

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20

ENGINEERING & CONSTRUCTION COMPANY, INC<sup>1</sup>

Employer

and

Case 20-RC-18298

INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS, LOCAL 302

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Engineering & Construction Company, Inc. (Employer) provides electrical construction, maintenance, repair, and other types of electrical services. By its amended petition, International Brotherhood of Electrical Workers, Local 302 (Petitioner), seeks to represent a craft unit of journeymen, apprentice and trainee electricians employed by the Employer at its Benicia, California facility; excluding temporary journeymen/apprentice and trainee electricians, officers, office personnel and all employees above the level of journeyman electrician. There are two employees in the unit urged by Petitioner.

The Employer contends that to be appropriate the unit must also include employees in the classifications of electrical scheduler, electrical maintenance technician, electrical designer, electrical consultant, electrical designer/instrumentation employee and electrical compliance officer. There are about seven to ten employees in the unit urged by the Employer. Petitioner asserts that these additional employees do not share a significant community of interest with the craft employees it seeks to represent and should be excluded from the unit.

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<sup>1</sup> The Employer's name appears as amended at the hearing.

While the Employer seeks to include the classifications of project manager, general foreman and foreman in the unit, the Petitioner seeks to exclude individuals in these classifications from the unit on the basis that they are statutory supervisors.

Finally, the Petitioner seeks application of the *Daniel/Steiny formula*<sup>2</sup> to determine voter eligibility and the Employer contends that the *Daniel/Steiny formula* should not be applied.

For the reasons discussed below, I find that the petitioned-for craft unit comprised of journeymen, apprentice and trainee electricians, which includes the position of electrical maintenance technician and electrical consultant, and excludes the positions of electrical scheduler, electrical designer, electrical designer/instrumentation employee, and electrical compliance officer, and other classifications excluded by the parties' stipulations, is an appropriate craft unit. I also find that the electrical foreman is not a statutory supervisor and that he shares a substantial community of interest with other craft unit employees and should be included in the unit. I further find that the project manager should be excluded from the unit as a statutory supervisor. As the Employer currently has no general foremen other than the project manager, I make no finding regarding the inclusion or exclusion of the general foreman classification. Lastly, I find that the *Daniel/Steiny formula* is appropriately properly applied herein to determine voter eligibility.

**I. Stipulations.** The parties stipulated, and I find, that journeymen, apprentice, and trainee electricians should be included in the unit; and that excluded from the unit should be: owners, office clerical employees, human resource managers, purchasing agents, inside salespersons, guards, managers and supervisors as defined in the Act.

The parties further stipulated, and I find, that workers referred to the Employer by temporary employment agencies who do not appear on the Employer's payroll should be excluded from the unit.

**II. Facts.** The Employer's facility is located in Benicia, California. It provides electrical construction, maintenance, repair, and other types of electrical services.<sup>3</sup> About

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<sup>2</sup> *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967), and *Steiny and Co.*, 308 NLRB 1323, 1324 (1992).

90% of its customers are industrial facilities such as oil refineries and chemical plants located in Northern California. The Employer's only officer is Operations Manager Brian Hay who manages the Employer's business and handles all human resources functions.<sup>4</sup> About 12 individuals were employed by the Employer at the time of the hearing. About half of the Employer's work is construction project work and the other half is service contract work.

**Construction Project Work.** At the time of the hearing, the Employer was working on two construction projects.<sup>5</sup> Four individuals performed electrical work on these projects: Project Manager Chris Hose and Foreman Chris Little, both journeyman electricians; and Trainee Electricians Theodore Michels and Shane Stifle.<sup>6</sup> As noted above, the Petitioner would exclude Hose and Little from the unit as statutory supervisors while the Employer takes the contrary view. The facts regarding Hose and Little are discussed below.

On construction projects, journeymen, apprentice and trainee electricians work together on a crew under the direction of a foreman, general foreman and/or project manager, depending on the size of the job and number of crews. A crew typically consists of from two to ten journeymen, apprentice and/or trainee electricians and a foreman. If there are multiple crews and foremen on a job, a general foreman oversees

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<sup>3</sup> The Employer holds C-10 and C-7 contractor's licenses. The C-10 license allows the Employer to do electrical work and its C-7 license allows it to perform work on voice, video, data, and other low voltage systems.

<sup>4</sup> The record reflects that the Employer is co-owned by two individuals, one of whom was the Employer's former President, Terry Hay, the father of Operations Manager Brian Hay. However, at the time of the hearing, Terry Hay was not employed by the Employer and it had no other officers or managers besides Brian Hay.

<sup>5</sup> These projects were for General Chemical and Criterion Catalysts & Technologies (Criterion), the latter of which has a facility in Pittsburgh, California. The Employer obtains work on construction projects by making lump-sum bids.

<sup>6</sup> Hay testified that during the three months prior to the hearing, Electrician Trainee, Stephan Podplesky, had worked for the Employer on an intermittent basis; Hay testified that the Employer had recently contacted Podplesky about his availability for a future construction project. According to Hay, the Employer had also recently contacted another electrical trainee, Jason Farris, for possible future employment on a project; Farris had most recently worked for the Employer prior to January 2010. Hay testified that the last time that the Employer had a significant number of employees had been in September 2009, when it completed a construction project for Conoco.

the foremen. A project manager oversees the Employer's projects. The crew's work includes running conduit, pulling wire, hooking up lights, motor control circuits, transformers, etc. In addition to construction project work, the Employer's journeymen electricians also sporadically perform electrical maintenance and service/repair work for customers.

Hay testified that the Employer requires its electricians to possess California State electrical certifications,<sup>7</sup> and the credentials necessary to obtain entry to customer facilities, such as Bay Area Training Corporation (BATC) and Transportation Worker Identification Credential (TWIC) cards. Other certifications may also be required, including those for CPR/First Aid, and those needed to operate equipment such as forklifts.<sup>8</sup> In hiring journeymen and trainee electricians, the Employer seeks applicants by word-of-mouth referrals, through the State Employment Development Department, and occasionally through a temporary employee agency specializing in electrical construction work.<sup>9</sup> The Employer prefers to hire electrical employees who have previously worked for the Employer's customers or for customers within the same industry. Hay testified that when the Employer has hired apprentice electricians, they have been referred by a recognized apprenticeship program. According to Hay, the Employer has not employed any apprentice electricians since about 2008.

Journeyman electricians are paid between \$31 and \$34.50 per hour and trainee electricians are paid between \$21 and \$28.50 an hour. All of the Employer's employees

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<sup>7</sup> In order to work as a general electrician for a C-10 contractor, an individual must have passed the State certification examination and worked 8000 hours for an electrical contractor installing, constructing or maintaining electrical systems covered by the National Electrical Code. In order to qualify as an electrical trainee, an individual must be enrolled in a State-recognized school and work directly under the supervision of a certified electrician. After accumulating 8,000 hours of on-the-job experience and 720 hours of related and supplemental instruction and passing an examination, the trainee may work as an electrician. As indicated above, the Employer had no apprentice electricians at the time of the hearing, but apprentices must be registered with the State and graduate from a State-approved apprenticeship program.

<sup>8</sup> BATC (Bay Area Training Corporation), is a credential that permits employees and contractors to enter an oil refinery in the San Francisco Bay Area after taking required safety training. A TWIC (Transportation Worker Identification Credential) is issued by the Transportation Safety Administration and is required to gain unescorted access to secure areas of Maritime Transportation Security Act (MTSA) regulated facilities and vessels.

<sup>9</sup> As indicated above, the parties have stipulated to the exclusion of such temporary employees.

are eligible for the same fringe benefits so long as they work the required number of hours for eligibility. Electrical construction crews also are given the use of two Employer trucks at their jobsites. Project Manager Hose, Foreman Little, and Trainee Electrician Shane Stifle, also have been given Employer cell phones.

**Service Contract Work.** About half of the Employer's work is performed under service contracts with Conoco-Philips (Conoco), Criterion Catalysts & Technologies (Criterion), or MECS.<sup>10</sup> Four employees work under service contracts: Electrical Maintenance Technician Alex Brown, Electrical Consultant Daniel Kolczak, Electrical Scheduler Ronald Mullins and Electrical Designer Rhonda Danielson. As discussed below, only two of the four service contract employees (Brown and Kolczak) working under these service contracts are journeymen, apprentice or trainee electricians.

All of the service contracts are labor-only contracts under which the Employer supplies workers to a customer to perform certain specified work. The customer pays the Employer for such personnel pursuant to monthly purchase orders submitted by the Employer. Service contracts are typically renewed annually at which time the parties renegotiate billing rates. Hay testified that the billing rates include the worker's hourly wages and benefits, and the Employer's overhead and profit.<sup>11</sup> Under the service contracts, the relationship between the Employer and the customer is described as that of an independent contractor and the workers are described as employees only of the Employer. The Employer is responsible for the withholding of taxes, social security, workers compensation, and/or other insurance premiums for its employees under these service contracts. Employees performing work under these service contracts work at the

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<sup>10</sup> Conoco has an oil refinery in Rodeo, California, about 13 miles from the Employer's facility. Criterion's plant is in Pittsburg, California, about 19 miles from the Employer's facility. MECS' plant is in Martinez, California, about 6 miles from the Employer's facility.

<sup>11</sup> The record contains service contracts between the Employer and Conoco, Criterion and MECS, and purchase orders generated pursuant to such contracts. Included is a purchase order dated January 22, 2010, issued under the Conoco service contract, for an "instrument tech to assist with planning duties for I/E Department for 2010," at the Conoco Rodeo, California refinery. The record also contains a purchase order under the Criterion service agreement, dated February 24, 2010, for the position of electrical maintenance tech at Criterion's Pittsburg, California plant, for specified hours at specified rates. Lastly, the record includes a copy of the a blanket purchase order under the MECS service contract, dated December 22, 2009, for Employer services for MECS from January 1, 2010 through December 31, 2010, at MECS's Martinez, California, plant.

customer's facilities. The Employer retains the sole right to discipline and/or terminate such service contract employees.

**Electrical Maintenance Technician Alex Brown (Criterion Service Contract).**

Alex Brown is a State-certified journeyman electrician who was hired by the Employer between 1998 and 2000, to perform electrical construction work. However, for the year preceding the hearing, Brown has worked as an electrical maintenance technician under a service contract between the Employer and Criterion. He works at Criterion's plant in Pittsburg, California. Brown works 40 hours a week, is paid hourly by the Employer, and is eligible for the same benefits as are its other Employer employees. The Employer determines Brown's pay rate and benefits. Since he has been working for Criterion, Brown has had infrequent contact with the Employer's other journeymen, apprentice and trainee electricians.

**Electrical Consultant Daniel Kolczak (MECS Service Contract).**

Daniel Kolczak is a journeyman electrician who was hired by the Employer between 2003 and 2005. For the past year, Kolczak has been employed on a part-time basis doing electrical consulting work under the Employer's service contract with MECS. Kolczak works at the MECS facility in Martinez, California.

**Electrical Scheduler Ronald Mullins (Conoco Service Contract).**

Ronald Mullins is a full-time employee of the Employer. He was hired to perform instrumentation work<sup>12</sup> on a Conoco construction project, which ended in about September 2009. Mullins is not a journeyman, apprentice or trainee electrician. About two weeks after he began working on the Conoco construction project, Mullins began doing electrical scheduling work for Conoco under a service contract. As noted above, the service contract states that the Employer is to provide: "an instrument tech to assist with planning duties for I/E Department for 2010." Essentially, Mullins's job is to schedule manpower for Conoco's maintenance department. He works on-site at Conoco's Pittsburg, California refinery, and has not been performing any instrumentation

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<sup>12</sup> Instrumentation work involves conducting loop-checks, bench calibrations, and other low voltage work under the Employer's C-7 license. Such work is done to ensure that instruments are correctly reading temperature, pressure, flow and other levels within a system. State certification is not required to perform instrumentation work. According to Hay, journeymen, apprentice and trainee electricians rarely perform instrumentation work and use different tools than those used in instrumentation work.

or any other type of work for the Employer since he went to work under the service contract. Mullins rarely has contact with other employees of the Employer. The Employer pays Mullins' wages and he is eligible for the same Employer benefits as are its other employees.

**Electrical Designer Rhonda Danielson (MECS Service Contract).** Rhonda Danielson works as an electrical designer under a service contract between the Employer and MECS. She works on-site at MECS' facility in Martinez. Danielson is not a journeyman, apprentice or trainee electrician. She has taken courses in the use of a computer-aided drawing (CAD) program to create design drawings and her primary responsibility at MECS is to update its electrical circuits for power, lighting and instrumentation using a CAD program. Danielson also makes some electrical and instrumentation design drawings for new construction work at MECS. Danielson has only intermittent contact with the Employer's journeymen, apprentice and trainee electricians, mostly with Electrical Consultant Daniel Kolczak, who also works for MECS under a service contract, as described above. Danielson is an hourly-paid, full-time employee of the Employer, and is eligible for the same fringe benefits as other employees of the Employer.

**Other (Non-Service Contract) Employees :**

**Electrical Designer/Instrumentation Employee Ronald Holmes.** Ronald Holmes has worked part-time for the Employer since about December 2009. Holmes is not a journeyman, apprentice or trainee electrician. He performs electrical design work and also a small amount of instrumentation and quality control work. Holmes spends about 70 to 80% of his work time at the Employer's facility doing design work for multiple customers. The remainder of his work time is spent in the field, mostly visiting customer facilities prior to creating electrical designs for them at the Employer's office. About 10% of Holmes's work time is spent in the field, doing instrumentation and/or quality control work. Hay testified that Holmes' job differs from Danielson's job in that Holmes works for multiple customers and does other types of work in addition to design work. Hay further testified that Holmes' design work generally involves making new project drawings, whereas Danielson's work generally involves updating existing drawings. Operations Manager Hay directs Holmes' work when he is in the office and

Project Manager Hose directs his work on those occasions when he is performing instrumentation or quality control work on a construction project. Holmes has only intermittent interactions with journeymen, apprentice and/or trainee electricians at such times.<sup>13</sup> Holmes is paid \$25 an hour and he is eligible for the same benefits as other employees.

**Electrical Compliance Officer Julie Suro.** Julie Suro is the Employer's electrical compliance officer. She works in the Employer's office and is not a journeyman, apprentice or trainee electrician. Her primary responsibility is to ensure that the Employer's electrician employees have the necessary certifications, credentials and training requirements for their jobs. Suro coordinates and schedules employee training. In addition, she handles payroll, purchasing and data compilation work for the Employer. Hay directs her work. She is paid hourly at a rate of \$22 an hour. Suro does not receive Employer benefits because she works too few hours under her part-time schedule to be eligible for them.

**Accounts Receivable/Accounts Payable Clerk.** Lilo Casier is employed by the Employer one or two days a week to handle the Employer's accounts payable/accounts receivable work. No party contends that Casier should be included in the unit.

**Project Manager Chris Hose.** The Employer asserts that Project Manager Chris Hose should be included in the unit. The Petitioner contends that Hose must be excluded as a statutory supervisor. Hose was hired by the Employer in 2005 as a general foreman and was immediately promoted to the position of project manager, his current job title. At the time of the hearing, Hose appeared to be the highest-ranking, and indeed the only, Employer representative besides Operations Manager Hay. Hose has 33 years of experience as an electrician and obtained his State certification as a journeyman electrician in about 2004. According to Hose, when he was promoted into the project

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<sup>13</sup> In this regard, Hay testified that in 2009, the Employer had a construction project which included both electrical and instrumentation work, and that the electricians worked in the same area as the employees doing instrumentation work. According to Hay, instrumentation work is usually only a small part of an electrical construction project and is included in the Employer's overall project bid. Hay testified that generally electrical and instrumentation work are performed by different employees and rarely does a journeyman electrician do instrumentation work. Hay testified that the Employer did not employ any employees who had both a journeyman electrician certification and the ability to do instrumentation work. Hay further testified that the electrician and instrumentation employees on a jobsite interact only insofar as is necessary to coordinate where conduit should be run.



manager position in about 2005, he handled projects mostly out of the Employer's office. However, since that time, the Employer's operations and workforce have decreased, and for the past couple of years, Hose has worked both in the office and in the field, performing the job of project manager, general foreman, foreman and regular journeyman electrician, depending on what is needed. Hay testified that Hose also does some estimating work for the Employer. Once the Employer has a construction job, Hose manages the job and is the Employer's highest-ranking on-site representative. He meets with the customer and obtains the project package, which contains the blueprints, job scope, time deadlines and safety sheets for the project. Hose reviews the project package and determines what tasks will be needed to complete the job in a timely manner. He decides how many journeyman, apprentice and trainee electricians will be needed to do the work. About half the time, Hose directly contacts journeymen, apprentice and/or trainee electricians, who are already employed by the Employer, and directs them to report to work on a project. If a project requires the Employer to hire additional employees, Hose notifies Hay, who directly hires new employees or obtains them through a temporary agency.<sup>14</sup> Hose has referred job applicants to the Employer for hire, but the record does not reflect how often his referrals have resulted in applicants being hired. Hose also sometimes participates in interviews of job applicants with Hay, but he has not directly hired employees. Hose testified that there are also occasions when he is informed by the Employer about a new project and told that workers are already being hired for it.<sup>15</sup>

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<sup>14</sup> Hay testified that the Employer has used temporary employees about 20 times in the past five years and there have been two occasions when a temporary employee became an employee of the Employer; one of these was an office worker. As indicated above, the parties have stipulated, and I have found, that temporary employees who are not on the Employer's payroll are excluded from the unit.

<sup>15</sup> Paul Dolittle, Petitioner's Assistant Business Manager and Membership Development Coordinator, testified that the collective-bargaining agreement between Petitioner and the National Electrical Council Association, for Contra Costa County, effective June 1, 2008, through May 31, 2011, (the NECA Agreement), covers the positions of foreman and general foreman; a foreman is required on a job whenever there are between 8 and 10 employees; and a general foreman is required if there are multiple foreman on a job. Under the NECA Agreement, the foreman and general foreman positions are treated differently from other positions with regard to grievance handling; that is, discipline involving a foreman or general foreman is handled by a Labor Management Cooperative Committee, whereas the discipline of other employees is handled through the regular contractual grievance procedure. According to Dolittle, both foremen and general foremen are paid hourly wages and receive the same fringe benefits as do other employees covered by the NECA Agreement.

On construction projects, Hose schedules, assigns and directs the work of employees on a daily basis. Hose has no independent authority to grant time off to employees. If employees are sick, they must call the office; they notify Hose only as a matter of courtesy. If changes to a construction project are required, Hose can independently decide to change the work assignments of the Employer's employees in response to such changes. However, if the changes require the expenditure of additional money for materials or the hiring of additional employees, Hose must refer the matter to Hay.

Hose testified that he has issued oral and written disciplinary warnings to employees. According to Hose, depending on how clear an employee's misconduct is, he will either give the warning to the employee on the spot or will consult with higher management before doing so. He testified that written warnings must be approved at a higher level. Hose testified that he has also terminated employees, but that 99% of the time, he has consulted with upper management prior to the termination and is directed how to proceed. However, Hose further testified that if an employee had done something "blatant," he would deal with it on the spot and had authority to do so. He also testified that there had been at least one occasion when his decision to fire an employee had been overturned by upper management.

Hose testified that a construction crew can be as small as two employees but that usually a crew consists of six to ten employees with a foreman overseeing them. According to Hose, a general foreman is necessary only if a project has such a large number of workers that multiple foremen are necessary to oversee them; on such occasions, a general foreman will oversee the foremen. Hose testified that he has worked as a foreman and/or general foremen on projects, depending on which is needed, and that the Employer has no other general foremen besides himself. In this regard, Hose testified that recently, the Employer has not needed another general foreman because it has not had any large projects. According to Hose, the last large construction project that the Employer worked on was a Conoco project that ended in about September 2009. The only person who acts as a foreman besides Hose is Chris Little.

At the time of the hearing, the Employer was working on two construction projects and Hose was spending several hours a day at each jobsite. According to Hose,

60% of his work on construction projects involves delegating tasks to other electrical employees, and 40% involves his performance of regular journeyman electrical work. Hose also writes up orders for materials and faxes them to the Employer; conducts safety meetings with employees at jobsites; and creates daily job analysis sheets, which identify safety hazards on the job and describe how the Employer's crew will safely deal with them.

In addition to his work on construction projects, Hose also handles after-hours service/repair calls from customers. In order to do so, he drives the Employer's service truck to the customer's plant and diagnoses the problem. Ninety percent of the time, Hose is able to repair the problem without any assistance, using the testing equipment and parts and materials on the truck. On a few occasions, when he is unable to make a repair without assistance, he directly contacts other journeymen, apprentice or trainee electricians, and asks them to come and help him. If a repair will incur additional costs for materials, Hose must call the Employer and obtain a purchase order. According to Hose, Foreman Chris Little sometimes covers for him on nights and weekends in performing such after-hours service/repair work when Hose is unavailable. Hose has no involvement with the Employer's service agreement work.

Hose has been paid a salary for about the past 18 months. Operations Manager Hay is the only other salaried worker of the Employer. Hose is eligible for the same fringe benefits as other employees except that the benefit plan contribution level differs for salaried as opposed to hourly paid employees. Hose has also been assigned an Employer truck, which is not a benefit given to other employees except that electrical employees are given the use of an Employer truck while working at jobsites. According to Hose, he was assigned the truck because he performs after-hours service/repair work. Hose also uses an Employer cell phone as do Foreman Chris Little and Trainee Electrician Shane Stifle.

**Foreman Chris Little.** Chris Little is a foreman for the Employer and a journeyman electrician. As indicated above, Little sometimes handles service/repair work after hours when Hose is unavailable. Little uses an Employer cell phone as does Hose and Trainee Electrician Stifle. Little is hourly paid and receives the same fringe benefits as other employees. The record does not show that Little has been involved in

hiring, disciplining or terminating any employees. As a foreman, his job requires him to direct the work of employees on his crew as well as performing journeyman electrical work. However, the record does not set forth the details regarding Little's direction of work or of the percentage of time he performs hand-on electrical work versus delegating work to other employees.

**Collective-Bargaining History & Industry Practice.** The parties stipulated, and I find, that there is no collective-bargaining history for the Employer. Regarding industry area practice, the current NECA Agreement for Contra Costa County describes the scope of the unit as follows:

Electrical employees employed under the terms of this Agreement shall do all electrical construction, installation, or erection work including fabrication or prefabrication of boxes, brackets, bends and nipples and all electrical maintenance thereon including the final running tests. This section shall not apply to the use of catalogue items which are available to contractors in the industry nor be applied or interpreted in any manner contrary to applicable law. This section shall include the installation and maintenance of temporary wiring, and the installation of all electrical lighting, heat and power equipment, photovoltaic systems, installation of all raceway systems including underground conduits and all supports, electrical and electronic loop systems associated with process control instrumentation, and motor control systems. The classifications included in the Agreement include: journeyman wireman, foreman, general foreman, senior general foreman, journeyman wireman when splicing cable; journeyman wireman when welding.

## **ANALYSIS**

**Whether the Petitioned-For Unit Is An Appropriate Unit.** Petitioner seeks a craft unit comprised of journeymen electricians, apprentice electricians and trainee electricians. The Board has long held that a "craft unit" consists of a distinct and homogeneous group of skilled journeymen craftsmen who, together with helpers or apprentices, are primarily engaged in the performance of tasks which are not performed by other employees and which require the use of substantial craft skills and specialized tools and equipment. *Burns & Roe Services Corp.*, 313 NLRB 1307, 1308 (1994). In determining whether a petitioned-for craft unit is appropriate, the Board considers: (1) whether the employees take part in a formal training or apprenticeship program; (2) whether their work is functionally integrated with the work of excluded employees; (3) whether their duties overlap with those of excluded employees; (4) whether the employer

assigns work according to need rather than on craft or jurisdictional lines; (5) whether the petitioned-for employees share common interests with other employees. Where there is no collective-bargaining history on a more comprehensive basis exists, a craft or traditional departmental group having a separate identity of functions, skills, and supervision, and exercising craft skills or having a craft nucleus, is generally considered an appropriate unit. See *Burns & Roe Services Corp.*, supra; *Anheuser-Busch, Inc.*, 170 NLRB 46 (1968).

In the instant case, the record shows that the Employer's journeymen electricians are required to be certified by the State of California and have the necessary training and experience to perform electrical work within the State. Apprentice electricians must be enrolled in apprenticeship programs and fulfill the requirements of such programs under State law; and trainee electricians must be certified as trainees, be taking trainee courses, and be working as trainees under the supervision of a certified journeyman electrician. Hay testified that the Employer assigns electrical work based on an employee's possession of the required training and certification requirements and does not assign electrical work to its employees who lack such credentials. Indeed, the Employer utilizes an electrical compliance officer to ensure that the employees it assigns to do electrical work have the required training, certifications and other credentials. By contrast, the Employer's electrical scheduler, electrical designer, electrical designer/instrumentation employee and electrical compliance officer are not journeymen, apprentice or trainee electricians and have had no electrical training.<sup>16</sup>

Second, the work of the journeymen, apprentice and trainee electricians is not functionally integrated with the work of the Employer's non-electrician employees. The record shows no overlap in the duties of these craft employees and those of the electrical scheduler, electrical designer, electrical designer/instrumentation employee and electrical compliance officer. Journeymen, apprentice and trainee electricians perform specialized electrical construction, maintenance and service/repair work that is not performed by such other employees. Most of the petitioned-for employees work together on

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<sup>16</sup> No party appears to seek the inclusion of Accounts Receivable/Accounts Payable Clerk, Lilo Casier. I find that Casier is properly excluded as an office clerical employee. See *Peco Energy Co., Inc.*, 322 NLRB 1074, 1086 (1997).

construction sites on a crew under a foreman who is also a certified journeyman electrician. They also perform service/repair work, which is not and cannot be performed by other non-journeyman electrician employees.

Further, with regard to whether a craft unit comprised of the Employer's journeyman, apprentice and trainee electricians is an appropriate unit, the record shows these employees share little in common with the other non-electrician employees of the Employer, other than being hourly paid and receiving the same fringe benefits. Thus, with few exceptions, the craft employees work at separate locations, performing different types of work, using different tools and equipment, and having infrequent contact with other employees. Further, there is no history of collective-bargaining supporting the inclusion of other employees in the petitioned-for craft unit.

With regard to the unit placement of Electrical Maintenance Technician Alex Brown and Electrical Consultant Daniel Kolczak, I find that both should be included in the unit. Even though they were working under service contracts at the time of the hearing, both are trained journeyman electricians. Brown performed electrical construction work for the Employer in the past, and was performing electrical service work at the time of the hearing, albeit for Criterion. There is no evidence in the record that Brown is paid differently than other journeyman electricians employed by the Employer or that he receives different benefits. Brown has some contact with other journeyman, apprentice and trainee electricians of the Employer when they are performing work at Criterion. For the same reasons, the record supports the inclusion of Electrical Consultant Daniel Kolczak in the unit.

In sum, the record establishes that a craft unit of journeyman, apprentice and trainee electricians, which includes Electrical Maintenance Technician Alex Brown and Electrical Consultant Daniel Kolczak, is a homogeneous craft unit and appropriate for collective-bargaining purposes.

**Whether Project Manager Chris Hose and/or Foreman Chris Little Are Statutory Supervisors.** The Petitioner seeks to exclude Chris Hose and Chris Little as statutory supervisors and the Employer takes a contrary position and urges their inclusion in the unit.

The term "supervisor" is defined in Section 2(11) of the Act as:

[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

*Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). *Croft Metals, Inc.*, 348 NLRB 717 (2006) and *Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Healthcare Center*, 348 NLRB 747 (2006). In *Oakwood*, the Board further observed that the term supervisor was not intended to include “straw bosses, lead men, and set-up men,” who are protected by the Act even though they perform “minor supervisory duties.” (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974)). Rather, the putative supervisor must exercise “genuine management prerogatives,” identified as the twelve supervisory functions listed in Section 2(11) of the Act. If the putative supervisor has the authority to exercise or effectively recommend the exercise of at least one of these twelve functions, Section 2(11) status exists, provided that the authority is held in the interest of the employer and is exercised neither routinely nor in a clerical fashion but with independent judgment. *Id.*

The record shows that Project Manager Chris Hose is the second-highest ranking and only representative of the Employer other than Operations Manager Hay. Hose has served as project manager, general foreman and foreman. He decides the manpower needed for a job and has authority to schedule, assign and direct the work of the journeymen, apprentice and trainee electricians on jobsites. He spends 60% of his work time delegating jobs to journeymen, apprentice and trainee electricians. Hose has also issued oral and written disciplinary warnings to employees, sometimes on the spot, and testified that he has the authority to terminate employees on his own authority if they engage in blatant misconduct. He is salaried and has a somewhat different benefit contribution level than other hourly-paid employees. Given such facts, I find that although Hose is also a journeyman electrician who also performs hands-on electrical work, he nevertheless possesses sufficient authority to assign, direct and discipline

employees to be deemed a supervisor under Section 2(11) of the Act. Accordingly, Project Manager Chris Hose is excluded from the unit.

**Foreman Chris Little.** The record shows that Chris Little is a journeyman electrician who works as a foreman for the Employer. However, there is no showing what his specific duties as a foreman have included, or whether he has ever hired, disciplined or engaged in any of the other types of authority set forth in Section 2(11) of the Act. The record shows that Little fills in for Hose but only as to the performance of after-hours repair work. Little is hourly paid but the record does not disclose his pay rate. He receives the same benefits as other employees. He has also been issued an Employer cell phone as have Hose and Trainee Electrician Shane Stifle. In sum, there is no evidence to establish that Little possesses or has exercised any of the types of authority set forth in Section 2(11) of the Act, and I find that he is not a statutory supervisor. Further, the record shows that he shares a community of interest with the employees in the unit since he is a journeyman electrician; performs the same type of electrical work that they perform; works with them at the same jobsites; is hourly paid; and receives



similar benefits. Accordingly, I find that Foreman Chris Little is properly included in the unit.

**Whether the *Daniels/Steiny* Formula Should be Applied to Determine Voter Eligibility.** Petitioner seeks the application of the *Daniels/Steiny* formula for voter eligibility and the Employer contends that it should not be applied in this case.

The *Daniel/Steiny* voter eligibility formula provides that in addition to those employees in the unit who were employed during the payroll period immediately preceding the date of the Decision and Direction of Election, also eligible to vote are all employees in the unit who have been employed for a total of 30 working days or more during the 12 months preceding the eligibility date for the election, or who have had some employment in that period and who have been employed for 45 working days or more within the 24 months immediately preceding the eligibility date for the election.

The *Daniel/Steiny* formula arises out of Board policy favoring maximum voter enfranchisement. See *The Cajun Company, Inc.*, 349 NLRB 1031 (2007); *Turner Industries Group LLC*, 349 NLRB 428 (2007); *Ameritech Communications*, 297 NLRB 654 (1990). Thus, the Board has long recognized that employers performing work within the construction industry experience fluctuations in the nature and duration of construction projects, which results in construction workers experiencing intermittent employment. As a result, such workers may work for short periods on different projects for several different employers during the course of a year. *The Cajun Company, supra*, 349 NLRB at 1037; *Daniel Construction Co., supra*; *Steiny and Company, supra*. In order to ensure the fullest voter enfranchisement given such conditions, the Board has adopted the *Daniel/Steiny* formula and has held that its application is reasonable whenever an employer performs more than a *de minimus* amount of construction work and its work patterns are comparable to those of a construction industry employer. *Turner Industries Group, LLC supra*.

The only exceptions to the use of the *Daniel/Steiny* formula arise when the parties have stipulated to the use of a different formula or where the employer clearly operates on a seasonal basis or establishes that it is imminently ceasing operations. See *Signet Testing Laboratories, Inc.*, 330 NLRB 1 (1999); *Davey McKee Corp.*, 308 NLRB 839 (1992); *M. B. Kahn Construction Co.*, 210 NLRB 1050 (1974). None of these

circumstances are present herein. Thus, the parties have not stipulated to the use of a different formula and the Employer does not contend that a different formula is necessary because of the seasonal nature of its operation. Nor does the Employer contend or the record suggest that the Employer is imminently ceasing operations. In this regard, Hay testified that during the past three or four years, the Employer has averaged between \$2.3 and \$2.7 million in annual gross revenue, and that for the fiscal year ending March 31, 2010, the Employer's gross revenue was between \$2 and \$2.5 million. While the record supports that the Employer has been negatively impacted by the ongoing economic recession, it also shows that the Employer had two construction jobs ongoing at the time of the hearing; was in the process of soliciting new construction work; and had recently contacted former electrical employees to determine their availability for such future electrical construction work. Under such circumstances, even though some of the Employer's employees are currently employed under ongoing service contracts, I find that that employer performs more than a *de minimus* amount of construction industry work and its work patterns are comparable to those of a construction industry employer.

Accordingly, I find that the record fully supports the application of the *Daniel/Steiny* formula to determine voter eligibility in this case.

### **CONCLUSIONS AND FINDINGS**

Based upon the entire record, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is an employer as defined in Section 2(2) of the Act, is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization within the meaning of the Act.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time journeymen electricians, apprentice electricians, and trainee electricians including the electrical foreman, electrical maintenance technician and electrical consultant, employed by the Employer at its Benicia, California facility; and excluding all other employees, workers referred to the Employer through temporary employment agencies and not appearing on the Employer's payroll, electrical schedulers, electrical designers, electrical designer/instrumentation employees, electrical compliance officers, office clerical employees, purchasing agents, inside salespersons, owners, human resource managers, project managers, guards, managers and supervisors as defined by the National Labor Relations Act, as amended.

### **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 the International Brotherhood of Electrical Workers, Local 302, or no union. 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 persons 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; persons in the bargaining unit who were employed by the Employer for 30 working days or more within the 12 months preceding the eligibility date of the election; and persons in the bargaining unit who were employed by the Employer for at least some time in the 12 months preceding the eligibility date of the election and for 45 working days or more within the 24 months immediately preceding the eligibility date of the election. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, eligible to vote are those employees who worked a minimum of fifteen (15) days during either of the quarters immediately preceding the date of this Decision. 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 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). The 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.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 20, 901 Market Street, Suite 400, San Francisco, CA 94103, on or before **June 10, 2010**. 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 to the Regional Office by electronic filing through the Agency's website,

[www.nlr.gov](http://www.nlr.gov),<sup>17</sup> by mail, or by facsimile transmission at (415)356-5156. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Because the list will be made available to all parties to the election, please furnish a total of two copies of the list, unless the list is submitted by facsimile or e-mail, 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 to Election provided by the Board in areas conspicuous to potential voters for at least 3 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 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 estops employers from filing objections based on nonposting of the election notice.

## **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, DC 20570-0001. This request must be received by the Board in Washington by **June 17, 2010**. The

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<sup>17</sup> To file the list electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the "Accept" button. The user then completes a form with information such as the case name and number, attaches the document containing the election eligibility list, and clicks the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, [www.nlr.gov](http://www.nlr.gov).

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request may be filed electronically through E-Gov on the Board's web site, [www.nlr.gov](http://www.nlr.gov),<sup>18</sup> but may not be filed by facsimile.

DATED AT San Francisco, California, this 3<sup>rd</sup> day of June, 2010.

*/s/ Joseph P. Norelli*

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Joseph P. Norelli, Regional Director  
National Labor Relations Board  
Region 20  
901 Market Street, Suite 400  
San Francisco, California 94103-1735

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<sup>18</sup> Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.