



UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 05



SKW CONSTRUCTORS

Employer

and

CASE 05-RC-100098

INTERNATIONAL UNION OF OPERATING

ENGINEERS LOCAL #37, AFL-CIO

Petitioner

**HEARING OFFICER'S REPORT AND
RECOMMENDATIONS ON THE CHALLENGED BALLOTS**

I. INTRODUCTION

This report contains my findings and recommendations regarding challenges to four individual ballots, made by the International Union of Operating Engineers Local #37, AFL-CIO (Petitioner). The evidence shows that of the four individuals who cast the ballots, two share a community of interest with the petitioned for unit, and two are temporary employees excluded from the unit.

Accordingly, I recommend that the two challenges claiming no community of interest be overruled, and the two challenges claiming temporary employee status be sustained, and that a Tally of Ballots issue. If appropriate, a Certification of Representative should be issued.

II. PROCEDURAL HISTORY

On March 12, 2013, the Petitioner filed a petition seeking to represent a unit comprised of all (NCCO) National Commission Certified crane operators employed by SKW Constructors (the Employer) within the limits of Sparrows Point, Maryland. Thereafter, on March 26, 2013,¹ the parties signed and the Regional Director approved the Stipulated Election Agreement (Agreement) for an election in the following unit:

¹ Unless otherwise noted all foregoing dates referenced herein occurred in 2013.

Included: All full-time and regular part-time certified crane operators employed by the Employer at its Sparrows Point Maryland facility.

Excluded: All other employees, guards, and supervisors as defined in the Act.

Pursuant to the Agreement, the election was scheduled for April 25, with an eligibility date of April 14.² During the April 25 election, the Union challenged the ballots of Richard Beerbower, Joseph Eller, Joseph Hafner, and Jamie Lukers. The Union contends that the four named individuals are ineligible. More specifically, the Union contends that Hafner and Lukers, do not perform the type of work encompassed within the definition of the bargaining unit. —the operation of cranes—performed by employees in the bargaining unit. Regarding Beerbower and Eller, Petitioner challenged their ballots on the grounds that each is a temporary employee, lacking a community of interest with the full-time and regular part-time certified crane operators that comprise the unit of eligible voters.

In order to preserve the secrecy of the voters' ballots, and as a clearly determinative number of ballots cast were challenged, the ballots were not counted; rather, all ballots were impounded following the polling period. No tally of ballots was issued.

On May 3, the Regional Director issued an Order Directing Hearing on Challenged Ballots and Notice of Hearing, ordering that a hearing be held before a Hearing Officer for the purpose of resolving the challenges. The Regional Director further ordered that the Hearing Officer prepare and serve upon the parties a report containing resolutions of witness credibility, findings of fact, and recommendations to the Board as to the disposition of the challenges.

Accordingly, I heard this matter on May 24³, in Baltimore, Maryland. All parties appeared at the hearing and were afforded a full opportunity to be heard on the issues, examine witnesses, introduce evidence, make oral arguments, and submit briefs. Based upon the record as a whole, including my observation of the witness⁴ and the arguments of counsel, I hereby make the following findings of fact, conclusions of law, and report as to the disposition of the challenges:

III. THE EMPLOYER'S OPERATIONS

The Employer is a construction contractor with a specific project at the Sparrows Point facility where it has been contracted to fabricate tunnel elements for a tunnel being constructed between Norfolk and Portsmouth, Virginia. There are tower cranes and crawler cranes onsite that operate along the dry dock, with each one operating in a certain part of the

² Both the Employer and Union agreed to an eligibility date of April 14, although the election was on April 25. The Employer argued that it was still working to reach its representational complement since it still had plans to continue to hire more employees. The Employer agreed to provide of copy of the *Excelsior* list to the Union on April 14, at which time the Union agreed to the eligibility date, and the Region approved.

³ Although the hearing was originally scheduled for May 14, the Petitioner requested a postponement, which the Region granted.

⁴ My credibility resolutions are based upon a review of each witness' testimony, their demeanor, the plausibility of the testimony proffered, the consistencies or inconsistencies therein, along with the exhibits in the record.

fabrication process. Tower cranes and crawler cranes operate at the Employer's Sparrow's Point facility along the dry dock, with each operating a certain part of the fabrication process.

Mike Hall (Hall) is the project manager, Daniel Francis (Francis) is the project engineer, and Colby Evans (Evans) is project site superintendent.

IV. CHALLENGES TO EMPLOYEES HAFNER AND LUKERS

A. EVIDENCE

The Union challenged the ballots of Joe Hafner and Jamie Lukers on the basis that they do not share a community of interest with the crawler crane operators.

It is undisputed that Hafner and Lukers were both hired as NCCCO certified tower crane operators. Hafner began his employment on March 18 and Lukers began his employment on April 8.

The Employer planned to have two tower cranes on site by March 1. However, the cranes arrived several weeks late and after their arrival the Employer encountered problems erecting the second crane because there were problems with some of the parts. Neither tower crane was erected before the date of the election.

When Lukers was hired, he began working on the erection of his tower crane. Following the election date, the tower crane has been erected and has been operated by Lukers. When Hafner was hired, he performed work on heavy equipment other than tower cranes and performed other duties on site. Hafner also performs work that assists in the erection of the second tower crane which he will operate when completed.

B. ANALYSIS OF EVIDENCE

It is well settled that the three-part test set forth in *Caesar's Tahoe*, 337 NLRB 1096 (2002), applies to the resolution of challenged ballots in cases involving stipulated units. Under the first prong of the test, if the objective intent of the parties is expressed in clear and unambiguous language in the unit stipulation, then the Board will enforce the agreement. If the language of the stipulation is ambiguous with respect to an employee's eligibility, then it is appropriate for the Board to examine extrinsic evidence to interpret the stipulation. If the intent of the stipulation cannot be determined, then the Board will decide the eligibility of the challenged voters using the traditional community of interest criteria. *Id.* at 1097. The party seeking to exclude an individual from voting has the burden of establishing that the individual is ineligible to vote. *Golden Fan Inn*, 281 NLRB 226, 230 n. 24 (1986).

The Board has long held that a certifiable unit need only be an appropriate unit, not the most appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409,418 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951). In fact, "[i]t is irrelevant that some other larger or smaller unit might also be appropriate or most appropriate." *Tallahassee Coca-Cola Bottling Co.*, 168 NLRB 1037, 1038 (1967), *enfd.* 409 F.2d 201 (5th Cir. 1969).

The record evidence reveals that in entering into the Agreement, the Union agreed to include the following employees in the unit: “All full-time and regular part-time certified crane operators employed by the Employer at its Sparrows Point Maryland facility.” This description is clear and unambiguous. The record evidence also reveals that both Hafner and Lukers performed work that assisted in the erection of tower cranes, a standard practice in the industry. Moreover, both were employed by the eligibility date and on the day of the election. *St. Elizabeth Community Hosp. v. N.L.R.B.*, 708 F.2d 1436, 1444 (9th Cir.1983).

Although they had not yet operated the cranes as of the date of the election, it is clear that they were both hired for the position of certified crane operators with the expectation that they would perform that work.

C. RECOMMENDATION

Based on the forgoing, I recommend finding that certified tower crane operators, including Hafner and Lukers, are included in the unit under the standards set forth in *Caesar's Tahoe*. I recommend that the challenges to the ballots of Hafner and Lukers be overruled and counted.

V. CHALLENGES TO EMPLOYEES ELLER AND BEERBOWER

A. EVIDENCE

The Union challenged the ballots of Eller and Beerbower on the basis that they are temporary employees. Eller began work on March 21 as a crane operator and Beerbower began work on April 13 as a crane operator.

Employee John Martin testified that when he spoke with Eller shortly after he was hired, he initially said he was hired to erect the tower cranes and that he was told that he would be there for maybe six to eight weeks to assemble the two cranes and that was it. Eller told Martin that it was fine with him, because he was from the Richmond area and he wanted to get back home. Martin also testified that Beerbower, about a few days or week after he was hired, also said he was put on the job temporarily and that he was working on a job in Washington D.C.⁵

Beerbower testified that when he was first asked to work the Sparrow's Point project, he was told it was a temporary thing and that he would be working for 6-weeks. He said that although the Employer told him it would only be for 6-weeks, he assumed it would be for longer based on his past experiences with temporary assignments. He told other coworkers that he was there on a temporary basis; He also testified that eventually the Employer told him he would be on the project more long term. However, this was a few weeks after he began his employment on April 13.

⁵ While Martin's testimony about Eller and Beerbower is hearsay, he ultimately proved credible about Beerbower based on Beerbower's own admissions.

Francis, the only management official from the Employer who testified at the hearing, testified that Eller was hired to be a permanent employee. Francis explained that he did not do the hiring of Eller, but that sometime in early April, he told Eller he would remain on site for the remainder of the project. Eller did ask Francis about a transfer back home and Eller told him he was needed on site.

B. ANALYSIS OF EVIDENCE

As a general rule, an employee is eligible to vote in a representation election if he or she is employed in the bargaining unit during the eligibility period and on the date of the election. *St. Elizabeth Community Hosp. v. N.L.R.B.*, 708 F.2d 1436, 1444 (9th Cir.1983). The Board has formulated an exception to this general rule, however, in the case of temporary employees. In determining whether a temporary employee should be included in a bargaining unit, the Board has applied two different tests: the reasonable expectation test, and the date certain test. *N.L.R.B. v. New England Lithographic Co.*, 589 F.2d 29, 32 (1st Cir.1978). Under the first test, the Board looks at the employee's reasonable expectation of permanent employment within the bargaining unit. Under the latter approach, an employee whose term of employment remains uncertain is eligible to vote.

The subjective nature of the reasonable expectation inquiry is the very thing the court in *New England Lithographic* was trying to avoid by adopting the alternative “date certain” test. I also find the date certain test the proper test to use in determining the eligibility of temporary employees.

In *Pen Mar Packaging Corp.*, 261 NLRB 874 (1982), the Board stated: “[i]t is established Board policy that a temporary employee is ineligible to be included in the bargaining unit and that an employee's eligibility status is determined by his status as of the eligibility payroll date.”

The “date certain” test does not necessarily require that the employee's tenure is “certain to expire on an exact calendar date,” it is only necessary that the “prospect of termination [is] sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired.” *St. Thomas-St. John Cable TV*, 309 NLRB 712, 713 (1992), citing *Pen-Mar Packaging Corp.*, 261 NLRB 874 (1982). This test does not require a party contesting an employee's eligibility to prove that the employee's tenure was certain to expire on an exact calendar date. It is only necessary to prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired.

Beerbower provided direct testimony that the Employer told him he would be on temporary assignment for 6-weeks. Although the Employer eventually told him he would remain on-site, it was not until several weeks after he was hired on April 13. The eligibility date was April 14.

Eller did not testify at the hearing. However, testimony was provided by employee John Martin and project engineer Daniel Francis about the details of Eller's employment. No direct testimony was offered from anyone who hired Eller. Martin testified that both Eller and Beerbower told him they were temporary employees. They were both hired around the same time for the same position. Although, Francis testified that he told Eller he would be on for the

remainder of the project, he could not recall when this conversation occurred. Therefore, I would infer from the testimony and evidence that I did receive, that Eller, like Beerbower was a temporary employee as of the April 14 eligibility date.

No direct testimony was offered that would establish that as of April 14, Eller understood that his employment at the Sparrow's Point facility would be for an infinite amount of time. Rather, the record evidence establishes that Eller was told he would remain on the project beyond 6-weeks and that he was likely told this during approximately the same time period Beerbower was told by the Employer that his assignment would be extended. Beerbower places that date several weeks after he began his employment.

I find the prospect of termination from the Sparrows Point facility at 6-weeks to be sufficiently finite. I, therefore, find that Beerbower and Eller were temporary employees as of the determinative April 14 eligibility date. It is irrelevant that they were subsequently told they would remain on the project, because such events occurred after the eligibility date. It is irrelevant that they were subsequently told they would remain on the project, because such events occurred after the eligibility date.

C. RECOMMENDATION

Accordingly, I recommend that the challenges to the ballots of Beerbower and Eller be sustained.

VI. CONCLUSION

Accordingly, I recommend that the two challenges to the ballots of Haffner and Lukers claiming no community of interest be overruled, and the challenges to the ballots of Beerbower and Eller claiming temporary employee status be sustained, and that a Tally of Ballots issue. If appropriate, a Certification of Representative should issue.

Right to File Exceptions: Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Regional Director, National Labor Relations Board Region 5, 100 South Charles Street, Tower II, Suite 600, Baltimore, Maryland 21201.

Procedure for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Regional Director by close of business on June 27, 2013, at 5:00 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions 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 exceptions filed by facsimile transmission. Upon good cause shown, the Regional Director may grant special permission for a longer period within which to file.⁶ A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions 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 **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was offline or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Baltimore, Maryland, this 13th day of June, 2013.

/s/ Kimberly Andrews

Kimberly Andrews, Hearing Officer
National Labor Relations Board, Region 5
100 South Charles Street, Tower II,
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Baltimore, Maryland 21201

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