

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

AUSTIN CREEK MATERIALS

Employer

and

Case 20-RC-072547

TEAMSTERS LOCAL 665 and
OPERATING ENGINEERS LOCAL
UNION NO. 3

Joint Petitioner

DECISION AND ORDER

The Employer produces and sells building materials, including rock, gravel, aggregate products and ready-mix cement. It has a ready-mix operation at Santa Rosa, California, and a quarry and ready-mix operation at Cazadero, California.¹

By its amended petition, Teamsters Local 665² and Operating Engineers Local 3 (Joint Petitioner), seek to represent a unit comprised of all full-time and regular part-time truck drivers, heavy duty repairmen, equipment operators, plant operators, yard persons, plant clericals and dispatchers employed by the Employer at its Cazadero and Santa Rosa, California facilities; excluding all office clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.³ The petitioned-for unit is comprised of approximately 29 employees.

¹ I take administrative notice that these two facilities are approximately 27 miles apart.

² At the hearing, the petition was amended to reflect the merger of Teamsters Local 624 into Teamsters Local 665. No party disputed the validity of the merger.

³ At the hearing, Joint Petitioner amended the petition to exclude the classification of scale house operator and to include the classification of plant clerical. Joint Petitioner's Counsel also stated on the record that Joint Petitioner wanted to include Ready-Mix Dispatcher Chris Lopez in the unit whether he is considered to be a plant clerical or a dispatcher, and argues this position in Joint Petitioner's brief. Joint Petitioner additionally takes the position that the other disputed employee, Dispatcher/Scale

The Employer contends that under Section 9(c)(3) of the Act, the petition must be dismissed because an election was conducted within the past 12 months in the same or in a substantially similar unit in Case 20-RC-64026.⁴ The petitioned-for unit in the instant case is identical to the unit in Case 20-RC-64026, except that Joint Petitioner has added the new classifications of plant clerical and dispatcher. As shown below, these two new classifications cover only two new individuals whom Joint Petitioner seeks to include in the unit. The Employer argues that one of these individuals is a statutory supervisor and that neither shares a community of interest with other unit employees sufficient to support their inclusion in the unit. Further, the Employer argues that even assuming both individuals were properly included in the unit, Section 9(c)(3) would still bar holding an election in the instant case because the petitioned-for unit would be essentially the same as the unit in the prior case.

Joint Petitioner takes a contrary position on these issues. It contends that Section 9(c)(3) is not applicable to the instant case because the inclusion of the new classifications/two new employees (Dispatcher/Scale Clerk/Inside Salesperson Deanna Jacobi and Ready-Mix Dispatcher Chris Lopez), makes this unit different from the unit in Case 20-RC-64026. Joint Petitioner argues that Jacobi is not a statutory supervisor, and that she and Lopez share a substantial community of interest with other unit employees that supports their inclusion in the unit.

After carefully considering the entire record, the arguments of the parties, and applicable legal principles, I find that under Section 9(c)(3), the instant petition must be dismissed. Thus, assuming *arguendo* that Jacobi is not a statutory supervisor and that she and Lopez share a community of interest supporting their inclusion in the unit, I find that the inclusion of the additional classifications, with the resulting addition of Jacobi and Lopez to the unit, does not substantially change the petitioned-for unit from the unit in

Clerk/Inside Salesperson Deanna Jacobi, also performs dispatching duties. I accept the statement of Joint Petitioner's Counsel on the record as an amendment of the petition to include the classification of dispatcher in the petitioned-for unit.

⁴ Section 9(c)(3) states in relevant part: "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve month period, a valid election shall have been held."

Case 20-RC-64026.⁵ Accordingly, given that an election was conducted in that case on October 14, 2011, I have concluded that Section 9(c)(3) prohibits holding an election in the instant case and requires dismissal of the petition.

Stipulations: The parties stipulated that the following individuals employed by the Employer are statutory supervisors who would be properly excluded from the unit: President/General Manager, Steve Canelis; Aggregate Operations Manager, Alfredo Rincon; and Operations Manager, Ryan Duncan. The parties also stipulated that Outside Salesperson, Darrell Carpenter, is properly excluded from the unit.

The Prior Proceeding. On September 7, 2011, Joint Petitioner filed a petition in Case 20-RC-64026, seeking to represent employees of the Employer. The parties thereafter stipulated to an election in the following unit:

All full-time and regular part-time truck drivers, heavy duty repairmen, equipment operators, plant operators and yard persons employed by the Employer at its Cazadero and Santa Rosa, California facilities; excluding all other employees, sales employees, professional employees, managers, guards and supervisors as defined by the Act.

An election was conducted in the stipulated unit on October 14, 2011.⁶ On January 30, 2012, the Board issued a Decision and Certification of Results of Election, finding that a majority of valid ballots had not been cast for Joint Petitioner, and that Joint Petitioner was not the exclusive bargaining representative of the employees in the unit.

The Current Petition. In the instant case, by its amended petition, Joint Petitioner seeks to represent a unit of employees which is identical to the unit in Case 20-RC-64026, except for the addition of the classifications of plant clerical and dispatcher. As indicated above, Joint Petitioner takes the position that there are two employees in these classifications: Dispatcher/Scale Clerk/Inside Salesperson Deanna Jacobi and Ready-Mix Dispatcher Chris Lopez.

⁵ I have set forth in this Decision and carefully considered the facts in the record with regard to the issues of the supervisory status of Lopez and the unit placement of Jacobi and Lopez. However, I reach no legal conclusions regarding such issues because my decision to dismiss this petition based on Section 9(c)(3) makes it unnecessary to resolve such issues.

⁶ Twenty-four employees voted in the election in 20-RC-64026, including one who cast a non-determinative challenged ballot.

Testimony at the Hearing. The only witness who testified at the hearing is Office Manager Gina Reid.⁷

The Employer's Management & Supervisory Structure. President/General Manager Canelis heads the Employer's operation. Aggregate Operations Manager, Alfredo Rincon; Operations Manager, Ryan Duncan; Office Manager, Gina Reid; Dispatcher/Scale Clerk/Inside Salesperson, Deanna Jacobi, and Outside Salesperson, Darrell Carpenter, all report directly to Canelis. The Employer's yard persons report to Rincon and its ready-mix drivers and Ready-Mix Dispatcher, Chris Lopez, report to Duncan. Transfer Driver Chris Hoffman reports directly to Jacobi. The record does not disclose specific evidence regarding other employees in the petitioned-for unit.

The Employer's Operation & Employees. As indicated above, the Employer operates out of two locations, one in Santa Rosa, where it has a ready-mix batch plant, and the other in Cazadero, California, where it has a quarry, ready-mix plant, business office and ready-mix dispatch trailer.⁸ The ready-mix batch plant at the Cazadero facility is located in the upper portion of the yard. Concrete is loaded into trucks at the batch plant. The trailer used by Ready-Mix Dispatcher Chris Lopez is also located in the upper part of the yard near the batch plant. The yard also contains a break-room for the yard persons and ready-mix drivers. The business office is located in a trailer in the middle of the yard about 75 yards away from the trailer where Lopez works and about 50 yards away from the break-room trailer.

The Employer's ready-mix drivers drive "cement mixer" trucks to transport concrete mix to the Employer's customers. Transfer Driver Chris Hoffman drives a different type of truck to transport rock, gravel and other aggregate products to customers and also to transfer materials between the Employer's two facilities. Another ready-mix

⁷ No party seeks to include Reid in the unit. Reid spends 100% of her work time in the office trailer at the Employer's Cazadero facility. Her job includes handling the processing of new hires; bank transactions and reconciliations; loan documents; timesheets; payroll; accounting functions; workers compensation; mail distribution; sales orders; maintenance of personnel files; and answering the telephone.

⁸ Prior to January 2012, the Employer's primary business office was located in Santa Rosa. In December 2011, it closed its Santa Rosa office and relocated its business office to its Cazadero facility.

driver, Terry Sheets, also transports materials between the Employer's facilities. As indicated above, the ready-mix drivers, including Sheets, and Ready-Mix Dispatcher Lopez, report to Operations Manager Duncan. Transfer Driver Hoffman reports to Jacobi.

Yard persons work in the Employer's yard loading rocks into the wash plant for cleaning and into the crush plant to be crushed into different sizes. They also operate loaders to move materials into storage areas in the yard and to add additional material to customer orders at the weigh scale. Yard persons and drivers do not use computers in their work. Yard persons report to Aggregate Operations Manager Rincon.

The Employer also employs plant operators, heavy duty repairmen and equipment operators.

Dispatcher/Scale Clerk/Inside Salesperson Deanna Jacobi. As indicated above, Joint Petitioner seeks to include Jacobi in the unit as a plant clerical employee, and the Employer contends that she must be excluded as a statutory supervisor or because she is an office clerical employee or salesperson who lacks a community of interest with other unit employees.

Jacobi works in the Employer's office at the Cazadero facility. The office is housed in a 12 by 50 foot trailer containing four desks equipped with computers and phones, file cabinets, a copy machine, a water cooler, a refrigerator, and a table and chairs. The office is located at about the middle of the yard about 50 yards from the trailer/break room used by yard persons and ready-mix drivers and about 75 yards away from the trailer used by Ready-Mix Dispatcher Lopez.

Working in the same office as Jacobi is President/General Manager Canelis, Operations Manager Duncan and Office Manager Reid. Jacobi works from 7 a.m. to 3:30 p.m.; Canelis from 7 a.m. to 5 p.m.; and Reid from 8:30 a.m. to 4:30 p.m.

Canelis, Reid and Duncan are salaried employees; the only other salaried employee is Outside Salesperson Carpenter. Jacobi is hourly paid as are the other employees in the petitioned-for unit; her wage rate is about \$18 an hour. Jacobi does not receive commissions for her inside sales work. Prior to December 2011, Jacobi had

received the same benefits as other employees in the petitioned-for unit. In December 2011, the Employer eliminated benefits for all of its employees, including its managers.

Reid testified that Transfer Driver Chris Hoffman is the only employee who reports directly to Jacobi. As indicated above, Hoffman drives a truck to deliver rock and other materials to customers and to transfer materials between Employer facilities. Reid testified generally that Jacobi is authorized to issue discipline to Hoffman and give input on his performance evaluations and pay increases. With regard to Jacobi's authority to discipline Hoffman, Reid testified that Jacobi had "talked to" Hoffman after he had parked in a spot in the Employer's lot after clocking out on several occasions. Reid further testified that Jacobi had spoken to President/General Manager Canelis about talking to Hoffman on this occasion, but Reid was unsure whether Jacobi had spoken to Canelis before or after speaking to Hoffman. Reid was also asked about an incident involving a written discipline Hoffman had apparently received for his conduct during a meeting attended by Canelis, but Reid did not know if Jacobi was involved in the issuance of this warning or whether it had been placed in Hoffman's personnel file. Reid ultimately explained that she knew Jacobi had authority to discipline employees because, as office manager, Reid had the authority to give Jacobi the authority to discipline.

According to Reid, Jacobi dispatches Hoffman and occasionally another driver, Terry Sheets, who is a ready-mix driver that sometimes drives a transfer truck. Reid testified that other than occasionally dispatching Sheets, Jacobi has no authority over him. Jacobi's dispatch work involves determining when materials must be delivered to customers or transferred between facilities; scheduling deliveries; processing delivery tickets; and giving the tickets to Hoffman and occasionally to Sheets. The scheduling of deliveries is controlled by customers' needs. According to Reid, Jacobi does all of her dispatch work at her desk.

Reid testified that Jacobi also schedules Hoffman's work hours on a daily basis. Hoffman's schedule and work hours each day are controlled by the number of jobs; when customers need the materials; and the distances involved in making deliveries. According to Reid, the scheduling of jobs is done on a first-in, first-out basis.

Reid also testified generally that Jacobi has authority to grant Hoffman's requests for time off, vacation and sick leave. Reid testified that Jacobi uses a couple of outside haulers to cover for Hoffman when he is out.

Reid testified that Jacobi can independently determine if Hoffman will work overtime. However, Reid testified that if a job ran over and a customer needed the materials that day, then the employee had to work the overtime.

Jacobi also has the primary responsibility for operating the scale used to weigh trucks and materials. The scale is outside but adjacent to the office and is connected to an electronic display inside the office showing the weight of the truck. Trucks are weighed while empty and after being filled with materials. Jacobi inputs into her computer information on the weight and type of material being sold, prints out and signs a delivery ticket for the materials, and hands it to the driver or customer through a window in the Employer's office trailer. At times, while using the scale to weigh a load for delivery, Jacobi uses a hand-held radio to contact a yard person to come and load additional materials onto a truck if the weight is less than what is being sold or delivered to a customer. Using the scale does not require Jacobi to leave the office. Canelis, Duncan, Reid and Lopez also operate the scale on an as needed basis when Jacobi is unavailable. According to Reid, during the past two months, Jacobi has only spent about 10% of her work time operating the scale. However, Reid further testified that she has only observed Jacobi using the scale during December and January, which are typically slow months for the Employer.

Reid testified that prior to December 2011, when the Employer's main office was still located in Santa Rosa, Scale Clerk Brenda Hernandez⁹ had been the primary person operating the scale at that location. According to Reid, because of difficult economic times, the Employer laid off Hernandez on December 6, 2011.¹⁰ Jacobi took over the

⁹ Hernandez had been paid about \$14 an hour and had worked from 6:30 am to 3 pm. The position of scale clerk was not included in the unit in Case 20-RC-64026.

¹⁰ In December 2011, the Employer also laid off Accounts Receivable Clerk, Adriene Leihy and Accounts Payable Clerk, Jennifer Berry; in November 2011, it had laid off Receptionist Felice Hernandez and a yard person.

scale clerk's duties after Hernandez was laid off.¹¹ At the time of the hearing, there were no scale clerks employed by the Employer and Jacobi was the person primarily fulfilling the functions of that position. According to Reid, the Employer has no current plans to recall or replace Hernandez or any of the other employees whom it has laid off. Reid further testified that although the Employer's business is seasonal in nature, she recalled no occasion when the Employer had recalled employees who had been laid off.

Jacobi also has "inside sales" duties, which involve her communicating with customers in person, by phone and by computer. Jacobi uses an established Employer protocol to determine the cost of materials and delivery, and she generates price quotes, which she emails to customers; the record does not establish that Jacobi exercises discretion in creating these price quotes. Jacobi also creates invoices; and, as described above, she makes delivery arrangements and handles dispatching with regard to Drivers Hoffman and occasionally Sheets. According to Reid, Jacobi performs all of these functions within the office. Lastly, Reid testified that Jacobi handles some payments.

Reid testified that Jacobi takes her breaks at her desk and does not use the break room used by yard persons and ready-mix employees.

Ready-Mix Dispatcher Chris Lopez. As indicated above, Joint Petitioner argues that Ready-Mix Dispatcher Chris Lopez shares a community of interest with other employees in the petitioned-for unit and should be included in the unit as either a plant clerical or dispatcher; the Employer takes a contrary view.

Lopez was hired as a yard person in 2009, and became the ready-mix dispatcher in November 2011, when the former ready-mix dispatcher, Ryan Duncan, was promoted to operations manager. Lopez and all of the ready-mix drivers are directly supervised by

¹¹ Reid testified that when Hernandez was employed she directly reported to Jacobi as did another Scale Clerk, Jodie Deathrage, who had been laid off in April 2011. According to Reid, Jacobi had possessed authority to grant their requests for time off; collected and verified their timesheets; had input with Canelis concerning their pay raises and discipline; and had corrected their mistakes on paperwork and taught them how to fill out paperwork correctly. According to Reid, Jacobi also gave Hernandez and Deathrage their layoff notices. Other than Reid's general testimony, the record contains no evidence regarding Jacobi's authority over Hernandez or Deathrage. In any event, given that these employees are no longer employed and the Employer has no plans to recall them, evidence regarding Jacobi's authority over them would be of little probative value in determining whether she is currently a statutory supervisor.

Duncan. Lopez is hourly paid as are all of the petitioned-for employees. Lopez also received the same benefits as other unit employees prior to the elimination of benefits for all employees in December 2011.

Lopez dispatches ready-mix drivers from both the Santa Rosa and Cazadero facilities except for Driver Chris Hoffman, whom Jacobi dispatches. Most of Lopez's work is performed inside a 20-foot trailer located in the upper yard area at the Cazadero facility near the ready-mix batch plant. The trailer is about 75 yards away from the office trailer where Jacobi works. Lopez is the only person who uses the trailer, which is equipped with a desk, computer and phone. According to Reid, other employees seldom enter Lopez's trailer and they do not use his computer.

Lopez's job includes communicating with customers on the phone to process orders for ready-mix concrete. He inputs order and delivery information into the computer and creates a delivery tag to show where the delivery is to be made and the amount and type of materials to be delivered. At the end of each work day, Lopez records a message for each driver with the driver's schedule for the following day. Lopez determines the drivers' schedules based on their seniority. Lopez schedules and dispatches ready-mix drivers based on customers' needs and the distances involved in making deliveries. Deliveries are booked on a first-in, first-out basis. Lopez also uses a hand-held radio to communicate with drivers, who contact him when they have on-the-road emergencies. None of the yard persons or drivers has access to computers at either facility and they do not enter Lopez's office or the business office to use the computers. According to Reid, Lopez does not work in the yard or operate any yard equipment, and he takes his breaks inside his trailer. As indicated above, Lopez worked as a yard person from his hire in 2009 until November 2011. He was included in the unit as a yard person in Case 20-RC-64026, and he voted in the prior election.

ANALYSIS

Whether Section 9(c) (3) of the Act Prohibits Holding An Election in this Case. As indicated above, Section 9(c)(3) prohibits an election in the same unit or any subdivision thereof in which an election has been held within the past 12 months. See

Retail Store Employee' Union, Local No. 692 (Irvins, Inc.), 134 NLRB 686 (1961). Section 9(c)(3) does not prohibit an election in a larger unit, when there has been an election in a smaller unit, because the subsequent election is not being conducted in a unit or any subdivision thereof in which the earlier election was held. See *Allegheny Pepsi-Cola Bottling Co.*, 222 NLRB 1298 (1976); *Thiokol Chemical Corp.*, 123 (1959); and *Allstate Insurance Co.*, 176 NLRB 94 (1969).

In this case, Joint Petitioner contends that the addition of the new classifications of plant clerical and dispatcher and of employees Jacobi and Lopez to the unit make Section 9(c)(3) inapplicable to the instant case. In essence, it argues that Section 9(c)(3) must be strictly interpreted and cannot prohibit an election in this case because the unit herein is different and larger by two employees than the unit in Case 20-CA-64026. The Employer argues that Jacobi is a statutory supervisor and that neither Jacobi nor Lopez is properly included in the unit under applicable community of interest criteria and that the petitioned-for unit is not an appropriate unit. Joint Petitioner takes a contrary position on the arguments raised by the Employer.¹²

I find it unnecessary to resolve the issues of Jacobi's supervisory status or of the unit placement of Jacobi and Lopez or of the appropriateness of the petitioned-for unit in order to make my determination in this case. Thus, even assuming *arguendo* that Jacobi is not a statutory supervisor; that Jacobi and Lopez are properly included in the unit; and that the unit is an appropriate unit for collective bargaining purposes, I find that Section 9(c)(3) is applicable to the instant case and requires dismissal of the petition.

Section 9(c)(3) was enacted, in part, to avoid the potential for disruption in the work place caused by holding elections too frequently. See *Brooks v. NLRB*, 348 U.S. 96, 100 (1954). The test applied by the Board under Section 9(c)(3) is whether the unit in a petition is "substantially like" the unit in which an election has been held within the past 12 months. See *Casey-Metcalf Machinery Co.*, 114 NLRB 1520, 1524 (1955). In *Casey-Metcalf Machinery Co.*, the Board found that Section 9(c)(3) barred holding new elections where two elections had been conducted less than 12 months previously in

¹² Joint Petitioner seeks the inclusion of Jacobi and Lopez in the unit whether they are viewed as plant clericals or dispatchers or, insofar as Jacobi is concerned, a scale house operator.

“units substantially like” the units in those prior elections. That test is met on the present record.

The two new classifications (plant clerical and dispatcher) added by Joint Petitioner in the instant petition would cause the addition of only two new employees, Jacobi and Lopez, to the unit in Case 20-RC-64026. Otherwise the unit of approximately 29 employees in Case 20-RC-64026 is identical to the instant unit. The Board has found Section 9(c)(3) to apply in similar circumstances. Thus, in *American Bridge Division, United States Steel Corp.*, 156 NLRB 1216, 1218 (1966), the Board found that Section 9(c)(3) barred an election where the employer had “been producing essentially the same types of finished goods, with *no substantial change in the number of job categories*,” even though the number of employees at the plant had increased “*considerably*.” Specifically, the unit in *American Bridge* had increased from 21 to 80 employees in the 9 months between the time of the prior election and the subsequent petition. *Id.* In *Fedders-Quigan Corp.*, 88 NLRB 512 (1950), the Board held that Section 9(c)(3) barred a subsequent election even though the number of unit employees had increased from 15 to 167 during the four months since the prior election.

Although the unit petitioned-for in the instant case is not identical to the unit in Case 20-RC-64026, it is substantially like the unit in that case and thus meets the applicable test under Section 9(c)(3), as set forth above. The two new classifications (plant clerical and dispatcher) added by Joint Petitioner to the instant petition would cause the addition of only two employees, Jacobi and Lopez, to the unit in Case 20-RC-64026.¹³ Under such circumstances, I find that Section 9(c)(3) requires the dismissal of this petition. See *American Bridge Division, supra*; *Casey-Metcalf Machinery Co., supra*; *Fedders-Quigan Corp., supra*.

In reaching this decision, I have carefully considered the cases cited by Joint Petitioner in its brief, and I find that they are not controlling. Thus, each of the cases cited involves petitioned-for units which are substantially different than the units in which elections had been held within the preceding 12 months. In *Robertson Brothers*

¹³ I take administrative notice that by virtue of his then-position as a yard person, Lopez was eligible to vote in the election in 20-RC-64026, and in fact did so.

Department Store, 95 NLRB 271, 273 (1951), the Board decided that Section 9(c)(3) did not prohibit an election in a store-wide unit of selling and non-selling department store employees, which included employees in just three classifications who had voted in a consent election during the preceding year and then merged into a store-wide contractual unit. The Board in *Robertson* found that the petitioned-for unit was not the same unit or subdivision of the unit in the consent election, which had been limited to employees in the three classifications. Rather, the petitioned-for unit was a larger unit. *Id.* Thus, unlike the unit in the instant case, the unit petitioned-for in *Robertson* was not substantially like the unit in the prior election.

In *Leslie Metal Arts Co., Inc.*, 167 NLRB 693 (1967), the Board ruled that Section 9(c)(3) did not prohibit an election in a unit of approximately ten truck drivers working at three employer facilities even though two of those truck drivers had voted in an election held within the preceding 12 months in a single-facility production and maintenance unit. The Board found that the petitioned-for unit was not the same unit or a subdivision of the unit in the prior election. Again, unlike the instant case, the petitioned-for unit in *Leslie Metal Arts*, was substantially different from the unit in the election that had previously been held.

Lastly, in *Allegheny Pepsi-Cola Bottling Co.*, 222 NLRB 1298 (1976), the Board found that Section 9(c)(3) did not bar an election where the petitioned-for unit was comprised of sales employees at a newly-opened branch operation resulting from the merger of the operations of two discontinued branch facilities at which sales employees had voted in elections within the preceding 12 months. The Board in *Allegheny* reasoned that the new branch operation was not a subdivision of an existing operation and that the petition was therefore not in the same unit or a subdivision of the unit in the prior case. By contrast the instant case involves the same operation at the same facility with a unit that is substantially like the unit in the preceding election. In sum, none of the cases relied on by Joint Petitioner are controlling in the instant case.

For all the foregoing reasons, I find that Section 9(c)(3) is applicable and bars the holding of an election in the instant case. Accordingly, the instant petition is dismissed.

CONCLUSIONS AND FINDINGS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I find as follows:

1) The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.¹⁴

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) Teamsters Local 665 and Operating Engineers Local 3 (Joint Petitioner) are labor organizations within the meaning of the Act.

4) No question affecting commerce exists within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

ORDER

IT IS HEREBY ORDERED that the petition be dismissed.

RIGHT TO REQUEST REVIEW

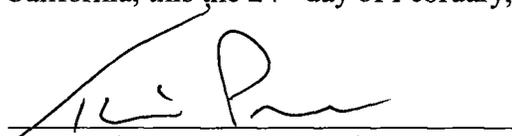
Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **March 9, 2012**. The request may be filed electronically through the Agency's web site, www.nlr.gov,¹⁵ but may not be filed by facsimile.

¹⁴ I find no prejudicial error in the Hearing Officer's refusal to enforce the subpoena duces tecum of Joint Petitioner, particularly given my decision that an election is barred by Section 9(c)(3), even assuming *arguendo* that Chris Lopez and Deanna Jacobi may otherwise have been properly included in the unit.

¹⁵ 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 Order
Austin Creek Materials
Case 20-RC-072547

DATED AT San Francisco, California, this the 24th day of February, 2012.

A handwritten signature in black ink, appearing to read 'T. Peck', is written over a horizontal line.

Tim Peck, Acting Regional Director
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735