

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

In the Matter of

BEACON SALES ACQUISITION d/b/a
BEACON SALES COMPANY

Employer¹

and

TEAMSTERS LOCAL 25 a/w
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

Petitioner

Case 01-RC-098033

DECISION AND DIRECTION OF ELECTION

Petitioner (the Union) seeks to represent a unit of drivers and warehouse employees employed by the Employer (Beacon) at its Peabody, Massachusetts facility (the Peabody facility). The parties dispute the unit placement of inside sales employee Robert Crotty. The Union asserts that Crotty should be included in the unit as a dual-function employee because he performs a substantial amount of bargaining unit work in the warehouse at the Peabody facility. Beacon asserts that Crotty should be excluded from the unit on the ground that his primary function is sales and that he does not meet the Board's test for a dual-function employee.

For the reasons set forth below, I find that Crotty is a dual-function employee who should be included in the unit.

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

I. FACTS

A. Background

Beacon distributes building materials to contractors in the building and construction industry from its Peabody facility, which consists of a sales office with a small showroom and an attached warehouse. Primarily responsible for overseeing the Peabody facility is Branch Manager Steven Murgó and Assistant Manager James Ohl. Reporting directly to Murgó is inside sales employee Robert Crotty, drivers Brady Howard and Russell Bard, and warehouseman Keith McEvoy. The only remaining employee at the Peabody facility is outside sales representative Greg Zeman.

Crotty, McEvoy and the two drivers are hourly paid and eligible for overtime, while Murgó, Ohl and Zeman are salaried. Crotty earns \$22.98 per hour, and McEvoy earns \$16.75 per hour. One of the drivers earns \$25.49 per hour and the other earns \$20 per hour. As the inside sales employee, Crotty is eligible for a discretionary year-end bonus in the amount of \$1000 to \$2000 and an additional annual award, both of which are based on his sales performance. McEvoy and the drivers are eligible for a discretionary year-end bonus of about \$250 to \$500 and a quarterly safety bonus of \$125. All other benefits are the same for all employees at the Peabody facility.

B. Work performed by the petitioned-for employees

Customer orders are picked from the warehouse by McEvoy, using a pick ticket directly provided to him by a customer, Ohl, Murgó, or Crotty. McEvoy also picks the orders to be delivered to customers by the two drivers. He utilizes a fork lift, for which he is required to have a license, in order to load the branch trucks used to make customer deliveries, and unload the trucks that deliver inventory to the warehouse. The two drivers, who are required to have a commercial driver's license, utilize tractor-trailers, straight trucks, and a crane to deliver the materials. They also load and unload their trucks.

C. Work performed by Crotty

When he functions as an inside sales employee, Crotty sits at a desk nearest to the front counter and takes orders from customers. In connection with that work, he occasionally enters the warehouse to show a product to a customer, take a physical inventory, or perform safety checks.

In addition to his sales work, Crotty, who has a fork lift license, helps out in the warehouse. Although this occasionally occurs pursuant to Murgó's specific instructions, Crotty usually decides on his own when to help out in the warehouse, usually when he sees that McEvoy is busy. McEvoy has also been told by Murgó that Crotty and Ohl should assist him when he needs help. When

assisting in the warehouse, Crotty performs the same work as McEvoy, picking orders, wrapping pallets, and loading and unloading trucks using the forklift. In doing so, he may pick the order for a sale he just made or for customers who are waiting. On other occasions he selects a pick ticket from McEvoy's desk. He also unloads trucks making deliveries to the warehouse. There are also occasions when Crotty and McEvoy work side by side picking a large order.

Either Crotty or Ohl fills in for McEvoy when he is out sick or on vacation or otherwise unavailable. Crotty has worked in the warehouse for his entire shift when doing so. Crotty or Ohl also cover for McEvoy when he is on a lunch break. Because Crotty starts work at 6:30 a.m., a half hour before McEvoy arrives, Crotty picks orders for customers who are already waiting at that hour for their materials. Crotty has also performed the warehouse employee duties while that position was vacant, although the drivers have primarily performed that function when the position was vacant. Crotty also moves trucks around the yard when necessary, which takes ten to fifteen minutes and happens around three to four times a month. About five times a year, Crotty makes deliveries to customers in his own truck.

There is no documentary evidence that breaks out the amount of time that Crotty spends performing bargaining unit work versus his inside sales work. According to Murgo and Ohl's observations, Crotty typically works nine to ten hours per day and, on average over the course of the entire year, he spends an hour and a half per day picking orders and loading and unloading trucks. This estimate includes only the time that Crotty performs bargaining unit work in the warehouse and does not include the time Crotty goes into the warehouse for other reasons, such as to do inventory counts, show product to a customer, or do safety checks. On those days that Crotty works less than nine to ten hours, according to Murgo and Ohl, he also spends proportionally less time working in the warehouse. Murgo admits that he does not observe Crotty when he is working in the warehouse, but claims that he can observe Crotty's inside sales desk from his office. Ohl similarly admitted that he cannot see into the warehouse from his desk, and that his estimate is based upon the amount of time he sees Crotty at his inside sales desk.

According to Crotty, in a typical week he works in the warehouse every day performing bargaining-unit work. In a typical 8 hour day, he works in the warehouse for at least an hour and a half, but more likely two and one-half hours per day, and it could be as much as four to six hours in one day. There are also some days that he performs no warehouse work, and others when he spends his entire shift performing bargaining unit work in the warehouse. Crotty's estimate, like Murgo's, does not include the time he spends in the warehouse performing non-unit work such as inventory counts, showing product to customers, or performing safety checks. When he works a nine- to ten-hour day, he works a little bit more in the warehouse because Beacon is selling more product and there is more product to load and unload. Crotty denied spending as much as

seven hours a day performing his inside sales work, noting that Murgo does not observe his work all the time. Crotty admits that he usually tells Ohl if he is going to work in the warehouse and why, and occasionally tells Murgo.

II. ANALYSIS AND CONCLUSION

The Board's well-established test for determining whether a dual-function employee should be included in a unit is whether the employee regularly performs unit work for sufficient periods of time to demonstrate that he has a substantial interest in the unit's wages, hours, and conditions of employment. 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. *Medlar Electric, Inc.*, 337 NLRB 796 (2002).

Although there is no dispute that Crotty regularly performs bargaining unit work on a daily basis, the record contains conflicting testimony about the percentage of time that Crotty spends performing such work. Murgo and Ohl testified that Crotty spends, on average, about an hour and a half of a nine- to ten-hour day performing unit warehouse work, and a little bit less time doing so in an eight-hour day. Crotty testified, in contrast, that he spends about two and a half hours of an eight-hour day performing warehouse work, and little bit more time doing so in a nine- to ten-hour day. I find that Crotty, who has first-hand knowledge of the amount of time he spends performing unit warehouse work, is in the best position to provide a reliable estimate. In this regard, Murgo and Ohl, who work primarily in the sales office/showroom, are admittedly not in a position to be aware of Crotty's activities in the warehouse. Thus, assuming Crotty averages two and a half hours per day performing unit warehouse work, it would constitute 31 percent of an eight-hour day, 28 percent of a nine-hour day, and 25 percent of a ten-hour day. Moreover, the actual percentage of Crotty's time performing unit work may be a little higher than that to the degree Crotty testified that he works a little more than two and a half hours in the warehouse during his nine- and ten-hour days. Accordingly, I find that Crotty regularly spends a sufficient percentage of his time performing unit work to be included in the unit as a dual-function employee.

In reaching this conclusion, I note that Beacon's assertion that Crotty should not be included in the unit as a dual-function employee because he does not have a substantial interest in the terms and conditions of employment of the warehouse employees and drivers (citing certain differences in Crotty's wages, hours and other terms and conditions of employment), is contrary to well-established Board law. See *Oxford Chemicals, Inc.*, 286 NLRB 187, 188 (1987)(inclusion of a dual-function employee within a particular unit does not depend on a showing of community-of-interest factors in addition to the regular performance of a substantial amount of unit work); *Harold J. Becker Co.*, 343

NLRB 51 (2004). Finally, contrary to Beacon's claim, the Board's decision and analysis in *WLVI, Inc.*, 349 NLRB 683 (2007), is inapposite to the facts of the instant case.

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 Section 2(5) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and 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 purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers and warehouse employees employed by the Employer at its Peabody, Massachusetts location, but excluding guards and supervisors as defined in the Act.

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 purposes of collective bargaining by Teamsters Local 25, a/w International Brotherhood of Teamsters. 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.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or 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, in an economic strike which

commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees 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 since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

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 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.). This list may initially be used by me to assist in determining whether there is an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before March 21, 2013. No extension of time to file this list will 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 to the Regional Office by electronic filing through the Agency's website, www.nlr.gov,² by mail, or by facsimile transmission at 617-565-6725. To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **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.

² To file the eligibility list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

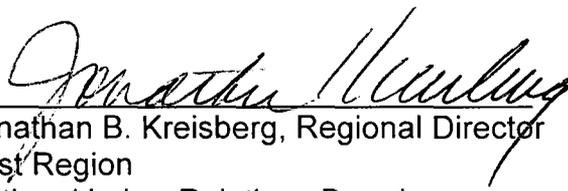
Notice of Posting Obligations

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 at least 3 working days prior to 12:01 a.m. of the day 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 5 full 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 nonposting of the election notice.

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 March 28, 2013. The request may be filed electronically through the Agency's website, www.nlr.gov, but may not be filed by facsimile.

DATED: March 14, 2013


Jonathan B. Kreisberg, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072