

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

In the Matter of

FRASER ENGINEERING COMPANY, INC.

Employer¹

and

PIPEFITTERS LOCAL 537, a/w UNITED
ASSOCIATION OF JOURNEYMEN &
APPRENTICES OF THE PLUMBING AND
PIPEFITTING INDUSTRY, AFL-CIO

Petitioner

Case 01-RC-080901

DECISION²

Fraser Engineering Company, Inc. (Fraser Engineering), with an office and primary place of business in Newton, Massachusetts, is a contractor that provides mechanical, plumbing, electrical, and HVAC services. Fraser Petroleum Services (Fraser Petroleum), located at the same facility in Newton, is a wholly owned subsidiary of

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

² Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 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 labor organization involved claims to represent certain employees of the Employer; and 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.

Fraser Engineering. Fraser Petroleum is a contractor that provides mechanical, maintenance, and construction services, as well as tank farm repair, for customers in the petroleum industry. The Union seeks to represent a bargaining unit composed of about 26 pipefitters, welders, and plumbers and 7 service technicians, including apprentices, who are employed by Fraser Engineering.³ The Employer takes the position that the smallest appropriate unit must also include about 13 pipefitters, welders, and plumbers employed by Fraser Petroleum. I find that the petitioned-for unit is appropriate and shall direct an election at an appropriate future time among a unit of employees employed by Fraser Engineering, excluding the Fraser Petroleum employees.⁴

Background and spinoff of Fraser Petroleum

Fraser Engineering is a contractor that provides mechanical, plumbing, process piping, HVAC and electrical services. Prior to 2010, Fraser Engineering had a service department that employed service technicians, an electrical department that employed electricians, and a mechanical department that employed all of the Employer's pipefitters, welders, and plumbers. The mechanical department engaged in three different types of work: 1) heating and cooling work, which involved installing new boilers and chillers, 2) "process" work, which involved installing, maintaining and repairing pipe systems for customers in the chemical, bio-pharmaceutical, natural gas, and utility industries, and 3) petroleum work, which involved performing maintenance on tank farms, as well as installing, maintaining and repairing pipe systems for petroleum companies.

A 2008 organizational chart that was submitted into evidence shows that all of the Employer's pipefitters, welders and plumbers were then employed by one department, the mechanical department. At some point prior to 2010, the mechanical department ceased to exist, and the pipefitters, welders, and plumbers were divided between two newly created departments, the process department and petroleum services department.⁵ The service department was renamed and is now called the HVAC department.⁶

³ In addition to these 33 current employees, the parties have stipulated, and I find, that the unit shall include two laid off employees, welder Michael Park and employee John Petrosovich.

⁴ This representation case is currently blocked by unfair labor practices in cases 01-CA-084234 and 01-CA-084225, and no election is to be directed at this time. The hearing in this case and the issuance of this Decision was held to resolve significant common issues, pursuant to NLRB Casehandling Representation Casehandling Manual Sec. 11731.3.

⁵ Fraser Petroleum Chief Operating Officer Phil DiSciullo testified that, prior to the incorporation of Fraser Petroleum Services as a separate company, Fraser Petroleum was a "third department" of the mechanical department and that the "petroleum department" jointly bid jobs with the mechanical department quite a bit.

Although the mechanical department technically no longer exists, the Employer sometimes uses the term "mechanical" to refer to what is now the Fraser Engineering process department.

⁶ The terms "service department" and "HVAC department" and the terms "service technician" and "HVAC technician" are used interchangeably by the Employer.

Fraser Petroleum Services was incorporated as a separate company in January 2010 and began operations in March 2010.⁷ As noted above, it is a wholly owned subsidiary of Fraser Engineering. Upon the creation of the new corporation, all of the plumbers, pipefitters, and welders who had previously been employed by Fraser Engineering in its petroleum services department became employees of the newly incorporated company, Fraser Petroleum Services.

Management hierarchy for the two companies

Cecelia Fraser is the president and CEO of both Fraser Engineering and Fraser Petroleum. Human Resources Director Liz Stead, Vice President of Accounting Meghan Ellis, Safety Officer Shawna Fraser, and Quality Control Manager Oliver Broschk all perform their respective functions for both companies.⁸

The two petitioned-for Fraser Engineering departments, i.e., HVAC and process, and Fraser Petroleum are each headed by a different manager or supervisor. It appears from the current organization chart that the service technicians in the Fraser Engineering HVAC department report to Service Manager Jim Carey and estimators Ken Lysik and

It is unclear from the record which of the current departments now performs the heating and cooling work that was previously performed by the mechanical department. It appears from a current organizational chart that was submitted into evidence that one pipefitter and one plumber are currently employed, along with seven service technicians, in what is referred to in the new organizational chart as the HVAC department, so it is possible that work is now performed by the HVAC department.

It appears from the current organizational chart that the electricians are no longer employed within a separate department and are now employed within the HVAC department. Neither party seeks to include electricians in the bargaining unit.

⁷ Fraser Engineering President and CEO Cecilia Fraser testified that Fraser Petroleum Services was created as a separate company for branding purposes, in order to try to grow that part of the business. In 2009, one of Fraser Engineering's petroleum customers began to use the "ISN" system, which measures the safety records of contractors in a more demanding way. At that time, the safety records of Fraser Engineering's petroleum division and process division were better than that of the service/HVAC division. By spinning off Fraser Petroleum as a separate company, the Employer could report the safety record of the petroleum side of the business separately to ISN, for those customers in the petroleum industry that use ISN. At the same time, the company instituted new safety programs for both Fraser Engineering and Fraser Petroleum, in an effort to improve its safety culture company-wide. Now, some of Fraser Engineering's process customers also require ISN reports, so both Fraser Engineering and Fraser Petroleum provide them, with different reports going to different sets of customers.

⁸ The parties have stipulated, and I find, that President and CEO Cecelia Fraser, Vice President of Accounting Meghan Ellis, and Safety Officer Shawna Fraser are owners or managerial employees who should be excluded from any unit found appropriate.

Sean Marchant, while a separate group of pipefitters, welders, and plumbers within the HVAC department reports to estimators Robert Flaherty and Mike Gorman.⁹

The pipefitters and welders in the Fraser Engineering process department report to Project Manager/Estimator Oliver Broschk and to Estimator Ed Nickerson.¹⁰

The pipefitters and welders employed by Fraser Petroleum Services report to Chief Operating Officer/Group Leader/Estimator/Project Manager Phil DiSciullo, Supervisor Eric Davis, and Assistant Manager Joe Hamilton.¹¹

President Cecelia Fraser has ultimate authority to hire and fire for both Fraser Engineering and Fraser Petroleum. With respect to hiring, Cecelia Fraser, Human Resources Director Stead, and the relevant department head generally interview applicants and reach a joint decision. Both hiring and firing decisions are Fraser's call if there is a split. With respect to annual performance evaluations, the head of each of the three groups participates in evaluations of the employees in their group, along with Cecelia Fraser and Stead. Fraser Petroleum Group Leader DiSciullo testified that he

⁹ The parties have stipulated, and I find, that Service Manager Jim Carey, Estimators Ken Lysik and Sean Marchant and Estimators Robert Flaherty and Mike Gorman are statutory supervisors who should be excluded from any unit found appropriate.

The parties have stipulated, and I find, that HVAC department foremen Michael Rooney and Michael Wysocki shall be included in the unit.

¹⁰ Broschk serves both as the project manager for the Fraser Engineering process department and as the company-wide quality control manager for both Fraser Engineering and Fraser Petroleum. The parties have stipulated, and I find, that Project Manager Oliver Broschk and Estimator Ed Nickerson are statutory supervisors who should be excluded from any unit found appropriate.

The parties have stipulated, and I find, that Fraser Engineering process foremen Willard Baker, Jeff Bresnahan, James Brogan, David Carrigan, Thomas Doucette, Abilio Guindeira, Jeff Hancock, Stephen Harvey, Michael Kenney, Joseph Milner, James Mixon, Eric Tucker, and Jonathan Wheeler shall be included in any unit found appropriate.

The parties have stipulated, and I find, that Fraser Engineering process foreman Nigel Howe shall be permitted to vote under challenge.

The parties have stipulated, and I find, that Vincent Byrnes and Herb Fuller shall be excluded from any unit found appropriate.

¹¹ The parties have stipulated, and I find, that Fraser Petroleum Chief Operating Officer/Project Manager Phil DiSciullo, Project Manager Eric Davis, and Project Manager Joseph Hamilton are statutory supervisors who should be excluded from any unit found appropriate.

The parties have further stipulated, and I find, that, should I determine to include Fraser Petroleum employees in the bargaining unit, Fraser Petroleum foremen Edward Bergeron, Kenneth Douglas, Brian Gates, and David Hucks shall be included in the unit.

makes a recommendation to Stead, and that he, Stead, and Cecelia Fraser discuss the matter and make a decision. Service technician Peter Christian testified that he meets with Service Manager Jim Carey, Liz Stead, and Cecelia Fraser for his annual performance review.¹²

Duties and qualifications of Fraser Engineering process department employees and Fraser Petroleum employees

The Fraser Engineering process department currently employs about 24 employees in the classifications of pipefitter, welder, and plumber. Fraser Petroleum employs about 13 employees in the classifications of pipefitter, welder, and plumber.¹³

According to the position summary for various job descriptions submitted into evidence,¹⁴ a journeyman pipefitter is responsible for the layout, assembly, installation and maintenance of all pipe systems, pipe supports and related hydraulic and pneumatic equipment for steam, hot water, heating, cooling, lubricating, sprinkling, and industrial production and processing systems. Welders are responsible for various types of weld preparation, welding and weld finishing operations to manufacture product to customer drawings, specifications, or other forms of instruction. A journeyman plumber is responsible for the layout, assembly, installation and maintenance of all plumbing pipe systems including the fittings and fixtures of heating, water and drainage systems according to specifications and plumbing codes.

Cecelia Fraser and Phil DiSciullo testified that there is no difference in the nature of the work performed by pipefitters and welders employed by the two companies. The only difference is the nature of the material that flows through the piping systems on which they work. Welders for both companies weld pipes.

There is no difference in the certification or licensure requirements between employees of the two companies, for employees in the same classification. Pipefitters for both companies are required to have the same background. Neither pipefitters who perform process pipefitting work for Fraser Engineering nor pipefitters who perform petroleum pipefitting work for Fraser Petroleum are required to have a pipefitter's license, although many of the pipefitters do have one.¹⁵ All Fraser Petroleum and Fraser

¹² Welder Michael Park testified that the only annual reviews he recalls involved peers completing review forms for one another.

¹³ Some of the employees in both companies appear to have more than one skill and are classified in Employer Exhibits as "plumber/pipefitter" or "welder/pipefitter." Some employees in both companies are classified as pipefitter apprentices or plumber apprentices.

¹⁴ It appears that the Employer maintains the same job description for pipefitters, welders, and plumbers, regardless of whether they are employed by Fraser Engineering or Fraser Petroleum.

¹⁵ The job description for pipefitters, which was prepared in 2009, before the incorporation of Fraser Petroleum, states that a journeyman pipe fitter or master license is required for the

Engineering welders are certified, as required by “ASME,” to perform specific categories of welding procedures.¹⁶ Plumbers are required to have a journeyman plumber’s license.

As noted above, Oliver Broschk, who is the project manager for the Fraser Engineering process department, also functions as the quality control manager for both Fraser Engineering and Fraser Petroleum. In his capacity as quality control manager, Broschk ensures that the welders for both Fraser Engineering and Fraser Petroleum maintain the necessary welding certifications. He visits Fraser Engineering and Fraser Petroleum job sites to ensure that welders follow proper procedures and randomly checks the quality of their work.

The Employer is required to maintain a “stamp,” a type of certification that must be renewed every three years so that it may perform certain types of repairs on boilers, pressure vessels, and piping systems. Pipefitters and welders for both Fraser Engineering and Fraser Petroleum perform such work. When either Fraser Engineering or Fraser Petroleum performs this type of work, Broschk goes to the job site to verify that the installation or repair was done properly.

Pipefitters and welders for both Fraser Engineering and Fraser Petroleum use the same types of hand and power tools. They are all required to supply their own hand tools. The shop manager at the Court Street facility orders materials for both Fraser Engineering and Fraser Petroleum, and the shop supplies the same tools to Fraser Engineering and Fraser Petroleum employees, which are shared. The two groups share a crane, welding machines, and torch sets. Fraser Petroleum employees drive trucks with the Fraser Engineering logo, although there is one truck that has a removable Fraser Petroleum logo.

Duties and qualifications of Fraser Engineering HVAC employees

The Fraser Engineering HVAC department employs seven service technicians, one plumber, and one pipefitter. The service technicians, also referred to as HVAC technicians, perform maintenance and repair work on heating systems and air conditioning systems. They also do start-ups of newly installed boilers and chillers.

Service technicians spend about 75 per cent of their time making services calls to customers who request service because their boiler, burner, or air conditioning system is not working. They may make one to four calls per day, depending on the complexity of each job. Each job may take anywhere from two hours to a week. A dispatcher notifies them of their next assignment by telephone. Service technicians typically work alone

mechanical department and that a pipefitter license is desirable but not required for petroleum or natural gas.

¹⁶ Many of the welders also have a pipefitter’s license, because they are not supposed to be welding without one. Welding is only a tool of the pipefitting trade. In order to be certified to perform a certain type of welding, a welder performs a welding test in the shop. The test weld is then sent to a contractor who verifies by x-ray that the weld has been done properly.

when they make service calls, but about 25 per cent of the time they work with another service technician when responding to service calls.

Service technicians spend about 25 per cent of their time doing construction installation/start-ups of new boiler rooms or chillers. For that type of work, they work with pipefitters and welders from the Fraser Engineering process department or Fraser Petroleum. The pipefitter or welder brings the job to a certain point, after which a service technician does the final tie-in to a boiler. The service technicians start the new boiler or chiller and make sure the pressure and vacuum is right.

The service technicians who work in the Fraser Engineering HVAC department are required to have an apprentice, journeyman or master pipefitting license or, in the alternative, a refrigeration license, oil burner license, or sprinkler license.

Permanent interchange

As noted above, when Fraser Petroleum Services was incorporated as a separate company in 2010, all of the pipefitters and welders who had previously been employed in the petroleum services division of Fraser Engineering were transferred to the new company. The transfer had no impact on the work of the employees, their supervision, their seniority, or their pay and benefits. Subsequently, three additional employees who had been laid off from Fraser Engineering, Marc Berthelette, Kenneth Douglas, and James Brogan, were recalled to work at Fraser Petroleum. Fraser Petroleum has hired no employees who did not previously work for Fraser Engineering.

There is no evidence of any permanent transfers from Fraser Petroleum to Fraser Engineering.

Temporary interchange and contact at job sites

Neither the Fraser Engineering employees nor the Fraser Petroleum employees ordinarily work at the Newton facility. Fraser Petroleum employees and Fraser Engineering process department employees generally report directly to the job site to which they are assigned. The process and petroleum jobs are typically somewhat long, lasting anywhere from a few weeks to as long as six to eight months, so the employees may be at one spot for a period of time. Employees sometimes go to the Newton facility to pick up supplies, but that happens infrequently. For the most part, supplies and equipment are delivered to the job sites. The employees take coffee and lunch breaks at their job sites. Weekly safety meetings, called “tool box” meetings, are held at each job site, and there is also a daily “huddle” at each job site at the beginning of the work day to review potential safety hazards that could come up that day. The tool box meetings and daily huddle are attended by all employees working at the job site. In the case of any jobs manned by both Fraser Petroleum and Fraser Engineering employees, employees for both companies attend the tool box meetings and daily huddles.

The managers for Fraser Petroleum and all Fraser Engineering departments meet weekly to discuss manpower needs and to decide which jobs need extra employees.¹⁷ If Fraser Petroleum needs extra workers for a job, Fraser Engineering employees may be assigned to work on it, and vice versa.

The Employer submitted into evidence various exhibits that quantify the degree to which Fraser Petroleum employees are assigned to work on Fraser Engineering jobs and vice versa. In this regard, the Employer used data entered into its computer system from employee time cards to create exhibits that quantify the number of hours worked by employees from both companies on either Fraser Engineering or Fraser Petroleum jobs. The exhibits cover the period from March 2010, when Fraser Petroleum began operations, through May 2012.¹⁸

According to Employer Exhibits 9(b) and 14(b), Fraser Engineering employees worked 2297.50 hours performing unit work on Fraser Petroleum jobs,¹⁹ during the period covered, which is about 5 percent of the total of 45,860.50 hours worked on all Fraser Petroleum jobs during that period and about 5.8 percent of the 39,633.50 hours worked on Fraser Petroleum jobs to which employees from both companies were assigned. Fraser Engineering employees were assigned to work on 42 of the 125 Fraser Petroleum jobs.

According to Employer Exhibits 10(b) and 15(b), Fraser Petroleum employees worked 2749.50 hours on Fraser Engineering jobs during the period covered, which is about 2.8 percent of the total of 96,669.25 hours worked on all Fraser Engineering jobs during that period and about 7.7 percent of the 35,560 hours worked on Fraser Engineering jobs to which employees from both companies were assigned.²⁰ Fraser

¹⁷ These include Phil DiSciullo and Eric Davis from Fraser Petroleum, Oliver Broschk from the Fraser Engineering process department, Jim Carey for the service technicians in the HVAC department, Mike Gorman for the plumbers in the HVAC department, and Cecelia Fraser.

¹⁸ The exhibits do not include the hours that service technicians work on service calls, which are recorded using a different system.

¹⁹ Employer Exhibit 9(b) shows that Fraser Engineering employees performed 2330 hours of work on Fraser Petroleum jobs, and the total number of hours worked by mixed groups of employees on Fraser Petroleum jobs was 39,666. Those totals include the hours of Fraser Engineering employee John Tavares, who worked some of those hours performing driving, which is non-unit work, and some of those hours performing welding work. After deducting 32.5 hours that Tavares engaged in non-unit driving work, the balance of 2297.50 is the number of hours that Fraser Engineering employees performed unit work on Fraser Petroleum jobs, and employees from both companies worked a total of 39,633.50 hours on Fraser Petroleum jobs.

²⁰ The 96,669.25 hours and 35,560 hours are revised totals that appear at the end of Exhibits 15(b) and 10(b), respectively, after deducting the number of hours that Tavares engaged in non-unit driving work.

Petroleum employees were assigned to work on 21 of the 393 Fraser Engineering jobs performed during this period.

While the Employer Exhibits described above demonstrate a degree of interchange between the two groups of employees, the exhibits, in and of themselves, do not necessarily demonstrate contact between the two groups of employees at the job sites, as the exhibits do not demonstrate that employees from the two companies who worked on the same job were necessarily at the same job site on the same day or that they worked side by side while they were there.

With respect to contact at the job sites, Fraser Engineering process department Project Manager Oliver Broschk testified that, on all the jobs identified as jobs worked by both Fraser Petroleum and Fraser Engineering employees, employees from the two groups worked together. He explained that a Fraser Engineering or Fraser Petroleum welder would not work alone in 99 per cent of cases. For example, Broschk supervised the Praxair-Strata Cold Skid job, where he saw Fraser Petroleum welder Edward Bergeron, Jr. working with Fraser Engineering pipefitters, who work right next to the welder during the “tacking” process. Broschk testified that Fraser Petroleum pipefitter Dennis Morse and Fraser Petroleum foreman Brian Gates worked with Fraser Engineering employees on the Air Product Engine job. Gates, who was on site for most of the four-week job, prepared the pipe, and Fraser Engineering welders tacked it and performed the final weld. Gates, who was the designated fire watcher, could not leave the site and worked a couple of feet away from Fraser Engineering employees. Fraser Petroleum Project Manager Phil DiSciullo testified that pipefitters and welders always work in pairs, for safety reasons. He testified that Fraser Petroleum and Fraser Engineering employees are currently working together on a job at Massport, fitting and welding pipe on the same pipeline. He testified with respect to two jobs that he has first-hand knowledge that employees from both companies worked alongside one another at the job site.

Fraser Engineering welder Michael Park testified, on the other hand, that he worked at several Fraser Engineering jobs listed on the Employer exhibits that indicate Fraser Petroleum employees worked on the same job, but that he does not recall seeing the Fraser Petroleum employees listed when he was there. Thus, he did not see the Fraser Petroleum employees listed as working at the Hebrew Rehabilitation chiller job, the Northeastern University chiller job, The AstraZeneca CWD Building job, the MIT steam upgrade job, the Bortech job, or the Artisan Industries job. Park saw only one Fraser Petroleum employee at the Richmond Group Cubist job. Park testified that he did work with Fraser Petroleum pipefitter Brian Gates for about a week to ten days on the Air Product Engine 1 PIP job.

Fraser Petroleum employees and process department employees do sometimes need to build something at the shop in Newton. Fraser Engineering welder Park testified that he spends about 40 per cent of his time at the shop in Newton building something needed for a job, and that he has never seen Fraser Petroleum employees at the shop. Fraser Engineering process Project Manager Broschk testified that he is in the shop in

Newton daily and sees both Fraser Engineering and Fraser Petroleum employees working in the shop there most days. He testified that, recently, Fraser Petroleum employee William McHugh and Fraser Engineering welder Jaymz Reed prefabricated some pipe together at the shop in Newton for the GE Energy Flow Jenkins job, and some Fraser Petroleum employees prefabricated some piping spools at the shop for use at a Fraser Engineering job, the Industrial Design Air Process job in Lynn, Massachusetts.

The Fraser Engineering service technicians report directly to the location of their first job for the day and go from job to job throughout the day. They generally work alone on these service calls and do not have contact with pipefitters, welders, and plumbers from either company on these calls. Service technician Peter Christian testified that he goes to the shop at the Newton facility about once a week to pick up stock or drop off and pick up a uniform, which takes about a half hour to an hour. He testified that he seldom sees Fraser Petroleum employees at the Newton facility. There is no evidence of any temporary interchange between the service technicians and the pipefitters, welders, and plumbers from either Fraser Engineering or Fraser Petroleum.

As noted above, Fraser Engineering HVAC department employees do work with pipefitters and welders from the Fraser Engineering process department and Fraser Petroleum at their job sites during the installation of new boilers and chillers. Employer Exhibit 9(b) indicates that HVAC department employees, including service technicians Peter Christian, John Clark, and Michael Rooney, and/or HVAC department pipefitter Michael Wysocki, have worked at four Fraser Petroleum jobs.²¹ Peter Christian, who worked on two of these jobs, the Sprague Burners/Gas Line job and the Sprague Energy Hot Oil job, testified he that he did not work with any of the Fraser Petroleum employees on those jobs, nor did he take breaks with them. He received his assignment to work on the Sprague Energy Hot Oil job from the HVAC supervisor. When he arrived, he did not check in with the Fraser Petroleum people. Employer Exhibit 10(b) indicates that HVAC department employees, including service technicians Peter Christian, John Clarke, Michael Fultz, James Kelly, Franklin Price, and Michael Rooney, plumber David Dunham, and pipefitter Michael Wysocki, have worked at ten Fraser Engineering jobs at which Fraser Plumbing employees were also assigned to work.²² Service technician Peter Christian worked on only two of those ten jobs, including eight hours on the Bristol Community College job and 53 hours on a Richmond Group Cubist job. Christian testified that he did not work with the Fraser Petroleum employees who are listed as working on those two jobs.

²¹ These are the Sprague-Burners/Gas Line job (Fultz, Wysocki, and Christian), Regis College Steam Line (Fultz and Wysocki), Sprague Energy Hot Oil (Christian), and Global Oil-Chelsea (Clarke and Rooney.)

²² These are the Bristol Community College job, the Hebrew Rehabilitation chiller job, the Northeastern University chiller job, the Showa Inst. Boiler job, two separate Richmond Group Cubist jobs, the Apt. Mgmt. boiler room job, the A&M Access Northeast job, the Bond Brothers Fitchburg job, and the Conte Cooling Tower Repl. Job. Anywhere from one to six HVAC department employees worked at each job.

Other contact between Fraser Engineering and Fraser Petroleum employees

Fraser Engineering and Fraser Petroleum employees attend some common events, such as an annual barbeque, an annual company meeting, annual crane recertification, and one to three company-wide safety meetings per year.

The Employer has a safety committee that meets monthly at the Newton facility. The committee includes employees from Fraser Petroleum, employees from the Fraser Engineering process department, and employees from the HVAC group, who meet with Safety Director Shawna Fraser and Human Resources Director Liz Stead to discuss how to improve safety.

Pay, benefits, and working conditions

The pay of individual employees varies depending on years of service, experience, and performance, but the pay of Fraser Engineering and Fraser Petroleum pipefitters and welders is “around the same ballpark.” Fraser Engineering and Fraser Petroleum employees receive the same benefits, including health, dental and vision insurance, life insurance, a 401(k) plan, and an employee stock ownership plan (ESOP).²³ Employees from both companies have access to a common website for employees. Employees from both companies are invited to the same events, such as company barbeques and benefits fairs. There is a common employee handbook that sets forth policies and procedures for employees of both companies. Both Fraser Engineering and Fraser Petroleum employees are subject to the same policies concerning hours of work, overtime, paid time off, weekly pay, and direct deposit. Employees of both companies are subject to the same safety policies and OSHA requirements, and they are covered by a common Worker’s Compensation policy.

The employees in the Fraser Engineering HVAC department, including the pipefitter and plumber, wear a distinct uniform. The HVAC department employees turn their uniforms in once a week and new ones are provided. The remaining Fraser Engineering employees and the Fraser Petroleum employees are provided with sweatshirts, long-sleeved shirts, and tee shirts with the respective Fraser Engineering or Fraser Petroleum logo. All employees are required to have a “TWIC” card, i.e., Transportation Worker Identification Credentials, which is needed to access certain job sites.

Fraser Engineering HVAC employees, including the service technicians and plumber, have IPADs, which they use to record information about the work performed on each job and to log their hours worked on each job. Hours recorded on the IPADs are also used for purposes of payroll. The pipefitters, welders, and plumbers who work in the Fraser Engineering process department and for Fraser Petroleum, in contrast, complete

²³ Consolidated financial statements for Fraser Engineering and Fraser Petroleum are used to value the stock in the ESOP.

weekly paper timecards. Fraser Engineering time cards are blue and Fraser Petroleum time cards are yellow.

Bargaining history

On December 10, 2010, in Case 1-RC-22511, the Union petitioned to represent a unit of pipefitters, plumbers, welders, and HVAC technicians employed by Fraser Engineering and Fraser Petroleum. I take administrative notice that the parties subsequently entered into a Stipulated Election Agreement covering that unit. The Region issued a Certification of Results of Election indicating that the Union lost the election.²⁴

²⁴ Fraser Engineering subpoenaed the Union's business agent and secretary treasurer, Leo Fahey, who was unable to appear on the day in question. The Hearing Officer permitted the Employer's attorney to make an oral offer of proof in order to determine whether Fahey's testimony was necessary. The Employer then submitted an offer of proof that, if he testified, Fahey would have testified to the following:

The jurisdiction of Local 537 includes pipefitting and welding of pipes made from a variety of metals which carry a variety of substances. Local 537 does not distinguish pipefitters and welders based on the type of pipe metal composition of the pipe on which pipefitters and welders work. The work of pipefitting and welding pipes that will carry petroleum and petroleum-based products is considered work within Local 537's jurisdiction. Local 537 accepts into membership pipefitters and welders who work on pipes that will or do carry or transport petroleum and petroleum-based products. Local 537 considers the work being performed by the pipefitters and welders employed by Fraser Petroleum Services to be work within their jurisdiction.

In the petition filed in 2010, Local 537 sought to include the pipefitters and welders employed by Petroleum Services, as well Fraser Engineering, in the same bargaining unit. Since the petition filed in 2010, Local 537 is not aware of any change in the work being performed by the pipefitters and welders employed by Fraser Petroleum Services. The reason that the pipefitters and welders from Fraser Petroleum Services were not included in the petitioned-for bargaining unit is that they do not support the Union.

If Local 537 becomes the representative of Fraser Engineering pipefitters and welders, Local 537 would not allow Fraser Engineering employees to work alongside Fraser Petroleum Services non-union pipefitters and welders and would not allow non-union Fraser Petroleum Services pipefitters and welders to do work on Fraser Engineering jobs.

If the Regional Director holds an election among only the Fraser Engineering employees, then Local 537 would seek by way of accretion the inclusion of Fraser Petroleum Services pipefitters and welders into the Fraser Engineering bargaining unit without giving the Fraser Petroleum Services pipefitters and welders the opportunity to vote on a question concerning representation.

CONCLUSION

In *Specialty Healthcare & Rehabilitation Center of Mobile*,²⁵ the Board recently reiterated its traditional principles of unit determination. Procedurally, the Board examines the petitioned-for unit first. If that unit is an appropriate unit, the Board proceeds no further. Employees may seek to organize a unit that is appropriate – not necessarily *the* single most appropriate unit. In making the determination of whether the proposed unit is an appropriate unit, the Board’s focus is on whether the employees share a community of interest. In determining whether employees in a proposed unit share a community of interest, the Board examines:

[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.²⁶

In *Specialty Healthcare & Rehabilitation*, the Board further set forth the traditional standard to be applied when an employer contends that the smallest appropriate unit contains employees who are not in the petitioned-for unit. The Board first assesses whether the petitioned-for unit is an appropriate bargaining unit. The employees in the petitioned-for unit must be readily identifiable as a group, and the Board must find that they share a community of interest using the traditional criteria. If the petitioned-for unit satisfies that standard, the burden is on the proponent of a larger unit to demonstrate that the additional employees it seeks to include share an “overwhelming community of interest” with the petitioned-for employees, such that there “is no legitimate basis upon which to exclude certain employees from the larger unit because the traditional community-of-interest factors overlap almost completely.”²⁷

The Hearing Officer ruled that he did not see the relevance of Fahey’s testimony based on the offer of proof and noted that he would not allow into evidence speculative testimony about what takes place in the future should the Union be certified as the representative of Fraser Engineering employees.

In response to the offer of proof, the Union stipulated that it does represent employees who work in the petroleum services industry.

²⁵ 357 NLRB No. 83, slip op. at 8-9 (2011).

²⁶ *Id.*, slip op. at 9, citing *United Operations, Inc.*, 338 NLRB 123, 123 (2002).

²⁷ *Id.*, slip op. at 11-13 and fn. 28 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 422 (D.C. Cir. 2008)).

I find that the petitioned-for unit is readily identifiable as a group and that the petitioned-for employees share a community of interest with one another. The HVAC department and process department employees all work for Fraser Engineering, an identifiable administrative segment of the Employer's organizational structure. Thus, the petitioned-for unit is not a fractured unit, as argued by the Employer, because it tracks a departmental line drawn by the Employer itself when it spun off Fraser Petroleum.²⁸ The petitioned-for employees are commonly managed by President Fraser and Human Resources Director Stead, who are personally involved in all hiring decisions, firing decisions, and performance evaluations in the two departments. The two departments also share a safety officer and quality control manager. The petitioned-for employees are all skilled tradesmen who are either required to have a special license or certification (service technicians, plumbers, and welders) or who generally possess such a license even though it is not required (pipefitters). The HVAC department employees work at least occasionally with the process department employees on the installation of new boilers and chillers. Employees in the two departments enjoy the same benefits, have access to the same website for employees, are subject to the same company handbook and policies, participate in a common safety committee, and attend common company events.

Having found that the petitioned-for unit is a readily identifiable group, I turn to the issue of whether the Fraser Petroleum employees share such an overwhelming community of interest with the Fraser Engineering employees that there is no legitimate basis to exclude them. I find that the Fraser Petroleum employees do share some common interests with the Fraser Engineering employees. Thus, the Fraser Petroleum employees perform essentially the same work as the Fraser Engineering pipefitters, welders, and plumbers and thus share common duties, skills, and qualifications with the petitioned-for employees. Their pay is similar, their benefits are identical, and they are subject to the same company rules and policies.

It cannot be said, however, that there is such complete overlap between the two groups, as required by *Specialty Healthcare*, that inclusion of the Fraser Petroleum employees is required. Functional integration is limited, as the two groups work on separate projects where the work process does not flow from one group to another. The only evidence of functional integration is that Fraser Engineering service technicians are responsible for completing the final tie-in during the installation of new boilers and chillers, but the Fraser Engineering service technicians have performed this work at only four Fraser Petroleum jobs during a period of over two years. Although Fraser Engineering and Fraser Petroleum employees share common supervision at the highest level, the two groups of employees are separately supervised at the first and second levels

²⁸ The Employer argues that the petitioned-for unit is fractured because it divides employees within a single job classification. Units including all employees within a certain job classification, however, are not the only permissible units. The Board has held that appropriate units may also be defined by other lines drawn by an employer, such as units based on departments, functions, facilities, and the like. *Specialty Healthcare*, supra, slip op. at 9, fn. 19; *Odwalla, Inc.*, 357 NLRB No. 132, slip op. at 5 (2011).

by different managers and assistant managers. *Grace Industries, LLC*²⁹ (common upper-level supervision outweighed by other factors). I note that the Board has found that interchange involving less than half the time of the excluded employees does not render a petitioned-for unit inappropriate. *Grace Industries, LLC*³⁰ Here, the degree of temporary interchange between the two groups, which ranges from about 2.8 to 7.7 percent of hours worked, is insignificant. As for permanent transfers, while it is true that all of the current Fraser Petroleum employees came from the ranks of Fraser Engineering, the Board has found permanent transfers to be a less significant indication of actual interchange than temporary transfers. *Red Lobster*.³¹ I note that there is no evidence of any permanent transfers from Fraser Petroleum to Fraser Engineering. Contact between the two groups is limited, as the Fraser Petroleum employees generally work separately at their own job sites and have contact with Fraser Engineering employees only in the relatively rare instances when there is temporary interchange on a job or during very occasional company-wide events, such as an annual barbeque, the occasional company-wide meeting, or safety meeting. The two groups wear uniforms with different logos. In these circumstances, it cannot be said that the overlap is almost complete.

The cases cited by the Employer do not warrant a different result. In *Wheeling Island Gaming, Inc.*,³² the Board found a petitioned-for unit of poker dealers inappropriate, where the poker dealers could not be distinguished from other table games dealers on the basis of their job functions, duties or skills, method of pay, hours, human resources policies, or casual contact with each other. *Wheeling Island Gaming* was a pre-*Specialty Healthcare* case, however, in which the Board did not apply the unit determination test in the manner articulated in *Specialty Healthcare*, which requires the excluded employees to have an “overwhelming” community of interest with the petitioned-for employees. Further, the petitioned-for poker dealers in *Wheeling Island Gaming* worked within the same administrative department as the other table games dealers, whereas here, the petitioned-for Fraser Engineering employees work in an organization that is administratively distinct from that of the Fraser Petroleum employees. *Acme Markets, Inc.*³³ relied on by the Employer, was also a pre-*Specialty Healthcare* case in which the Board found that the smallest appropriate unit was an employer-wide unit covering stores in four states, where there was no administrative structure corresponding to the three separate statewide units approved by the Regional Director. Here, in contrast, the petitioned-for unit corresponds to organizational lines drawn by the employer and is limited to an identifiable administrative segment of the Employer’s

²⁹ 358 NLRB No. 62, slip op. at 6 (2012), citing *Hydro Constructors, Inc.* 168 NLRB 105(1967).

³⁰ *Id.*, citing *Hychem Constructors, Inc.*, 169 NLRB 274, 276-277(1968) and *Charles H. Tompkins Co.*, 185 NLRB 195, 196 (1970).

³¹ 300 NLRB 908, 911 (1990).

³² 355 NLRB No. 127 (2010).

³³ 328 NLRB 1208 (1999).

operation. *WeCare Transportation, LLC*³⁴ is similarly distinguishable, as it was a pre-*Specialty Healthcare* case, it concerned the rebuttal of the single-facility presumption, which is not at issue in this case, and the Board found significant interchange and functional integration between the excluded and petitioned-for employees, which is not the case here.

The Employer's argument regarding extent of organization

The Employer argues that, because the Union lost an election in 2010 in a unit that included employees from both companies and because nothing about the Employer's operations has changed since the last election, the only possible explanation for the newly proposed unit is the extent to which the Union has been able to organize the Fraser Engineering employees and a lack of support for the Union by Fraser Petroleum employees. The Employer asserts that defining a unit on this basis is prohibited by Section 9(c)(5) of the Act, which provides that the extent to which employees have organized shall not be controlling.

The Supreme Court has held, however, that, extent of organization may be taken into consideration as one factor in unit determination, so long as it is not the governing factor. *Metropolitan Life Insurance Co. v. NLRB*.³⁵ Even if a petitioning union's proposal is, in part, based on the extent of its organizational efforts, it does not follow that such a unit is necessarily defective or that in designating that unit as appropriate the Board is thereby giving any, much less controlling, weight to the union's extent of organization. *Consolidated Papers, Inc.*³⁶ The fact that the Union's motive in seeking a certain unit is guided by the extent to which the union has organized is immaterial, so long as the Board, in its choice of appropriate unit, does not give controlling weight to that fact. *Stern's Paramus*.³⁷ Here, I have based my unit determination decision on the various other factors described above. Thus, the Union's motive in seeking a unit limited to Fraser Engineering employees, even if proven, is irrelevant.³⁸

The Employer's argument about the consequences of approving a unit limited to Fraser Engineering employees

³⁴ 353 NLRB 65 (2008).

³⁵ 380 U.S. 438 (1965).

³⁶ 220 NLRB 1281, 1283-1284 (1975).

³⁷ 150 NLRB 799, 807 (1965) (emphasis original).

³⁸ The Employer appears to assert that because the Union presented no evidence to rebut its offer of proof, the Employer's assertion in its offer - that the only reason Fraser Petroleum employees were not included in the petitioned-for unit was that they did not support the union - must be considered as proven. I concur with the Hearing Officer's determination, however, that the offer of proof was irrelevant and find that it was properly rejected. The assertions in a rejected offer of proof do not constitute actual evidence of those assertions, and the Union had no burden to rebut them.

The Employer argues further, based on its offer of proof, that if a unit limited to Fraser Engineering employees is approved, and if the Fraser Engineering employees vote to unionize, Fraser Engineering will no longer be able to use Fraser Petroleum employees to perform bargaining unit work for Fraser Engineering, the Union will not allow Fraser Engineering employees to work alongside non-union Fraser Petroleum employees, and the Union will likely assert in the future, based on the similarity of their work, that the Fraser Petroleum employees must be accreted into the unit without an opportunity to vote.

Even if the Employer's assertions could be proven by a rejected offer of proof, which they have not, its assertions about the possible consequences of approving the petitioned-for unit are far too speculative to form the basis for a unit determination.

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

All full-time and regular part-time pipefitters, welders, plumbers, and service technicians, including apprentices, employed by the Fraser Engineering Company, Inc. at its Newton, Massachusetts facility, but excluding employees employed by Fraser Petroleum Services, electricians, other crafts, office clerical employees, managerial employees, guards and supervisors as defined in the Act.

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 August 23, 2012.

The request may be filed electronically through the Agency's website, www.nlr.gov, but may not be filed by facsimile.

DATED: August 9, 2012

/s/ Elizabeth A. Gemperline

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