

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

BUZZ OATES CONSTRUCTION

Employer

and

Case 20-RC-18366

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL 162

Petitioner

DECISION AND DIRECTION OF ELECTION

The Employer is engaged in the construction industry primarily doing tenant improvement work on properties owned by members of a family-owned business called the Buzz Oates Group of Companies (herein called the Buzz Oates Group). Petitioner seeks to represent a unit comprised of all full-time and regular part-time sheet metal workers, including service technicians and installers, employed by the Employer at its Sacramento, California facility; and excluding all other employees, guards and supervisors in the Act. There are about eight employees in the petitioned-for unit.

The Employer contends that the HVAC service technicians and installers do not constitute an appropriate unit because they do not share a substantial community of interest. Further, the Employer contends that even if the employees in these two classifications share a substantial community of interest, the installers cannot be included in the unit because they are temporary employees. Lastly, the Employer argues that the *Daniel-Steiny* formula for voter eligibility should not be used in this case because the installers are temporary employees. The Petitioner takes a contrary view on these issues.

For the reasons discussed below, I find that the petitioned-for unit, including employees in both the HVAC service technician and installer classifications, and as modified to include the classification of apprentice installer, is an appropriate unit for collective-bargaining purposes; that the installers are not excludable from the unit as

temporary employees; and that the *Daniel-Steiny* formula for voter eligibility is properly applied in this case.

FACTS

Three witnesses testified at the hearing: the Employer's Senior Vice President of its Construction Division, Steven Sherman, HVAC Service Technician James Coleman, and Apprentice Installer Daniel Young.

Senior Vice President Sherman testified that the Employer's work involves submitting estimates and performing construction work on properties owned by the Buzz Oates Group. According to Sherman, the Employer rarely bids on or performs work for companies outside the Buzz Oates Group.¹

About two years ago, the Employer formed the HVAC service division to handle the service and maintenance of HVAC systems in buildings owned by the Buzz Oates Group. At the time of the hearing, the Employer employed four HVAC service technicians in this division: James Coleman, Daniel Bryant, Nick Hood and Jason D'Amaral. The manager of this division is Jerry Jessup.

HVAC Service Technician James Coleman testified that he had been working for the Employer for a little over a year, and his job includes performing preventive maintenance, trouble-shooting, diagnosing, and repairing HVAC units. Coleman testified that he has nine years of experience doing service work; holds a universal refrigerant certification; and has had three years of experience in an apprenticeship program on heating and cooling given by a different employer. He testified that he has all of the qualifications and performs all of the duties listed in the Employer's job description for his position.² According to Coleman, he has occasionally worked on jobs involving the

¹ Sherman testified that during the past two years, the Employer had bid on five or six outside projects, most recently about six or seven months before the hearing. However, the Employer was unsuccessful on such bids while its in-house work had been "very busy," so several months ago, Sherman decided not to bid on any more outside jobs. According to Sherman, during the Employer's operation, it has done only about five outside construction jobs.

² The record contains a job description for the position of HVAC service technician, which Sherman testified had been created about two years ago. The job description states that the essential duties and responsibilities of the position include, in relevant part: performing maintenance and service repairs on HVAC systems and related components; technical knowledge of various types of equipment such as DDC controls, boilers, chillers, cooling towers, and large commercial equipment; installing and replacing parts on new and existing HVAC units; scheduling and performing maintenance on regular cycles; trouble-shooting issues; the ability to read and interpret wiring diagrams and blueprints; and an

installation of new HVAC units for the Employer, and on such jobs, he ran the copper piping/refrigerant lines and electrical wiring to the HVAC units, started them up, and verified that they were operating properly.

In early June 2011, the Employer commenced work on a construction project at 1749 North Market Street, Sacramento (herein called the Project) for the Buzz Oates Group, involving 60,000 square feet of tenant improvements that included the installation of HVAC units. All four of the Employer's HVAC service technicians worked on the Project to hang refrigerant lines and to run copper piping and electrical lines to the HVAC units.

Sherman testified that although the Employer typically did not directly hire installers, but rather subcontracted HVAC installation work, because the Project was "fast paced" and had a "tight time frame," he decided to hire installers directly for the Project because he wanted to retain greater control over such work.³ The Employer hired two journeymen installers by placing an advertisement in the newspaper, and hired two installer apprentices through the apprentice hiring hall (collectively called installers).⁴ According to Sherman, the installers were hired only for the term of the Project. The record does not contain the job advertisement or any requisition form used by the Employer to hire the installers; Sherman could not recall the contents of the advertisement and he did not participate in the hiring interviews.

Because the Project was a prevailing wage job, the Employer paid the HVAC service technicians and the installers at the prevailing wage rate while they worked on the Project utilizing the classification of sheet metal worker. Both the HVAC service technicians and the installers worked on the Project from about early June until around August 11, 2011.

understanding and ability to execute air balancing techniques. Qualifications for the position include: a high school or GED degree; one to three months of related experience and/or training; one to three years of experience in HVAC maintenance and installation; and computer skills. The working conditions described for the position include, in relevant part, the operation of heavy equipment, small power tools, basic hand tools, and aerial lift equipment.

³ The record does not disclose the number of times the Employer has directly hired HVAC installers.

⁴ According to Sherman, the Employer hired the two apprentices because it was required under prevailing wage guidelines, based on the number of journeyman hours required for the Project.

On the Project, the four installers prepared the layout for the placement of the HVAC units; hung the supports for the HVAC units; hung up the HVAC units; and installed the duct work and the plenums.⁵ The installers did not perform any of the work performed by the HVAC service technicians on the Project; that is, the installers did not hang refrigerant lines; run the copper lines,⁶ or run the electrical control wiring to the HVAC units.

HVAC Service Technician James Coleman testified that he worked on the same shift with the installers for only about two weeks during the Project and worked in the same room where the installers were working for only about 20 to 25 minutes, while they worked on ductwork and Coleman connected electrical wiring to an HVAC unit.⁷ According to Coleman, the work of the installers was different from the work he performed on the Project. Thus, he testified that the installers would install an HVAC unit and make connections from it to the ductwork and then move on to install the next HVAC unit; after the installers finished installing a unit, the HVAC service technicians would begin making the connections from the unit to the copper piping and do the electrical connections for the unit. Coleman testified that his work on the Project did not require him to interact with the installers. However, Coleman testified that on one occasion, Field Service Supervisor Jerry Jessup told Coleman to take one of the installers with Coleman to work on a different job located an hour away in Stockton, California.⁸ According to Coleman, the Stockton job involved installing two new HVAC units to

⁵ Coleman described a plenum as a “big box” that connects the HVAC unit to the ductwork and covers the sides of the HVAC unit where air enters and exits the unit, pressurizing the air exiting the unit.

⁶ Coleman testified that installing copper piping is a specialized area of work because doing such work requires knowledge of how to solder and braze copper. The copper lines must be vacuum-sealed and pressure-tested. Further, because refrigerant runs through the copper pipes, a refrigerant certification is required. According to Coleman, he had been told several times by sheet metal workers, including by one of the installers on the Project, that they did not “touch copper,” because it was outside the scope of their work.

⁷ Coleman testified that during the first month of the Project, the HVAC service technicians worked on a different shift than the installers, and although both groups of employees worked on the same shift for the second and third months of the Project, Coleman worked at other jobsites and only returned to the Project during the last two weeks that the installers were working on the Project.

⁸ Sherman testified that the Employer had done three small in-house projects involving sheet metal work during the six months preceding the hearing.

replace two units that had been stolen. While on the Stockton job, Coleman worked side-by-side with the installer for a day; the installer mounted the HVAC units and Coleman hooked up the electrical wiring and copper piping to the units. Coleman testified that this was the first time he had ever worked closely with an employee installing HVAC units. Although Coleman testified that he lacked experience installing HVAC units, he testified that he had the necessary training and skills and could do such work.

Apprentice Installer Daniel Young testified that he was dispatched to the Project by his apprenticeship school/hiring hall and worked there from June 11 to August 11, 2011. According to Young, at the time he was dispatched to the Project, he was told that the job with the Employer would last about 120 hours, but in fact, his work for the Employer “well exceeded” that number of hours. According to Young, he had no expectation of re-hire at the time of either his hire or layoff.⁹

Young testified that all four of the installers¹⁰ did the same work on the Project: creating the layout for the installation of the HVAC units; hanging the HVAC units, plenums and ductwork; and insulating the registers for the HVAC units. Young testified that he saw HVAC Service Technicians James Coleman, Daniel Bryant, Nick Hood, and another employee named Robert,¹¹ at work on the Project, mostly running copper pipe line sets. Young also observed Nick Hood hooking up the piping to the HVAC units and running the copper pipe through the ceiling from the first to the second floor. Young testified that the Employer did not direct him to do similar work on the Project as that performed by the HVAC service technicians.

According to Young, while working on the Project, he would see the HVAC service technicians “all the time,” and although they were performing different tasks than

⁹ According to Young, he is in his fifth and last year of apprentice school in sheet metal, heating and air conditioning. Young testified that he is “indentured” to a small company, A. V. Alton, meaning that he is committed to work for that company until his apprenticeship ends next spring. According to Dalton, when work is slow, A. V. Alton lays him off and his apprenticeship school dispatches him out to jobs with other companies through the apprentice hiring hall.

¹⁰ In addition to Young, the installers included two journeymen installers, Jon Watson and Jim Baker, and one other apprentice installer, Juan Guerrara.

¹¹ Young testified that he believed HVAC Service Technician Robert left his employment with the Employer and was replaced by Daniel Bryant on the Project.

the installers, both groups of employees were “around each other” or “just across [from] each other,” doing their work, and also took their breaks together.¹²

Young testified that the work of the installers on the Project was overseen by Jason D’Amaral, one of the HVAC service technicians.¹³ According to Young, while working on the Project, he observed D’Amaral consulting with HVAC Division Manager, Jerry Jessup, and making up lists of supplies needed by the installers. In addition, he also occasionally observed D’Amaral assembling plenums and hanging and connecting HVAC units and insulating registers, which was the same work as that performed by the installers. According to Young, HVAC Service Technician D’Amaral did not oversee the work of the other HVAC service technicians on the Project; rather, HVAC Service Technician Nick Hood appeared to be overseeing the work of the technicians, as well as performing the same work that they performed.¹⁴ According to Young, HVAC Division Manager Jerry Jessup was also present on the Project.

According to Sherman, all of the installers were laid off by the Employer on August 11, 2011, when the installation work on the Project was completed. However, Sherman further testified that about 40% of the registers still needed to be installed on the Project and that would not be done until September 2011. The record discloses that it was the installers and not the HVAC service technicians who had handled the installation

¹² Young testified that he knows how to run copper lines and attach them to HVAC units, but does not know how to do “penetrations,” which involve running copper piping through roofs or ceilings, a task that he observed Hood doing on the Project. Young further testified that he has not yet obtained his refrigerant certification, but would do so as part of his apprenticeship program. According to Young, the other apprentice on the Project, Juan Guerrara, passed the test for obtaining a refrigerant certification about a month prior to the hearing, but did not have that certification at the time he was hired by the Employer. Young testified that he (Young) was capable of doing some of the job duties on the job description for the Employer’s HVAC service technicians (i.e., installation of HVAC units, installing and replacing parts on HVAC units, electrical control work, including DDC controls, large equipment and large commercial equipment, and reading and interpreting diagrams and blueprints), but he was not capable of doing other work on the job description (i.e., maintenance of HVAC units, boilers, chillers and cooling towers). Young further testified that he has a high school diploma and one to three years experience with HVAC installation but not with HVAC maintenance. Young further testified that he was being trained to service and maintain HVAC units in his apprenticeship program.

¹³ Although Young testified that D’Amaral supervised the installers, the record evidence does not support that D’Amaral is a statutory supervisor and no party contends that he is.

¹⁴ Young testified that Hood supervised the HVAC service technicians, but the record does not support that Hood is a statutory supervisor and the record evidence does not support such a finding.

of the registers on the Project prior to their layoff on August 11. The record contains no evidence regarding how the remainder of the register installation will be handled. At the time of the hearing, HVAC Service Technician Coleman was still working on the Project to finish up the electrical control wiring, tie the entire HVAC system together, charge the system with refrigerant, and perform start up procedures. The record does not disclose whether any of the other HVAC service technicians have performed work on the Project since August 11.

Coleman testified that before working on the Project, he was paid \$27 an hour and was eligible to receive certain fringe benefits, including vacation, medical and a 401(K) plan. In addition, Coleman and the other HVAC service technicians use an Employer truck and are given credit cards for gas purchases. As indicated above, the Project was a prevailing wage job and for its duration, the wages paid to both the HVAC service technicians and the installers were apparently the same and paid under the classification of sheet metal worker. According to Coleman, while working on the Project, he was paid \$37.10 an hour and his usual fringe benefits remained the same, but he was also paid an additional amount in his paycheck to compensate him for fringe benefits under the prevailing wage standard. Coleman testified that once the Project ended, he expected to return to his regular rate of pay of \$27 an hour.

Sherman testified that the work performed by the HVAC service technicians on the Project was similar to the type of work they had performed on other projects. For example, as noted above, he testified that during the past six months, the Employer had done sheet metal work on three other small projects for the Buzz Oates Group.

According to Sherman, the HVAC service technicians will remain employed by the Employer and will continue their jobs of servicing and maintaining HVAC units. However, the Employer has no intention of rehiring the installers and plans to subcontract HVAC installation work in the future.

ANALYSIS

The Employer contends that the HVAC service technicians and installers are not an appropriate unit for collective bargaining because they do not share a substantial community of interest. The Petitioner takes the contrary view.

The Board's procedure for determining an appropriate unit under Section 9(b) of the Act is to first examine the petitioned-for unit. If that unit is appropriate, then the inquiry ends. *Dezcon, Inc.*, 295 NLRB 109, 111(1989). If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties or determine that a different unit is an appropriate unit. See e.g., *Bartlett Collins Co.*, 334 NLRB 484 (2001); *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000). It is well settled that the unit need only be *an* appropriate unit, not the most appropriate unit. *Morand Brothers Beverage Co.*, 91 NLRB 409, 419 (1950), enf'd on other grounds, 190 F2d 576 (2d Cir. 1951).

The Board has long found that units may be appropriate based on craft status, or where the requested employees are a clearly identifiable and homogenous group with a community of interest separate and apart from other employees. See *Brown & Root Braun*, 310 NLRB 632, 635 (1993); *Dick Kelchner Excavating Co.*, 236 NLRB 1414 (1978); *R.B. Butler, Inc.* 160 NLRB 1595, 1598-1599 (1966). A "craft unit" is defined as a distinct and homogeneous group of skilled journeymen, apprentices and helpers who primarily perform tasks requiring craft skills, tools, and equipment, which are not performed by others. See *Burns & Roe Services Corp.*, 313 NLRB 1307 (1994). In determining whether the petitioned-for employees constituted an appropriate craft unit or a clearly identifiable and homogeneous group, the Board examines several factors, including whether the petitioned-for employees participate in a formal training or apprenticeship program; whether their work is functionally integrated and/or overlaps with that of other employees; whether the employer assigns work according to need, rather than on a craft or jurisdictional basis; skills and common functions of employees; commonality of supervision; frequency of contact and interchange; and common wages, hours and other working conditions. See, *Turner Industries Group, LLC*, 349 NLRB 428, 430 (2007); *Yuengling Brewing Co. of Tampa*, 333 NLRB 892 (2001); *Burns & Roe Services, supra*, 313 NLRB at 1308.¹⁵

¹⁵ I note that in some circumstances, the Board has found appropriate separate units of HVAC technicians where such employees comprise a distinct craft unit with a community of interest separate and apart from that of other employees. See *Schaus Roofing and Mechanical Contractors, Inc.*, 323 NLRB 781 ((197); *United Operations Inc.*, 338 NLRB 123 (2002). In other cases, the Board has found

In the instant case, the record supports a finding that the HVAC service technicians and the installers share a substantial community of interest. First, the record evidence supports a finding that both groups of employees share common skills and functions requiring specialized training in heating and air conditioning. Both Coleman and Young testified that they had participated in apprenticeship programs teaching them about HVAC systems. HVAC Service Technician Coleman's testimony shows that he has the skill to install HVAC units even though he may lack experience in performing such work; the testimony of Apprentice Installer Young is that he has many of the skills listed in the job description for the HVAC service technicians, and is also learning to maintain and repair HVAC units in his apprenticeship program. Further, the record evidence shows that HVAC Service Technician Jason D'Amaral performed work similar to that of the installers even if he did so only occasionally.

Secondly, the record supports the finding that the work of the HVAC service technicians and the installers is functionally integrated, given that one group installs the HVAC units while the other ties in the electrical and copper piping to the units. This functional integration is also established by the evidence showing that Coleman and an installer worked together on the Stockton job, installing HVAC units and hooking up copper piping and electrical control wiring to such units.

Third, the record shows significant frequency of contact between both groups of employees since both groups worked in common areas and took breaks together and one of the HVAC service technicians apparently oversaw the work of the installers and occasionally performed the same work they were performing. Moreover, Coleman and one of the four installers worked together on a job in Stockton.

Fourth, although the record is sparse regarding the actual supervision of the HVAC service technicians and installers, it appears that HVAC Division Manager Jerry Jessup was present to supervise the work of HVAC employees on the Project.

Lastly, the record shows that both the HVAC service technicians and installers were paid at the same prevailing rate for wages and benefits while working on the

appropriate a combined unit of other service employees and HVAC technicians. See *R.L. Stott Co.*, 183 NLRB 884(1970).

Project. I do not find that the fact that the HVAC service technicians have a different regular rate of pay or are given gas cards and the use of an Employer truck to be sufficient to warrant the exclusion of the installers from the unit. See *Ameritech Communications, Inc.*, 297 NLRB 654 (1990).

In sum, the record evidence supports a finding that the installers and the HVAC service technicians share a substantial community of interest based on their common skills and functions; their functional integration; their frequent contact; their common supervision by HVAC Division Manager Jerry Jessup; and their similar wage and fringe benefit rates. Moreover, the record supports that together, the HVAC service technicians and the installers constitute a clearly identifiable and homogeneous group of skilled craftsmen who work in an area requiring specialized training. Accordingly, I find that the petitioned-for unit as modified to include apprentice installers is an appropriate unit.

Whether the Installers Must Be Excluded from the Unit as Temporary Employees. The Employer contends that the unit must exclude the installers because they are temporary employees, arguing that they were only hired to work on the Project, they have no reasonable expectancy of re-employment, and they will not be employed beyond the term for which they were hired.

The test for determining whether employees are temporary employees is whether they have an uncertain tenure. See *Marian Medical Center*, 339 NLRB 127 (2003). Although the installers were apparently laid off on August 11, 2011, this does not answer the question regarding the tenure of their work. The record is insufficient to establish that the term of employment of the installers had uncertain tenure. Neither the hiring advertisement nor any requisitions for the installers were placed in the record to show the terms under which they were hired. The record contains only limited testimony regarding their hiring interviews or job offers. Installer Apprentice Young testified that when he was dispatched by the apprentice hall, he was told that he had 120 hours on the job, but he further testified that his work for the Employer “well exceeded” that number of hours.

Further, the record indicates that while the Employer may have hired the installers initially with the intent that they work only on the Project, the Employer directed at least one of them to work on a different project in Stockton while he was employed by the Employer.

In addition, the record shows that about 40% of the registers still need to be installed on the Project; that such work will be done in September; and that such work has previously been done by the installers on the Project.

Further, this is not a case where the Employer is going out of business or will not be handling jobs involving HVAC installation work in the future.¹⁶ Indeed, the record supports that the type of work handled by the Employer on the Project is typical of the type of work it generally performs for the Buzz Oates Group. According to Sherman, the Buzz Oates Group owns many properties, keeps the Employer “very busy,” doing construction work on those properties, and that during the past six months it has done sheet metal work on three other small in-house projects.

Contrary to the assertion of the Employer, in its brief, Sherman did not testify that the Project is the “only” occasion on which the Employer has directly hired installers; rather, his testimony was that the Employer has “typically” not hired HVAC installation employees, but instead has subcontracted out such work. As indicated above, the Employer used one of the installers hired for the Project to work on another job involving hanging HVAC units, so the Project is plainly not the only job for which the Employer has used an installation employee that it hired. Further, Sherman’s testimony that the Employer had three other jobs involving sheet metal work in the past six months also supports that the Employer’s need for such employees has not been limited to the Project. Thus, Sherman’s testimony raises uncertainty about the Employer’s hiring practices with regard to sheet metal installation employees, and suggests that the Employer has previously hired such employees on at least some occasions to supplement its core group of HVAC service technicians. As such, it raises doubt about the certainty of the tenure of the installers.

Moreover, the Board clearly contemplates construction industry units which include both temporary and permanent employees. See e.g. *Steiny and Company, Inc.* 308 NLRB 1323 (1992). Indeed, the Board devised the *Daniel-Steiny* formula in the construction industry to prevent the disenfranchising of laid off “temporary” employees

¹⁶ See e.g., *Davey McKee Corporation*, 308 NLRB 339; *Fish Engineering & Construction Partners, LTD*, 308 NLRB 836 (1992).

because typical hiring patterns in the construction industry include the hire of project-only employees to supplement core employees.

In sum, I find that the record raises a sufficient degree of uncertainty as to the tenure of the installers to warrant the conclusion that they should not be excluded from the unit as temporary employees.

Application of Daniel-Steiny Formula. The Board has a long-established policy to favor and not restrict eligibility to vote. *Ameritech Communications*, 297 NLRB 654 (1990). In *Daniel Construction Company, Inc.*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967), the Board recognized that in the construction industry, intermittent employment is common; employees may work for short periods on several different projects for several different employers during the same year. Therefore, the Board in *Daniel* established an eligibility formula to ensure that all employees with a reasonable expectation of future employment with a construction industry employer would have the fullest opportunity to participate in a representational election.¹⁷ In *Steiny and Company*, 308 NLRB 1323 (1992), the Board held that the *Daniel* formula is applicable to all construction industry elections regardless of whether the employer hires on a project-by-project basis or has a stable group of core employees. As it is clear from the record that the Employer is a construction industry employer and the parties have not stipulated to the use of another eligibility formula, I find that that the *Daniel* formula, as modified by *Steiny and Company*, is properly applied in this case.

CONCLUSIONS AND FINDINGS

Based upon the 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.

¹⁷ In *Daniel*, *supra* at 1078-1079, the Board stated that:

In addition to those in the unit who were employed during the payroll period immediately preceding the date of the Decision and Direction of Election, all employees in the unit who have been employed for a total of 30 days or more within a period of 12 months, or who have had some employment in that period and who have been employed 45 days or more within the 24 months immediately preceding the eligibility date for the election hereinafter directed, shall be eligible to vote.

2) The Employer is an employer as defined in Section 2(2) of the Act, and 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 an appropriate unit for the purposes of collective-bargaining within the meaning of the Act:

All full-time and regular part-time sheet metal workers, including HVAC service technicians and installers and apprentice installers employed by the Employer out of its Sacramento, California facility; and excluding all other employees, guards and supervisors in the Act.

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 Sheet Metal Workers International Association, Local 162. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are all employees in the unit if they have been employed for 30 working days or more within the twelve months preceding the eligibility date for the election **or** if they have had some employment in those twelve months and have been employed for 45 working days or more within the twenty-four month period immediately preceding the eligibility date. Also eligible are 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 **September 2, 2011**. 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,¹⁸ 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 electronic filing, 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 **September 9, 2011**. The request may be filed electronically through the Agency's web site, www.nlr.gov,¹⁹ but may not be filed by facsimile.

DATED AT San Francisco, California, this 26th day of August, 2011.

¹⁸ To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

¹⁹ To file the request for review electronically, go to www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Decision and Direction of Election
Buzz Oates Construction
20-RC-18366

/s/ Tim Peck

Tim Peck, Acting, Regional Director
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