

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

MBI HVAC, INC.¹

Employer

and

Case 04-RC-089309

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION LOCAL UNION 19

Petitioner

**REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

The Employer, MBI HVAC, designs, fabricates, installs, and maintains heating and air conditioning systems from a facility in Allentown, Pennsylvania. The Petitioner, Sheet Metal Workers Local 19, seeks to represent the Employer's six Service Technicians, but the Employer contends that the unit must also include about 20 Installers.²

A Hearing Officer of the Board held a hearing, and the parties filed briefs. I have considered the evidence and the arguments presented by the parties and conclude, in agreement with the Petitioner, that a unit limited to the Service Technicians is appropriate. In this Decision, I will first provide an overview of the Employer's operations. Then, I will set forth the legal standards to be applied in resolving the community-of-interest issues presented in this case. Finally, I will present the facts and reasoning which support my conclusions.

I. OVERVIEW OF OPERATIONS

Mark Berean, the Employer's President, has overall responsibility for the Employer's operations. The company is divided into several departments, including Installation, Service, Office, Fabrication, Estimating, and Warehouse/Delivery.

¹ The Employer's name appears as amended at the hearing.

² The parties agree that two fabricators, a truck driver, and a warehouse employee should be excluded from the unit.

Three job foremen and 17 Installers work in the Installation Department. The Installation Coordinator makes work assignments to these employees and orders supplies and materials for the department.³

The Service Director and Service Coordinator assign Service Department work. The Service Director makes assignments related to the Employer's preventive maintenance contracts with customers and dispatches employees to perform other service work. Service Manager Ron Kurtz supervises day-to-day work in the Service Department. He is in charge of the six Service Technicians the Petitioner seeks to represent in this proceeding -- Chad Werkheiser, Nicholas Lynn, Mark Curcio, Mike Rodriguez, Ed Morrison, and Carl Seibert.

II. THE RELEVANT LEGAL STANDARDS

The Act does not require that the unit for bargaining be the only or even the most appropriate unit. Rather, it requires only that the unit be an appropriate one. *Overnite Transportation Co.*, 322 NLRB 723 (1996); *P.J. Dick Contracting, Inc.*, 290 NLRB 150 (1988). Procedurally, the Board examines the petitioned-for unit first. If that unit is appropriate, the inquiry ends. *Wheeling Island Gaming, Inc.*, 355 NLRB 637 (2010); *Bartlett Collins Co.*, 334 NLRB 484 (2001). It is only where the petitioned-for unit is not appropriate that the Board will consider alternative units which may or may not be units suggested by the parties. *Bartlett Collins Co.*, supra; *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000). The Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employee classifications. See, e.g., *R & D Trucking, Inc.*, 327 NLRB 531 (1999); *State Farm Mutual Automobile Insurance Co.*, 163 NLRB 677 (1967), enf'd. 411 F.2d 356 (7th Cir. 1969), cert. denied 396 U.S. 832 (1969).

In determining whether a proposed unit is appropriate, the focus is on whether employees share a community of interest. *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 491 (1985). To make this determination, the Board examines such factors as common supervision, employee skills and job functions, contact and interchange, similarities in wages, hours and other terms and conditions of employment, functional integration, and bargaining history, if any. *Publix Super Markets, Inc.*, 343 NLRB 1023 (2004); *Home Depot USA, Inc.*, 331 NLRB 1289 (2000); *United Operations, Inc.*, 338 NLRB 123 (2002); *Bartlett Collins Co.*, supra.

In *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. at 10-13 (2011), the Board modified the framework to be applied in making certain unit determinations. Pursuant to this decision, the Board first looks at whether the petitioner seeks a unit consisting of employees readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors) and whether these employees share a community of interest. If so, in order to prevail, the party seeking a broader unit must demonstrate, "that employees in the larger unit share an *overwhelming* community of interest with those in the petitioned-for unit." [Emphasis added]. Additional employees share an

³ The Employer also has an Installation Director, but the position is currently vacant.

overwhelming community of interest with petitioned-for employees only where there is no legitimate basis upon which to exclude them from the unit because the traditional community-of-interest factors overlap almost completely. *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip op. at 3 (2011). On the other hand, a petitioner cannot fracture a unit, seeking representation in “an arbitrary segment” of what would be an appropriate unit. *Odwalla, Inc.*, 357 NLRB No. 132, slip op. at 5 (2011); *Specialty Healthcare*, supra, slip op. at 13; *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999).

III. FACTS

Skills and duties

Installers spend the bulk of their time putting in ductwork, piping, grills, and registers. In contrast, a majority of the Service Technicians’ work consists of responding to service calls and handling preventive maintenance on existing equipment. According to Employer President Berean, Service Technicians have a “more technical type skill set” than Installers and spend more time diagnosing equipment problems.

Service Technicians handle some of the installation work, but Service Technician Nicholas Lynn testified that, at least in his case, such assignments are rare. Installers may be assigned work generally performed by Service Technicians when there is not enough available installation work.

Service Technicians are frequently sent to installation jobs once most of the installation work has been completed so that they can put in the equipment controls and perform the electrical work necessary to start the system. Although Installers will sometimes perform this control work, Berean estimated that it is handled by Service Technicians about 90 percent of the time. Installers, on the other hand, are normally responsible for connecting any high voltage wiring.

Removing refrigerant from equipment is a regular part of the Service Technicians’ job. The federal Environmental Protection Agency requires that individuals who remove refrigerant obtain a license, and all of the Employer’s Service Technicians have this license. In contrast, Berean could only recall two Installers who possess refrigerant licenses. Other than the refrigerant license, neither the Installers nor the Service Technicians are obliged to have any licenses or certifications to perform their jobs.

The Service Technicians are required to rotate being on-call 24 hours per day to respond to emergency service requests. Installers are not on-call, although they are sometimes asked to assist with emergency repairs when Service Technicians are unavailable.

Contact and Interchange

Installers and Service Technicians sometimes work together on the same jobs. As noted above, Service Technicians are often sent to projects near the completion of installation to wire

controls and start equipment. Service Technician Lynn testified that Installers are frequently present “tying up loose ends” when he visits sites to do this control work. Berean testified that Service Technicians and Installers work with each other on 25 per cent of the Employer’s projects. He stated that the two groups of employees were present together on two or three of the 12 jobs performed by the Employer in September 2012.

Much of the Employer’s control installation work is handled by Service Technician Chad Werkheiser, and Werkheiser works with Installers on jobs much more frequently than the other Service Technicians. Berean estimated that Werkheiser spends 70 per cent of his time on jobs with Installers, and Werkheiser testified that in the two months prior to the hearing, he spent 80 per cent of his time working with Installers. The Employer introduced time records from three recent jobs on which Werkheiser and Installers worked. On one of the jobs, Werkheiser was on site early in the project, and he testified that he did the same work as the Installers.⁴ On a second job, he spent a full day working with Installers, but when he returned on two subsequent days, no Installers were present. Berean reported that Werkheiser assisted the Installers for a portion of the first day and then performed the necessary wiring to activate the installed system. He returned to the site on later days to repair problems with the equipment which had been installed. On the third job, Werkheiser appeared briefly near the conclusion of the project to install thermostats and wire controls.

The Employer also presented documents showing hours worked by employees on two sites where Service Technicians other than Werkheiser worked with Installers. In both cases, the Service Technicians were present for brief periods late in the projects, and Berean testified that they were assigned to install control wiring.

In general, the Service Technicians other than Werkheiser spend significantly less time on projects with Installers. Berean testified that Service Technicians Lynn, Rodriguez and Seibert spend 20 to 25 per cent of their time on jobs with Installers and that Service Technicians Curcio and Morrison work with Installers less than five percent of the time. Lynn testified that he is only on-site with Installers when he is sent to an installation job to put in controls or do wiring required to start installed equipment.

Berean testified that one Service Technician was permanently transferred to an Installer position in May 2012, but the record does not show any other permanent transfers between the positions. According to Berean, employees do not often transfer temporarily between the Service and Installation Departments. He estimated that this takes place about once per month, but did not provide records supporting this testimony.

Terms and conditions of employment

Service Technicians perform much of their work in homes and offices which are not accessible early in the day. As a consequence, they work hours different from those worked by

⁴ Service Technician Carl Seibert worked on this job after the installation was completed and the Installers departed. The record does not indicate what functions Seibert performed at the site.

the Installers. The normal work day for Installers begins at 7 a.m. and ends at 3:30 p.m., while the Service Technicians work from 8 a.m. until 4:30 p.m.

Service Technicians are required to wear uniforms supplied by the Employer consisting of button-down shirts, pants, coats, and hats. Installers are provided with company tee shirts, polo shirts, sweatshirts, and hats, but they do not always wear them.

Pay for Installers and Service Technicians is comparable. Newly-hired Service Technicians are paid between \$15 and \$20 per hour, while starting Installers earn \$14 to \$18 per hour. Experienced employees are paid based on their skill sets, and the highest-paid employee is an Installer. Installers and Service Technicians receive the same benefits, are subject to the same rules, and attend the same safety training.

IV. ANALYSIS

Pursuant to *Specialty Healthcare and Rehabilitation Center of Mobile*, supra, 357 NLRB No. 83, slip op. at 12, the first issue is whether the petitioned-for employees are a readily identifiable group that shares a community of interest. The Service Technicians meet this standard. They work in a department separate from the Employer's other employees and have separate supervision. The Service Technicians other than Werkheiser spend most of their time working in homes and offices which are separate from the work sites at which Installers and other employees work.⁵ They also work different hours than the Installers and wear different uniforms. Additionally, employees rarely move to and from the Service Department; Berean could only recall one Service Technician who permanently transferred to an Installer position, and temporary transfers only occur about once a month.

Service Technicians perform functions distinct from those handled by other members of the Employer's workforce. They spend most of their time repairing existing equipment and handling preventive maintenance, and unlike the Installers, they are required to possess refrigeration licenses. On those occasions when Service Technicians are dispatched to installation projects where new equipment is being put in place, they normally perform control wiring and thermostat installation work different from the tasks handled by the Installation employees on the job. There are instances in which Service Technicians do installation work and Installers perform tasks typically assigned to Service Technicians, but they only perform duties associated with the other classification for a minority of their time. The Board has found that some overlap of job functions is not sufficient to render construction industry units inappropriate where unit employees spend most of their time performing distinct functions. *Grace Industries, LLC*, 358 NLRB No. 62, slip op. at 5 (2012); *Dick Kelchner Excavating Co.*, 236 NLRB 1414, 1415 (1978); *Charles H. Tompkins Co.*, 185 NLRB 195, 196 (1970).

⁵ Although Berean and Werkheiser testified that Werkheiser spends 70 to 80 per cent of his time working with Installers, the records introduced at the hearing suggest these estimates may be too high. Thus, while the records show that Werkheiser was recently present at three sites on which Installers also worked, on those projects he either worked most of his hours after the Installers departed or at a time when most Installer work had already been completed.

Excepting Werkheiser, contact between the Service Technicians with the Installers is limited. The other five Service Technicians spend less than 25 per cent of their time on sites where Installers are present, and two of them work with Installers less than five per cent of the time. Although Werkheiser works with Installers more frequently, his situation is not at all typical of the Employer's Service Technicians. In short, based on all of the above factors, I find that the Service Technicians constitute a discrete group that shares a community of interest.

Therefore, the burden shifts to the Employer to demonstrate that the Service Technicians and Installers share an *overwhelming* community of interest. An overwhelming community of interest would exist only if there was no legitimate basis on which to distinguish the Service Technicians and Installers because nearly all of the community-of-interest factors indicate they should be included in the same unit. *Northrop Grumman Shipbuilding, Inc.*, supra, 357 NLRB No. 163. Since I have already concluded that many traditional community-of-interest factors support finding a separate unit of Service Technicians appropriate, it is apparent that the Employer cannot sustain its burden. The Service Technicians are in a separate department from the Installers, are separately supervised, and spend most of their time performing distinct functions. They work hours different from the hours worked by Installers and wear different uniforms. They are employed most often at sites distinct from the locations at which Installers work and have limited contact with them. Interchange between the classifications is irregular. Thus, the Service Technicians do not share an overwhelming community of interest with the Installers.

There are some factors which would allow a finding that a unit combining Service Technicians with Installers is appropriate. In particular, Service Technicians and Installers receive comparable wages and benefits and use similar skills. But, the question is not whether a combined unit might be appropriate, but whether there is an overwhelming community of interest between the Service Technicians and the Installers. This question must be answered in the negative. I therefore find that a unit limited to the Service Technicians is appropriate, and I shall order an election in that unit.

V. CONCLUSIONS AND FINDINGS

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

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization which claims to represent certain employees of the Employer.

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

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Service Technicians employed by the Employer, **excluding** all other employees, Installers, fabricators, truck drivers, warehouse employees, office clerical employees and guards and supervisors as defined in the Act.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by **Sheet Metal Workers International Association Local Union 19**. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Eligible Voters

The eligible voters shall be unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike that commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **Thursday, October 25, 2012**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by mail, facsimile transmission at (215) 597-7658, or by electronic filing through the Agency's website at **www.nlr.gov**. Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party. Since the list will be made available to all parties to the election, please furnish a total of three (3) copies, unless the list is submitted by facsimile or electronic filing, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) working days prior to 12:01 a.m. on the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, a request for review of this Decision may be filed with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

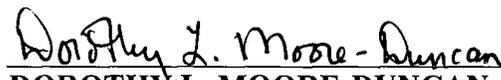
Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by the close of business on **Thursday, November 1, 2012, at 5:00 p.m. (ET)**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If

the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁶ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Signed: October 18, 2012

at Philadelphia, PA



DOROTHY L. MOORE-DUNCAN

Regional Director, Region Four
National Labor Relations Board

⁶ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.