

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

DOWN TO EARTH LANDSCAPING, INC.¹

Employer

and

Case 04-RC-076495

NEW JERSEY BUILDING CONSTRUCTION
LABORERS DISTRICT COUNCIL, LIUNA²

Petitioner

**REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

The Employer, Down To Earth Landscaping, provides landscaping, excavation and irrigation services from a facility in Jackson, New Jersey. The Petitioner, which currently has a Section 8(f) contract with the Employer, seeks an election in the unit covered by the contract, i.e. employees who perform landscape construction work on commercial, public and institutional jobs.³ The Employer argues that this unit is inappropriate and must be expanded to encompass all laborers and foremen working in its Design Build Division, including those employees who work on residential projects. The Petitioner asserts that there are four employees in its petitioned-for unit, while the Employer contends that there are about 15 employees in the unit sought by the Petitioner and about 60 employees in the unit the Employer claims is the only appropriate unit.

A Hearing Officer of the Board held a hearing, and the parties filed briefs. I have considered the evidence and the arguments presented by the parties and conclude, in agreement with the Employer, that the petitioned-for unit is inappropriate and that the unit must include all

¹ The Employer's name appears as amended at the hearing.

² The Petitioner's name also appears as amended at the hearing.

³ Specifically, its attorney stated at the hearing that the Petitioner seeks a unit of "all full-time and regular part-time building and construction laborers, including foremen, employed by the Employer in its Design Build Division . . . for commercial, institutional and prevailing wage job sites, excluding all other employees, landscape maintenance employees, irrigation employees, excavation employees, office clerical employees, [employees] in the residential demarcation, guards and supervisors as defined in the Act."

Design Build Division laborers and foremen. In this Decision, I will first provide an overview of the Employer's operations. Then, I will set forth the legal standards to be applied in resolving the community-of-interest issues presented in this case. Finally, I will set forth the facts and reasoning which support my conclusions.

I. OVERVIEW OF OPERATIONS

The Employer has three divisions: Design Build; Grounds and Maintenance; and Irrigation. The parties agree that employees working in the Grounds and Maintenance and Irrigation Divisions should be excluded from the bargaining unit. Thus, this case involves only employees in the Design Build Division (DBD).

The DBD performs landscaping work on new construction and renovations for both commercial and residential projects. Some of the commercial projects are covered by the New Jersey Prevailing Wage Act.

Employer President William Merkler is ultimately responsible for the work done by all three of the company's Divisions. Six DBD Area Managers who report to Merkler are responsible for work on particular projects.

The Employer's foremen⁴ and laborers directly perform the landscaping work. They install trees and other plants, spread mulch, and rake leaves, using picks, shovels, and wheelbarrows.

The DBD's work is seasonal, with the busy season running from March through October of each year. As many as 10 foremen and 50 laborers are employed by the DBD during the busy season. Most of these employees are laid off during the off-season when the DBD has as few as one or two foremen and an equal number of laborers.

The vast majority of DBD employees are direct hires, and about 95 percent of them return from year to year. A small number of DBD employees are referred by the Petitioner to work on particular projects, and they do not generally return to work for the Employer in subsequent years. Referred employees are only assigned to work on projects covered under the New Jersey Prevailing Wage Act and are normally laid off at the conclusion of a project.

II. THE RELEVANT LEGAL STANDARDS

The Act does not require that the unit for bargaining be the only or even the most appropriate unit. Rather, it requires only that the unit be an appropriate one. *Overnite Transportation Co.*, 322 NLRB 723 (1996); *P.J. Dick Contracting, Inc.*, 290 NLRB 150

⁴ The parties agreed that the foremen are non-supervisory employees who should be included in the bargaining unit.

(1988). Procedurally, the Board examines the petitioned-for unit first. If that unit is appropriate, the inquiry ends. *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127 (2010); *Bartlett Collins Co.*, 334 NLRB 484 (2001). It is only where the petitioned-for unit is not appropriate that the Board will consider alternative units which may or may not be units suggested by the parties. *Bartlett Collins Co.*, supra; *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000). The Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employee classifications. See, e.g., *R & D Trucking, Inc.*, 327 NLRB 531 (1999); *State Farm Mutual Automobile Insurance Co.*, 163 NLRB 677 (1967), enfd. 411 F.2d 356 (7th Cir. 1969), cert. denied 396 U.S. 832 (1969).

In determining whether a proposed unit is appropriate, the focus is on whether employees share a community of interest. *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 491 (1985). To make this determination, the Board examines such factors as common supervision, employee skills and job functions, contact and interchange, similarities in wages, hours and other terms and conditions of employment, functional integration, and bargaining history, if any. *Publix Super Markets, Inc.*, 343 NLRB 1023 (2004); *Home Depot USA*, 331 NLRB 1289 (2000); *United Operations, Inc.*, 338 NLRB 123 (2002); *Bartlett Collins Co.*, supra.

In its recent decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip. op. at 10-13 (2011), the Board modified the framework to be applied in making certain unit determinations. Pursuant to this decision, the Board first looks at whether the petitioner seeks a unit consisting of employees readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors) and whether these employees share a community of interest. If so, the party seeking a broader unit must demonstrate “that employees in the larger unit share an *overwhelming* community of interest with those in the petitioned-for unit.” [Emphasis added]. Additional employees share an overwhelming community of interest with petitioned-for employees only where there is no legitimate basis upon which to exclude them from the unit because the traditional community-of-interest factors overlap almost completely. *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip op. at 3 (2011).

III. FACTS

The Petitioner has had a collective-bargaining relationship with the Employer since about 2001. The most recent contract between the parties is effective by its terms from May 1, 2007 through April 30, 2012. In 2008, the parties clarified the bargaining unit covered by the agreement as part of a litigation settlement. Under the settlement, the contractual unit was limited to employees working on, “landscape construction occurring at commercial, public and institutional work sites, along with any other project covered by the New Jersey Prevailing Wage Act.” Specifically excluded from the unit were employees performing landscaping on residential property as well as employees handling “grading, excavation or earth moving services; ... snow removal services; and lawn sprinkler installation, repair and service.”

Although the collective-bargaining agreement as clarified by the parties' settlement agreement theoretically applies to all employees performing landscaping work at commercial, public and institutional sites, the Employer has in fact only applied the terms of the agreement to individuals referred by the Petitioner to work on individual projects covered under the New Jersey Prevailing Wage Act. They are paid the wage rates specified in the collective-bargaining agreement and receive the collectively-bargained benefits. During the course of the 2011 summer season, the Employer employed four individuals referred by the Petitioner who worked for periods ranging from 8 to 23 weeks.⁵

Unlike employees referred by the Petitioner, employees directly hired by the Employer move from job-to-job during the course of the season, and their pay and benefits depend on the type of job they perform. On prevailing rate jobs, these employees are paid a flat rate dictated by the State of New Jersey. Employer Payroll Administrator Katherine Bostian testified that this rate was \$51.60 per hour in 2011. On non-prevailing rate jobs, foremen are paid \$20 to \$35 per hour, and laborers receive \$10 to \$25 per hour. The rate of pay is the same regardless of whether employees work on commercial or residential projects. Foremen receive certain benefits which are spelled out in the Employer's Personnel Handbook, but directly-hired laborers are not eligible for benefits.

Although some of the Employer's direct hires work only on residential projects, none of the employees other than those referred by the Petitioner are assigned exclusively to commercial jobs. Some direct hires are assigned to prevailing rate jobs with greater frequency, but there are no direct hires who work exclusively on such jobs. The Employer introduced payroll records into evidence for two different weeks in July 2011 which it claimed are representative of the pattern of work assignments given to direct hires. The records showed that from July 11 to July 15, five direct hires moved back-and-forth between commercial prevailing rate jobs and residential jobs, and there was a similar pattern of assignments between July 25 and July 29.

Direct hires and employees referred by the Petitioner perform the same functions on prevailing rate jobs. In fact, they regularly work together on the same jobs. Four of the Employer's six Area Managers supervise prevailing rate work, and they also supervise non-prevailing rate commercial and residential projects.

The employees – both referrals and direct hires – usually report to the Employer's shop at the start of the work day, although they occasionally report directly to their designated job site. The foremen and laborers perform the same functions and use the same tools whether the project is commercial or residential. All of the DBD employees wear the same uniforms and use the same vehicles.

⁵ The Petitioner maintains that its records do not show any referrals to the Employer in years preceding 2011, but the Employer insists that it has employed four or five employees referred by the Petitioner in each summer season since at least 2007.

IV. ANALYSIS

If the petitioned-for-unit consists of a discrete and identifiable group of employees who share a community of interest, then it will be found appropriate unless there are additional employees with whom these employees share an overwhelming community of interest. *Specialty Healthcare and Rehabilitation Center of Mobile*, supra, slip op. at 10-13. Therefore, the first question that must be answered is whether the Petitioner's proposed bargaining unit of DBD laborers and foremen who work on commercial, institutional and prevailing rate jobs constitutes a discrete and identifiable group of employees who share a community of interest.

I find that it does not. With the exception of a handful of employees referred by the Petitioner, no DBD laborers or foremen work exclusively on commercial, institutional, or prevailing rate projects. The vast majority of the laborers and foremen assigned to these projects also perform residential work and frequently move between commercial and residential projects. The Area Managers oversee residential projects as well as commercial, institutional and prevailing rate work. Additionally, the skills required for both types of jobs are the same, and employees use the same type of equipment for all of their work. Moreover, except in the case of prevailing rate work, directly-hired laborers and foremen receive the same pay and benefits regardless of whether they are doing commercial or residential work. In short, there is no clear dividing line between bargaining unit work as defined in the parties' contract and the other work performed by the DBD.

Employees referred by the Petitioner are assigned only to jobs covered by the New Jersey prevailing rate statute, and accordingly, pursuant to the collective-bargaining agreement, they receive distinct wages and benefits. But, these employees work alongside direct hires performing the same tasks in the same manner under the same supervision. Accordingly, I find that the employees referred by the Petitioner do not constitute a sufficiently distinct group to warrant placement in a separate bargaining unit.

Moreover, even if they were found to constitute a distinct group, the Employer has clearly met its burden of showing that the directly-hired laborers and foremen share an overwhelming community of interest with the employees referred by the Petitioner. *Odwalla Inc.*, 357 NLRB No. 132 (2011). Indeed, other than the bargaining history and its effect on compensation, the community-of-interest factors for direct hires and referred employees are almost identical.

The parties' collective-bargaining agreement defines the unit essentially as consisting of laborers and foremen on commercial, institutional, and prevailing rate projects, and the Petitioner contends that this bargaining history supports finding appropriate a unit of employees who perform this work.⁶ However, while bargaining history is given substantial weight in defining

⁶ The Petitioner's counsel stated at the hearing that he believed the unit the Petitioner sought included only the four employees referred by the Petitioner who worked for the Employer in the summer of 2011. This comment at least suggests the possibility that the Petitioner is seeking a unit limited to those employees referred from its hiring hall. This would effectively be a

appropriate units, it is only one of the factors considered, and it is not necessarily determinative. *Barron Heating & Air Conditioning, Inc.*, 343 NLRB 450, 452 (2004); *Alley Drywall, Inc.*, 333 NLRB 1005, 1007 (2001). Further, the significance of bargaining history in this case is undermined by the fact that the Petitioner does not appear to have ever represented a unit of all laborers and foremen performing commercial, institutional and prevailing rate work; the parties' contract seems to have been applied only to employees referred by the Petitioner. Most of the employees who work on commercial projects have not been covered by the contract and have no history of union representation. Under these circumstances, I find that the existence of a collective-bargaining agreement purporting to cover a unit of employees who only work on these projects is insufficient to outweigh the numerous other factors indicating that such a unit is not appropriate.

Having found that the unit sought by the Petitioner is not appropriate, I must determine what group of the Employer's employees has a sufficient community of interest to constitute an appropriate unit. I find that the unit proposed by the Employer – all laborers and foremen working in the DBD – is the smallest appropriate for purposes of collective bargaining. Employees in this unit routinely work together on the same projects. They perform the same functions, use the same equipment, share common supervision and wear the same uniforms. Additionally, with the exception of the few employees referred by the Petitioner, they receive the same wages and benefits. In sum, the foremen and laborers in the DBD all share an overwhelming community of interest, and I shall order an election in this unit.⁷ *Barron Heating & Air Conditioning, Inc.*, supra; *Casino Aztar*, 349 NLRB 603, 604 (2007).

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are 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 in this case.
3. The Petitioner is a labor organization which claims to represent certain employees of the Employer.

members-only unit and would clearly be inappropriate. *Scandia Stucco Co.*, 319 NLRB 850, 855 (1995); *Ron Wiscombe Painting & Sandblasting Co.*, 194 NLRB 907, 908 (1972).

⁷ The Petitioner indicated at the hearing that it was willing to go to an election in any unit found appropriate. The parties agreed that the Employer is engaged in the construction industry and that voting eligibility should be determined based on the formula established by the Board in *Daniel Construction Co.*, 133 NLRB 264 (1961), modified in 167 NLRB 1078 (1967), and *Steiny and Co., Inc.*, 308 NLRB 1323 (1992).

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.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time laborers and foremen employed by the Employer in its Design Build Division; excluding all other employees, landscape maintenance employees, irrigation employees, excavation employees, office clerical employees and guards and supervisors as defined in the Act.

VI. 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 the purposes of collective bargaining by **New Jersey Building Construction Laborers District Council, LIUNA**. 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. Eligible Voters

The eligible voters shall be unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. 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, employees engaged in an economic strike that commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Additionally eligible are those employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months or who have had some employment in that period and have been employed for a total of 45 working days within the 24 months immediately preceding the designated payroll period for eligibility and also have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.⁸ Employees who are otherwise eligible but who are 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 after the designated payroll period for eligibility, 2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or

⁸ *Steiny & Co., Inc.*, supra; *Daniel Construction*, supra.

reinstated before the election date, and 3) employees engaged in an economic strike which began more than 12 months before the election date 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 seven (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.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **Friday April 13, 2012**. No extension of time to file this list shall 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 by mail, facsimile transmission at (215) 597-7658, or by electronic filing through the Agency's website at www.nlr.gov. Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. 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 three (3) copies, unless the list is submitted by facsimile or electronic filing, 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 a minimum of three (3) working days prior to 12:01 a.m. on the date 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 five (5) 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 non-posting of the election notice.

VII. RIGHT TO REQUEST REVIEW

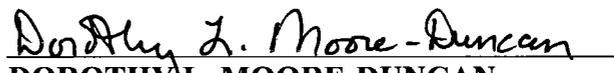
Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, a request for review of this Decision may be filed with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by the close of business on **Friday, April 19, 2012, at 5:00 p.m. (ET)**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁹ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at **www.nlr.gov**. Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Signed: April 6, 2012

at Philadelphia, PA


DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four
National Labor Relations Board

⁹ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.