UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

FIRETROL PROTECTION
SYSTEMS, INC.

Employer,

and Case 27-RC-080251

ROAD SPRINKLER FITTERS,
LOCAL UNION NO. 669, U.A., AFL-CIO

Petitioner.

DECISION AND DIRECTION OF ELECTION

On May 3, 2012, the Road Sprinkler Fitters, Local Union No. 669, U.A., AFL-CIO (Petitioner), filed a petition under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of all full-time and part-time employees engaged in the installation, maintenance, and/or repair of automatic fire protection systems who are based out of Firetrol Protection Systems, Inc.'s (Employer's) Denver, Colorado facility.[1] The unit sought by the Petitioner would exclude all other employees, designers, salespersons, office clerical employees, and guards and supervisors as defined by the National Labor Relations Act (Act). The Petitioner also contends that the Employer is an employer within the construction industry and seeks an election to be conducted using the *Daniel/Steiny*[2] construction industry formula to determine voter eligibility.

[1] Although the Employer operates facilities throughout the Southwest United States, only the Employer's Denver facility is at issue in the present case. The Employer's name appears as amended at the hearing.

[2] *Daniel Construction Co*., 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967), reaffirmed and further modified in *Steiny & Co*., 308 NLRB 1323 (1992).

This case presents three issues regarding the petitioned for unit. First, the Employer contends that the *Daniel/Steiny* formula is not applicable because it is not an employer within the construction industry and it does not have a hiring pattern that would necessitate the use of the *Daniel/Steiny* formula. Second, the Employer maintains that the petitioned-for unit is not appropriate and the smallest appropriate unit should include four alarm technicians and/or three inspection employees. Third, the Petitioner presented evidence regarding the potential supervisory status of suppression employees Ryan Bruce (Bruce) and Carlos Balderama (Balderama).

On May 22 and 23, 2012, Julia Durkin, a hearing officer of the National Labor Relations Board, conducted a hearing in Denver, Colorado. Following the close of the hearing, the parties filed briefs. As explained below, based on the record and the relevant Board law, I find that the petitioned-for unit is appropriate, that the Employer is an employer engaged in the construction industry, and, therefore eligibility to vote in the election should be determined by the use of the *Daniel/Steiny* formula. Finally, I find that there is no dispute regarding the supervisory status of suppression employees Bruce and Balderama, and that the record evidence does not establish that they possess or exercise supervisory authority within the meaning of Section 2(11) of the Act.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I make the following findings:

THE EMPLOYER IS ENGAGED IN THE CONSTRUCTION INDUSTRY

Relevant Facts

The Employer operates a full-service fire safety and life protection company. The Employer designs, installs, repairs, services, and inspects a wide variety of fire alarm and fire suppression systems. The Employer maintains separate operating licenses for its fire protection work and alarm work. Denver District General Manager William Jones (Jones) estimated that about 5% of the work performed in about the past year consisted of installing fire alarm and fire suppression systems in new construction buildings. Jones further testified that the remaining 95% of the work performed consisted of "service work," which, by his definition, includes the following: retrofits that cost less than $25,000; alterations; tenant improvements; inspections, and repairs.[3] Jones testified that he derived the 5% new construction installation figure and the 95% service figure from his "gut feeling."

Jones defined the Employer's retrofit work as the installation of fire suppression and alarm systems in existing buildings that did not previously have fire safety systems. Jones estimated that retrofit work made up about 10 to 15% of the total "service work." Tenant improvements and alterations involve projects where the structure of the building is being altered, which, in turn, requires the relocation or alteration of existing fire protection and alarm systems or the installation of new fire protection or alarm system components. Jones described an example of the type of tenant improvement

[3] Jones testified that retrofit work is considered "service depending on how big it is. It's somewhat complicated. If it's 25,000, or less, we would book it as an SVC [service] job." It is unclear from the record how the Employer classifies retrofit projects that are billed at more than $25,000.

components when a tenant adds a wall to an existing building.

Inspection work involves testing the functionality of existing fire suppression and alarm systems and completing a report on any deficiencies in those systems. Inspections often generate repair work for the Employer, which entails making repairs to existing systems. The record evidence does not establish a precise percentage of new construction installation work, retrofit work, tenant improvement work, alteration work, repair work, or inspections the Employer performed the past year. Moreover, there is no record evidence regarding the revenues generated from the various types of work performed by the Employer.

Board Precedent

The Board's well established policy regarding voter eligibility is to not restrict eligibility to vote. *Ameritech Communications*, 297 NLRB 654, 656 (1990). Thus, although the Act does not define the term "construction industry," the Board has adopted a broad and inclusive definition of the term. The Board has cited the Standard Industrial Classification (SIC) Manual for 1957 and 1987 to define "construction" as including "new work, additions, alterations, reconstructions, installations, and repairs." *F.H.E. Services, Inc.*, 338 NLRB 1095, 1098 (2003) citing *Carpenters (Rowley-Schlimgen)*, 318 NLRB 714, 715-716 (1995). Similarly, the Board has used the *Construction Review,* volume 3, to define construction as:

> [T]he erection, maintenance and repair (including replacement of integral parts), of immobile structures and utilities, together with service facilities which become integral parts of structures and are essential to their use for any general purpose. It includes structural additions and alterations, Structures include buildings…and all similar work which are built into or affixed to the land … Construction covers those types of immobile equipment which, when installed, become an integral part of the structure and are necessary to any general use of structure. This includes such service facilities as plumbing, heating, air conditions and lighting equipment…

F.H.E. Services, 338 NLRB at 1098 quoting *Construction Review*, volume 3.

Thus, the Board defines construction industry work broadly to encompass work that goes beyond new construction installation. For example, the Board concluded that retrofit work is construction industry work. *Johnson Controls, Inc.*, 322 NLRB 669, 673 (1996) (concluding that replacing old fire and security systems with updated systems constitutes construction industry work for purposes of applying the *Daniel/Steiny* formula). Additionally, the Board defined construction industry work as including repairs and replacements to integral parts of an immovable structure. *Cajun Co*., 349 NLRB 1031, 1038 (2007); See also *South Alabama Plumbing*, 333 NLRB 16, 23 (2001) (concluding that plumbing work pertaining to repairs, remodeling, and roughing in plumbing constituted construction work); *C.I.M. Mechanical Co.*, 275 NLRB 685, 691 (1985) (finding that the distinction between service and repair and new construction installation "does not alter the legal principals involved"). Further, the Board has held that providing labor and materials in connection with installing floor coverings for buildings and homes constitutes construction industry work. *Painters Local 1247 (Indio Paint and Rug Center)*, 156 NLRB 951, 959 (1966). Finally, the Board concluded that an employer engaged in the removal of asbestos is engaged in the construction industry. *U.S. Abatement, Inc.*, 303 NLRB 451, 451 fn. 1 (1991).

In the construction industry, the *Daniel/Steiny* formula is used to determine the eligibility of employees to vote in a Board election, unless the parties stipulate not to use the formula.[4] *Steiny*, 308 NLRB at 1327. The *Daniel/Steiny* formula is applicable in all

[4] The *Daniel/Steiny* formula does not apply where the construction industry employer operates on a seasonal basis. *Steiny*, 308 NLRB at 1328 fn. 16.

construction industry elections regardless of an employer's specific hiring patterns. Id. at 1327-1328. Under the *Daniel/Steiny* formula, employees eligible to vote include (1) individuals who have been employed by the construction industry employer for 30 working days or more within the 12-month period preceding the eligibility date for the election; and (2) individuals who have some employment in those 12 months and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date. See *Daniel*, 133 NLRB at 267, as modified by *Steiny*, 308 NLRB at 1327 fn.13.

Application of Board Precedent to this Case

The Employer contends that it is not primarily engaged in the construction industry because only 5% of its business consists of installing fire suppression and alarm systems in new construction buildings. The record does not establish with precision the extent of the construction work performed by the Employer. Nevertheless, the record evidence is sufficient to establish that the Employer is engaged in the construction industry.

In that regard, approximately 5% of the Employer's work consists of installing fire suppression and alarm systems in new construction buildings, which the Employer concedes falls under the Board's definition of construction. In addition, approximately 10% of the Employer's work is retrofit work (installing new fire suppression and alarm systems in existing buildings), which the Board has defined as construction industry work. See *Johnson Controls*, 322 NLRB at 673.

The Employer's tenant improvement and alteration work is also encompassed by the Board's inclusive definition of construction industry work. See *F.H.E. Services*, 338 NLRB at 1098 (citing to the SIC Manual to define construction work to include

"alterations" and "reconstructions"). The Employer is also engaged in the repair of existing fire suppression and alarm systems. The Board has held that repairs of integral components of structures constitute construction work. See *C.I.M. Mechanical.*, 275 NLRB at 691. Undoubtedly fire suppression and alarm systems constitute integral components of structures and, therefore, the Employer's repair work also falls under the Board's definition of construction industry work.

The only work performed by the Employer that the Board may not consider construction work is the inspection work. There is no evidence that inspections alone constitute a majority of the Employer's total work. Rather, the record reveals that inspection is only one aspect of the Employer's full service fire protection business that, in turn, generates construction work. Thus, I find that the fact that the Employer performs inspections, in addition to its construction work, does not remove it from being engaged in the construction industry. Finally, the Board has classified employers who perform inspection, installation, and repair of fire suppression devices and alarms as employers engaged in the construction industry. *Road Sprinkler Fitters (Cosco Fire Protection)*, 357 NLRB No. 176, slip op (2011). Accordingly, I find that the Employer is engaged in the construction industry.

Having found that the Employer is engaged in the construction industry, it is not necessary to examine the Employer's hiring patterns and I direct that the *Daniel/Steiny* eligibility formula be applied to the election in this matter. [5]

[5] The Board also utilizes the *Daniel/Steiny* formula where an employer is not primarily engaged in the construction industry but performs a *de minimis* amount of construction work and has hiring patterns similar to those in the construction industry. See *Cajun Co.*, 349 NLRB 1035; *Turner Industries Group, LLC.*, 349 NLRB 428, 435 (2007). I would not apply the *Daniel/Steiny* formula here, on that basis. Rather, the evidence establishes that the Employer's work is primarily construction.

THE PETITIONED FOR UNIT IS AN APPROPRIATE UNIT

Relevant Facts

The Employer employs about 21 employees, 13 of which it classifies as "field employees." It is these 13 field employees that are issue here. The Employer further delineates the field employees into the following three classifications: (1) suppression employees (also referred to as sprinkler fitter employees);[6] (2) alarm technicians; and (3) inspection employees. The Employer currently employs six suppression employees, four alarm technicians, and three inspection employees.

Supervisory Hierarchy

Denver district manager Jones is the senior manager at the Denver facility. Jones oversees the Employer's Denver operations and maintains the ultimate authority to hire, fire, and discipline employees. Currently four managers report directly to Jones – service coordinator Katherine Allen, alarm manager Robert Barbour, warehouse manager Joseph Jones and office manager Antonette Romero. Until about two weeks prior to the hearing, Charles Hartman was the construction manager and also reported directly to Jones. Hartman's employment was recently terminated and Jones has taken over the construction manager duties. The six suppression employees used to report directly to Hartman but currently report directly to Jones or in Jones' absence, to lead suppression employees Balderama or Bruce. The four alarm technicians report directly to alarm manager Barbour and the three inspection employees report directly to service coordinator Allen. In that regard, Jones, Allen, and Barbour are responsible for approving the time sheets of their respective employees, scheduling and assigning work

[6] The term suppression employee is synonymous with "sprinkler fitter" employee.

to their respective employees, and are involved in making decisions regarding, hiring, layoffs, and temporary transfers to other job classifications.

Terms of Employment

The Employer maintains an employee handbook that applies to all of its employees. The suppression, alarm technicians, and inspection employees have the same benefits and are compensated on an hourly basis. The Employer bases its hourly wage rates on the experience, skill sets, and job responsibilities of the individual employee. The hourly wage rate for suppression employees ranges from $14 to $30 an hour. The hourly wage rate for alarm technician employees ranges from $10 to $27.50 an hour. The hourly wage rate the inspection employees spans from $12 to $28.50 an hour. The Employer provides the same t-shirts and button up shirts with the company logo to the suppression, alarm technician, and inspection employees.

The suppression, alarm technician, and inspection employees spend a majority of their time working in the field at the customer's facility. They spend an average of one to four hours per week at the Employer's facility to turn in time sheets and job orders for completed jobs. The Employer provides a company vehicle, gas card, and cell phone to all employees who work in the field. Alarm technicians are provided with company laptop computers for the purpose of programming fire alarm panels. Suppression and inspection employees are not issued company laptop computers.

Although the work assignments may dictate employees' schedules, the suppression, alarm technician, and inspection employees generally work Monday through Friday from 7:00 a.m. to 3:30 p.m. In addition, suppression employees and alarm technicians are required to be on-call after normal business hours and on weekends. The Employer maintains separate and distinct on-call lists for the

suppression employees and the alarm technicians. There is no evidence that inspection employees are required to be on-call, and no inspection employees were included on either the suppression on-call list or alarm technician on-call list.

Skills and Training

Suppression employees are required by the City of Denver and the State of Colorado to maintain a fire sprinkler license to perform fire suppression work. The City of Denver licenses fire suppression employees either as "Fire Protection Systems – Installer" or " Fire Protection Systems – Apprentice." To obtain the Fire Protection Systems – Installer license, the applicant must pass a written test and must have completed a five-year work experience requirement with an accredited apprenticeship program.

The Employer also enrolls suppression employees in the American Fire Sprinkler Association (AFSA) apprenticeship program to facilitate the training of its suppression employees. The Employer does not provide AFSA training for inspection or alarm technician employees.

Alarm technicians are also required to obtain and maintain licenses from the City of Denver and the State of Colorado. The City of Denver licenses alarm technician employees as either "Fire Alarm System – Installer " or "Fire Alarm System – Apprentice."

It is unclear from the record whether the Employer requires inspectors to obtain a license to perform their job duties. The record reveals that inspection employee Jonathan Jones currently is licensed as a "Portable Fire Extinguishers – Apprentice," "Fire Protection Systems – Apprentice," and "Fire Alarm Systems – Apprentice." Inspection employee Christopher Schirk currently holds licenses for Fire Protection

Systems – Installer, and Fire Alarms Systems – Apprentice. Inspection employee Lee Helmers is currently licensed as a "Portable Fire Extinguishers – Installer," "Fire Protection Systems – Installer," and "Fire Alarm Systems – Installer."

Job Duties

Suppression Employees

Suppression employees' (sprinkler fitters') primary job duties relate to installing, servicing, and repairing different types of fire suppression systems such as wet systems, pre-action systems, dry systems, and specialty gas systems. Suppression employees install pipe, install and repair backflow devices, replace pipe, repair leaks, and replace damaged sprinkler heads. Suppression employees also perform some inspections of fire suppression systems and backflow devices.

Alarm Technicians

The primary job duties of alarm technicians are to install and service major fire alarms. District Manager Jones testified that the following paragraph from a job advertisement accurately describes alarm technician's job duties as: "…experience installing and servicing major fire alarms. The ideal Technician will be organized, professional, and a good communicator. This important position will establish a rapport and build positive relationships with our customers. Denver License required." In addition, alarm technicians use Employer provided computers to program fire alarm systems.

Inspection Employees

Inspection employees primarily inspect and test the functionality of life safety systems (suppression or alarm), report that functionality on an inspection report and identify any deficiencies discovered from the inspection. Inspections often occur

because a customer is required to have periodic inspections of life safety systems. The Employer often generates proposals to correct deficiencies based on the information noted in the inspection reports.

Employee Interchange/Contact

Suppression employees perform limited duties related to the inspection of fire suppression systems. District Manager Jones estimated that suppression employees perform about 20% to 25% of the inspection work on fire suppression systems. However, there is also evidence that some inspection of a fire suppression system requires traditional suppression work, such as opening and closing valves and repairing the system, which is distinct and different than from a safety inspection of the entire system for functionality. It is unclear from the record what percentage of the inspection related work performed by suppression employees is actually traditional suppression work and what percentage is actual inspection work. Finally, the record reveals that in May 2012, the Employer had a backlog of inspection work to complete. To facilitate the completion of the work, the Employer temporarily shifted suppression employee Jeff Jameson to perform inspection work for one week. At the conclusion of the week, Jameson returned to suppression work. This is the only specific example of any suppression employees being temporarily transferred to a different classification.

The record reveals that suppression employees perform a very limited amount of alarm work. Jones testified that suppression employees will perform “small repairs” related to alarm work. For example, suppression employees may replace batteries in a fire alarm panel or replace a conventional smoke detector head. The record evidence shows that suppression employees, on occasion, perform a limited amount of alarm work in conjunction with larger suppression jobs. For example, the Employer installed a

new fire sprinkler system with a backflow preventer at the Climax Mine in Colorado, which is fire suppression work. Suppression employees completed minimal work related to alarm systems such as, installing conduit wire, terminating fire alarms, and installing the flow switches that connect the fire suppression system to the alarm system. However, alarm technicians or electricians wired the flow switches. On two recent jobs, fire suppression employees installed the deluge solenoid component on the deluge system, which releases the fire sprinkler when instructed to do so by the alarm system. Suppression employee Jameson testified that he has no understanding of fire alarm and detection systems, and he has not performed any alarm system work during his employment with the Employer.

There is scant record evidence regarding the interchange of alarm employees with the other classifications. Although Denver District Manager Jones testified that alarm technicians perform a limited amount of small fire suppression repairs, he did not provide specific examples of alarm employees performing suppression work, and there is no evidence regarding the frequency of alarm employees performing suppression work. Similarly, there is no evidence regarding whether alarm employees perform inspection work.

With respect to interchange of inspection employees, the record contains one example of inspection employees performing suppression work. District General Manager Jones testified that inspection employees may perform backflow repairs (typically suppression work), if the customer wants it repaired immediately and the inspection employee has the appropriate parts and kit in his vehicle at the time he is inspecting the system. However, the Employer did not introduce any evidence regarding the frequency that inspection employees perform backflow repairs or provide

any specific examples. There is no evidence that inspection employees perform alarm work.

With respect to employee contact, there is no evidence introduced to establish the amount or frequency of contact suppression employees have with inspection employees or alarm technicians. Suppression employee Jameson testified that he generally works alone. He testified that when he performed inspections of the E470 toll booths, another employee (name unknown) was with him, but the other employee performed different work - mainly inspecting the panel and smoke detectors located in the toll stations.

Finally, Joe Johnson transferred from his position as an inspection employee to an alarm technician position. This is the only evidence of a permanent transfer from one of the three field classifications to another.

Board Precedent

It is well established that the Act does not require a petitioner to seek representation of the most appropriate unit possible; rather, the petitioner must seek representation of *an* appropriate unit. *Overnite Transportation Co*., 322 NLRB 723 (1996). In *Specialty Healthcare and Rehabilitation Center of Mobile*, the Board articulated the two-step standard that applies in cases like this one, in which an employer contends that the smallest appropriate bargaining unit must include additional employees/job classifications beyond those in the petitioned-for unit. 357 NLRB No. 83, slip op. (August 26, 2011).

First, the Board assesses whether the petitioned-for unit is *an* appropriate bargaining unit by applying traditional community of interest principles. Id. slip op. at 8-9 (emphasis added). In that regard, the Board analyzes whether the employees in the

petitioned-for unit are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors) and whether the employees share a community of interest under the traditional criteria. Id. slip op. at 11 fn. 25, 12. The following traditional criteria are relevant to determine whether employees in a proposed unit share a community of interest:

> [W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work; including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Id., slip op at 9 quoting *United Operations, Inc*., 338 NLRB 123, 123 (2002).

Second, where it is determined that the petitioned-for unit is an appropriate unit, the employer bears the burden of demonstrating that "the employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit." *Specialty Healthcare*, slip op. at 12-13. Additional employees share an overwhelming community of interest with the petitioned-for employees when there "is no legitimate basis upon which to exclude [the additional] employees from" the petitioned-for unit because the traditional community-of-interest factors "overlap almost completely." Id. slip op. at 11, quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421, 422 (D.C. Cir. 2008).

Application of Board Precedent to this Case

The Petitioner seeks a unit consisting of six suppression (sprinkler fitter) employees. The Employer contends that the appropriate bargaining unit must include, in addition to the six suppression employees, four alarm technicians and three inspection employees. Contrary to the Employer's argument, I find that under the

analytical framework outlined in *Specialty Healthcare*, supra, suppression employees share a community of interest to constitute an appropriate unit, and the Employer has not satisfied its burden of demonstrating that the alarm technicians and inspection share an overwhelming community of interest with the suppression employees.

Application of the first principle of the *Specialty Healthcare* test reveals that the suppression employees alone constitute an appropriate unit. First, the evidence reveals that suppression employees are "readily identifiable as a group" based on their job classification and their work skills. The Employer classifies the six employees who perform suppression work as "suppression" or "sprinkler fitter" employees. Thus, even the Employer distinguishes the suppression employees, based on job classification, from its other field employees – alarm technicians and inspection employees. Moreover, suppression employees have distinct skills and qualifications. All suppression employees are required by the Employer, the City of Denver, and the State of Colorado to obtain a Denver Fire Protection Systems license to perform suppression work. This is not a requirement for the other field employees. While some of the inspection employees may hold a Fire Protection Systems license, there is no evidence that the Employer, Colorado, or the City of Denver require inspection employees to obtain the license to perform inspection work. Moreover, the Employer provides the suppression employees with specific training not offered to its other field employees. Only the suppression employees participate in the AFSA apprenticeship program to complete fire suppression apprenticeship training. Thus, I find that the suppression employees are readily identifiable as a group based on their job classification and specialized work skills.

Second, the suppression employees share a community of interest under the traditional criteria. As discussed above, they are organized into a distinct group and they have unique skills, qualifications and training. Additionally, they share all of the remaining community of interest factors quoted above. Suppression employees share the same distinct job functions and perform the same work. In that regard, suppression employees perform the majority of the Employer's fire suppression system work. Moreover, the Employer maintains a distinct on-call list exclusively for suppression employees to perform after hours and weekend suppression system work. Finally, suppression employees continue to report to the same manager (currently Jones) and share the same terms and conditions of employment.

Having determined that the suppression employees are clearly identifiable as a group and share a community of interest, I next analyze whether the alarm technician and inspection employees share an overwhelming community of interest with the suppression employees. It is the Employer's burden to establish this overwhelming community of interest. The Employer has not satisfied that burden here.

An important factor that favors an expanded unit is that all three field classifications have the same or similar terms and conditions of employment such as benefits, wage scales, and uniforms. However, this factor alone does not render a unit consisting solely of suppression employees inappropriate. See *DTG Operations*, 357 NLRB No. 175, slip op. at 7 (December 30, 2011) (rejecting the employer's contention that a wall-to-wall unit was appropriate based on the similarity of the wage scale).

As discussed above, the suppression employees share community of interest factors that are distinct. In that regard, the suppression employees are organized into a distinct department; the bulk of the work they perform is different from the work

performed by alarm technicians and inspection employees; and suppression employees possess unique skills, qualifications and training that the alarm technician and inspection employees do not necessarily hold. Moreover, the suppression employees, alarm technicians, and inspection employees have separate immediate supervision. These factors militate against finding an overwhelming community of interest between the suppression employees and the alarm technician and inspection employees.

The Employer contends that the high degree of interchange between the three field employee classifications necessitates expanding the unit. Contrary to the Employer's contention, I conclude that the record evidence fails to establish a level of interchange that would render the smaller unit inappropriate. In that regard, the record reveals that the suppression employees perform some inspection work on fire suppression systems. However, the record is vague regarding the overall quantity, extent, and specific type of inspection work performed by suppression employees. Moreover, the record contains scant evidence regarding the actual job duties of the inspection employees. Therefore, the evidence fails to demonstrate that the type of inspection work performed by suppression employees is comparable to the type of inspection work performed by the designated inspection employees. Finally, there is no evidence that inspection employees perform suppression work on a regular or frequent basis.[7]

[7] The Employer introduced some Work Order Cost Reports (Employer Exhibit 14) that show that the Employer listed some Suppression employees as ostensibly having worked on assignments under a Work Order Description that used the term "inspection". Petitioner objected to the introduction of the documents on the grounds that the Cost Reports did not establish the actual work performed by each employee. The underlying handwritten work orders and inspection reports that the employees completed were not introduced into the record. Although the Cost Reports provided and received into the record utilize the term inspection and demonstrate how the costs were apportioned, I do not find that these records are sufficient to establish the type of work that was actually performed on the dates noted.

Likewise, the record does not establish that there is a substantial degree of interchange between the suppression employee and the alarm technicians. In that regard, suppression employees perform simple and small alarm technician tasks such as changing a battery in an alarm or installing a switch on a suppression system. However, the record is vague concerning the frequency that suppression employees perform that type of work. Moreover, the only employee who testified at the hearing is designated as a suppression employee and he stated that he has no understanding of alarm systems and has never worked on an alarm system. As with the inspection employees, there is limited record evidence regarding the actual job duties of alarm technicians. In that regard, only alarm technicians program alarm systems with Employer provided computers. The record evidence is insufficient to establish that the work regularly performed by suppression employees is similar to the work regularly performed by alarm technicians.

Finally, the Employer's contention that employee interchange necessitates the expanded unit is undercut by the evidence that the Employer recognizes and enforces the distinction between the three field employee classifications. Specifically, employee Johnson converted from his former position as an inspection employee to an alarm technician position and, for a period of one week, suppression employee Jameson temporarily transferred to inspection but then returned to his regular suppression position. The fact that the Employer converted Johnson to a new position and only temporarily transferred Jameson illustrates that the three field classifications are distinct and that the three field classifications are not entirely interchangeable.

The Employer contends that a unit comprised solely of suppression employees is an inappropriate fractured unit. In support of its contention, the Employer relies on

Odwalla Inc., 357 NLRB No. 132, slip op. (December 9, 2011). I find that *Odwalla* is distinguishable from the present case. In *Odwalla*, the Board reversed the Regional Director and concluded that the Employer's merchandisers must be included in a unit with RSRs (delivery drivers), swing reps (relief drivers), warehouse associates, and cooler technicians. Id. slip op at 6-7. The Board specifically found that "none of the Board's traditional community-of-interest factors suggest that all the employees in the recommended unit share a community of interest that the merchandisers do not share, such that the community-of-interest factor would reasonably support drawing the unit's boundaries to include the RSRs, swing reps, warehouse associates, and cooler technicians, but not the merchandisers." 357 NLRB at slip op at 5. The Board, in *Odwalla*, found that the recommended unit did not track any classification, department, or job function lines drawn by the employer; was not structured along lines of supervision; was not drawn in accordance with methods of compensation; and was not drawn along lines of work location. Id., slip op 5-6. That is not the case here. In this case, the petitioned-for unit tracks classification lines created by the Employer by including only those employees who perform suppression work. In addition, the petitioned-for unit follows job function lines (fire suppression work) and immediate supervision lines. For the reasons discussed above, I conclude that the Employer has failed to meet its burden of establishing that the community of interest factors overlap almost completely between the suppression employees and other field classifications to create an overwhelming community of interest.

In sum, I find that the suppression employees share a community of interest among themselves but do not share an overwhelming community of interest with the

alarm technicians and inspection employees. Under *Specialty Healthcare*, the petitioned-for unit, thus constitutes an appropriate unit.

THE ISSUE OF RYAN BRUCE'S AND CARLOS BALDERAMA'S 2(11) SUPERVISORY STATUS WAS NOT PROPERLY RAISED

Board Precedent

It is well established that the burden to prove Section 2(11) supervisory status rests with the party asserting it. *Oakwood Healthcare, Inc*., 348 NLRB 686, 687 (2006), citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999). The Board has long recognized that purely conclusory evidence is not sufficient to establish supervisory status. *Volair Contractors*, 341 NLRB 673, 675 (2004); *Sears, Roebuck & Co*., 304 NLRB 193, 194 (1991). Moreover, the Board has held that where a party refuses to take a position regarding the supervisory status of an employee during the hearing, there is no dispute and, therefore, no basis for the Regional Director to make a determination regarding the employee in question's Section 2(11) supervisory status. *Bennett Industries, Inc*., 313 NLRB 1363, 1363 (1994).

Application of Board Precedent to this Case

At the beginning of the hearing, the Hearing Officer inquired whether the parties could reach a stipulation concerning the supervisory status of suppression employees Ryan Bruce and Carlos Balderama. The Petitioner did not take a position stating that it would like to "reserve on that" issue. The Employer contended at that

time, and throughout the hearing, that Bruce and Balderama are not Section 2(11) supervisors.

During the hearing, the Petitioner elicited minimal testimony from District General Manager Jones regarding the possible supervisory status of suppression employee Bruce. The Hearing Office again asked the parties' to state their position regarding Bruce's supervisory status. The Employer maintained that Bruce was not a Section 2(11) supervisor. The Petitioner, again, refused to take a firm position when its counsel stated: "I had declined to stipulate that he is in. The record is unclear…I'm hoping that we can agree to disagree on his status and worry about it when he votes."[8] Towards the end of the hearing, an exchange took place between the Hearing Officer and the Petitioner's counsel when the Hearing Officer sought Petitioner's position on the status of Bruce and Balderama. Petitioner's counsel then withdrew the objection to the inclusion of Bruce and Balderama. The Hearing Officer noted that the issue would not be reserved for the challenged ballot process, and that was acknowledged by the Petitioner.

Although the Petitioner initially elicited evidence regarding the supervisory status of Bruce and Balderama, the Petitioner never decisively took the position on the record that they are Section 2(11) supervisors. Even if the Petitioner had clearly taken the position that Bruce and Balderama are statutory supervisors, the Petitioner's final position on the subject was that Bruce and Balderama were not statutory supervisors and were appropriately included in the unit.[9] At that time, the Hearing Officer properly advised the Petitioner that he could not reserve the issue for the challenged ballot

[8] There was no discussion regarding Balderama at this time.

procedure. Finally, in its post-hearing brief Petitioner takes the position that Bruce and Balderama are included in the unit. Thus, I conclude that under *Bennett*, supra, Petitioner has not adequately raised the issue of the supervisory status of Bruce and Balderama. As there is no dispute as to the status of Bruce and Balderama, I decline to make a determination regarding their supervisory status and they are, therefore, included in the unit. Accordingly, absent changed circumstances, no party may re-litigate this issue through the challenge procedure. *Bennett*, 313 NLRB at 1363.[10]

CONCLUSION AND FINDINGS

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

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

2. **Jurisdiction**: The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board. Specifically, I find that the Employer is a Utah corporation with a facility and place of business located in Denver, Colorado, where it is engaged in the business of designing, installing, repairing, servicing, and inspecting fire

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[9] In its post-hearing brief Petitioner takes the position that Bruce and Balderama are included in the unit.

[10] Even if the issue were properly raised by the Union, the record evidence is insufficient to establish that Bruce and Balderama are Section 2(11) supervisors. In that regard, the record reveals that Bruce and Balderama currently have the same job responsibilities. They spend 32 hours per week in the field performing the same work as the other fire suppression employees. Bruce and Balderama do not have authority to hire, fire, or discipline employees. There is no evidence that they have authority to transfer, suspend, lay off, recall, promote, reward, direct, or adjust grievances of employees. The only possible supervisory indicia they have is the assignment of work. Occasionally, Bruce and Balderama fill in for Jones and assign suppression employees to specific jobs. Jones testified that the primary criteria used by Bruce and Balderama for assigning work is the calendar. Thus, the evidence is insufficient to establish that they use independent judgment when assigning work to suppression employees. See *Oakwood Health Care*, 348 NLRB at 693.

3. During the past twelve months, a representative period, in conducting its business operations, the Employer has purchased and received at its Colorado facility goods valued in excess of $50,000 directly from points located outside the sate of Colorado.

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

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, and it will effectuate the purposes of the Act to assert jurisdiction herein.

5. **Unit Finding**: It is appropriate to direct an election in the following unit of employees:

> **INCLUDED:** All full-time and regular part-time suppression employees engaged in the installation, maintenance, and/or repair of automatic fire protection systems at the Employer's Denver, Colorado facility.
>
> **EXCLUDED:** Designers, salespersons, alarm technicians, inspection employees, office clerical employees, guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor relations Board will conduct a secret ballot election among the employees found appropriate above. The employee will vote whether or not they wish to be represented for purposes of collective bargaining by:

ROAD SPRINKLER FITTERS, LOCAL UNION NO. 669, U.A., AFL-CIO

The date, time, and place (or dates, times, and places) of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Direction of Election.

VOTING ELIGIBILITY

Eligible to vote are those in the unit as described above who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election 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 a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement of that strike and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

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 Co***.,** 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days from the date of this Direction of Election, the Employer must submit to the Regional Office an election eligibility list, containing the full name and address of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The list must be 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, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Towers, 600 Seventeenth Street, Denver, Colorado 80202-5433 on or before **June 22, 2012.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by electronic filing through the Agency's

website, **www.nlrb.gov**,[11] by mail, or by facsimile transmission to (303) 844-6249. The burden of establishing timely filing and receipt of the list will continue to be placed on the sending party.

Since the list is to be made available to all parties to the election, please furnish a total of tow (2) copies of the list, unless the list is submitted by facsimile or electronically, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

NOTICE OF POSTING OBLIGATIONS

According to the Board's Rules and Regulations, Section 103.21, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) working days prior to the day of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least five (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 estops employers from filing objections based on nonposting of the election notice.

PROCEDURES FOR FILING A REQUEST FOR REVIEW

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, D.C., by close of business on **June 29, 2012**, unless filed electronically. **Consistent with the Agency's E-**

[11] To file the list electronically, go to www.nlrb.gov and select ***File Case Documents***, enter the NLRB Case Number, and follow the detailed instructions.

Governing 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.[12]

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.nlrb.gov. Once the website is accessed, select the E-Gov tab, click on E-Filing, and follow the detailed directions. The responsibility for the receipt of the request for review rests exclusively with the sender.

A failure to timely file an appeal electronically will not be excused on the basis of a claim that the receiving machine was off-line or unavailable, the sending machine

[12] 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 utilized in filing the request with the Board.

malfunctioned, or for any other electronic-related reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Denver, Colorado this 15th day of June, 2012.

/s/ Wanda Pate Jones
Wanda P. Jones
Regional Director
National Labor Relations Board, Region 27
600 Seventeenth Street
700 North Tower, Dominion Towers
Denver, Colorado 80202-5433