

R.D. # 05-12
Wayne, New Jersey

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

MARCH ASSOCIATES CONSTRUCTION, INC. ¹	
Employer	
and	CASE 22-RC-075268
NEW JERSEY BUILDING CONSTRUCTION LABORERS DISTRICT COUNCIL	
Petitioner	

DECISION AND DIRECTION OF ELECTION

The Petitioner, New Jersey Building Construction Laborers District Council, filed a petition under Section 9(c) of the National Labor Relations Act seeking to represent a unit of approximately five employees consisting of all full-time and regular part-time building and construction laborers employed by the Employer in the state of New Jersey excluding office clerical employees, guards, and supervisors as defined by the Act. While the parties stipulated that the petitioned-for unit is appropriate for collective bargaining, the Employer contends that there should be no election because as of May 1, 2012, the unit will be disappearing in its entirety. I have considered the evidence and the arguments presented by the parties. I find that the petitioned-for unit is an appropriate

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

unit in scope and, for the reasons discussed *infra*, that the petition should not be dismissed because of the Employer's contention concerning the disappearance of the unit. Accordingly, I will order an election herein.

Under Section 3(b) of the Act, I have authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding,² I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and hereby affirmed;
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein;³
3. The labor organization involved claims to represent certain employees of the Employer;⁴
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 2(7) of the Act;⁵
5. The appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act is as follows:

All full-time and regular part-time building and construction laborers employed by the Employer in the state of New Jersey excluding office clerical employees, guards, and supervisors as defined by the Act.

² Briefs filed by the parties have been duly considered.

³ The parties stipulated, and I find, that the Employer is a New Jersey corporation engaged in general contractor as well as construction management services at its Wayne, New Jersey facility, the only facility involved herein. During the preceding 12 months, the Employer, in conducting its business operations, purchased and received goods and services in excess of \$50,000 directly from suppliers located outside of the State of New Jersey.

⁴ The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

⁵ The record reveals that there is no contract or other bar to an election in this matter.

I. STATEMENT OF FACTS

Louis March, Jr., the president and owner of the Employer, and sole witness at the hearing, testified that since 2003, the Employer has been a general contractor and construction manager contracting with developers, retailers and other parties to perform construction projects. To complete these projects, the Employer hires, supervises and manages subcontractors in various building trades.

As a member of the Building Contractors Association of New Jersey (“BCANJ”), a multi-employer association, the Employer entered into a collective bargaining agreement pursuant to Section 8(f) of the Act with the Northern New Jersey Building Laborers District Council, Central New Jersey Building Laborers District Council and the Southern New Jersey Laborers District Council beginning May 1, 2007 and expiring on April 30, 2012. This agreement applies to the Petitioner. The 2007 agreement was the first collective bargaining agreement to which the Employer has been a party since it began operations in 2003.

March testified that the Employer subcontracts 99% of the work required for its construction projects, except for a small amount of clean-up work performed by laborers. Since the Employer began operations, it has required by agreement that each of its subcontractors be responsible for cleaning up after a job. Because of this requirement, March has always intended that it would not be necessary to hire laborers for this purpose. Notwithstanding March’s expectation that his project managers and supervisors enforce the requirement that subcontractors clean up, the Employer’s subcontractors have not always performed the required clean-up. In such instances, rather than enforce its agreements with subcontractors, the Employer has hired laborers to clean up after the subcontractors. March testified that at the time of the hearing, he has not been

completely successful in enforcing the Employer's requirement that subcontractors clean up after their work.

March testified that in early 2010, he was determined to enforce the requirement in the Employer's subcontracts that subcontractors be responsible for clean-up work. March testified that to further this objective, he met with his officers in 2010, 2011 and 2012 and discussed the need to utilize more subcontractors. He also testified that he decided in 2010, that after the expiration of the pre-hire agreement on April 30, 2012, he would not hire any laborers. March testified that he believes the BCANJ agreement required him to wait to implement his decision not to employ laborers until the agreement expired on April 30, 2012. He also believes that the BCANJ agreement required him to continue to employ his two current laborers until the expiration of the contract, prohibited him from promoting them to supervisors prior to that time, and that after that date, they could no longer work for him as laborers. Apart from the expiration date of the agreement, March did not identify any language in the BCANJ agreement or any other basis supporting his understanding of the consequences of the pre-hire agreement.

Since approximately 2010, the number of laborers working for the Employer has fluctuated between two and seven. The Employer currently employs as laborers, Donny McDonough, who has worked for the Employer for about nine or ten years, and Benny Turano, who has worked for the Employer, for about twelve or thirteen years. March testified that he considers McDonough and Turano to spend significant portions of their time performing supervisory work by making sure that jobs get completed on time.⁶

March testified that in about the fall of 2011, he told McDonough and Turano that he intended to promote them as of May 1, 2012 to supervisors. He testified that he had

⁶ The Employer does not contend that these employees are statutory supervisors who should be excluded from the unit pursuant to Section 2(11) of the Act.

had similar discussions with Turano about a promotion over the past five years. He testified that both McDonough and Turano will receive a salary of \$85,000 and have the title of Superintendent. However, the record does not reflect that these details were communicated to the two employees or to anyone else. March has not provided either employee with an offer letter. There was no evidence of any documentation confirming their promotions. The Employer did not call McDonough or Turano to testify at the hearing.

March testified that by letter sent in about February 2012, he advised both the BCANJ and the Petitioner that the Employer withdrew its authority for the association to bargain on behalf of the Employer after the expiration of the agreement on April 30, 2012.⁷

II. ANALYSIS

The Board's longstanding policy is that it will not conduct an election where permanent changes to the scope and composition of an otherwise appropriate unit are imminent and certain. *Hughes Aircraft Company*, 308 NLRB 82 (1992); *Larson Plywood Company, Inc.*, 223 NLRB 1161 (1976); *Martin Marietta Aluminum, Inc.*, 214 NLRB 646 (1974). Dismissal of a petition based upon the imminent elimination of the voting unit is premised by the Board upon the fact that no useful purpose would be served by holding an election. *See e.g., M.B. Kahn Construction Co., Inc.*, 210 NLRB 1050 (1974).

In *Hughes Aircraft Company, supra*, in furtherance of its plan to lay off security guards and to subcontract this function, an employer sent detailed questionnaires to guard companies seeking requests for proposals, received proposals, identified four companies

⁷ Petitioner asserts that the Employer did not timely withdraw from the BCANJ agreement. I do not find that the record evidence enables me to determine the timeliness of the withdrawal. However, I find that whether or not the withdrawal was timely is not relevant to the issue raised in this case concerning the longevity of the petitioned-for unit.

for consideration and met with representatives of the companies to discuss its specifications. In addition, the employer circulated statements to employees on various dates advising them of its efforts to restructure its security operation and provided them with notice of layoff effective on a stated date. The employer subsequently signed agreements with two outside contractors to provide uniformed plant protection services. The subcontractors agreed to begin services within a specific time period.

The Regional Director found that the employer's decision to subcontract in *Hughes* "has methodically been carried forward and has achieved certainty in the execution of letters of intent with subcontractors." *Hughes Aircraft Company*, 310 NLRB at 83. Imminence was likewise "manifest" as reflected in the notice of layoff to occur less than two months from the date of the hearing. The Board affirmed the decision of the Regional Director that the petition should be dismissed because of the imminent cessation of the employer's guard operations.

The employer in *Larson Plywood Company, supra*, presented evidence that during the three years prior to the representation hearing, it had operated at a loss and that its losses were accelerating. The Board decided that a corporate resolution directing the officers to liquidate the business within 90 days constituted an imminent and certain decision in the absence of evidence of any inconsistent action on the part of the employer or evidence that any employment relationship was expected to survive the liquidation.

In *Martin Marietta Aluminum, Inc., supra*, after deciding to close its plant, the employer wrote to all plant employees and issued a public release announcing the impending plant closure set for a date certain. The employer stopped taking further orders at the plant, and notified utility companies and suppliers that it was terminating its contracts with them. A substantial number of employees had been terminated prior to the

hearing. The Board found that the record there showed that the closure of the plant was definite and imminent.

On the other hand, the Board will not dismiss a petition alleged to consist of a disappearing unit where the Employer's plans to reduce its workforce are indefinite and speculative. In *Canterbury of Puerto Rico Inc.*, 225 NLRB 309 (1976), the Board found that the employer's stated intention to cease operations was too speculative to bar an election where the employer had applied to renew a tax exemption for the ensuing twelve years, despite a corporate resolution directing that all manufacturing activities be terminated within six months and that all machinery and inventory be sold.

Here, the Employer's owner testified to his intention since the beginning of the Employer's operations in 2003 to rely on subcontractors rather than laborers to perform clean-up work. The record further establishes that since 2003, the Employer has not been entirely successful in achieving this goal, although it reduced the number of laborers it employs. In 2010, the Employer decided that beginning on May 1, 2012 it will cease employing laborers and will promote its two current laborers to supervisory positions. However, the Employer's mere stated intention does not meet the required showing that the asserted change in the unit be definite and imminent. *See Canterbury of Puerto Rico Inc., supra.*

The Employer, in its brief, argues that in addition to its stated intent, the Employer has taken several affirmative actions that show that its plan to cease employing laborers is certain and imminent. The Employer points out that starting in 2010, there were discussions among the Employer's officers that the Employer should rely entirely on its subcontractors. However, there was no evidence of a definite, binding or verifiable

decision by the officers to eliminate the use of laborers at a fixed point in time. *See Larson Plywood Company, supra.*

The Employer next points to the testimony that during the past year, its owner has communicated to the laborers it now employs its intent to promote them effective May 1, 2012. Here, March testified merely that he had “conversations” with the two laborers about their prospective promotions. He testified that he has determined their salaries and title although it is not clear if this information was communicated to the employees or anyone else. There was no evidence that the owner has made an actual offer to the employees or discussed with them their future wages, hours, benefits or any other term and condition of employment. No documents were proffered verifying March’s plan to promote the laborers. Significantly, the Employer failed to call either employee or any other witness to support its position that its plan to promote these employees was certain and imminent. I do not, therefore, find that there was sufficient evidence that March’s uncorroborated conversations with his employees reflect a definite and imminent commitment to promote them.

There remains the Employer’s assertion that in furtherance of its plan, it sought in early 2012 to withdraw from its pre-hire agreement which it believed prevented it from terminating its laborers and promoting them. The Employer does not offer any basis supporting the reasonableness of the owner’s beliefs as to the putative effect of the pre-hire agreement or his additional belief that the agreement prevented him from retaining them after its expiration. Moreover, these beliefs are contradicted by the facts. The Employer has employed at least two laborers, McDonough and Turano, including 2003 through 2007, notwithstanding that it was not a party to a collective bargaining agreement then. Additionally, the number of laborers employed by the Employer has fluctuated

during the life of its Section 8(f) agreement, demonstrating that the Employer was not prohibited from terminating laborers during that time. Therefore, it is difficult to view the Employer's attempt to withdraw from its pre-hire agreement as an affirmative action that advanced its plan to cease employing laborers, when there is no basis for concluding that the pre-hire agreement was an obstacle to that plan.

Thus, I conclude that when all of the evidence is viewed in the entirety, the Employer has not adduced sufficient evidence beyond its stated intention that it has a definite and imminent plan to cease employing laborers. A mere stated intention that a unit will disappear is an insufficient basis to support dismissing the petition. *Canterbury of Puerto Rico Inc., supra*.

The cases cited by the Employer in its brief, in which the Board found a certain and imminent plan to cease employing petitioned-for employees, do not involve situations comparable to the instant case. Each case includes persuasive evidence of more than a stated intention. In *Davey McKee Corp.*, 308 NLRB 839 (1992), the Board held that the evidence did not support the petitioner's challenge, based on weather conditions, to the imminent cessation of operations due to the scheduled completion of a construction project, when there was no probative evidence that weather would delay the work and the employer had documented that the work was on schedule. In *Hughes Aircraft*, discussed above, the employer took numerous concrete, verifiable steps in further of its plan to permanently layoff employees and to subcontract that work, including obtaining requests for proposals from subcontractors, and selecting and signing agreements with subcontractors. In addition, that employer had given written, definite notice to the employees of their layoff. In *Douglas Motors Corp.*, 128 NLRB 307 (1960), also relied by the Employer, an employer intending to eliminate production

employees had executed subcontracts for labor and contracts for equipment in furtherance of its plan. Thus, in each case, the Board found a definite and imminent cessation of operations based on evidence demonstrating that the plan was more than an intention of the employer.

In this case, I can not conclude that the Employer's plan to operate without laborers is certain and imminent and therefore, I can not deny the employees of the Employer their right to vote on whether they desire to be represented by a labor organization. Accordingly, I find that there is an insufficient basis on which to dismiss the petition and shall direct an election in the petitioned-for unit.

III. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently. 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.⁸ Employees engaged in an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that 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

⁸ Pursuant to the Board's formula for voter eligibility in the construction industry, unit employees who are not working at any jobsite on the date of the election are eligible to vote if: a) they have been employed for at least 30 days within the 12 months preceding the eligibility date for the election, or b) if they have had some employment during the past 12 months, and they have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date. *Steiny and Company, Inc.* 308 NLRB 1323 (1992).

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. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by **NEW JERSEY BUILDING CONSTRUCTION LABORERS DISTRICT COUNCIL**.

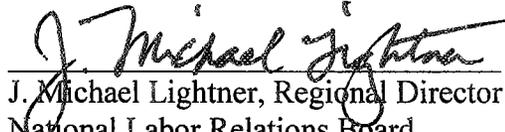
IV. LIST OF VOTERS

In order 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 in 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 seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters in the unit found appropriate above shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before **April 5, 2012**. No extension of time to file this list shall be granted except in extraordinary circumstances nor shall the filing of a request for review operate to stay the requirement here imposed.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. The Board in Washington must receive this request by April 12, 2012. The request may be filed electronically through E-Gov on the agency's website, www.nlr.gov, but may not be filed by facsimile⁹.

Signed at Newark, New Jersey this 29th day of March, 2012.



J. Michael Lightner, Regional Director
National Labor Relations Board
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⁹ To file the request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlr.gov.