

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6**

CLIMATECH, INCORPORATED¹

Employer

and

Case 06-RC-080123

**SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 12, AFL-CIO²**

Petitioner

DECISION AND DIRECTION OF ELECTION

Sheet Metal Workers' International Association, Local Union No. 12, AFL-CIO ("the Petitioner") seeks to represent a unit of all full-time and part-time commercial and residential HVAC employees engaged in the installation and fabrication of HVAC systems employed by Climatech, Incorporated ("the Employer") at its Pittsburgh, Pennsylvania, facility.³ While the parties are in agreement as to the "core" group of approximately 45 petitioned-for employees who work in Pennsylvania, they disagree as to the inclusion of those employees who work outside of Pennsylvania, at jobsites in West Virginia and Ohio, who number approximately 8 to 20. The Employer seeks to exclude the disputed employees from the unit on the following grounds: 1) The jobs located in West Virginia and Ohio have been "experimental" in nature and will not continue in the future; 2) some of the employees who work outside of Pennsylvania have been covered by Section 8(f) project labor agreements; and 3) the employees who work at the West Virginia and Ohio jobsites do not share a community of interest with Employer's employees who work in Pennsylvania.

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

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

³ The Petitioner has indicated a willingness to proceed to an election in any unit found appropriate herein.

Second, the parties are in disagreement as to whether the Employer operates within the construction industry, so as to warrant application of the Board's Daniel-Steiny⁴ formula for calculating voter eligibility. The Employer contends that it is not engaged in business within the construction industry, primarily because it employs a core group of employees who do not work on an intermittent basis. The Union, however, argues that the Employer has long performed both new construction and renovation of existing facilities and that the Daniel-Steiny eligibility formula necessarily applies to the petitioned-for employees herein.

I have considered the parties' arguments, as articulated at the hearing and in their respective briefs. As discussed below, based on the entire record⁵ and relevant Board law, I find that the petitioned-for employees who worked at the Employer's now-completed jobsites in West Virginia and Ohio⁶ and who currently work at its single remaining jobsite in Ohio must be excluded from the unit because they do not share a sufficient community of interest with those employees who work at the Employer's Pennsylvania jobsites and because the work that they perform will imminently cease to exist, leaving them with no expectation of recall in the future. Further, I reject the contention that the Employer is not a construction industry employer and I

⁴ See, Daniel Construction Co., 133 NLRB 264 (1961), as modified by 167 NLRB 1078 (1967) (Board established voter eligibility formula for construction industry employees) and Steiny & Co., 308 NLRB 1323 (1992) (Board re-adopted Daniel eligibility formula for employees of employers in the building and construction industry).

⁵ A hearing in this matter was held on May 9, 2012, pursuant to the Board's Revised Rule, effective April 30, 2012, governing the processing of representation petitions. Following the hearing, on May 14, 2012, a United States District Court Judge for the District of Columbia, in Chamber of Commerce of the United States of America, et al. v. National Labor Relations Board, Civil Action No. 11-2262 (D.D.C. May 14, 2012), rendered the Board's Revised Rule was inoperative. Accordingly, on May 18, 2012, I issued an Order scheduling a hearing on May 25, 2012, pursuant to the Board's Rules and Regulations that were in effect prior to the nullified Revised Rule. On May 25, 2012, the parties participated in a telephonic hearing in this matter, during which they stipulated that the record, testimony, exhibits and stipulations from the initial hearing held on May 9, 2012, constitute the record for in this matter and that there was no need for further testimony, evidence or stipulations. Finally, the parties stipulated that the only individual whose supervisory status is disputed is witness William Bell and that no party wished to litigate Bell's supervisory status at the hearing. Rather, the parties stipulated that Bell will be permitted to vote in any directed election and that his vote will be subject to challenge.

⁶ The Employer has not performed work in West Virginia since early 2011.

find that the Board's Daniel-Steiny voter eligibility formula applies to the unit found appropriate herein.

I. The Employer's Operations

A. Overview

The Employer is a mechanical contractor engaged in the business of fabricating, installing and servicing HVAC equipment for commercial and residential customers located in Pennsylvania, West Virginia and Ohio. The Employer's sole facility, located in Pittsburgh, Pennsylvania, houses corporate offices, a small fabrication shop and a warehouse in a building that is approximately 21, 000 square feet in size ("the Employer's facility").

Brad Taback is the Employer's president. Reporting directly to Taback are Jeff Miller, who serves as the Employer's Vice-President of Design and Build Services; Dan Whites, Vice-President of Construction Services; Joe Saltmar, Vice-President of Service; and Jack Miller, Manager of Small Works. Steve Weber, who also reports directly to Taback, is the Employer's Labor Manager. Weber is responsible for hiring and firing the Employer's employees, as well as enforcing company policies, conducting employee evaluations and participating in wage determinations for the employees.

Originally established in 1972 as a business for servicing HVAC systems, the Employer's residential and commercial installation and ancillary fabrication operations now comprise 50% of the its business. With a total complement of nearly 100 employees, approximately 45 of the Employer's employees work as installers and 5-6 are employed as fabricators.⁷ The fabricators work in the metal shop at the Employer's facility, while the installers work in the field. The number of installers on any given job varies, depending on the requirements of each project. Residential installation projects, for example, may require only

⁷ The Employer's service employees are not in issue, as neither party contends that they should be included in any unit found appropriate herein and they are specifically excluded from the petitioned-for bargaining unit.

two employees, one of whom may be a foreman, while commercial and “light commercial” projects requires larger crews.

The Employer secures its various projects by bidding on jobs, as well as direct requests from individual customers. The Employer’s installation projects involve both new construction and renovations of existing building systems. Additionally, the Employer has performed work on both publically-funded prevailing rate jobs and privately-funded jobs.

B. The Employer’s West Virginia and Ohio Projects

The Employer describes its market area as “Western Pennsylvania” and the record reveals that the Employer’s projects outside of Pennsylvania only represent a slight portion of its overall construction business, with the vast majority of its work being done on projects within Pennsylvania. In this regard, the record indicates that since 2007, the Employer has performed three projects in West Virginia and two projects in Ohio. In West Virginia, the Employer performed HVAC installation work (duct work, ventilation/exhaust work) on a light commercial project referred to as “the Highlands project” in or about 2007. Located near Wheeling WV, the Highlands project involved HVAC installation at the Cabella’s shopping center site. At least one foreman from the Employer’s Pittsburgh, PA facility worked on the project, along with at least one journeyman whom the Employer acquired through Sheet Metal Workers International Association, Local Union No. 33, AFL-CIO (“Local 33”). The Employer did not enter into a project labor agreement with Local 33 for the Highlands project.

In or about 2010, the Employer performed installation work on a school renovation project at Long Drain Elementary School, near New Martinsville, WV. At the peak of the project, the Employer employed approximately five of its Pittsburgh-based employees, as well as a foreman, and approximately five sheet metal installers whom the Employer acquired through referrals from Local 33. It is unclear precisely what job tasks the Pittsburgh-based employees performed on this project (laborers’ duties, installers’ duties and/or foremen’s duties), but the Local 33-referred employees were responsible for hanging sheet metal. There was no project

labor agreement between the Employer and Local 33 in effect for the Local 33 referrals who worked on the Long Drain Elementary School project. At least one of the referrals had also worked on the Employer's Highlands project.

The Employer performed work on a third project in West Virginia from in or about 2010 until Spring 2011, at Madison School, on Wheeling Island, WV. Also a school renovation project, the Madison School project involved installation of duct work and exhaust ventilation. Approximately six of the job's employees were referred to the Employer from Local 33, while at least one employee was assigned to the job from the Employer's Pittsburgh facility. Five of the Local 33 referrals who worked on the Madison School job had previously been employed by the Employer on its Long Drain Elementary School project near New Martinsville, WV.

In the Spring of 2011, the Employer also began a new construction project on a school located in Beallsville, OH. Located approximately an hour and twenty minutes from the Madison project in West Virginia, the Beallsville project involved installation of duct work and ventilation. Approximately nine of the employees whom the Employer employed on the Beallsville project were referrals from Local 33; another employee came from the Employer's Pittsburgh facility. Four of the Local 33 referrals to the Beallsville job were sent to the job directly from the Employer's Madison job. There was a project labor agreement in effect between the Employer and Local 33 for the Beallsville job.

In or about the end of 2011, the Employer began working on the Woodsfield and Monroe school projects for the Switzerland County School District in Ohio. The Woodsfield and Monroe school jobs are located beside each other and the Employer's employees sometimes worked between the two jobsites. At the peak of activity, the Employer employed approximately 12 journeymen installers from Local 33 on the projects, as well as two Local 33 apprentices. The Employer entered into a project labor agreement with Local 33 covering the Woodsfield and Monroe school project. At the time of the hearing in this matter, the Woodsfield project was more than 95% completed and the Monroe portion of the project was approximately 90%

completed. The Monroe project is scheduled to be completed in June 2012. There are only eight employees currently working for the Employer outside of Pennsylvania and they are employed on the Woodsfield/Monroe jobsite.

Since bidding on the Woodsfield/Monroe project, the Employer has not placed bids for any additional work outside of Pennsylvania and there are no pending bids for projects in either West Virginia or Ohio. In March 2012, the Employer was invited to bid on another school project in Ohio, a renovation and addition project at Switzerland County School District's "River K-12" building, but it specifically decided not to place the bid based on financial losses it sustained on the other non-Pennsylvania jobsites involving project labor agreements. Once the Employer completes the Monroe job in Ohio, in June 2012, it will have no work in West Virginia or Ohio. The Employer is not advertising for workers in West Virginia and/or Ohio. Indeed, the Employer has no current plans to bid on future work in West Virginia and Ohio and, according to the testimony of President Taback, it does not ever again intend to bid on work involving project labor agreements.

II. The Appropriate Unit

"Determination of an appropriate bargaining unit is guided by the objectives of ensuring employee self-organization, promoting freedom of choice in collective bargaining, and advancement of industrial peace and stability." P.J. Dick Contracting, 290 NLRB 150, 151 (1988). The Board has recognized, however, that there is "typically more than one way to group employees for purposes of collective bargaining." CCI Construction Co., 326 NLRB 1319, 1322 (1998) (citations omitted). Thus, the Board has consistently held that the petitioned-for unit need not be the ultimate or *most* appropriate unit, but only *an* appropriate unit. Overnite Transportation Co., 322 NLRB 723 (1996).

The cornerstone of the Board's policies involving unit determinations is the community-of-interest doctrine which operates to group together only employees who have substantial mutual interests in wages, hours and other terms and conditions of employment. This is

especially true where a multi-site unit is involved. Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83 (Aug. 26, 2011) (In reaffirming prior precedent that a petitioned-for unit will generally be found appropriate where a community of interest exists, Board noted that the mere act of petitioning for a certain unit does not automatically eliminate the need for a traditional community of interest analysis). In determining whether there is a sufficient community of interest among various groups of employees to warrant their inclusion in a single unit, the Board considers such factors as common wages, hours, and other working conditions; degree of skill and common job duties and functions; centralized control of labor relations and supervision; frequency of contact, transfers among sites and extent of interchange; bargaining history; and functional integration. See, e.g., Bashas, Inc., 337 NLRB 710, 711 (2002); Alamo Rent-A-Car, 330 NLRB 897 (2000); CCI Construction Co., Inc., 326 NLRB 1322, 1319 (1998); Dezcon, Inc. 295 NLRB 109 (1989); and P.J. Dick Contracting, supra.

The record evidence in this matter establishes that the employees in the “core” group of installers and fabricators employed at the Employer’s Pittsburgh facility share some commonalities with those employees whom the Employer employed through the Local 33 referral system for its West Virginia and Ohio projects, but that the two groups’ interests are sufficiently distinct to render their placement together in the petitioned-for unit inappropriate. More particularly, as described below, the record discloses evidence that there are significant differences between the core employees and those referred to the Employer by Local 33 with respect to the manner in which they are hired and trained; their wages and benefits; applicable employee policies; and the employees’ job skills and duties.

With respect to hiring practices for the two groups, the record establishes that Labor Manager Weber interviews and hires the Pittsburgh-based installers and fabricators who report directly to the Employer’s facility. The petitioned-for installers whom Local 33 refers to the Employer’s West Virginia and Ohio, on the other hand, are neither interviewed nor hired by

Weber. Instead, these employees are sent directly to the jobsites by the Union's Business Agent, Scot Mazzulli, upon Weber's requests for referrals.

Labor Manager Weber also determines the compensation for the Employer's core Pittsburgh-based employees. Their wages are merit-based and linked to evaluations that Weber prepares for them. The core employees' wage rates range between \$13.00 and \$25.00 per hour, with an average wage of \$20.00 per hour. By contrast, the Employer does not evaluate the job performances of those employees whom Local 33 refers to the Employer's jobsites in West Virginia and/or Ohio and, more importantly, does not set their wages. Instead, these referred employees are paid in accordance with a standard union contract wage for Local 33 members working in that union's jurisdiction, which is set forth in project labor agreements and/or by requirement of the Davis-Bacon Act. While the record is silent as to the current rate of pay for these Local 33 referrals, documentary evidence demonstrates that as of 2010, the Petitioner's journeymen installers received a base wage of \$31.38 per hour (not including benefits) and it is reasonable to conclude that the Local 33 journeymen had comparable wages. While paychecks for all employees originate from the Employer's Pittsburgh facility, the referrals' regular payday is Wednesday and the core employees' regular payday is Friday.

The Employer's core employees undergo an orientation program at the Employer's Pittsburgh facility. The Employer's employees who are referred for work in West Virginia and Ohio through Local 33 do not receive such an orientation and, in fact, *never* travel to the Employer's facility. In addition to the orientation program, the Employer's core employees receive on-the-job training. The Local 33-referred employees receive their training through Local 33's apprenticeship program.

The Employer requires its Pittsburgh-based core employees to sign for, and adhere to, an employee handbook containing the Employer's policies. The Local 33-referred employees working at the Employer's West Virginia and Ohio jobsites are not provided copies of the employee handbook.

The Employer provides various benefits to its Pittsburgh-based installers and fabricators. Established by President Taback and Labor Manager Weber, these benefits include health insurance, life insurance, 401(k) benefits, vacation benefits (three weeks), tool replacement, short-term disability, and paid holidays. Benefits for the installers who were referred to the Employer's West Virginia and Ohio jobsites by Local 33, on the other hand, are established by the Union through its various Funds and are set in accordance with applicable project labor agreements.

With respect to other terms and conditions of the employees whom the Petitioner seeks to represent, the Employer's "core" employees have access to several company vehicles for use on projects within Pennsylvania. The installers on the Employer's West Virginia and Ohio projects do not enjoy the use of these vehicles. Similarly, while the Employer's Pittsburgh-based employees wear "Climatech" shirts as uniforms, the employees whom Local 33 refers for work at the Employer's West Virginia and Ohio jobsites do not. Finally, for the Local 33-referred employees, the Employer provides tools in accordance with applicable project labor agreements and Local 33's contractual guidelines. These contractual requirements do not apply to the Employer's core Pittsburgh-based employees; rather, they receive, and are responsible for, tools in accordance with the Employer's internal company policies.

As to job skills and duties of employees in the two respective groups, the evidence establishes that all of the Employer's employees, both within Pennsylvania and at the outlying jobsites in West Virginia and Ohio, share the general job skills and duties involved with installing sheet metal duct work and ventilation. The record evidence indicates, however, that in addition to hanging sheet metal, the Employer's Pittsburgh-based core employees regularly perform ancillary tasks that may "cross crafts," such as electrical wiring, refrigeration evacuation and carpentry and demolition tasks. The core employees sometimes also get involved in early job coordination, including preparation of preliminary drawings. While there is evidence that the Local 33-referred installers working at the Employer's jobsites in West Virginia and Ohio also

occasionally “punch holes” in walls for installation purposes, the employees who are working under project labor agreements are necessarily limited to their particular craft’s jurisdictional duties. No such limitations exist for the Employer’s core, Pittsburgh employees, allowing the Employer to use them as “jacks of all trades.”

To the extent that Labor Manager Weber is responsible for overseeing all personnel matters for the Employer, the Employer’s Pittsburgh-based “core” employees share a certain commonality of management with the disputed West Virginia and Ohio employees. In this regard, the record indicates that employees who wish to take time off from work, whether at a Pennsylvania jobsite or at one of the Employer’s West Virginia and/or Ohio jobsites, are directed to contact Weber for permission. Similarly, all call-offs are supposed to be made directly to Weber, regardless of jobsite, though the employees do not always comply with that directive.

With respect to interchange and interaction between the two groups, the record evidence establishes that the Local 33-referred installers working on the Employer’s West Virginia and Ohio projects have never worked on the Employer’s Pennsylvania projects and there is no expectation that they will do so in the future. Some of the referred employees have incidental contact with the Employer’s Pittsburgh-based employees, such as when a truck driver from the Employer’s facility telephones a Local 33 foreman in West Virginia or Ohio, to announce that supplies are on their way to the jobsite, when the foreman contacts the warehouse in Pittsburgh for materials, or when a Local 33 foreman communicates timecard information to the Employer’s payroll clerk. The record also indicates that on limited occasions, employees from the Pittsburgh facility worked at some of the West Virginia and Ohio jobsites, though it is unclear whether they did so as laborers, installers or supervisors. Indeed, President Taback testified that the Employer did not use any of its “core installers” (Pittsburgh-based employees) on jobs outside of Pennsylvania where project labor agreements were in effect.

Turning to the matter of the two groups’ bargaining history, another element in the community of interest inquiry, the record establishes that neither the Employer’s core

Pittsburgh-based employees nor the Local 33-referred employees in West Virginia and Ohio have a bargaining history with the Petitioner. While the Petitioner has provided installers to the Employer for at least two prevailing rate jobs in Pennsylvania, the PA Cyber School and the VA Hospital, neither of the projects involved the Local 33 employees whom the Petitioner now seeks to include in a unit with the core employees. Instead, the petitioned-for employees in West Virginia and Ohio have historically been represented by Local 33.

Finally, with respect to functional integration of operations, it appears that Employer's West Virginia and Ohio jobsites are not an integral part of its primary business. In this regard, uncontroverted testimony establishes that prior to a downturn in the economy that prompted the Employer to bid on the West Virginia and Ohio projects, the Employer had never before sought to expand its operations beyond Western Pennsylvania. Described by President Taback as being "experimental" in nature, the outlying projects represent a small portion of the Employer's work over the past five years. The average tenure of the petitioned-for core employees employed at the Pittsburgh facility is 15 years, an indication that those employees constitute a functional entity that is both stable and of significant duration. By contrast, the Local 33-referred employees working on the Employer's West Virginia and Ohio jobsites function like temporary employees, sent to the job by Local 33's Business Agent and laid off at the completion of the project, with no expectation of being recalled to work for the Employer. The Employer does not maintain a separate facility for the West Virginia and Ohio jobsites and the employees from those sites never travel to the Employer's facility in Pittsburgh. Thus, the record does not establish that there is a significant degree of functional integration between the two separate groups that the Petitioner seeks to represent in a single unit.

Having examined the parties' evidence as to the Board's relevant factors for determining whether the petitioned-for multi-site unit is an appropriate unit, I find that the Local 33 employees working at the Employer's West Virginia and Ohio jobsites do not possess the requisite community of interest with the Employer's Pittsburgh-based core employees to warrant

their inclusion in the unit. Recognizing that the employees in the two groups share some of the same job skills and duties and that there is some commonality of supervision, there are also notable differences in job skills and duties, as the core employees are required to perform many additional ancillary tasks beyond pure sheet metal installation. Further, the employees' wages, benefits and other terms and conditions of employment in the two groups are substantially different from each other; there is no relevant bargaining history that would support their inclusion in a single unit; and functional integration of the two groups is negligible. Perhaps most significantly, none of the Local 33-referred employees working in West Virginia and Ohio ever work with the Employer's core employees at its Pennsylvania jobsites or even go to Pennsylvania to visit the Employer's facility. Even though some of the Employer's laborers or supervisors may have worked at the Employer's West Virginia and Ohio jobsites, they were not permanently transferred to those locations and there is no evidence that they performed the work of the Local 33-referred employees in their absence. See, e.g., CCI Construction, supra, 326 NLRB at 1324 (Board found that, despite commonalities in job skills and duties, supervision, wages and labor relations policies, no community of interest existed for Pennsylvania-based employees and those at jobsites in Ohio, Maryland and Virginia, where jobsite transfers only occurred within Pennsylvania).

In addition to lacking a community of interest with the Employer's core Pittsburgh-based employees, the employees at the Employer's West Virginia and Ohio jobsites must be excluded from the unit based on uncontroverted evidence that the Employer's operations at its non-Pennsylvania jobsites will imminently cease. The Board has held that no useful purpose is served by directing an election that includes employees working on projects that will cease within several months. Thus, for example, in Davey McKee Corp., 308 NLRB 839 (1992), the Board denied a Request for Review of the regional director's decision, thereby affirming a finding that the petitioned-for unit was inappropriate where the employer was scheduled to complete the disputed projects in three to four months. Notably, this conclusion was reached in

Davey McKee even though the employer therein acknowledged that it would bid on additional work in the petitioned-for area if the opportunity arose, a factor not present in the instant case. *Id.* at 840.

In the instant matter, the record establishes that the Employer's only remaining work outside of Pennsylvania is at the Woodsfield/Monroe jobsite, which is scheduled to be completed by June 2012. There are no pending bids for other work outside of Pennsylvania and the Employer has already rejected an opportunity to bid for such work. The Employer asserts that it has no plans to work in those areas and there is no record evidence to the contrary. Further, the individual responsible for making the decisions about job bids, President Taback, testified that he does not intend to bid on any jobs under project labor agreements in the future, given that the Employer lost more than a million dollars on the Beallsville and Woodsfield projects.

Based on the foregoing, including the significant lack of community of interest between the Employer's core Pittsburgh-based employees and the Local 33-referred employees at the West Virginia and Ohio jobsites, and the imminent cessation of the Employer's operations in those areas, I find that the appropriate unit herein consists only of the petitioned-for employees who work within Pennsylvania and I shall exclude from the unit those employees of the Employer who work at its West Virginia and Ohio jobsites. These employees will not be included among those who are "employed at the Employer at its Pittsburgh, Pennsylvania facility", as set forth in the unit description below.

III. The Applicable Voter Eligibility Formula

In its effort to provide for optimum employee enfranchisement and free choice, the Board has developed a variety of voter eligibility formulas to address the idiosyncrasies that arise in certain industries. See, e.g., Hondo Drilling Co., 164 NLRB 416 (1967), *enfd.* 428 F2d 943 (5th Cir. 1970) (oil drilling industry); American Zoetrope Productions, 207 NLRB 621, 623 (1973) (entertainment industry); and Berlitz School of Languages, 231 NLRB 766 (1977) (education

field). Among these well-established eligibility formulas is the Daniel-Steiny formula for the construction industry, in which employers and employees perform their work on a project-by-project basis. Daniel Construction, supra, and Steiny, supra.

The Act itself does not define the term “construction industry,” but the Board has construed the term in a number of cases. Thus, for example, in Carpet, Linoleum and Soft Tile Local Union No. 1247 (Indio Paint), 156 NLRB 951, 959 (1966), the Board held that “construction” includes work providing labor and materials in connection with floor covering installations and specialized construction activities such as plumbing, painting, electrical work, carpentry and the installation of prefabricated building equipment and materials. The Board has similarly found that asbestos removal is work within the construction industry, U.S. Abatement, Inc., 303 NLRB 451, 456 (1991), and that “construction” includes the dismantling of a missile site. Zidell Explorations, Inc., 175 NLRB 887 (1969). Ultimately, the Board will apply the Daniel-Steiny voter eligibility formula where it is established that an employer, on a year-round basis, performs more than a “de minimis” amount of construction work and its work patterns are comparable to those of a construction industry employer. Cajun Co., Inc., 349 NLRB 1031 (2007) and Turner Industries Group, 349 NLRB 428, 433 (2007).

Contrary to the Petitioner, the Employer in this matter contends that it should not be considered a “construction industry” employer, emphasizing the importance of the *service* component of its operations. Alternatively, the Employer argues that even if the amount of construction work that the Employer performs is more than de minimis, the Daniel/Steiny eligibility formula for construction industry employers should not be applied to the instant petition because the “core” employees do not experience the hiring patterns typical of the construction industry (layoffs between jobs and intermittent work). The Employer specifically distinguishes its hiring practices from those considered by the Board in Cajun Company, supra, in which the employer maintained a no-recall policy and required discharged employees to reapply for future employment. The Employer also vigorously argues that, even if use of the Daniel-Steiny

formula is found to be justified herein, it must not be applied to the employees whom the Employer through Local 33 for the West Virginia and Ohio jobsites because they do not have a reasonable expectation of future employment with the Employer. This latter argument is now moot, as I have already determined that the Employer's West Virginia and Ohio employees are excluded from the appropriate unit.

Notwithstanding the Employer's contentions to the contrary, the record evidence clearly establishes that the Employer operates within the construction industry. In this regard, at least fifty percent of its revenue is derived from the installation of HVAC systems. This is the type of work that the Board has categorized as "construction." See, e.g., Indio Paint, supra at 957 ("Construction" covers, inter alia, those types of immobile equipment which, when installed, become an integral part of the structure). Indeed, when testifying at the hearing, President Taback even referred to the petitioned-for employees as the "construction" employees, as distinguished from those who perform service work for the Employer. In light of all these circumstances, the Employer is properly considered a "construction industry" employer.

The question remains, as the Employer observes, whether the Daniel/Steiny formula should be applied to the Employer's core employees. While it is evident that the Employer utilizes a more traditional hiring pattern for the petitioned-for core employees, the record reveals that the Employer has laid off these construction employees on at least one occasion since 2010. According to the record testimony, the Employer recalled the laid off workers within two to three months, but not all of the employees returned to work for the Employer. The record does not contain any evidence establishing who among the Employer's petitioned-for employees was laid off and/or returned to work. In these circumstances, where the Employer clearly operates within the realm of the construction industry and its employees experienced a layoff typical of the construction industry, I find that application of the Daniel/Steiny voter eligibility formula is warranted.

IV. Findings and Conclusions

Based on the entire record in this matter and in accordance with the discussion above, I find and conclude 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 matter.

3. The Petitioner claims to represent certain employees of the Employer.

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

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:⁸

All full-time and regular part-time commercial and residential HVAC employees engaged in the installation and fabrication of HVAC systems employed by the Employer at its Pittsburgh, Pennsylvania facility; excluding all office clerical employees, salespersons, estimators, service technicians and professional employees, guards and supervisors as defined in the Act and all other employees.

V. 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 Sheet Metal Workers' International Association, Local Union No. 12, AFL-CIO. The date, time and place of the election, will be specified in the Notice of Election which will issue shortly.

⁸ Pursuant to the afore-mentioned agreement of the parties at the hearing, employee William Bell's name shall be placed on the Excelsior list and be permitted to vote subject to challenge.

A. Voting Eligibility

The employees who are eligible to vote are those in the unit who are 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, unit employees are eligible to vote if they have been employed in the unit for either : (1) a total of 30 working days or more within the 12-month period immediately preceding the payroll period for eligibility, (2) if they have had some employment in those 12 months and have been employed 45 working days or more within the 24-month period immediately preceding payroll period for eligibility, and who have not quit or been discharged for cause prior to the payroll period for eligibility. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have 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.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

To be timely filed, the list must be received in the Regional Office on or before **June 14, 2012**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website www.nlr.gov, by mail, by hand or courier delivery, or by facsimile transmission at [insert Region's fax number]. To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, 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 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 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 Services, 317 NLRB 349 (1995). Failure to do so stops an employer from filing objections based on nonposting of the election notice.

VI. 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 **June 21, 2012**. The request may be filed electronically through the Agency's website, www.nlr.gov,⁹ but may not be filed by facsimile.

DATED: June 7, 2012

/s/Robert W. Chester

Robert W. Chester, Regional Director
NATIONAL LABOR RELATIONS BOARD
Region Six
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, PA 15222

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362-3350-600
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⁹ 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.