

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

HARLO CORPORATION¹

Employer

and

Case 07-UC-081964

**LOCAL 275, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO (IBEW)²**

Petitioner

APPEARANCES:

Jonathan P. Kok, Attorney, of Grand Rapids, Michigan, for the Employer.
Sean Eagan, of Coopersville, Michigan, for the Petitioner.

DECISION AND ORDER

The Employer manufactures control panels for the utility industry in a facility located in Grandville, Michigan. The Petitioner is the exclusive collective-bargaining representative for the following unit:³

All production, checker, maintenance, transportation, and material handlers employed by the Employer at 4210 Ferry Street, Southwest, Grandville, Michigan; but excluding all construction, office, clerical, engineering, custodial and sales employees and manufacturing supervisors who do not customarily perform production work.

On January 3, 2012, Mary Helen Crooks, majority owner of the Employer, purchased the assets of RC Metals and founded Alana Metal Products Corporation (“AMP”). In January, AMP moved into the Grandville facility, setting up its computerized numerical control (“CNC”) machinery. AMP hired a sheet metal mechanic who had previously been employed by RC Metals, a sheet metal mechanic’s helper, a CNC programmer, and an administrative assistant, and commenced production of the sheet metal boxes previously supplied to the Employer by RC

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

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

³ The record does not indicate whether it is a certified unit. The parties stipulated to the unit description and that it is an appropriate unit within the meaning of Section 9(b) of the Act.

Metals. In March, Petitioner requested that the Employer bargain over the inclusion of the AMP sheet metal mechanic and the mechanic's helper in the bargaining unit. The Employer declined.

Petitioner seeks to clarify the existing unit of the Employer's production employees to include the AMP "CNC machine operators, sheet metal fabricators, and other production positions not currently covered."⁴ Petitioner argues that AMP and the Employer are a single employer. The Employer asserts that AMP is a separate entity and there is not a single employer relationship. The Employer further argues that even if AMP and the Employer are found to be a single employer, accretion would not be appropriate because the AMP employees do not share a sufficient community of interest with the bargaining unit employees. Petitioner asserts that there is a sufficient community of interest to accrete the AMP employees into the existing unit.

As discussed below, based on the record and relevant Board law, I reject the Petitioner's arguments for including the AMP production employees in the existing unit. There is insufficient record evidence to determine whether the Employer and AMP are a single employer. However, assuming arguendo that there is a single employer relationship, a unit clarification is not appropriate because there is a question concerning representation.

Procedural Issue

During the hearing Employer counsel attempted to litigate AMP employees' desires to be represented by Petitioner. The hearing officer warned counsel against eliciting such testimony, and precluded further testimony on the issue. I affirm the hearing officer's ruling.

The Employer argues that the hearing officer erred in advising the parties on the record that they should not ask witnesses about their union sympathies and stating that he would instruct witnesses not to answer said questions. The Employer relies on *Baltimore Sun Co. v. N.L.R.B.*, 257 F.3d 419, 429 (4th Cir. 2001), wherein the Fourth Circuit denied enforcement of the Board's order, finding that the Board failed to adhere to its own stringent criteria in accreting certain classifications into a pre-existing unit. The court noted that it agreed with the Regional Director in the underlying decision in finding that the hearing officer erred by excluding evidence proffered by the employer to show that the employees at issue did not desire union representation.

The Board has never adopted a subjective standard for determining whether accretion is appropriate. It has adopted a restrictive policy, which includes numerous factors for evaluating community of interest, and does not include the desires of affected employees. *E.I. Du Pont de Nemours, Inc.*, 341 NLRB 607, 608 (2004); *Dean Transportation, Inc.*, 350 NLRB 48, 59 (2007); enfd. by *Dean Transp., Inc. v. N.L.R.B.*, 551 F.3d 1055 (D.C. Circuit, 2009). While the Fourth Circuit held in *Baltimore Sun Co.*, supra, that there is no more probative evidence of community of interest than employees' desires, the Board does not even consider this as a factor. Accordingly, I reject the Employer's argument that it was error to restrict the testimony of the affected employees' desires and hereby affirm the hearing officer's ruling.

⁴ The correct names of the classifications are sheet metal mechanic and sheet metal mechanic's helper. The record is silent with respect to the parties' positions on the inclusion or exclusion of the CNC programmer, a classification which arguably may be considered a "production position." This issue will be briefly addressed herein.

Overview

The Employer has been in existence since 1937, manufacturing control panels for the utility industry. It is owned by a group of family members. Prior to January 2010, Dick Crooks, Mary Helen Crooks' father-in-law, was the majority owner. Currently, CEO Mary Helen Crooks is majority owner with 51%; Deborah Grimminck, Mary Helen Crook's sister-in-law, owns 20%; Dick Crooks owns about 13%, and Mary Helen Crook's husband Craig and their children own 16% of the company. In addition to the production department, the Employer has an accounting department, human resources department, and engineering department. Accounting manager James Johnson, assistant human resource director Jessica Hitchcock, engineering manager Duane Riggs, and manufacturing supervisor Jack Houghton⁵ report directly to CEO Crooks.

The Employer's wholly owned subsidiary Harlo Products Corporation manufactures rough terrain forklifts within a partially walled off section of the Grandville facility. Harlo Products⁶ has existed since 1949. The ownership interests in Harlo Products are the same as the interests held in the Employer – Mary Helen is the majority owner with 51% and the balance is divided among family members. Harlo Products has a separate management structure with CEO Crooks serving as its President. The International Union, United Automobile Aerospace and Agricultural Implement Workers of America, (UAW), has been the collective bargaining representative for the production employees of Harlo Products since about 1949. The UAW disclaimed interest in the instant matter.

The Employer's 90,000 square foot Grandville facility is divided into two distinct walled off sections, with the Employer occupying approximately 54,000 square feet on one side and Harlo Products occupying the remaining 36,000 square feet on the other side. A very large opening between the two sections, "about the size of a two-stall garage door," allows materials and employees to readily pass between the areas.

In 1989, Dick Crooks founded RC Metal Products Corporation ("RC Metals"), a sheet metal manufacturing company. RC Metals was located in a separate facility owned by Mary Helen Crooks. RC Metals contracted with the Employer to provide some services including accounting and human resources. RC Metals supplied the Employer with the boxes that were then welded, painted and wired by the Employer and eventually sold as control panels. Prior to 1989, the boxes had been made by the Employer in-house on manually operated machinery. RC Metals utilized computerized numerical control ("CNC") machine tools to manufacture the boxes. The RC Metals employees had never been represented by a union.

Mary Helen Crooks purchased the assets of RC Metals on January 3, 2012 and founded AMP. Mary Helen Crooks is the majority owner holding 51% interest in AMP, with her husband Craig holding the balance. AMP does not have any departments or managers. On January 3, AMP entered into a service agreement with the Employer to receive accounting

⁵ The Employer and the Petitioner stipulated that Houghton is a statutory supervisor under Section 2(11) of the Act. There are no stipulations regarding the supervisory status of Johnson, Hitchcock, or Riggs, and very little record evidence to determine their status in this regard.

⁶ The Employer refers to Harlo Products Corporation as the Material Handling Division and to itself as the Control Panel Division. They are referred to herein as Harlo Products and the Employer.

services, "marketing/sales support," and "partial production supervision." On January 9, AMP entered into a lease agreement with the Employer for an unspecified amount of space within the Employer's facility for a term of 3 years with the option of a one year renewal. Both agreements were signed by Accounting Manager James Johnson on behalf of the Employer and by CEO Crooks on behalf of AMP.⁷ After entering into the lease agreement, AMP began moving its equipment into the Employer's side of the Grandville facility.

Pursuant to the service agreement, accounts payable, accounts receivable and financial statements for AMP are processed by the Employer's accounting department. Sales and marketing support services are provided to AMP by Harlo Products employee Mike Frey. Production supervision is provided by Employer manufacturing supervisor Jack Houghton. In practice, Houghton provides about one hour per day of services to AMP, but the agreement does not specify or limit the amount of time provided by Houghton. A clause in the service agreement allows for additional services to be provided to AMP by agreement of the parties.

Board Law⁸

It is well established that unit clarification petitions are appropriate for resolving ambiguities concerning the unit placement of individuals who come within a newly created classification. *Union Electric Co.*, 217 NLRB 666, 667 (1975); *Bethlehem Steel Corp.*, 329 NLRB 241 (1999). Where a party argues that a newly created position should be included in the existing bargaining unit, the burden is generally on the party seeking to include the new group to show that the new group has little or no separate identity. *Seven-Up/Canada Dry Bottling Co.*, 281 NLRB 943, 947 (1986); *Bay Shipbuilding Corp.*, 263 NLRB 1133, 1140 (1982), enfd. 721 F.2d 187 (7th Cir. 1983); *Rice Food Markets, Inc.* 255 NLRB 884, 887 (1981).

The Board has followed a restrictive policy in finding accretions to existing units because employees accreted to such units are not accorded a self-determination election, and the Board seeks to insure the employees' rights to determine their own bargaining representative. *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001); *Compact Video Services*, 284 NLRB 117, 119 (1987). Thus, the Board will find a valid accretion only when the additional employees have little or no separate group identity and share an overwhelming community of interest with the preexisting unit to which they are accreted. *E.I. Du Pont de Nemours, Inc.*, 341 NLRB 607, 608 (2004); *Compact Video Services, Inc.*, supra at 119.

In determining whether employees in a newly created position share a sufficient community of interest with employees of an existing bargaining unit, several factors must be considered. Among these factors are bargaining history, common supervision, interchange and contact among employees, similarity of employee skills, degree of functional integration,

⁷ The record does not indicate who drafted the agreements or how the terms of the agreements were determined.

⁸ I have not included a discussion of the Board law regarding single employer determinations, because the record is not sufficient to make such a determination. Moreover, the record does not specifically indicate that AMP was present at the hearing or was represented by counsel at the hearing. Thus, any stipulations are entered by the Employer (Harlo Corporation) and the Petitioner, only. That being said, it is also obvious to any reader of the record that Mary Helen Crooks was present and testified on behalf of the Employer, and as 51% owner of AMP and its CEO, this procedural concern may be form over substance. For purposes of going forward, however, and assuming arguendo that AMP and the Employer are a single employer, I address the appropriateness of the instant petition.

geographic proximity, and similarity of working conditions. Employee interchange and common day-to-day supervision are viewed as the most important factors. *E.I. Du Pont de Nemours, Inc.*, supra at 608; *Archer Daniels Midland Co.*, supra at 675. Cases in which every factor favors accretion are rare and the normal situation presents a variety of elements, some militating for and some militating against accretion, so that a balancing of factors is necessary. *Id.*

Application of Board Law to this Case

In reaching the conclusion that the AMP production employees should not be accreted into the existing unit, I rely on the following analysis and record evidence.

(1) Bargaining History:

AMP is a newly established entity whose employees have not been represented by a Union. The Employer argues that AMP is a successor to RC and that RC employees were never represented by a union. There is insufficient record evidence to establish that AMP is in fact a successor to RC Metals. The absence of bargaining history for the AMP employees is a neutral factor in this matter.

The Petitioner has represented the Employer's production and maintenance employees since at least 1955, or for as long as current management can remember. There are currently 16 employees in the bargaining unit. The parties' collective bargaining agreement is effective from November 11, 2009, to October 19, 2012.

(2) Common Supervision:

The AMP production employees and the unit employees share a common direct supervisor – Employer manufacturing supervisor Jack Houghton. The record established that pursuant to the above-described services agreement, Houghton provides approximately one hour of supervision per day to the AMP production employees. The Employer argues that this is a minimal amount of supervision and that the bulk of Houghton's time is spent supervising unit employees. The Petitioner argues that AMP constitutes only one process of the control panel production and that there are six other processes. Based on an eight-hour work day, if Houghton's time was evenly divided among all processes, he would spend approximately one hour and eight minutes supervising each process.

The majority of Houghton's time for AMP is spent developing the CNC programmer's schedule based upon purchase orders received from Harlo Products and the Employer, as well as the rare order from an outside customer. When the sheet metal mechanic completes an assignment, he advises Houghton and provides him with the finalized, annotated purchase order. Sheet metal mechanic Fisher testified generally that he has more authority in his position with AMP than he had when he was employed by RC Metals, and attributes that to his status as the most experienced employee and only CNC operator. No party asserts that Fisher is a supervisor within the meaning of the Act. The job descriptions for the AMP sheet metal mechanic and the

sheet metal mechanic's helper state that they report jointly to Houghton and CEO Crooks.⁹ Houghton and Crooks are neither trained on the computerized machinery that is used by the AMP employees or able to assist the employees with questions related to the CNC equipment. Houghton serves as an intermediary between the AMP employees and CEO Mary Helen Crooks communicating inquiries and issues, and clearly is the primary contact between AMP employees and the Unit employees, coordinating and directing all movement of material and product between them.

The Employer disputes that Houghton is a Section 2(11) supervisor with regard to the AMP production employees, asserting that he does not possess the authority to hire, transfer, suspend, lay-off, recall, promote, discharge, reward, or discipline AMP production employees, nor can he recommend such action or exercise independent judgment relative to AMP employees. In furtherance of its position that Houghton has no supervisory authority with respect to AMP employees, the Employer also argues that CEO Crooks handles all disciplinary and discharge matters for AMP production employees while decisions of this nature for unit employees are made by Human Resources. I find this argument unpersuasive because Crooks also serves as the interim Human Resource Director for the Employer, a position she has held since 2009. Ultimately all personnel decisions come across her desk for final review.

While there is significant overlap in the ownership and management of the Employer and AMP, based on the record evidence, a determination with regard to Houghton's 2(11) supervisory status relative to the AMP production employees cannot be made.

(3) Interchange of Employees:

There is little evidence of interchange of employees. AMP production employees and unit employees have never substituted for each other. The AMP sheet metal mechanic and the CNC programmer have specific skills, as discussed below, which are not possessed by any unit employee. Thus, interchange would not be possible. Furthermore, there are not any former employees of one group now working for the other group.

(4) Contact Among Employees:

While the AMP production employees work in close proximity to the unit employees, their day-to-day contact appears to be limited to the exchange of pleasantries. The two groups have separate employee meetings, and staggered work schedules and break times. Additionally, while the AMP employees are not restricted from entering the break room used by the unit employees, they generally take their breaks in their own space and only enter the break room if they need ice or want to purchase an item from the vending machines. The record testimony indicates that there has been little or no conversation of the terms and conditions of employment between AMP production employees and unit employees. AMP employees work as part of an integrated process that includes the unit employees, but all coordination between the two work groups is orchestrated by Houghton and not the production employees. Aside from isolated incidents during the initial transition period, the AMP employees have not asked the unit employees for assistance in completing their work.

⁹ There is no job description in the record for the CNC programmer.

(5) Similarity of Skills:

The AMP sheet metal mechanic operates and maintains specialized machinery. For example, the turret machine has 20 different computer controlled stations with each station operating a different tool. The job description states that this position requires a minimum of two-to-four years of experience or comparable education. Sheet metal mechanic Jamie Fisher has over 20 years of experience operating CNC machines, and has taken three different courses related to the operation of specific machines. One of the job responsibilities of the sheet metal mechanic's helper is to serve as a back-up for the sheet metal mechanic. Sheet metal mechanic's helper Anthony Corey, who was hired with no previous experience, receives on-the-job training from Fisher.¹⁰

The job descriptions for the unit employees, as set forth in the collective bargaining agreement, do not require specific education or experience. There is no evidence that the unit employees possess the skills necessary to program or operate the CNC machines. The unit position that is closest to the sheet metal mechanic is the shop mechanic. The shop mechanic operates manual machines, some of which have similar functions to specific CNC tools. Conversely, neither Fisher or Corey has been trained to operate these manual machines. There is no evidence of the Employer cross-training the AMP production employees and the unit employees so that they can be interchanged in the event of absence or heavy workload.

(6) Functional Integration:

An overwhelming majority of the work performed by AMP employees is producing sheet metal boxes for the Employer.¹¹ The CNC programmer creates a program for the CNC machine to create a specific panel. The program is loaded into the appropriate machine, and the sheet metal mechanic or his helper then feeds raw sheet metal into the CNC machine which bends and forms the metal into a box. Another CNC operated tool drills holes into the box. When the box is completed, AMP takes it to the shipping area and provides Houghton with the completed purchase order.

Unit employees get the box from the shipping area, and then weld, paint and wire the box. The completed control panel is then sent to the Employer's quality control and if it passes this step, it is shipped to the customer. Thus the AMP employees who perform the bending, forming and drilling to create the empty box are the first step in an integrated process.

The AMP production employees have specific job functions that are not generally performed by unit employees. Based on the record evidence, there have been only a few isolated incidents when a unit employee drilled holes into a box for AMP. This work was performed before the CNC programmer was hired. This function (drilling or punching holes in the sheet

¹⁰ Due to the nature of her job, it is apparent that the CNC Programmer has some degree of training in computer programming. While it would be appropriate to discuss the CNC programmer skills, duties, and functional integration at this juncture and forward, the record is largely silent in this regard and no finding is made as to her inclusion in the group the Petitioner seeks to accrete to the bargaining unit.

¹¹ AMP produces about 30 parts for Harlo Products, including floor panels, but there is scant testimony regarding how often or how much. Also, as indicated above, AMP may have the rare order from an outside customer.

metal) is typically performed by the sheet metal mechanic on the CNC machine; however, prior to the hiring of a programmer to create the program to tell the machine where to drill the holes, the work had to be done by a unit employee on a manually operated machine.

The Employer argues that non-unit employees who can perform their job functions without reliance on unit employees are not integrated. *Milwaukee City Center, LLC*, 354 NLRB 551 (2009). This is not the case in the instant matter. AMP exists largely to produce boxes for the Employer. AMP's production schedule is set in large part based upon the purchase orders for control panels received by the Employer. AMP production employees do not perform a significant amount of work for outside customers. Likewise, the Employer is dependent upon AMP for production of the boxes so it can make control panels. The Employer has utilized other suppliers for boxes, but it is not cost effective unless the Employer is ordering a large quantity of boxes.

The operational integration that has taken place has not led to an intermingling of job functions among production employees, nor has it otherwise destroyed the identity of the AMP production employees as a self-contained homogenous group, separate and distinct from the unit employees. *Hershey Foods Corp.*, 208 NLRB 452 (1974).

(7) Geographic Proximity:

The AMP employees work in close proximity to the Unit employees. The AMP equipment and production process is on the Employer's side of the facility, separated from the Employer's production processes by an aisle. The AMP employees work close enough to unit employees that they can shout out to each other. The two groups share a common restroom and both have access to the same break room, although the AMP employees have created a space for breaks on their production floor, and frequent the break area primarily to use the vending machines, get ice, etc.

(8) Similarity of Working Conditions:

Employees of the Employer, Harlo Products, and AMP utilize the same time clocks, on the KRONOS system. A time clock is located at each of five points of entry into the facility. Employees are allowed to enter or exit at the doorway of their choosing.

Although the two groups of employees have different handbooks and work rules, these differences can largely be accounted for by the fact that the Employer bargained with the Petitioner to set the terms and conditions of employment for the unit employees while it unilaterally set terms and conditions of employment for the AMP employees. That said, the Petitioner identified numerous Employer policies that are nearly identical for the two groups, such as "Conflict of Interest," "Outside Employment," and "Personal Data Changes." Among the policies that differ, the most notable is the attendance policy. Unit employees receive an attendance point for each absence, and after the accumulation of a certain number of points are subject to disciplinary action. There is no corresponding point system in place for the AMP employees. Instead management has the discretion to excuse absences for AMP production employees.

The greatest differences are seen when comparing employee compensation and benefits. An example is sheet metal mechanic's helper Anthony Corey. Corey, without any relevant experience, was started at \$15 per hour. The most comparable unit position is the utility classification, which has a pay range between \$9 and \$13.50 per hour. Sheet metal mechanic Jamie Fisher is also paid considerably more than any comparable unit employee.¹² AMP production employees do not have pension benefits, whereas unit employees do.

Petitioner argues that the AMP production employees and unit employees have similar insurance benefits based upon the premiums paid and the fact that both groups have a Blue Cross Blue Shield Community Blue PPO. However, the unit employees' coverage is not equivalent to that provided the AMP employees. The co-pays and deductibles for unit employees range between 1.5 and 4 times the co-pay and deductibles for AMP production employees, and the unit employees do not have prescription drug coverage, which AMP employees have.

Conclusion Regarding Accretion:

Due to the lack of interchange among employees, significant differences in employee compensation and benefits, differences in the required skills and limited contact among the employee groups, I find that the AMP production employees lack an overwhelming community of interest with the bargaining unit. Accordingly, accretion is inappropriate. *E.I. Du Pont de Nemours, Inc.*, supra at 608; *Compact Video Services, Inc.*, supra at 119.

CONCLUSIONS AND FINDINGS

Based on the foregoing discussion and on the entire record,¹³ I find and conclude as follows:

1. The hearing officer's rulings are free from prejudicial error and are 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.

¹² The record is silent with regard to the CNC programmer's compensation and benefits.

¹³ The Employer and Petitioner timely filed briefs, which were due on July 30, 2012. On August 6 the employer filed a "Motion to Reject Union Brief," for Petitioner's failure to timely serve a copy of its post hearing brief on the Employer and AMP, and failure to file a proof of service with its brief, pursuant to 102.114(c) of the Board's Rules and Regulations. Petitioner filed a response entitled "Objection to Motion to Reject Union Brief" urging the undersigned to deny the Employer's motion because it believed, in error, that by electronically filing its brief all parties were also served, and it ostensibly did not timely receive the Employer's brief either. Petitioner asserts that on August 6, upon learning that its brief was not served on the Employer, a discussion ensued between the parties and each served the other with their respective brief by email. Additionally, Petitioner asserts that inasmuch as the parties have no opportunity to file responsive briefs and these briefs are for consideration of the Regional Director in resolving the issues before her, no harm was done to the Employer in the late receipt of Petitioner's brief. The Employer has not raised any prejudice suffered as a result of the delay in its receipt of Petitioner's brief. I deny the Employer's motion and have considered all briefs filed in this matter. See *Certain-Teed Products Corporation*, 173 NLRB 229 (1968).

3. The labor organization involved claims to represent certain employees of the Employer.

4. The sheet metal mechanic and sheet metal mechanic's helper are excluded from the unit due to the lack of an overwhelming community of interest favoring accretion.

Accordingly, the Petitioner's request to clarify the stipulated bargaining unit to include the sheet metal mechanics, sheet metal mechanic's helpers, and other unnamed production employees is denied, and the petition is dismissed.

Dated at Detroit, Michigan, this 31st day of August 2012.

(SEAL)

/s/ Terry Morgan

Terry Morgan, Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

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 **September 14, 2012**. The request may be filed electronically through the Agency's website, **www.nlr.gov**,¹⁴ but may **not** be filed by facsimile.

¹⁴ To file a Request for Review electronically, go to the Agency's website at **www.nlr.gov**, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Board/Office of the Executive Secretary** and follow the detailed instructions.