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

In the Matter of O&G INDUSTRIES, INC. AND O&G INDUSTRIES, INC./TUTOR PERINI JOINT VENTURE Employer[1] and CONNECTICUT LABORERS' DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS a/w LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO Petitioner	Case 01-RC-115842

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a bargaining unit of approximately 120 laborers employed by O&G Industries (O&G) a construction firm located in Connecticut, and its joint venture with Tutor Perini (collectively referred to as the Employer). The Employer contends that the petitioned-for single-employer unit is inappropriate and that, based on the parties' history of bargaining on a multi-employer basis, the only appropriate unit is a multi-employer unit. I find that the petitioned-for single-employer unit is appropriate and shall direct an election in that unit.

This petition in this case was filed under Section 9(c) of the Act. The parties were provided an opportunity to present evidence on the issues raised by the petition at a hearing held before a hearing officer of the National Labor Relations Board (the Board). I have the authority to hear and decide this matter

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

on behalf of the Board under Section 3(b) of the Act. I find that the hearing officer's rulings are free from prejudicial error and are affirmed; that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction; that the Petitioner is a labor organization within the meaning of the Act; and that a question affecting commerce exists concerning the representation of certain employees of the Employer.

Facts[2]

O&G is one of the largest construction firms in Connecticut. For many years O&G has been a member of two employer associations, the Connecticut Construction Industries Association, Inc. (CCIA) and Associated General Contractors of Connecticut (AGC), which represent numerous construction firms in the state and bargain with the Union on a multi-employer basis. O&G authorized CCIA to represent it in collective bargaining in 1987 and similarly authorized AGC to represent it in 2006.

CCIA and the Union are currently parties to a Heavy and Highway agreement covering laborers, while the AGC and the Union are currently parties to a Building Agreement covering laborers. Both agreements are Section 8(f) agreements and both are effective April 1, 2012 through March 31, 2015.[3] O&G, which formed its joint venture with Tutor Perini two years ago, is signatory to both agreements, as is Tutor Perini.

At some point after entering into the current agreements, the Union requested that the two Associations agree to convert the parties' 8(f) agreements to agreements covered by Section 9(a) of the Act. By letter dated November 29, 2012, CCIA responded that, while not opposed to discussing this question at contract renewal, CCIA was not in favor of pursuing such a change at that time.

Thereafter, according to the Union's attorney, the Union undertook a campaign to convert all of these contractual relationships to 9(a) relationships, either by voluntary recognition or a Board election. When O&G denied the same request, the Union filed the instant petition.

Positions of the parties

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[2] No witnesses testified at the hearing. All facts are based upon the parties' stipulations, documentary evidence, and the written "Declaration" of Raymond Oneglia, O&G's Vice-Chairman who previously served as president of CCIA and held various other positions as an officer and board member of CCIA, including chair of the negotiating committee in connection with labor negotiations with the Union.

[3] Consistent with Board law, the Employer does not contend that the 8(f) agreements are a bar to the instant petition.

The Employer, citing *Arbor Construction Personnel, Inc.*, 343 NLRB 257 (2004), asserts that the Board has rejected petitioned-for single-employer units in favor of multiemployer units. In that case, in which the multiemployer bargaining relationship was governed by Section 9(a), the Board held that the "single-employer presumption" may be overcome if there is evidence of an unequivocal intent by the single employer to be bound by group action, manifested either by participation in group bargaining or delegation of authority to the multiemployer group to engage in bargaining. The Employer asserts that the participation of O&G's vice chairman in multiemployer bargaining and O&G's delegation of authority to the two multiemployer associations evidences its intent to be subject to group action.

The Employer further asserts that in making unit determinations in these circumstances, the Board must balance two competing interests, the stable labor relations created by a long history of bargaining on a multiemployer basis, to which the Board gives great deference, and the right of employees to select their bargaining representative. The Employer asserts that where, as in this case, the employees are already represented by the petitioning union, and little will be accomplished by permitting them to vote for a union they already support, the interest in giving those employees the right to select their bargaining representative is less powerful than the interest in maintaining a stable bargaining relationship.

The Union, citing *Barron Heating & Air Conditioning, Inc.*, 343 NLRB 450 (2004), asserts that bargaining history is a factor in unit determinations, but not determinative, and that the relevant inquiry is whether the petitioned-for unit is appropriate.

Analysis and Conclusion

In *John Deklewa & Sons*, 282 NLRB 1375, 1377, 1385 (1987), the Board modified its approach to unit scope rules in 8(f) cases, holding that 8(f) agreements will not act as a bar to petitions pursuant to Section 9(c) or (e) and that, in processing such petitions, the appropriate unit normally will be "the single employer's employees covered by the agreement." With respect to multiemployer 8(f) situations, the Board abandoned the merger doctrine it had previously followed, under which, when a single employer joined a multiemployer association and adopted that association's collective-bargaining agreement, the single employer's unit "merged" into the multiemployer unit, and the requisite inquiry into majority support occurred in the multiemployer unit. Id. at 1379. "In so doing, we do not imply that multiemployer associations and multiemployer bargaining units are no longer appropriate in the construction industry. Rather, we hold that the employees of a single employer cannot be precluded from expressing their representational desires simply because their employer has joined a multiemployer association. Id. at 1385, fn. 42.

The Board further clarified its approach to unit determinations in situations involving 8(f) agreements in *Barron Heating & Air Conditioning, Inc.*, supra. The Board noted the well-settled principle that the Act does not require that a unit for bargaining be the only appropriate unit or even the most appropriate unit, and that the Board's procedure for determining an appropriate unit under Section 9(b) is first to examine the petitioned-for unit. If that unit is appropriate, the inquiry ends. The Board rejected the employer's argument in that case, based on *Deklewa*'s reference to the appropriateness of a unit of employees covered by an 8(f) agreement, that if the "contract unit" is appropriate, an election should be directed in that unit rather than in the more comprehensive unit sought by the petitioning union in that case, even though the more expansive unit might also be appropriate:

> While it is clear that bargaining history is a factor to be weighed and considered in determining whether a petitioned-for unit is appropriate, we reject the Employer's reading of *Deklewa*. In *Deklewa*, the Board announced new rules to apply to 8(f) agreements; the Board, however, did not jettison its long-standing procedure that, in determining the appropriate unit under Section 9(b), it will first examine the petitioned-for unit. The very language that the Board used in *Deklewa*, "the appropriate unit *normally will be* the single employer's employees covered by the agreement" (emphasis added) clearly conveys that the 8(f) contractual unit is not necessarily conclusive as to the determination of the appropriate unit. See *Alley Drywall, Inc.* 333 NLRB 1005, 1007 (2001)("Bargaining history pursuant to 8(f) agreements is not the conclusive consideration in determining whether a petitioned-for unit is appropriate.")...

Although *Barron Heating and Air Conditioning* involved a petitioned-for unit that was more comprehensive than the contractual 8(f) unit, the Board's reasoning should apply with equal force where, as here, the petitioned-for unit is less comprehensive than the contractual 8(f) unit.

Moreover, *Arbor Construction Personnel, Inc.*, supra, relied on by the Employer, is not controlling. In that case, the Board rejected a petitioned-for single-employer unit, in light of the existence of a controlling history of multiemployer bargaining. In that case, unlike here, at the time the petition was filed, the parties had changed their relationship from one governed by Section 8(f) to one governed by Section 9(a). "Where an employer is part of a multiemployer bargaining relationship governed by Section 9(a), a petition for a single-employer unit will not be entertained." Id. at 257-258. See *Casale Industries*, 311 NLRB 951, 952 (1993).

An employer-wide unit is presumptively appropriate under the Act. *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. at 7, f.n. 16 (2011); *Greenhorne & O'Mara, Inc.*, 326 NLRB 514, 516 (1998). Other than the assertions made above, the Employer proffered no evidence or claim that the petitioned-for employees do not share a community of interest.

Accordingly, I find that 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 laborers employed by the Employer, but excluding all other employees, 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 **Connecticut Laborers' District Council and its affiliated Local Unions, a/w Laborers' International Union of North America, AFL-CIO**. 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 **November 22, 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.nlrb.gov,**[4] by mail, or by facsimile transmission at 617-565-6725. To file the eligibility list electronically, go to the Agency's website at www.nlrb.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.

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

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

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 November 29, 2013. The request may be filed electronically through the Agency's website, www.nlrb.gov, but may not be filed by facsimile.

DATED: November 15, 2013

Jonathan B. Kreisberg, Regional Director
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