

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

TRISTAR FIRE PROTECTION, INC.¹

Employer

and

Case 07-RC-071841

**SPRINKLER FITTERS LOCAL 704,
UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING AND
PIPE FITTING INDUSTRY OF THE
UNITED STATES AND CANADA (UA), AFL-CIO²**

Petitioner

APPEARANCES:

Robert E. Day, Attorney, of Detroit, Michigan for the Employer.

John Canzano, Attorney, of Southfield, Michigan for the Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,³ the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are affirmed.

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

³ The Petitioner and the Employer timely filed briefs, which were carefully considered. On February 10, 2012, the Petitioner filed "Petitioner Local 704's Motion For Leave To File Supplemental Brief Advising Regional Director of Relevant Post Hearing Bankruptcy Court Developments." In the interests of not further delaying the processing of this representation petition, and in consideration of this decision to proceed to an election, Petitioner's Motion is denied.

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.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Overview

The Petitioner seeks to represent a collective-bargaining unit of all full-time and regular part-time journeymen sprinkler fitters and apprentices working in Wayne, Oakland, Macomb, and Washtenaw counties employed by the Employer out of its facility located at 47810 Galleon Drive in Plymouth, Michigan, but excluding all shop employees, truck drivers, designers, estimators, office employees, sales employees, and guards and supervisors as defined in the Act. The Petitioner was recognized by the Employer as the exclusive collective-bargaining representative of the above unit under a Section 8(f) agreement, which expired on July 31, 2011.⁴ The Petitioner is seeking to be the exclusive collective-bargaining representative of the petitioned-for employees, under Section 9(a) of the Act. The Employer argues that the petition should be held in abeyance,⁵ as the Employer, on August 18 filed for Chapter 11 bankruptcy. I find that the instant representation proceeding shall not be stayed by the filing of the bankruptcy petition, and an election is directed as set forth below.

The Employer

The Employer, a Michigan corporation, is engaged in the installation and maintenance of fire protection systems and fire suppression systems. The Employer designs, fabricates and installs fire sprinkler systems for new buildings; retrofits equipment for existing buildings; upgrades existing fire suppression systems; repairs fire protection systems; and conducts annual inspections of fire sprinkler systems at various buildings. Almost all of the Employer's work is performed on commercial and industrial buildings. It was providing work on approximately 55 construction projects for fire protection service contracts at the time it filed its "Disclosure Statement" with the

⁴ All dates are 2011, unless otherwise noted.

⁵ In its post-hearing brief, the Employer urges the Region to *dismiss* the representation petition.

Bankruptcy Court on October 6,⁶ and at the time of the representation hearing was functioning as an operating entity.

Darrel Glasen, now deceased, was the founding member of the Employer; his estate may still have an investment stake with the Employer. Glasen's wife, Janine, owns the building where the Employer operates its business. Gary Wolf was also an investor of the Employer's, and at the time of the collective-bargaining negotiations with the Petitioner in 2006, oversaw the Employer's day-to-day operations. Wolf is listed as one of 13 secured investors in the bankruptcy proceedings, but is no longer involved in the day-to-day operations nor was he involved in negotiations for the successor collective bargaining agreement. The current vice president of operations, Bruce Hermanson, is involved in the day-to-day operations of the Employer. He was trained as a fire protection system engineer and has been with the Employer for 16 years. His duties include coordinating and staffing projects; prioritizing, overseeing and scheduling design and fabrication projects, as well as estimating and sales. Eric Wieber is the chief financial officer, and has been with the Employer as the CFO since 2005.

History of Collective-Bargaining

The Employer is a contractor member and signatory to a collective-bargaining agreement between the National Fire Sprinkler Association, Inc. and the Petitioner. The expired collective-bargaining agreement was in effect from August 1, 2006 to July 31, 2011. There is no dispute that as between the Employer and Petitioner, it was a Section 8(f) agreement. At the time it expired, the Employer employed 18 employees in the bargaining unit. Greg Herman, the business manager and financial secretary/treasurer of Petitioner, was involved in the negotiations for both the expired contract and the successor contract. As indicated above, Darrel Glasen and Gary Wolf served as negotiators on behalf of the Employer for the expired contract.

On the day following the expiration of the contract, August 1, all 18 bargaining unit employees went on strike. During the strike, the Employer hired eight permanent replacement employees and continued operating its business. On September 15, the Union made an unconditional offer to return to work and ended the strike. The following day, on September 16, the Employer rejected the offer and locked out the striking employees.⁷

⁶ Although not introduced as an exhibit, the Employer referred to the public bankruptcy records throughout the hearing, as Bankruptcy Petition Number 11-62283-PJS, presided by Bankruptcy Judge Phillip J. Shefferly. I take administrative notice of these filings, as they are public documents.

⁷ The Petitioner filed an unfair labor practice charge, Case 07-CA-071073, against the Employer regarding the alleged unlawful lockout. When the Petitioner filed the instant representation petition, it also filed a Request to Proceed.

Bankruptcy Proceedings

The Employer filed for Chapter 11 bankruptcy on August 18, roughly two and one-half weeks following the expiration of the collective-bargaining agreement and during the strike. Wieber testified that the Employer filed for bankruptcy, mainly for three reasons: (1) the construction industry dropped significantly as the economy slowed, causing a decline in sales from roughly \$17 million in 2008 to less than \$7 million in 2010, with many of the Employer's general contractors transferring their business to low cost providers; (2) it had been in forbearance for several months on a Bank of America loan for \$900,000, and the bank initiated legal proceedings to collect the money owed through its debt covenant; and (3) the labor dispute, strike and work stoppage caused the Employer a disruption of its work in process, eliminating any chance to repay its loan. Wieber testified that the above reasons are all contained in the official Disclosure Statement of the bankruptcy documents.

As of August 1, the Bank of America loan had been purchased by 13 secured creditors/investors of the Employer, who paid off the bank loan and assumed the debt for themselves. At the time of the bankruptcy filing on August 18, the disclosed value of the secured claims was approximately \$5.8 million. The value of the non-secured claims was roughly \$250,000. The Employer had about \$1.5 million in assets, with a liquidation value of approximately \$1 million, which is insufficient to satisfy the secured claims.

On October 11, the Employer filed a plan of reorganization with the bankruptcy court, which must be confirmed by the court before it can be put into effect. The plan of reorganization outlines options for one of two possibilities: the potential sale of the assets **or** the liquidation of assets. According to the monthly financial disclosure reports submitted to the bankruptcy court, the Employer had a net loss of almost \$75,000 in September 2011; \$44,000 net loss in October; \$10,000 net loss in November; and \$24,000 net loss in December. The plan confirmation hearing was slated for December 9, but was rescheduled due to an outstanding objection to the plan filed on December 2 by the Petitioner. The objection was heard on February 8, 2012, during the plan confirmation hearing. The bankruptcy court will decide the value of the claim, which Petitioner contends is in excess of \$300,000. The Employer responded to the claim, asserting that its value is zero, or in the alternative, at most \$10,000. As soon as that last objection/claim is settled or ruled upon, the bankruptcy court will rule on the plan of reorganization.

Based on the two potential scenarios outlined in the plan of reorganization, Wieber testified that if the Employer is involved in asset liquidation, its ongoing business operations would cease within days. All employees would be terminated at the end of the liquidation process, and the Employer would cease as an entity for any purpose. To the extent of the liquidation, there would be a trust set up and a trustee assigned to such.

Likewise, Wieber testified that if the Employer is involved in a sale of the business, ongoing operations of the Employer would cease at the time of the sale.

The plan of reorganization designates a sale of the Employer's assets as the most financially feasible and preferable option. Pursuant to the plan, an auction was held for any qualified potential purchasers. The only entity to present a bid or offer for the purchase of the assets during the auction was TSFP Holdings, Inc., which is owned by Wieber and Hermanson. Wieber testified that if a sale of the assets is made, it is undetermined whether TSFP Holdings, Inc., would continue to operate the same business, how the business would be structured, what employees it would have, and whether it would perform or sell the Employer's contracts.

The bankruptcy Disclosure Statement, signed by Wieber, indicates that the Employer/Debtor selected [TSFP Holdings, Inc.], the Stalking Horse Bidder,⁸ composed of Wieber and Hermanson, "... because, in part, the Management Team has significant experience in the fire sprinkler design and installation business, has a proven track record of successfully managing and completing fire sprinkler design and installation projects, and has relationships with the Debtor's general contractors and customers. **As a result, a sale of the business to the Stalking Horse Bidder would allow the Debtor's Business to continue with the least disruption to its ongoing projects as well as maximize the value of the Debtor's assets for the benefit of all creditors.**" (emphasis added, page 32 of Disclosure Statement).

Analysis

The issue is whether, in the context of the Board's obligation to enforce the National Labor Relations Act while accommodating the Bankruptcy Code, it is appropriate to process a representation petition, which was filed approximately four and one-half months after the Employer filed for Chapter 11 bankruptcy. The specific conflict between the Act and the Code arises with the obligation to protect employees' rights through the Board's election process.

In general, bankruptcy court proceedings do not stay or impede the Board's processing of election petitions in representation cases. See *In Re American Buslines, Inc.*, 151 F. Supp. 877 (D.N.E. 1957), where, in a corporate reorganization proceeding, the federal district court did not possess the power or authority to command or require further stay of proceedings before the Board to determine the bargaining representative for employees of the corporation being reorganized. The court stated that the alleged harm to an employer's reorganization to be caused by the Board's representation case

⁸ In corporate bankruptcy proceedings, "stalking horse bid" (or bidder for these purposes), refers to the first bid for a company's assets, by a third party chosen by the bankrupt company. This is done to ensure that the bankrupt corporation does not have to settle for unacceptably low prices for its assets. As explained @ <http://financial-dictionary.thefreedictionary.com>.

was “remote,” “unrealistic” and “undemonstrated.” In that case, as well as in the instant case, the facts do not involve an initial organizing campaign among the debtor’s employees, but rather employees who are already represented by a union.

In a proceeding involving the National Mediation Board, the District Court held that precertification proceedings under the Railway Labor Act were not proceedings “against the debtor” within the meaning of automatic stay provisions of the Bankruptcy Code, and thus the bankruptcy proceeding did not form a basis for enjoining the representation election. *In Re Continental Airlines Corporation*, 50 B.R. 342 (S.D. Tex. 1985).

Although urging opposite results, the Employer and Petitioner rely on the same two cases, *Larson Plywood*, 223 NLRB 1161 (1976), and *Hughes Aircraft*, 308 NLRB 82 (1992), neither of which involve a bankruptcy court proceeding. In *Larson Plywood*, the Board decided that it would not direct an election because a corporate resolution to sell the company assets within 90 days constituted an imminent and certain decision. Likewise, in *Hughes Aircraft*, the Board held that it would not conduct an election at a time when a permanent layoff was imminent and certain, documented by letters of intent with subcontractors and permanent layoff notices to employees in the bargaining unit. I agree with the Petitioner’s reading of these two cases, in that they can be distinguished from the instant case where no such imminence or certainty exists. There is no timeframe, akin to the 90 days in *Larson Plywood*, where an action eradicating either the business or the Employer’s workforce is set to take place. Wieber’s testimony about the Employer’s operations ceasing within days of a liquidation of assets or a sale of assets is mere speculation and conjecture. The Employer failed to establish *with certainty* when a sale or liquidation would occur once the bankruptcy judge rules on the last objection. Moreover, there is no certainty as to when such a ruling will take place.⁹

Compare *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976), a case which issued shortly after *Larson Plywood*, wherein the Board held that the employer’s stated intention to cease operations was too speculative a basis to bar an election. The employer had sustained financial loss in the preceding two years, and a corporate resolution directed that all manufacturing activities be terminated within six months and all machinery and inventory be sold or otherwise disposed. But there was also evidence that the employer hired additional employees, sought and received a tax exemption extending well beyond the six-month closure plan, and, as counsel represented, “... would like to continue and . . . are doing everything we can to make it possible.” *Canterbury of Puerto Rico* at 309. This scenario is more similar to the instant case than either *Larson Plywood* or *Hughes Aircraft*: the Employer herein continues to operate its business and has approximately 55 projects on which it performs work, and has selected the stalking horse bidder with potential to “allow the Debtor’s business to continue with the least

⁹ There is no evidence showing that the Bankruptcy Court established a time certain for the occurrence of any of these events.

disruption to its ongoing projects as well as maximize the value of the Debtor's assets ...” (Bankruptcy Disclosure Statement, p. 32). As in *Canterbury of Puerto Rico*, asset liquidation and/or sale of business operations and financial losses at some indeterminate point in the future is insufficient to stay the representation petition. I find that the policies of the Act are best served in this instance by processing the petition and directing an election.¹⁰

Conclusion

5. For the above stated reasons, and based upon the record as a whole, I find 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 and direct an election therein:¹¹

All full-time and regular part-time journeymen sprinkler fitters and apprentices working in Wayne, Oakland, Macomb, and Washtenaw counties employed by the Employer out of its facility currently located at 47810 Galleon Drive in Plymouth, Michigan, but excluding all shop employees, truck drivers, designers, estimators, office employees, sales employees, and guards and supervisors as defined in the Act.

Dated at Detroit, Michigan, this 15th day of February 2012.

(SEAL)

/s/ Dennis R. Boren

Dennis R. Boren, Acting Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

¹⁰ At the hearing, the parties orally presented their position with regard to the propriety of a manual or mail ballot election. This is an administrative matter and will be determined at the time election arrangements are made.

¹¹ The parties stipulated to using the construction industry eligibility formula set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961) as modified in 167 NLRB 1078 (1967), and *Steiny & Co.*, 308 NLRB 1323 (1992). Thus, the *Daniel/Steiny* eligibility formula will apply, as noted in the attached Direction of Election.

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 **SPRINKLER FITTERS LOCAL 704, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA (UA), AFL-CIO**. 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 to vote are all employees who have been employed for 30 working days or more within the 12 months preceding the eligibility date or if they have had some employment in those 12 months and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date. 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, 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 quit or 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.). 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 on or before **February 22, 2012**. 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,¹² by mail, or by facsimile transmission at **313-226-2090**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since 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. Posting of Election Notices

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of

¹² 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, select the option to file documents with the **Regional Office**, and follow the detailed instructions.

the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).]

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

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 **February 29, 2012**. The request may be filed electronically through the Agency's website, **www.nlr.gov**,¹³ but may **not** be filed by facsimile.

¹³ To file a Request for Review electronically, go to the Agency's website at **www.nlr.gov**, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Board/Office of the Executive Secretary** and follow the detailed instructions.