

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

Elysian Brewing Company, Inc.

Employer

and

Case 19-RC-082934

International Union of Operating
Engineers, Local 286, AFL-CIO

Petitioner

**SUPPLEMENTAL DECISION ON CHALLENGED BALLOT
AND CERTIFICATION OF REPRESENTATIVE**

I. Introduction

A Decision and Direction of Election (“Decision”) issued on July 13, 2012,¹ directing a secret ballot election in the following unit of employees:

All full and regular part-time boiler operators and maintenance mechanics employed at or working out of the Employer’s facility located at 5510 Airport Way South in Seattle, Washington; excluding all other employees, the Maintenance Supervisor, guards and supervisors as defined by the Act.

The Region conducted a manual election on August 6, during which the Petitioner challenged the ballot of William “Bill” Fairbanks on the basis that he was neither a boiler operator nor a maintenance mechanic. The Tally of Ballots, which was served upon the Employer and the Petitioner at the conclusion of the election, showed the following results:

Approximate number of eligible voters.....	5
Void ballots.....	0
Votes cast for Petitioner.....	2
Votes cast against participating labor organization.....	1
Valid votes counted.....	3
Challenged ballots.....	1
Valid votes counted plus challenged ballots.....	4

On August 16, the undersigned issued a Report on Challenged Ballot and Direction of Hearing, concluding that Fairbanks’ challenged ballot presented substantial and material issues of law or fact which would best be resolved at a hearing. Pursuant to this report, on September 4, a hearing was held before Hearing Officer Daniel M. Hickey concerning the eligibility of the challenged voter. All parties were accorded a full opportunity to be heard, to present evidence, to examine and cross-examine witnesses, to introduce evidence bearing

¹ All subsequent dates are in 2012, unless otherwise indicated.

upon the issues, and to provide oral and written arguments. Thereafter, on October 10, the Hearing Officer issued his Hearing Officer's Report and Recommendation on Challenged Ballot ("Report"). In his Report, the Hearing Officer recommended that the challenge to Fairbanks' ballot be sustained and a Certification of Representative issue.

On October 24, the Employer submitted Exceptions to the Hearing Officer's Report and Recommendation on Challenged Ballot ("Employer's Exceptions")² regarding the amount of time Fairbanks spent doing maintenance mechanic in comparison to production related duties. The Employer also excepted to the conclusion that the burden of proof was on the Employer and the overall conclusion that Fairbanks did insufficient maintenance work to warrant his inclusion in the bargaining unit.

This Supplemental Decision on Challenged Ballot and Certification of Representative contains my review of the Report, Employer's Exceptions, as well as Petitioner's response to the Employer's Exceptions. Upon review of the entire record in this proceeding, I find that while there is merit to certain of the Employer's exceptions, the Hearing Officer was correct in his ultimate conclusion that Bill Fairbanks is not a dual-function employee who regularly performs maintenance mechanic duties for a sufficient period of time to demonstrate that he shares a substantial interest in the working conditions of the bargaining unit, and hereby sustain the challenge to his ballot.³ My findings and conclusions are discussed more fully below.

A. Parties' Positions

The Employer excepts to the Hearing Officer's findings with regard to Fairbanks' inclusion in the bargaining unit. In particular, the Employer enumerates a number of exceptions which are broadly subsumed by the following categories: the time Fairbanks spends operating the floor Zamboni and performing "end of the night cleaning," the actual time he spends on "ad hoc" maintenance tasks, the burden of proof, and conclusions regarding Fairbanks' eligibility and his challenged ballot. The Employer has requested that the Region reopen the record so that it can call Fairbanks to clarify his testimony.

The Petitioner agrees with the Hearing Officer's Report and objects to reopening the hearing to take additional testimony of Fairbanks, and argues that all parties were afforded an opportunity to present witnesses and evidence.

B. Parties' Burdens

During the hearing, the Hearing Officer correctly concluded that while the Petitioner initially bore and met its burden of establishing its challenge to Fairbanks' ballot because he was a production employee, the burden shifted to the Employer to establish that Fairbanks was eligible to vote as a dual-function employee. *Harold J. Becker Co., Inc.*, 343 NLRB 51, 52 (2004). In *Becker*, the Board determined that once the petitioner substantiated its basis for the challenges to the ballots of 21 employees (who were employed in positions explicitly

² The Employer's Exceptions are attached and incorporated herein.

³ The above conclusion is based on all parties' presentation of evidence and witnesses, which they were afforded ample opportunity to provide at the hearing. Accordingly, the Employer's request to reopen the record is denied.

excluded from the parties' stipulated unit), the burden shifted to the employer to establish that the challenged employees were nevertheless eligible to vote. *Id.* In so holding, the Board explained that the employer was in the best position to establish dual-function status, because it had superior access to the relevant information. *Id.*; *In re Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 n. 28 (2011) (citing *Becker*). Like the petitioner in *Becker*, the Petitioner is thus, under no obligation to rebut the Employer's evidence. The Employer argues that *Becker* does not apply here because the employer in *Becker* did not provide estimates of the amount of time the disputed employees themselves spent performing unit work and thus, the Board was unable to conclude that the disputed employees regularly performed duties similar to those performed by unit employees. That the employer in *Becker* did not meet its burden to establish dual-function status of these disputed employees, does not change the Board's holding that the burden of proof falls on the employer. Accordingly, the Hearing Officer did not err in establishing the parties' burdens and the Employer's exception in this regard, has no merit.

C. Employer's Exceptions

1. Time Spent Cleaning

The Employer excepts to the Hearing Officer's calculation of the time Fairbanks spends operating a floor Zamboni (45 minutes) and his finding that Fairbanks also assists two other production employees in cleaning up the keg area and engaging in "end of the night cleaning" before clocking out at 10 p.m. The Employer asserts that Fairbanks operates the Zamboni about a half hour each day cleaning in the production area, which constitutes his portion of the "end of the night cleaning" and that he does no additional end of night cleaning. I agree with the Employer on these points. Fairbanks testified that his cleaning tasks entail operating the Zamboni while employees Nigel Wallace and August (last name unknown) clean their respective areas, including the keg washing area. While Fairbanks initially testified that cleaning the floor for the whole facility probably takes 45 or 50 minutes, he subsequently clarified that his portion of the cleaning (operating the Zamboni in the area by the filler and row by the depalletizer) takes about a half hour. Hearing Transcript 98:7-99:19. This cleaning at the end of the night only takes place when they are not "cleaning all during the night." Tr. 98:7-11. Thus, at the end of the night, it appears Fairbanks spends approximately 30 minutes total cleaning. Accordingly, I conclude that the Hearing Officer likely overestimated the actual time Fairbanks spends operating the Zamboni and that this task constituted his "end of the night cleaning," rather than being one of several of his tasks involved in "end of the night cleaning."

2. Calculation of 13 Percent for Maintenance Mechanic Tasks

With regard to the Employer's exception to the Hearing Officer's calculation that Fairbanks spent at most 13 percent of his total time performing maintenance mechanic tasks, I conclude that both the Hearing Officer's and Employer's calculations are inaccurate. The Employer contends that Fairbanks spends about 30 percent or more of his time as a maintenance mechanic and thus qualifies as a dual-function employee entitled to vote. Both the Employer and Hearing Officer correctly established the time Fairbanks spends doing production work for the early part of his shift: Fairbanks clocks in at 1:30 p.m. and assists day-shift production employees with the end of the bottling run until around 3:30 p.m., usually operating the depalletizer and case erector machines. However, the time spent from that point forward is less clear. CEO Joseph Bisacca testified that after the bottling line

shuts down, Fairbanks cleans up for about an hour once a week when he switches over to a different bottle size. However, Fairbanks testified that he helps break down and clean the production line for about 15 to 45 minutes each day (averaging 30 minutes), until the remaining day-shift production employees leave. He then operates a forklift for about an hour and constructs boxes, on average, for about 2 hours each night. He stated that there are days that he does not construct any boxes, which can happen once every ten days. There is nothing in the record, however, about what he does in lieu of constructing boxes on those days. During the day, he also has two rest breaks totaling about 30 minutes and an unpaid 30 minute lunch break.

Beginning at about 7:30 p.m., the Employer contends Fairbanks performs only maintenance assignments, except for the time he spends cleaning up at the end of the shift. This would assume Fairbanks takes all his breaks by this time, which is not necessarily the case. However, assuming he takes all breaks by the time he commences preventive maintenance work (greasing or lubricating machines), the earliest Fairbanks can begin his maintenance duties is 8 p.m. After greasing machines for an hour until about 9 p.m., he then has about a half hour to work on his other ad hoc maintenance mechanic tasks (9-9:30 p.m.). Fairbanks ends the night by operating the floor Zamboni for about 30 minutes (9:30-10:00 p.m.).⁴

Additionally, there is one day a week where Fairbanks works the day shift, during which he operates the depalletizer. He initially implied that this is all the work he completes on this day (Tr. 73:13-23) but later clarified that this work comprised 75 percent of the day, with 25 percent of the day (almost 2 hours) being like a normal evening shift, including some preventive maintenance work. 100:14-101:22. The Employer also correctly points out that there are days when Fairbanks has done no bottling work during the day shift and does exclusively maintenance work. Tr. 155:23-157:9. However, nothing in the record describes the frequency in which he performs exclusive maintenance work when on the day shift.

In sum, Fairbanks' schedule breaks down to about 6 hours a day for production or non bargaining unit work (80 percent), about 1 hour of preventive maintenance mechanic work (13.3 percent) and 30 minutes of ad hoc maintenance mechanic work (6.7 percent).⁵ Thus, Fairbanks averages about 20 percent of his time doing both preventive and ad hoc maintenance mechanic work, which is more than the Hearing Officer's conclusion of 12.5 to 13 percent. If the 2 hours of unaccounted time when Fairbanks does not build boxes, was added to the calculation for bargaining unit work, this would amount to about 22.7 percent of his time towards bargaining unit work over a two week period.⁶ However, the burden of establishing that this additional time constitutes bargaining unit work rests on the Employer and the Employer has not met its burden of proving Fairbanks does maintenance mechanic work when not building boxes once every ten days. Notwithstanding this failure, the Employer's exception to the Hearing Officer's conclusion regarding the time Fairbanks

⁴ Fairbanks testified that he spends 2 hours operating bottling equipment (production) + 30 minutes cleaning the line (an average of 15-45 minutes) (production) + 1 hour driving the forklift (production/non-maintenance)+ 2 hours building boxes (production/non-maintenance) + 30 minutes for breaks + 30 minutes for lunch + 1 hour lubricating equipment (maintenance/mechanic) + 30 minutes cleaning floors (production/non-maintenance) = 8 hours. This leaves 30 minutes to perform his ad hoc maintenance tasks, which completes his 8.5 hour shift.

⁵ The ad hoc maintenance mechanic work is addressed in more detail below.

⁶ $2 \text{ hours} + (1.5 \text{ maintenance hours} \times 10 \text{ days}) / 75 \text{ work hours} = 22.67 \%$.

spends performing maintenance mechanic tasks, has merit to the extent that the actual time is closer to 20 percent.

3. Ad Hoc Maintenance Tasks and Additional Maintenance Tasks Between May and August 6

Next, the Employer excepts to the Hearing Officer's conclusion that Fairbanks performs only minimal "ad hoc" maintenance tasks amounting to 0.4 percent of his working time and that the only additional maintenance tasks Fairbanks accomplished between May and August 6 were repair on the production chain, the Zamboni, and the forklift hydraulic cylinder. The Hearing Officer pointed to several examples of Fairbanks doing repair and other maintenance work and concluded that based on the specific examples he provided, this amounted to only 0.4 percent of his work time in addition to the 1 hour (or 12.5 percent) spent on nightly preventative maintenance work.

The Employer states that during the hearing, Fairbanks provided examples of some of the tasks that are left for him to accomplish at night. Upon review of the record, I conclude that Fairbanks' list of examples of his ad hoc maintenance tasks was not intended to be a comprehensive list of all the maintenance mechanic tasks he has ever completed. During the hearing, Fairbanks was asked to provide "an example of some of the tasks" that Jason Michaelson leaves for Fairbanks at night after Jason leaves, not all the instances of maintenance mechanic tasks. Tr. 96:10-11. Fairbanks added that there are repairs and maintenance tasks that he initiates on his own (e.g., repairs on the cylinder on the forklift and on the floor Zamboni). The Hearing Officer thus minimized Fairbanks' maintenance mechanic work that he performs on a regular basis and calculated this work based on only the specific examples he provided. Accordingly, his calculation of 0.4 percent is inaccurate. In the best circumstance, Fairbanks' schedule allows for no more than 30 minutes a day to perform ad hoc maintenance duties. This translates to about 6.7 percent of time he has to troubleshoot and repair equipment on an ad hoc basis, which is more than what the Hearing Officer concluded.

D. Analysis

While I disagree with the Hearing Officer's calculation of the time Fairbanks spent each day performing maintenance mechanic work,⁷ I concur with his recommendation that Fairbanks is not a dual-function employee who regularly performs maintenance mechanic duties for a sufficient period of time and that the challenge to Fairbanks' ballot be sustained and a certification of representative issued. Employees who perform more than one function for the same employer are considered by the Board to be dual-function employees. *Berea Publishing*, 140 NLRB 516 (1963). In determining whether dual-function employees should be included in a bargaining unit, the Board looks to whether such employees regularly

⁷ The record establishes that Fairbanks spent about 1.5 hours a day for both preventive maintenance work as well as ad hoc maintenance mechanic work, which translates to about 20 percent (versus 12.5 percent which the Hearing Officer determined). The Hearing Officer's calculation omitted the roughly 2 hours Fairbanks spends doing maintenance mechanic work when working the day shift once a week, as well as about 30 minutes of regular ad hoc maintenance tasks he performs on average each night. Moreover, the Hearing Officer overestimated the amount of time Fairbanks spent operating the Zamboni and doing end of the night cleaning (30 minutes total versus 45 minutes on the Zamboni plus additional end of night cleaning). Finally, with regard to the ad hoc maintenance tasks, I agree with the Employer that the examples provided did not comprise an exhaustive list, and thus should not have been treated as such in the Hearing Officer's calculation.

perform work for sufficient periods of time to demonstrate that they have a substantial interest in the unit's wages, hours, and conditions of employment. *Avco Corp.*, 308 NLRB 1045 (1992). Although no bright line rule has been established, the Board generally finds that dual-function employees should be included in a bargaining unit if they spend 25 percent or more of their time performing unit work. *Id.* at 1047; *WLVI, Inc.*, 349 NLRB 683 fn. 5 (2007); *Medlar Electric, Inc.*, 337 NLRB 796, 797 (2002) (Board held that a heavy equipment operator who drove a dump truck 25 percent to 30 percent of his time was sufficient to include the operator in a unit of truck drivers).

After recalculating the time Fairbanks actually spends performing maintenance mechanic duties (20 percent),⁸ Fairbanks still falls short of the Board's 25 percent floor for establishing dual-function employee status. See *In re Arlington Masonry Supply, Inc.*, 339 NLRB 817 n.3 (2003) (finding that an employee who spent as low as 15 percent to a high of 25 percent, was ineligible to vote as a dual-function employee); see also *Continental Cablevision*, 298 NLRB 973, 974-975 (1990) (excluding employees spending approximately 17 percent of their time performing unit work). In *In re Arlington Masonry Supply, Inc.*, although the disputed employee at times spent up to 25 percent of his time performing unit work, there was no evidence to show how often this occurred. 339 NLRB 817 n.3. Accordingly, the Board could not conclude that he regularly performed duties similar to those performed by unit employees for sufficient periods of time to demonstrate that he had a substantial interest in working conditions of the unit. *Id.* In dicta, the majority distanced themselves from *Oxford Chemicals*, 286 NLRB 187 (1987), which the hearing officer cited, to the extent that it holds that if it can be shown that an employee regularly performs unit work for a sufficient period, it is inappropriate to evaluate other community of interest factors in determining whether that employee should be included in the unit. Rather, in reaching its conclusion that the employee was not a dual-function employee, the Board relied on the amount of time the employee performed bargaining unit work for sufficient periods of time. In the case at hand, the amount of time Fairbanks spends doing maintenance mechanic work (20 percent) is more akin to the time the employees in *In re Arlington Masonry Supply* and *Continental Cablevision*, *supra*, spent doing bargaining unit work (15 to 25 percent and 17 percent, respectively). This amount of time is insufficient to make Fairbanks a dual-function employee. Accordingly, I concur with the Hearing Officer's recommendation that the challenge to Fairbanks' ballot be sustained and a certification of representative issued.

II. Conclusion

Based on the above, I concur with the Hearing Officer's conclusion that Bill Fairbanks is not an eligible voter because the record supports that he spends about 20 percent of his time performing maintenance mechanic work, which falls below the 25 percent floor suggested by the Board. Thus he is not eligible to vote under the Board's dual-function employee standard. Consequently, I sustain the challenge to Fairbanks' ballot and hereby issue the following:⁹

⁸ The Board bases eligibility to vote on work actually performed and not "intended" work in the future. See *Harold J. Becker Co., Inc.*, 343 NLRB at 52-53. Therefore, the Employer's description of the outcome of the election if Fairbanks' vote should not be counted once it possibly eliminates the two boiler operators' positions in the future, is inconsequential to the determination of Fairbanks' eligibility.

⁹ Under the provisions of Secs. 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570, with supporting brief, if desired, which shall be printed or otherwise legibly duplicated. The request for review must be received by the Board in

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

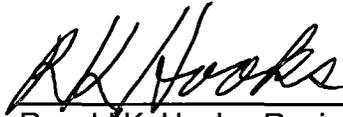
As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots have been cast for

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 286, AFL-CIO

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full and regular part-time boiler operators and maintenance mechanics employed at or working out of the Employer's facility located at 5510 Airport Way South in Seattle, Washington; excluding all other employees, the Maintenance Supervisor, guards and supervisors as defined by the Act.

DATED at Seattle, Washington on the 14th day of December, 2012.



Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

Washington, D.C. within fourteen (14) days from the date of issuance of this Supplemental Decision. The request may not be filed by facsimile. A copy of the request, if filed, must be timely served upon the other parties and upon the Regional Director, including copies of any supporting brief. A statement of such service should also be filed with the Board. In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board website: www.nlr.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed. Immediately upon filing of such exceptions, the party filing the same shall serve a copy thereof, together with a copy of any brief filed, upon the other parties and simultaneously submit to the Regional Director a statement of such service. If no exceptions are filed to the Regional Director's Supplemental Decision, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

ELYSIAN BREWING CO. Employer and IUOE LOCAL 286 Petitioner	Case 19-RC-082934
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**EMPLOYER'S EXCEPTIONS TO HEARING OFFICER'S REPORT AND
RECOMMENDATION ON CHALLENGED BALLOT**

Exceptions are taken by the Employer to the following:

1. H/O Report p. 2: Hearing Officer's finding that Bill Fairbanks is not a dual-function employee who regularly performs maintenance mechanic duties for a sufficient period time.
2. H/O Report p. 5: Hearing Officer's finding that Bill Fairbanks spends 45 minutes operating a floor Zamboni cleaning in the production area and then assists two other production employees in cleaning up the keg washing area before clocking out at 10 p.m.
3. H/O Report p. 7 fn.11: Hearing Officer's conclusion that Fairbanks engages in "end of the night cleaning" in addition to Zamboni operation.
4. H/O Report p. 7: Hearing Officer's conclusion that Fairbanks performs only minimal "ad hoc" maintenance tasks amounting to 0.4 percent of his working time.

5. H/O Report p. 7: Hearing Officer's calculation that Bill Fairbanks spent at most 13 percent of his total time performing maintenance mechanic tasks.

6. H/O Report p. 7 fn.11: Hearing Officer's conclusion that the only additional maintenance tasks Fairbanks accomplished between May and August 6 were repair on the production chain, the Zamboni, and the forklift hydraulic cylinder.

7. H/O Report p. 7 (legal analysis): Hearing Officer's conclusions that the Burden of Proof was not on the challenger but on the Employer, and that the evidence failed to adequately establish that Fairbanks did sufficient maintenance work to warrant his inclusion.

8. H/O Report pp. 2 and 8: Hearing Officer's conclusion that Bill Fairbanks is not an eligible voter because he did not perform maintenance mechanic's duties for a sufficient period of time.

9. H/O Report p. 8: Hearing Officer's recommendation that the challenge to Mr. Fairbanks' ballot be sustained and a certification of representative issued.

RESPECTFULLY SUBMITTED this 23rd day of October, 2012.

s/Clemens H. Barnes
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CERTIFICATE OF SERVICE

The undersigned certifies that he filed the foregoing **Employer's Exceptions to Hearing Officer's Report and Recommendation on Challenged Ballot** electronically with the NLRB, and emailed a true and correct copy to:

Ronald K. Hooks
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I declare under penalty of perjury under the laws of the United States of America and the state of Washington that the foregoing is true and correct.

Signed at Seattle, Washington this 24th day of October, 2012.

Respectfully submitted,

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