

**UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CS CONSTRUCTION, INC.,)	
Employer / Respondent,)	
)	
and)	Case No. 28-RC-080331
)	
OPERATIVE PLASTERERS' AND CEMENT)	
MASONS'S INTERNATIONAL)	
ASSOCIATON, LOCAL 394,)	
_____ Petitioner / Charging Party.)	

RESPONDENT'S MOTION FOR EXCEPTIONS

COMES NOW the Employer / Respondent, CS CONSTRUCTION, INC., by and through its representative, Burdzinski & Partners, Inc., and moves this Board for a ruling in favor of its exceptions filed herein, and attaches a memorandum in support of this motion.

Respectfully submitted by:

BURDZINSKI & PARTNERS INCORPORATED

By: _____


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Representatives for CS Construction, Inc.

Dated: August 21, 2012

CERTIFICATE OF SERVICE

This is to certify that service of the above and foregoing RESPONDENT'S MOTION FOR EXCEPTIONS, along with the attached EMPLOYER'S MEMORANDUM IN SUPPORT OF ITS EXCEPTIONS was electronically filed with the National Labor Relations Board's Office Of Executive Secretary, with true and correct copies also served via electronic mail to Region 28 of the National Labor Relations Board via the Agency's e-filing portal, and courtesy copies have been electronically served on the following parties, namely:

Mr. Pablo Godoy
Hearing Officer
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Dated this 21st day of August, 2012.

By: 

Brian S. Carroll
Burdzinski & Partners Incorporated
A Federal Labor Practice

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<u>Petitioner / Charging Party.</u>)	

EMPLOYER'S MEMORANDUM IN SUPPORT OF ITS EXCEPTIONS

COMES NOW the Respondent / Employer, CS CONSTRUCTION, INC. (hereinafter referred to as "CS Construction" or "Employer"), by and through its representative, Burdzinski & Partners, Inc., and hereby provides the *Employer's Memorandum in Support of Its Exceptions*.

Pursuant to §102.69 of the National Labor Relations Board's (hereinafter referred to as the "Board") Rules and Regulations, CS Construction, the Employer in the above-captioned case, hereby requests the Board review Hearing Officer Godoy's Hearing Officer's Report and Recommendations on the Challenged Ballots issued on August 7, 2012, solely on the issue of the eligibility of the right to vote for four (4) challenged voters. As grounds for this request for review, the Employer takes exception to the findings of the Hearing Officer on two different grounds: (1) Hearing Officer Godoy erred in finding the stipulated election agreement to be ambiguous; and (2) Hearing Officer Godoy erred in finding that the employees in question were not dual function employees.

I. PROCEDURAL BACKGROUND

CS Construction, Inc. (hereinafter referred to as “CS Construction” or the “Employer” or the “Company”) is a major construction company located in Phoenix, Arizona. The Company is broken into two (2) divisions: Concrete Structures and Traffic Signal and Lighting.

On July 1, 2009, CS Construction and Operative Plasterers’ and Cement Mason’s International Association, Local 394 (hereinafter referred to as “OPCMIA” or the “Union” or the “Petitioner”), entered into a Collective Bargaining Agreement (hereinafter referred to as the “CBA”), under § 8(f) of the National Labor Relations Act (hereinafter referred to as the “NLRA” or the “Act”). The effective dates for the CBA are July 1, 2009 through June 30, 2012.

On May 4, 2012, OPCMIA filed a petition with the National Labor Relations Board (NLRB), seeking to represent certain employees of CS Construction, “all Cement Finisher/Cement Masons, in the Phoenix area facility.” (Joint Exhibit 3).

On May 29, 2012, the parties entered into a Stipulated Election Agreement. Pursuant to the Agreement, the proposed unit and election voters included “All full-time and regular part-time cement masons and finishers employed by the Employer in the State of Arizona.” (Joint Exhibit 2).

On June 13, 2012, an election was conducted by Region 28. Seven (7) total votes were cast, with four (4) votes challenged by the Union. The four (4) challenged voters were Craig Potts, Carl Perkins, Jerme Hill, and Carlos Moreno (hereinafter referred to as “Potts, Perkins, Hill, and Moreno” or the “Challenged 4”). The three (3) unchallenged votes were cast by Rafael Polanco, Omar Puebla, and Cesar Retana (hereinafter referred to as “Polanco, Puebla, and Retana” or the “Union 3”). Historically, Potts, Perkins, Hill and Moreno worked in the Traffic Signal and Lighting Division of the Company, and had never previously joined the Union.

Polanco, Puebla, and Retana worked in the Concrete Division and had previously joined the Union.

Based on the challenged votes, a hearing was conducted on July 9, 2012, and again on Tuesday, July 10, 2012, wherein the parties were given an opportunity to present evidence. At the conclusion of the hearing, briefs were timely submitted by both parties. On August 7, 2012, Hearing Officer Godoy issued his Hearing Officer's Report and Recommendations on the Challenged Ballots effectively denying the Challenged 4 the right to vote in the election. It is this Report that the Employer takes exception to as set forth below.

II. EXCEPTIONS

A. Exception 1 - Hearing Officer Godoy Erred in Finding The Stipulated Settlement Agreement To Be Ambiguous

Hearing Officer Godoy maintains that after receiving into evidence the Stipulated Election Agreement, the wording of the stipulation itself is unclear as to the parties' intent:

A review of the text of the Stipulated Election Agreement entered into by the parties fails to reveal the objective intent of the parties and the employees whom the parties intended to include.

Hearing Officer's Report, pages 7-8.

Hearing Officer Godoy goes on to opine that because of the lack of clarity, the stipulated bargaining unit is ambiguous as to whether or not the parties' intended to included the Challenged Four:

The stipulated bargaining unit is ambiguous in so far as it is not possible to determine with certainty whether the parties intended to include the four employees whose ballots are in question based solely on the duties that they perform.

Hearing Officer's Report, page 8.

Finally, Hearing Officer Godoy claims that the inclusion of the Challenged Four is an impermissible effort to expand the bargaining unit by the Employer:

The Employer's subsequent efforts to expand the bargaining unit with additional employees whose inclusion it did not contemplate when entering into the agreement are impermissible under the standards in set forth in Caesar's Tahoe.

Hearing Officer's Report, page 9.

In order to determine whether or not Hearing Officer Godoy is correct in his assertions, we must look at the NLRA and the actual Stipulated Election Agreement. With respect to the NLRA, pursuant to § 2(3) of the Act, the term “employee” shall include any employee unless the Act explicitly states otherwise. In addition, § 7 of the Act indicates that all “employees” shall have the right to self-organization, to form, join, or assist labor organizations. It is an unfair labor practice for a union to restrain an employee in his or her § 7 rights (*see* § 8(b)(1)(A) of the Act).

As for whether or not Potts, Perkins, Hill, and Moreno are “cement masons or finishers”, according to the United States Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, a cement mason pours, smooths, and finishes concrete floors, sidewalks, roads, and curbs (*see* <http://www.bls.gov/ooh/construction-and-extraction/cement-mason-and-terrazzo-workers.htm>).

In addition, a United States federal district court approved the following language as tasks that a concrete finisher or cement mason should be able to perform, “[s]mooth and finish surfaces of poured concrete floors, walls, sidewalks, or curbs to specified textures, using hand tools or power tools including floats, trowels, and screeds.” Lentos v. Hawkins Constr. Co., 2007 DNE 5507 (D. Neb. 2007) (www.versuslaw.com).

On May 29, 2012, the parties entered into the Stipulated Election Agreement. Pursuant to the Stipulation, the proposed unit and election voters included, “All full-time and regular part-time cement masons and finishers employed by the Employer in the State of Arizona.” (Joint

Exhibit 2). The Stipulation excluded, “All other employees, clerical employees, maintenance employees, foremen, general foremen, superintendents, managerial employees, guards, and supervisors as defined in the Act.” (Id.) The Stipulation was executed by Zachary Teegarden, Division Manager, on behalf of CS Construction and Thomas Hardie, business manager for OPCMU.

By executing the Stipulation with an inclusion and exclusion clause, the parties clearly and unambiguously agreed to include ALL full-time and part-time concrete masons and finishers (see Stipulated Election Agreement, Joint Exhibit 2, § 5). If the parties’ objective intent is expressed in clear and unambiguous language in unit stipulation, the Board will enforce that agreement. (see Regional Emergency Medical Services, Inc., 354 NLRB No. 20 (2009)). Had the Union not wanted to include ALL full-time and part-time cement masons and finishers, but rather include just those under the CBA between the parties, the Union could have expressly requested that only those covered under the current CBA be eligible to vote.

No further analysis should be necessary. There should be no need to inquire as to whether or not the Union wanted to include the Challenged 4 or just include the Union 3. In fact, limiting a voting pool only to the known Union members of CS Construction, would be a § 7 violation. However, this in essence is what Hearing Officer Godoy has done. As he states:

The record evidence reveals that in entering into the Stipulation, the Union sought to include only those concrete masons and finishers in the Concrete Structures division whom it represented under the terms of its expiring Agreement.

Hearing Officer’s Report, page 8. The Employer would like to point out that there is no reference to the CBA between the parties in the Stipulated Election Agreement. In fact, if the Stipulation were to include such a provision, the Union itself recognizes the illegality of the same:

Q Right. In other words, Mr. Hardie, can you tell me where the terms of the election agreement says that in order to vote in this particular case,

you had to be a member of the union to begin with?

A That's against the law.

Hearing Transcript, page 53.

B. Exception 2 - Hearing Officer Godoy Erred In Finding That The Employees In Question Were Not Dual Function Employees

In the event the Board agrees with Hearing Officer Godoy's position that the stipulated election agreement is ambiguous, a *Cesar's Tahoe* analysis needs to be conducted. In conducting this analysis, Hearing Officer Godoy found that the Challenged 4 do not share a community of interest with the Union 3. Wrote the Hearing Officer:

Even assuming that the extrinsic evidence adduced at the hearing is insufficient to make a determination as to the intent of the parties, the employees in question do not share a community of interest with the three undisputed bargaining unit employees.

Hearing Officer's Report, Page 9.

Hearing Officer Godoy did concede that the Challenged 4 performed some cement masonry and finishing work, but that their primary job duties and working conditions, as well as wages and supervision, distinguished them from the Union 3.

While it is undisputed that the four employees whose ballots are in question perform some cement masonry and finishing work, their primary job duties and working conditions, wages, and supervision are distinguishable from that of the three unit employees, such that their exclusion from the bargaining unit is warranted.

Hearing Officer's Report, pages 9-10.

Hearing Officer Godoy went on to further distinguish the two groups of employees by concluding that the complexity, purpose, and scale of the work performed by both groups differed significantly:

However, the extent, complexity, purpose, and scale of their work differ significantly from the masonry work performed by the three bargaining unit employees.

Hearing Officer's Report, page 11.

The Employer takes exception with all three of these findings. First, the Employer demonstrated that the Challenged 4 and the Union 3 share a deep community of interests. Specifically, the testimony of Thomas Hardie, Zachary Teegarden, Rafael Polanco, and Jerney Hill established that all seven (7) employees performed the following twelve (12) functions of a cement mason:

- (1) Set forms for the concrete pour¹
- (2) Establish footings and foundations²
- (3) Pour concrete³
- (4) Set grade for the concrete⁴
- (5) Rodding and striking of the concrete⁵
- (6) Tamping of the concrete⁶
- (7) Bull floating of the concrete⁷
- (8) Fresnoing of the concrete⁸
- (9) Establishing tool joints in the concrete⁹
- (10) Troweling the concrete¹⁰
- (11) Edging the concrete¹¹
- (12) Finishing the concrete¹²

In addition, all seven (7) employees use common tools.¹³ They all provide their own basic hand tools, trowels, hand floats, and patching tools. The Employer provides for their use and benefit rubber boots and gloves, hard hats, rain gear, bull floats, fresnoes, troweling machines, and cure cans. Furthermore, the community of interests extends to such items as health

¹ Hearing Transcript Pages 17, 23, 165, 208

² Hearing Transcript Pages 107, 206

³ Hearing Transcript Pages 72, 81-82, 84, 95, 97, 208, 220

⁴ Hearing Transcript Pages 18-19, 86, 165-166, 209, 233

⁵ Hearing Transcript Pages 19, 119, 165-166, 209

⁶ Hearing Transcript Pages 19-20, 86, 210

⁷ Hearing Transcript Pages 21, 120, 165-166, 210

⁸ Hearing Transcript Pages 120-121, 166

⁹ Hearing Transcript Pages 88, 166, 211, 223-224

¹⁰ Hearing Transcript Pages 89, 90, 166, 234-235

¹¹ Hearing Transcript Pages 25, 122, 166, 211

¹² Hearing Transcript Pages 27, 206-207, 220, 221

¹³ Hearing Transcript Pages 36, 94, 112, 203-204

insurance, retirement, no licensing requirements, attendance, punctuality, vacation, sick leave, personal leave, and jury duty.¹⁴

The Employer is surprised at Hearing Officer Godoy's aforementioned conclusions given his extensive questioning involving the similarities of the seven (7) workers. First, Hearing Officer Godoy questioned whether or not the cement masonry skills of the Union 3 differed from the skills of the Challenged 4:

HEARING OFFICER GODOY: With regard to the skills that the individuals in traffic signal and lighting have when compared to those of Omar, Rafael and Cesar, do they differ in any way?

WITNESS: I think the majority of the skills are identical.

Hearing Transcript, page 164.

Apparently not satisfied with Teegarden's response, Hearing Officer Godoy continued the line of questioning to Teegarden:

HEARING OFFICER GODOY: But is there a distinction between some of the work that they do in doing concrete, and the work that the three individuals, Rafael, Polanco, and Cesar Retana and --

THE WITNESS: Retana.

HEARING OFFICER GODOY: -- Retana, and Omar Pueblo do?

THE WITNESS: As a -- as we stated before, the -- I mean, Mr. Hardie gave it an excellent explanation of what a concrete finisher does. Mr. Hill testified that he basically did all of those same things. He possesses his own small finishing tools, he knows how to edge and joint and screed and consolidate and tamp, float, finish. He really didn't bring up jeering, but I know they all know how to do that. I mean, all of the required work, it is basically as though you have an aggregate task of concrete, and then there is a

¹⁴ Hearing Transcript Pages 45, 100, 147-148, 173, 174, 239

specific part of that task that is concrete finishing work, and it is a specialized skill. These -- all seven of the men that we named off here have this specialized skill. They all have the same small tools, they all have the ability to perform a very -- I mean, something that I consider to be a -- kind of an artful. I mean, it is an impressive skill and they all have it, and it is something that sometimes people might say, "Oh, it is just drying concrete," and it is not.

Hearing Transcript, pages 271-272.

Hearing Officer Godoy then attempted to summarize Teegarden's statements and form an application to the matter of equal skills between all seven (7) employees:

HEARING OFFICER GODOY: I see, but often, from what I heard, the individuals in Traffic and Lighting, that is, Potts, Perkins, Moreno, and Hill, engage in activity that -- that falls within the work that could have been done, I suppose, by Retana, Pueblo, and Polanco; is that right?

THE WITNESS: That is -- that particular answer is yes.

Hearing Transcript, page 274.

The Employer believes that the Hearing Officer's concerns regarding any differences between the Challenged 4's and the Union 3's primary job duties, working conditions, wages, and supervisors were clearly and concisely addressed at the hearing. As for job duties, the dual function label should be applied to the Challenged 4. It is this label that allows for them to have different job duties. The law is clear that employees who perform more than one function for the same employer, may vote even though they spend less than a majority of time doing unit work, if they regularly perform duties similarly to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in unit working conditions. Martin Enterprises, Inc., 325 NLRB No. 133 (1998). Furthermore, at the hearing, the Employer stressed that the differences in job duties had nothing to do with the skills of the Challenged 4 in

comparison to the Union 3, but had to do with the barriers and limits placed upon the Employer in utilizing both groups the same. As Zachary Teegarden explains during his recall testimony:

Q: And then, while they were employed with you, working with you, I should say, and the 394, when they were working with the 394, there was a Collective Bargaining Agreement in place that limited what they could or could not do?

A: Correct. They can only perform the activities of a -- we can only require them to perform the activities of a cement finisher.

Q: Now, from a company standpoint, however, as far as the skills that those -- that the three union guys have, would they have been precluded from doing concrete work on some smaller jobs? Is there anything that would preclude them from that, other than what you testified earlier, which is just the amount of time, but could they do the concrete work on those smaller jobs?

A: Well, I mean, they have the skills definitely. It is just the amount of hours. They would spend more hours traveling than they would spend finishing in some cases, I mean. It is not practical and -- or they may have -- what would a guy do with -- for eight hours on a paycheck.

Q: Okay. In other words, we don't know for sure whether they could meet the other skills, the electrical, and the -- being able to do some of those things, but as far as the skills related to the concrete work, no problem.

A: Right. They clearly have the ability to do that work.

Hearing Transcript, pages 264-265. It is the limitations of the CBA, not skills or work conditions or complexity of work, which served as the dividing line between the cement mason projects performed by the seven (7) employees. The fact that the CBA was in force during the time of the hearing (but has since expired), and that the Employer complied with the prohibitions

of the CBA, should not serve as a justification to exclude four (4) dual function employees from voting on union representation.

III. CONCLUSION

The Board is empowered by § 10 of the Act to prevent any person, including a union, from engaging in any unfair labor practice. To allow the Union to disenfranchise Hill, Potts, Perkins, and Moreno would allow the Union to commit an unfair labor practice. In Air Liquide America Corp., 324 NLRB No. 104 (1997), an employee who was a dual-function employee, was allowed to vote over the Union's objections because the employee performed sufficient unit work to have substantial interest in the unit's terms and conditions of employment. The Employer simply requests that Hill, Potts, Perkins, and Moreno have their votes counted so their voices can be heard as to whether or not they want the Union to represent them in the future.

Respectfully submitted by:

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