

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

SKW CONSTRUCTORS

Employer

and

Case 05-RC-100098

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL #37, AFL-CIO

Petitioner

**DECISION AND ORDER**

I have considered determinative challenges in an election held on April 25, 2013, and the Hearing Officer's Report recommending disposition of those challenges. The election was conducted pursuant to a Stipulated Election Agreement. The Petitioner challenged the ballots of four individuals, claiming that each was ineligible to vote. For two of those challenged ballots (those cast by Joseph Hafner and Jamie Lukers), the Petitioner maintained that the individuals did not perform the type of work encompassed by the definition of the mutually-agreed upon bargaining unit. As for the other two challenged ballots (those cast by Richard Beerbower and Joseph Eller), the Petitioner argued that each individual was a temporary employee, lacking a community of interest with the full-time and regular part-time certified crane operators that comprised the unit of eligible voters. These four challenged ballots comprised a determinative number of challenges, and the ballots were not counted, but instead impounded. A tally of ballots has not been issued.

By my Order of May 3, a hearing was held before a Hearing Officer for the purpose of resolving the challenges. A Hearing Officer conducted a hearing on May 24 in Baltimore, Maryland, and the Hearing Officer issued her Report and Recommendations on the Challenged

Ballots on June 13. On June 27, the Employer filed exceptions to that report, along with a brief in support of its exceptions.

I have reviewed the record in light of the exceptions and brief, and adopt the hearing officer's findings and recommendations to the extent consistent with this Supplemental Decision and Order.<sup>1</sup>

### **I. The Hearing Officer's Report and Recommendation**

The Hearing Officer recommended sustaining the Petitioner's challenges to the ballots of Beerbower and Eller, finding that each was a temporary employee as of the determinative date for voter eligibility. The Employer timely filed exceptions to the Hearing Officer's findings and recommendations regarding Beerbower and Eller.

To be eligible to vote in the April 25 election, an employee had to be employed by the Employer as of the April 14 eligibility date. Both Beerbower and Eller satisfied this condition.

In concluding that Beerbower was a temporary employee, the Hearing Officer relied on two portions of Beerbower's own testimony, as well as the testimony of a fellow employee, John Martin. First, the Hearing Officer found that Beerbower testified the Employer had told him that he would be on a temporary assignment for six weeks. Second, the Hearing Officer relied on Beerbower's testimony that he was not told his assignment to the relevant jobsite was to be extended until several weeks after he began working for the Employer. Third, the Hearing Officer relied on Martin's testimony that Beerbower had identified himself as a temporary employee to Martin. The Hearing Officer thus concluded that, as of April 14, Beerbower had a

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<sup>1</sup> No exceptions were filed to the Hearing Officer's recommendation to overrule the Petitioner's challenges to the ballots of Hafner and Lukers, nor to the Hearing Officer's finding that each was hired for the position of certified crane operator with the expectation that each would perform that work. Accordingly, I find that the Hearing Officer's findings and recommendations regarding the ballots of Hafner and Lukers are free from prejudicial error, and I affirm them.

sufficiently finite prospect of employment with the Employer's jobsite so as to be considered a temporary employee.

As for Eller, the Hearing Officer exclusively relied on the testimony of Martin and Francis, as Eller did not testify at the hearing. Similar to her reliance on Martin's testimony regarding Beerbower, the Hearing Officer relied on Martin's testimony that Eller identified himself as a temporary employee to Martin. Furthermore, the Employer's project engineer, Daniel Francis, testified that he had told Eller that Eller would be on the Employer's jobsite for the remainder of the project, but he could not specifically recall when the conversation occurred, and the Hearing Officer inferred that the conversation did not occur until after April 14. In sum, the Hearing Officer concluded that, as of April 14, Eller had a sufficiently finite prospect of employment with the Employer's jobsite so as to be considered a temporary employee.

## **II. Analysis**

Based upon my review of the record and the Employer's exceptions and supporting brief, I conclude that the Petitioner did not meet its burden of proving that Eller was a temporary employee. As for Beerbower, I conclude that the Petitioner introduced enough evidence into the record to support a conclusion that, as of the payroll eligibility date, Beerbower had a sufficiently finite prospect of employment with the Employer to be considered a temporary employee as of that date. However, I reach this conclusion on a somewhat different basis than the Hearing Officer. In sum, I conclude that the Petitioner's challenge to Eller's ballot be overruled, but that the Petitioner's challenge to Beerbower's ballot be sustained.

As the Hearing Officer correctly identified, an employee who is employed and working in the unit on the payroll eligibility date and the date of the election is generally considered eligible to vote. However, one exception to this general rule pertains to temporary employees.

The party asserting that such an employee should be declared ineligible as a temporary employee bears the burden of establishing that the employee should be excluded. *See, e.g., Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986). To determine the voting eligibility of an employee challenged as a temporary employee, the critical inquiry is whether the employee's tenure of employment remains uncertain. If the employee has an uncertain tenure of employment, then that employee is not considered temporary and is eligible to vote. *NLRB v. New England Lithographic*, 589 F.2d 29 (1st Cir. 1978)(citations omitted). As the Board further explained (and as correctly identified by the Hearing Officer), the burden on the party seeking to establish an employee's temporary status is "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." *St. Thomas-St. John Cable TV*, 309 NLRB 712, 713 (1992). As the Hearing Officer also correctly identified, that inquiry as to the employee's eligibility status is determined by the employee's status as of the eligibility payroll date. *See, e.g., Pen Mar Packaging Corp.*, 261 NLRB 874 (1971).

In reaching her conclusions on the temporary status of Beerbower and Eller, the Hearing Officer explicitly relied on the testimony of a fellow employee, Martin, about statements that Beerbower and Eller made to Martin concerning their temporary status on the job—what each said and what each had been told about their employment with the Employer. Martin's testimony in this regard was comprised of out-of-court statements offered to prove the truth of the matter asserted—namely, what Beerbower and Eller had been told about their duration of employment with the Employer. Based on my review of the record evidence, counsel for the Petitioner asked Martin a question that called for a hearsay answer, and counsel for the Employer made a timely objection on hearsay grounds. Counsel for the Petitioner maintained that the

testimony was not hearsay because it was an admission, presumably relying on Federal Rule of Evidence Rule 801(d)(2), the rule identifying as non-hearsay the admissions of a party-opponent. However, the testimony in question—Martin’s accounting of what Beerbower and Eller separately said to him about what each had been told by their prior employer about their duration of employment with the Employer—does not fall under FRE 801(d)(2), because neither Beerbower nor Eller are party-opponents in the above-captioned matter, nor is there prior employer a party-opponent in this matter. While the Hearing Officer acted within her discretion by admitting Martin’s testimony into evidence over the Employer’s objection, I apply little weight to the portions of Martin’s testimony concerning what Beerbower or Eller said to him.<sup>2</sup> Rather, I place greater reliance on more probative, direct evidence.

While Martin was the only witness offered by the Petitioner, the Employer called Beerbower as a witness. Beerbower testified that he was called during his vacation told by his prior employer, Skanska-Facchina, J.V., and told that he was needed at the Employer’s jobsite for a temporary position, and that he would be on that jobsite for six weeks. Beerbower was then terminated by Skanska-Facchina, J.V. on April 11,<sup>3</sup> and hired by the Employer—a joint venture of Skanska USA Civil Southeast, Inc., Kiewit Infrastructure Co, and Weeks Marine—on the same day. Thus, Beerbower was told by a representative of one Skanska business unit that he was needed by another Skanska business unit, and Beerbower reported to work accordingly. However, there was no evidence introduced into the record going to what business relationship exists, if any, between Skanska-Facchina, J.V. and the Employer.

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<sup>2</sup> See *Northern States Beef*, 311 NLRB 1056 n.1 (1993). While Beerbower’s testimony that he told his co-workers he had been told he would be on the Employer’s project for six weeks is corroborative of Martin’s testimony, it does not change the fact that Martin’s testimony is hearsay within hearsay, to which I will apply little evidentiary value.

<sup>3</sup> Skanska-Facchina, J.V.’s termination report for Beerbower states, regarding his termination, “TERM – OTHER SKANSKA BUSINESS UNIT.”

As for the circumstances of how Beerbower came to work for the Employer, Beerbower testified that he was terminated by Skanska-Facchina, J.V. and then “rehired” by the Employer. However, the record is clear that a Skanska-Facchina, J.V. representative informed Beerbower where he would be working and when to report to work. Furthermore, Beerbower testified that it was “not unusual” for him to be called off of one job and sent to another “[w]hen somebody quits and they need somebody in the seat.” Beerbower elaborated that “Skanska always tells you it's a temporary thing and you always end up being permanent,” and that he understood his position with the Employer would be permanent. When asked whether his experience was that he was “transferred temporarily at first and then it becomes permanent,” Beerbower answered affirmatively.<sup>4</sup> Indeed, through the direct and cross-examinations of Beerbower and Francis, the term “transfer” was frequently used to describe Beerbower’s employment relationship with the Employer.<sup>5</sup> In the Employer’s employment information record form for Beerbower, a, underscored area for “new hire” is checked, but crossed out, while the underscore area for “transfer” is marked and circled, with a reference to the jobsite in Washington, D.C. where Beerbower had been working.<sup>6</sup> In the Employer’s benefits enrollment form that Beerbower completed on April 11, the Employer’s business manager identified that Beerbower was not a new hire, but that he was a transfer; Beerbower signed this form. Beerbower testified to a

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<sup>4</sup> However, Beerbower admitted on cross-examination that he also anticipated or hoped that, after working for the Employer for six weeks, he would be returned to the jobsite in Washington, D.C. where he had come from, where he worked for Skanska-Facchina, J.V.

<sup>5</sup> Tr. 68, 72 (cross-examination of Beerbower); 78-80 (re-direct examination of Beerbower, in which he admitted he had been transferred around ten times in his past ten years of working for Skanska-Facchina, J.V.); 85 (further re-cross examination of Beerbower, in which he admitted that he received paperwork about his transfer, but that it said nothing about the duration or temporary status of his transfer); 121 (direct examination of Francis); 126-27 (cross-examination of Francis).

<sup>6</sup> Francis acknowledged that the marking meant that Beerbower had been transferred from the Skanska-Facchina, J.V. jobsite, but that the Employer had to hire such employees independently, and that no such transfers could take place, because of the Employer’s legal obligations for safety standards administered by the Occupational Safety & Health Administration.

distinction between situations where he has been temporarily assigned to another employer (in which case “D.C.” (which I infer from the record to mean Skanska-Facchina, J.V.) would pay him and charge the recipient company for his time spent working for that company), and situations where he has been permanently assigned (in which case his paycheck would be from that company). Beerbower testified without contradiction that his first paycheck after he began working for the Employer was from the Employer. For his part, Francis acknowledged, regarding how Beerbower came to be employed by the Employer, that the Employer will “typically use employees from internal to move them around as needed based on the need for personnel.”

In sum, the record contains no evidence about what business relationship exists, if any, between Skanska-Facchina, J.V. and the Employer. As described above, though, there is some evidence about Beerbower’s employment experience with Skanska-Facchina, J.V., and the circumstances surrounding his beginning to work for the Employer, that, when viewed as a whole, suggests that Beerbower was merely transferred from one Skanska entity to another, as had occurred with him in the past. However, while the Hearing Officer concluded that *the Employer* told Beerbower that he would be on temporary assignment at the relevant jobsite for six weeks, there was no evidence attributing such comments to the Employer herein, nor will I infer that such comments should be attributed to the Employer. That said, for the purposes of determining his eligibility, the record evidence supports a conclusion that Beerbower had been told that his work with the Employer would be temporary, and there was no evidence supporting a conclusion that any representative from the Employer told Beerbower prior to the April 14 payroll eligibility date that he was a permanent employee of the Employer. While evidence indicates that the Employer informed Beerbower that he was a permanent employee at some

point before the election, the record is not clear exactly when the Employer did so. Considering that Beerbower only became employed by the Employer three days before the payroll eligibility date, and Beerbower testified that he was told that he was assigned to the Employer's jobsite for the duration of the project "a few weeks after" he began working there, I find from this evidence that the Employer did not clarify to Beerbower that he was a permanent employee until sometime after the April 14 payroll eligibility date. Accordingly, I conclude that the Petitioner established its burden of proving that Beerbower was ineligible to vote in the election as a temporary employee, and I sustain the challenge to his ballot.

Unlike Beerbower, no party to the proceeding called Eller to testify. Thus, there is even less probative evidence that Eller was ineligible to vote in the election as a temporary employee. Eller was terminated by Skanska-Facchina, J.V. on March 20, hired by the Employer on March 21, and began actually working on the relevant jobsite as of March 25. In addition to the hearsay evidence discussed above, the Hearing Officer drew an inference regarding what Eller had been told about the status of his employment with the Employer. Based on Francis' inability to recall when he told Eller that Eller would be working on the Employer's jobsite indefinitely, the Hearing Officer concluded that Eller was told that he would be working on the jobsite indefinitely at approximately the same time that the Employer conveyed the same message to Beerbower, which was after the April 14 eligibility date. However, I find this inference to be unwarranted. For one, the Hearing Officer's inference contradicts Francis' direct testimony that Eller, who was hired on March 21, was always expected to be working for the Employer for the duration of its project, and that Francis told Eller as much at a time in early April, before the election. Moreover, the Hearing Officer's drawing of an inference misconstrues the burden on

the Petitioner to prove that Eller was a temporary employee as of the eligibility payroll date, and thus ineligible to vote in the election.

In sum, I find that the Petitioner has not met this burden regarding its challenge to Eller's ballot. To meet its burden, the Petitioner proffered only hearsay evidence, on which I afford little weight, and ambiguous statements that cannot be attributed to the Employer. On the other hand, the Employer produced direct testimonial evidence rebutting the Petitioner's contention that Eller was a temporary employee as of April 14. Furthermore, I find that Eller shares a sufficient community of interest to be included with the unit because there is no dispute that he works side-by-side with employees in the unit, performing the same type of work, under the same supervision and working conditions.

### **III. ORDER**

IT IS ORDERED that, within 14 days from the date of this Supplemental Decision and Direction, that the ballots of Joseph Hafner, Jamie Lukers, and Joseph Eller in the above-captioned proceeding be opened and counted.

IT IS FURTHER ORDERED that a Tally of Ballots should be prepared and served on the parties, and that the appropriate certification should issue.

### **IV. RIGHT TO REQUEST REVIEW**

**Right to Request Review:** Pursuant to the provisions of Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14<sup>th</sup> Street, NW, Washington, D.C. 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

**Procedures for Filing a Request for Review:** Pursuant to the Board's Rules and Regulations, Section 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, D.C. by close of business on **August 28, 2013**, 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.<sup>7</sup> 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](http://www.nlr.gov). Once the website is accessed, select **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

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<sup>7</sup> A request for an extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, D.C., 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.

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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.

(SEAL)

/s/ Wayne R. Gold

Dated: August 14, 2013

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Wayne R. Gold, Regional Director  
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