and includes the construction of several new structures, a reclaim tunnel and stacking tubes.

It is undisputed that the Employer never notified the Union that non-unit construction workers were employed at the site. Moreover, the record reveals that only two of the construction employees hired in 2007 and 2008 worked beyond the 960 hour, or 120 day, probationary period. It is likewise undisputed that the skills necessary to perform material handling work and construction work are similar, and that the reconstruction work to modify existing structures on the Employer's site is comparable to performing construction on new buildings.

The record establishes that unit material handling workers performed construction work until April 2009. In many cases while performing construction tasks, the material handling workers have worked directly with non-unit construction employees. For example, maintenance class-A employee Robert Ruddock testified that he worked on the construction of the truck scales, wheel washers, coal handling conveyors and bin 4⁷. Ruddock also took part in the project involving the connecting of two trailers to create the Employer's office building. On the portions of these projects which occurred after construction employee Chris Uncapher was hired in February 2009, Ruddock worked directly with Uncapher. In March 2009, Ruddock and unit

⁶ The collective bargaining agreement provides that the Employer may hire temporary employees for a period of up to three months, and that the three month period can be extended for an additional three months with the consent of the Union.

⁷ Bin 4 is a drive-over truck dump.

material handling worker David Blackburn constructed part of the tower of the crusher building with non-unit construction employee Richard Kinnan. The record establishes that Ruddock and Blackburn pulled the steel into place at the top of the crusher while Kinnan worked on the same project. During the same time period Ruddock poured concrete with construction employee Monty Hall, cut steel columns with construction employee Steve Akins, and built a handrail for bin 5 with construction employee Don Grimm. Ruddock also testified that he personally observed material handling workers Blackburn, Oliver, Tomb, Silk and Plachta working directly with construction employees.⁸

The record also contains evidence that construction employees have assisted and/or worked directly with bargaining unit material handling workers. For instance, in early 2009, construction employees and material handling workers worked together for approximately one week to unclog the Employer's 10,000 ton silo. This work involved using air lances from both the top and bottom of the silo. The record also reveals that construction employees have been utilized to perform general labor and clean-up work, such as the shoveling of coal, with material handling workers. When construction employee Donald Wynn first became employed in January 2009 he worked on the 11 p.m. to 7 a.m. shift where he performed material handling work for several weeks. In addition, the record reflects that bargaining unit employee Nate Matko, who performs electrical work, is regularly assisted by two to four construction employees. Finally, the record reflects that the Employer's crane is regularly operated by both unit material handling workers and non-unit construction employees.

IV. ANALYTICAL FRAMEWORK

Unit clarification "is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit

⁸ Currently, construction employees are scheduled to work four 10 hour days on day shift while the material handling employees work rotating shifts. The record reflects that until April 2009 the bargaining unit employees and the construction employees worked the same hours.

placement or, within an existing classification which has undergone recent, substantial changes. . . .” Union Electric Co., 217 NLRB 666, 667 (1975). Similarly, in circumstances where the parties cannot resolve the placement status of non-determinative challenged voters, a unit clarification petition is appropriate. Kirkhill Rubber Co., 306 NLRB 559 (1992), citing Niagara University, 227 NLRB 313 (1976) (Board clarified unit during certification year to include four challenged voters.)

Clarification is not appropriate, however, for upsetting an agreement of a union and employer or their established practice concerning the unit placement of particular employees. Union Electric Co., supra at 667. Neither will the Board entertain a unit clarification petition seeking to accrete a classification historically excluded from the unit, unless the classification has undergone recent, substantial changes. Kaiser Foundation Hospital, 337 NLRB 1061 (2002), citing Bethlehem Steel Corp., 329 NLRB 243, 244 (1999).

In Wallace-Murray Corp., 192 NLRB 1090 (1971), the Board refused to entertain a unit clarification petition filed midway in the term of an existing collective-bargaining agreement which sought to exclude from a unit otherwise made up of nonguards, certain individuals whom the parties agreed were statutory guards. Noting that the bargaining unit was “clearly define[d]” in the agreement to include the guards, the Board said that to allow such a midterm petition would be disruptive of a bargaining relationship voluntarily entered into between the parties when they executed the contract. The petition in that case was therefore dismissed without prejudice to the filing of another petition at an appropriate time.

The Employer contends that, based on the Wallace-Murray doctrine, the instant petition is untimely because the collective-bargaining agreement clearly defines the bargaining unit as consisting of material handling workers and excluding all other employees. However, the unit in this matter is not clearly defined so as to exclude construction employees. Although the recognition clause of the parties’ collective-bargaining agreement states that the Union represents all material handling workers, the parties negotiated a schedule of job classifications

encompassed within the title “material handling workers” such that in years 1 and 2 of the collective-bargaining agreement construction employees were to be included in the unit. In addition, in years 3 through 5 of the agreement construction class-A and construction class-B would become maintenance class-A and maintenance class-B, after the completion of the construction. In these circumstances, it cannot be said that the bargaining unit is clearly defined to exclude construction employees. As noted herein, the Employer has been unable to complete the construction in accordance with its initial projection.

As to the Employer’s assertions that temporary employees have historically been excluded from the bargaining unit and that the Union knew for at least two years and did not object to the use of non-unit construction workers, the record establishes that the Employer did not notify the Union until May 2009 that it planned to employ long-term non-unit construction workers to perform work that had been performed in part by the material handling employees. In addition, the probationary period for new employees is 120 days or 960 hours. The record establishes that one employee, who worked more than 960 hours in 2007, was brought into the bargaining unit. Only one employee hired in 2008, Chris Uncapher, worked more than 960 hours, and he is one of the construction employees in dispute in this proceeding.

Inasmuch as the Union was only recently informed that the employer intends to have a construction division staffed with non-unit employees it cannot be established that the Union should have objected to the Employer’s hiring of new employees to perform construction tasks. Based on the record evidence, I cannot conclude that the parties had any agreement to exclude construction employees who worked beyond the contractual probationary period or that the Union acquiesced in some manner to having non-unit employees perform tasks previously performed by the unit employees.

Having determined that the petition is not untimely and that the Union has not acquiesced in the use of non-unit construction employees, there remains for determination the placement of the construction employees. As stated above, I find that the construction

employees are properly included in the unit.⁹ The record establishes that the construction workers perform the same basic functions that historically have been performed by bargaining unit material handling workers, including the duties set forth in the description of the operator/maintenance class-B and class-A contained in the collective bargaining agreement such as welding, carpentry, cement finishing, HVAC, equipment operation, as well as shoveling of coal and general labor work. Moreover, on many occasions, material handling workers and construction employees have worked together on projects such as cleaning out the silo, assisting with electrical work, constructing the office trailer and installing the bins.

The Employer attempts to differentiate new or “pure” construction work from reconstruction work. The Employer thus argues that the inclusion of construction job titles for the first two years of the agreement were meant to be temporary jobs designed to deal with the fact that during the initial period of the contract some bargaining unit material handlers would be performing both construction and material handling functions. The Employer notes that it was anticipated that these dual functions would cease because the construction should have been completed by the third year of the contract. Finally, the Employer argues that the collective bargaining agreement cannot be read as covering pure construction work.

The fact of the matter is that the construction contemplated by the parties is not yet complete and it appears from the record that most, if not all, unit employees have performed some construction tasks in the course of their employment. Moreover, until April 2009, at least four of the unit material handling workers continued to perform significant amounts of the construction work undertaken by the Employer.

Based on the above and the record as a whole, noting both that the material handling workers have historically performed construction tasks at the facility and until April 2009 material

⁹ I note that because the record establishes that the construction employees are performing the same basic functions as the material handling workers, this classification will be included in the unit and need not be added to the unit by accretion. Developmental Disability Institute, 334 NLRB 1166 (2001); Premcor, Inc., 333 NLRB 1365 (2001).

handling workers and construction employees regularly worked together on both construction projects and material handling tasks, I find that the construction employees are appropriately included in the unit of material handling workers. Premcor, Inc., 333 NLRB 1365 (2001); Brockton Taunton Gas, Co. 174 NLRB 969, 971 (1969).

V. 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 Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

VI. ORDER

IT IS HEREBY ORDERED that the Petitioner's petition for unit clarification is granted, and that the bargaining unit of material handling workers at the Employer's facility is hereby clarified to include all construction employees employed by the Employer at the Employer's facility in New Florence, Pennsylvania.

VII. 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. 20570-0001.¹⁰ This request must be received by the Board in Washington by 5 p.m., EST (EDT), on . The request may **not** be filed by facsimile.

Dated: August 4, 2009

/s/Robert W. Chester

Robert W. Chester, Regional Director

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355-7700

385-7533-2060

¹⁰ 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.