UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

SYLVANIA LIGHTING SERVICES CORP.[1]

Employer

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 357, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS[2]

Case 28-RC-079901

Petitioner

DECISION AND DIRECTION OF ELECTION

International Brotherhood of Electrical Workers Local Union 357, affiliated with the International Brotherhood of Electrical Workers (the Petitioner) seeks to represent a unit of all full-time and regular part-time service technicians, lighting installers, and warehousemen employed by Sylvania Lighting Services Corp. (the Employer) at its facility located at 7485 Dean Martin Drive, Las Vegas, Nevada. The unit sought by the Petitioner would exclude all other employees, office clerical employees, guards, and supervisors as defined in the National Labor Relations Act (the Act). The Union contends that the Employer is an employer within the construction industry and seeks an election to be conducted using the construction industry formula to determine voter eligibility. The Employer maintains that the unit sought by the Petitioner is not appropriate for two reasons. First, the Employer contends that it is not an employer within the construction industry and that the employees that the Petitioner seeks to represent are temporary employees with no expectation of recall to their former positions. The Employer further contends that even if it is found to be an employer within the construction industry, its six permanent employees should not be included in a unit with the temporary employees because they have a distinct and separate community of interest from the temporary employees.

A hearing officer of the Board held a hearing in this matter and the parties orally argued their respective positions prior to the close of the hearing. As explained below, based on the record and relevant Board law, I find that the petitioned-for unit is appropriate, that the Employer is an employer engaged in the construction industry, and that those eligibility to vote in the election that I am directing should be determined by use of the *Daniel/Steiny* formula.[3]

---

[1] The name of the Employer appears as stated at the hearing.
[2] The name of the Petitioner appears as stated at the hearing.
[3] *Daniel Construction Co*., 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967), reaffirmed and further modified in *Steiny & Co*., 308 NLRB 1323 (1992).

DECISION

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

1. **Hearing and Procedures:** The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. **Jurisdiction**: The parties stipulated, the record establishes, and I find, that the Employer, a Delaware corporation, with an office and place of business in Las Vegas, Nevada, is engaged in the installation and maintenance of lighting services. During the 12-month period preceding ending April 30, 2012, the Employer, in the course and conduct of its business operation described above, purchased and received goods and materials at its Las Vegas, Nevada facility valued in excess of $50,000 directly from points located outside the State of Nevada. The Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and, therefore, the Board's asserting jurisdiction in this matter will accomplish the purposes of the Act.

3. **Labor Organization Status**: The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and seeks to represent certain employees of the Employer.

4. **Statutory Question**: 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. **Unit Finding:** This case presents the issues of whether the Employer is an employer engaged in the construction industry and whether the Employer's permanent employees should be included in a unit with the temporary employees. As discussed more fully below, I conclude, based on the record before me and for the reasons more fully set forth below, that the Employer is an employer engaged in the construction industry, that the petitioned-for employees constitute an appropriate unit, and that the appropriate voter eligibility formula to be applied is the *Daniel*/*Steiny* formula.

A. The Employer's Operations

The Employer is a multi-national corporation which installs lighting systems in commercial and public facilities in various states throughout the United States and in various countries throughout the world. The Employer's operations are organized into geographical districts, one of which includes Arizona, Colorado, New Mexico, and Utah. Within these geographical districts, the Employer provides services to its customers, including the installation of new and retrofit lighting systems. **The Employer advertises in its website that "Installation is done by [its] trained and certified technicians," and that the Employer offers "full maintenance services, from remote diagnostics and monitoring to field diagnosis and replacement of components."** Among the services that the Employer provides are the removal of existing lighting fixtures, the installation of new lighting systems, the wiring of these new lighting systems, and the attachment of lighting fixtures to structures

through the use of bolts, cabling, and screws. The Employer ensures that these fixtures comply with various local and state building codes, repairs existing fixtures, and provides maintenance of such items as the ballasts and lamps in the existing systems. The record shows that in many cases, including the instant case, the Employer engages subcontractors to perform various aspects of the installation of lighting fixtures and systems and serves as the general contractor for these installations.

The Union petitions for a unit of all full-time and regular part-time service technicians, lighting installers, and warehousemen employed by the Employer at its facility in Las Vegas, Nevada. The record reveals that this unit comprises all of the Employer's employees at its Las Vegas facility who are engaged in the installation or maintenance of lighting systems. The Employer contends that the temporary employees who would be eligible under the *Daniel/Steiny* construction framework are unlike its permanent employees, and do not share a community of interest with them, because the temporary employees are primarily engaged in construction while the permanent employees could be deemed to be engaged more in the routine maintenance of existing fixtures with repeat customers.

The record shows that the Employer received a contract to perform extensive work on the lighting systems throughout the Clark County School District (CCSD) in Nevada from approximately early July 2011 to early January 2012. This contract involved the installation of at least 1,400 new fixtures and the repair or replacement of over 300,000 lamps or fixtures throughout the school district. The Employer employs installation employees in its Phoenix, Arizona location, but it was constrained by the contract with the CCSD to use only Nevada residents for the installation work on the CCSD project. Accordingly, the Employer hired approximately 40 Nevada applicants for the CCSD project. The CCSD project as a whole was overseen by the Employer's Area Operations Manager from the Phoenix office, Mark Fishel. Two of the Employer's Project Coordinators, Steve Wallen from the Employer's Denver office and Ron Argento from the Employer's Phoenix office, supervised the construction at the CCSD sites. Ronald Ritter, who supervisors the permanent employees in Las Vegas, supervised the employees during the last two weeks of the CCSD project. In this project, the newly-hired employees performed such services as installing new ballasts into existing lighting fixtures and replacing old lamps; installing new energy efficient fixtures where appropriate, and running wiring for those fixtures; moving fixtures to new locations in buildings and securing those fixtures appropriately; as well as performing other general lighting services as required. These services were subject to local building codes and to inspection by appropriate inspectors. Where inspection was not passed, employees performed corrections.

The record reflects that the employees on the CCSD project were paid according to the prevailing wage under the Davis-Bacon Act. The record further reflects that these employees were informed that the work was temporary. However, they were told at the time they were laid off that they should check the Employer's website, look for job postings, and apply for openings. The school district job ended in January 2012, and all of the employees used on that project were terminated at the end of the job.

At its Las Vegas facility, the Employer employs six permanent employees who primarily maintain the electrical fixtures of the Employer's existing customers, such as 7-11

and Wal-Mart. Their regular job involves traveling to the customers' facilities, inspecting fixtures, replacing lamps and ballasts where necessary, and performing minor, routine maintenance on the fixtures. Where more extensive electrical work is required, the maintenance employee refers that work to the Employer who generally contracts with an outside electrician to perform the more extensive electrical repairs. The maintenance employees in Las Vegas are supervised by Ronald Ritter. The record does not reflect whether the maintenance employees performed any work at the school sites during the period of time construction was underway in the CCSD. The record is silent as to the wages and benefits of the maintenance employees.

B. Legal Analysis and Determination

1. The Employer is Engaged in the Construction Industry

Although the Act does not define "construction industry" the Board has construed the term in a number of cases. See, e.g., *Carpet, Linoleum and Soft Tile Local Union No. 1247 (Indio Paint)*, 156 NLRB 952, 957 (1966) ("construction" includes work "providing labor and materials in connection with floor covering installations" and affirming the ALJ's use of the definition of "construction" found in the 1957 edition of the Standard Industrial Classification Manual, which included "specialized construction activities such as plumbing, painting, electrical work, and carpentry" and "the installation of prefabricated building equipment and materials by general contractors and special trade contractors"); *U.S. Abatement, Inc*., 303 NLRB 451, 456 (1991) ("construction" includes the removal of asbestos from a building undergoing renovation); *Zidell Explorations, Inc.*, 175 NLRB 887 (1969) ("construction" includes the dismantling of a missile site); *Fenix & Scisson, Inc*., 207 NLRB 752, 754-55 (1973), enfd. 506 F.2d 1404 (7th Cir. 1974) ("construction" includes "the creation and development of subterranean caverns for the storage of petroleum products").

I find that the Employer is engaged in the construction industry during the performance of its installation and maintenance of lighting systems. The Employer's statement in its brochure, "Installation is done by [its] trained and certified technicians," and the further statement that it offers "full maintenance services, from remote diagnostics and monitoring to field diagnosis and replacement of components," is an exposition of precisely the type of work defined by the Board as construction work. *Indio Paint*, supra at 957

2. Appropriate Bargaining Unit

When determining an appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective bargaining must function. Therefore, each unit determination must foster efficient and stable collective bargaining. *Gustave Fisher, Inc*., 256 NLRB 1069 (1981). On the other hand, the Board has also made clear that the unit sought for collective bargaining need only be an appropriate unit. Thus, the unit sought need not be the ultimate, or the only, or even the most appropriate unit. *Overnite Transportation Co*., 322 NLRB 723, 723 (1996). The Board has adopted this approach because "[t]here is typically more than one way to group employees for purposes of collective bargaining." *CCI Constr. Co., Inc.*, 326 NLRB 1319, 1322 (1998) (citations omitted). Thus,

when the Board considers bargaining unit issues, and specifically in the construction industry, the Board "'look[s] first to the unit sought by the petitioner. If it is appropriate, our inquiry ends.'" Id. (quoting *Dezcon, Inc*., 295 NLRB 111 (1989)).

"The cornerstone of the Board's policies on appropriateness of bargaining units is the community-of-interest doctrine which operates to group together only employees who have substantial mutual interests in wages, hours, and other conditions of employment." *In re Met Elec. Testing Co., Inc*., 331 NLRB 872, 876 (2000). In determining whether the requisite community of interest among employees exists, the Board looks to factors including a common interest in wages, hours and other working conditions; common supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. See *Franklin Mint Corp*., 254 NLRB 714, 716 (1981).

In applying the relevant case law to the facts, the record establishes that the petitioned-for unit is an appropriate bargaining unit. The weight of the evidence indicates that the permanent and temporary employees share a significant community of interest, including similar skills and functions, common grouping within the employer's operation, and, at times, common supervision. An important consideration in any unit determination is whether the proposed unit conforms to an administrative function or grouping of an employer's operation. Thus, for example, generally the Board would not approve a unit consisting of some, but not all, of an employer's production and maintenance employees. See e.g., *Check Printers, Inc*. 205 NLRB 33 (1973). In this case, the unit sought by Petitioner conforms to an administrative grouping of the Employer. The Employer's list of current employees identifies one "Lighting Installer" and five "Service Technicians." Likewise, the list of employees for the CCSD project includes a few "SLS Laborers," two "Lighting Installers," and approximately 30 "Service Technicians." Moreover, there is significant overlap in the job duties of the permanent and temporary employees in that they all change lamps and ballasts. Evidence that employees perform the same basic function or have the same duties support a finding of similarity of functions. See, e.g., *Casino Aztar,* 349 NLRB 603 (2007); *J.C. Penny Company, Inc*., 328 NLRB 766 (1999); *Brand Precision Services*, 313 NLRB 657 (1994); *Phoenician*, 308 NLRB 826 (1992).

Another community-of-interest factor is whether the employees in dispute are commonly supervised. See, e.g., *Executive Resources Associates*, 301 NLRB 400, 402 (1991); *NCR Corporation*, 236 NLRB 215 (1978). Common supervision weighs in favor of placing the employees in dispute in one unit. However, separate supervision does not mandate separate units. *Casino Aztar,* 349 NLRB at 607, fn 11. Here, the permanent and temporary employees had separate supervisors for much of the time the temporary employees were on the CCSD job, but the supervisor of the permanent employees, Ronald Ritter, did supervise the CCSD project employees during the final month of the project.

Based on these factors, I find that the permanent and temporary employees possess a sufficient community of interest to form an appropriate unit. Because the petitioned-for unit is an appropriate unit, my inquiry ends. *CCI Constr. Co., Inc.*, 326 NLRB at 1322.

C. Application of the *Daniel/Steiny* Formula

In the construction industry, unless the parties agree otherwise, the *Daniel/Steiny* formula is used to determine the eligibility of employees to vote in a Board election when those employees have worked for the Employer for a specified period of time under specific conditions, but who are not currently on the payroll of the Employer. See *Signet Testing Laboratories*, 330 NLRB 1, 1 (1999). Thus, eligible employees include individuals who have been employed in the construction industry for 30 days or more within the 12-month period preceding the eligibility date for the election, or if they have some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date. The *Daniel/Steiny* formula excludes employees who have been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. See *Steiny*, 308 NLRB at 1326.

Having found that the Employer is engaged in the construction industry, I direct that the *Daniel/Steiny* eligibility formula be applied to the election in this matter. The Board has determined that this formula is applicable in all construction industry elections. *Steiny*, 308 NLRB at 1327. In addition, the Board has held that this formula is to be applied where the employer performs more than a de minimis amount of construction work. *Turner Industries Group, LLC,* 349 NLRB 428 (2007). See also *Cajun Co.,* 349 NLRB 1031 (2007). Moreover, the Board continues to hold that the *Daniel/Steiny* eligibility formula shall be utilized in all construction industry elections unless the parties specifically stipulate not to use it. Id. at 1328, fn. 16; *Signet Testing Laboratories*, 330 NLRB at 1. The record in this matter shows that the parties have not stipulated or otherwise agreed that the *Daniel/Steiny* formula will not be used in the conduct of the election.

Accordingly, based upon the foregoing and the record as a whole, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time service technicians, lighting installers, and warehousemen employed by the Employer at its facility located in Las Vegas, Nevada, but excluding all other employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 357, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS**. The date, time and place of the election will be specified in the Notice of Election which will issue shortly.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In addition, all employees who have been employed for a total of 30 working days or more within the 12-month period immediately preceding the eligibility date for the election, or have had some employment in those 12 months and have been employed 45 working days or more within the 24-month period immediately preceding the eligibility date, are also eligible. 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 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 at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). 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 National Labor Relations Board Resident Office, 600 Las Vegas Boulevard South, Suite 400, Las Vegas, NV, 89101,on or before May 18, 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.nlrb.gov,** by mail, by hand or courier delivery, or by facsimile transmission at (602)640-2178. To file the eligibility list

electronically, go to the Agency's website at www.nlrb.gov, select **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.

C. **Notice Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Service*s, 317 NLRB 349 (1995). Failure to do so stops an employer from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67(b) and 102.69(b) of the Board's Rules, this decision is final and shall have the same effect as if issued by the Board unless **after the election** a request for review is filed. In the absence of election objections or potentially determinative challenges, the request for review of the decision and direction of election must be filed within 14 days after the tally of ballots has been prepared. In a case involving election objections or potentially determinative challenges, the request for review must be filed within 14 days after the regional director's decision on challenged ballots, on objections, or on both. The Request for Review is filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The request may be filed electronically through the Agency's website but may not be filed by facsimile. To file the request for review electronically, go to www.nlrb.gov, select **File Case Documents,** enter the NLRB Case Number, and follow the detailed instructions.

Dated at Phoenix, Arizona, this 11th day of May 2012.

/s/ Cornele A. Overstreet
Cornele A. Overstreet, Regional Director
National Labor Relations Board
Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004