

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

KINGS READY MIX INC.
Employer

and

Case No. 29-RC-119421

BUILDING MATERIAL TEAMSTERS,
LOCAL 282, a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS
Petitioner

DECISION AND DIRECTION OF ELECTION

Kings Ready Mix Inc. (“the Employer”) is an employer in the construction industry, specifically engaged in mixing, delivering and pouring concrete at various construction sites in the New York City area. As described in more detail below, it joined a multi-employer group called the Tri-State Commercial Association (“the Association”) which has had a collective bargaining relationship with a labor organization called Local 17-18, United Productions Workers Union (“Local 17-18”).¹ On December 20, 2013, the Building Material Teamsters, Local 282, affiliated with the International Brotherhood of Teamsters (“the Petitioner”) filed a petition under Section 9(c) of the National Labor Relations Act (“the Act”), seeking to represent for collective-bargaining purposes approximately 40 truck drivers employed by the Employer. However, the Employer initially challenged the appropriateness of the petitioned-for unit on two grounds. First,

¹ Although the recognized, incumbent union, Local 17-18 was notified of the instant case, it chose not to participate in the hearing. A letter from Local 17-18 to this effect, which the Hearing Officer inadvertently omitted from the record, is hereby admitted as Board Exhibit 3, and a copy is attached to this Decision. Local 17-18 has not moved to intervene in this proceeding.

the Employer contended that the bargaining unit must be a multi-employer unit, encompassing all employees of the Association's members. Second, the Employer contended that other classifications of employees (yardmen, dispatchers, mechanics, batchers and phone operators) must be included along with the petitioned-for drivers.

A hearing on these unit issues was held before Henry Powell, a Hearing Officer of the National Labor Relations Board ("the Board"). In support of its position, the Employer called two witnesses to testify: Michael Falcone (corporate secretary-treasurer)² and Robert Bruzzese (vice president and general manager). The Petitioner did not call witnesses to testify.

Subsequently, in its post-hearing brief, the Employer withdrew its position regarding the non-driver classifications. Thus, the instant Decision deals only with the unit scope issue, i.e., single-employer versus multi-employer.

Pursuant to Section 3(b) of the Act, the Board has delegated authority in this proceeding to the undersigned Regional Director.

Based on the record as a whole, I reject the Employer's contentions regarding the multi-employer unit. I will therefore direct an election in the petitioned-for unit, limited to drivers employed by Kings Ready Mix Inc.

Multi-employer association issue

As noted above, the Employer mixes, delivers and pours concrete at various construction sites in the New York City area. The Employer currently has four plants, located at: MacDonald Avenue in Brooklyn, Johnson Avenue in Bushwick (Brooklyn),

² The transcript inadvertently identified Michael Falcone as "Robert" Falcone.

Henry Street in Inwood (Nassau County) and Derick Court in Staten Island.³ It also has an administrative office on 3rd Avenue in Brooklyn. There is no dispute that the Employer is engaged primarily in the construction industry within the meaning of Section 8(f) of the Act. The following facts are based on the testimony of Michael Falcone, the Employer's corporate secretary-treasurer, and on the corresponding documents.

Falcone testified that in 1999, the Employer joined the Tri-State Commercial Association ("the Association"), a multi-employer association that already had a collective bargaining relationship with Local 17-18. In March 2000, the Employer agreed to follow the Association's three-year contract with Local 17-18 (1999-2002), with certain modifications. (See Employer Exhibit 3(a) and (b).) Thereafter, the Employer entered into a series of three-year agreements with Local 17-18, i.e., for the years 2002-2005, 2005-2008, 2008-2011 and 2011-2014. The most recent Association-Local 17-18 contract and the modification documents signed by this Employer and Local 17-18 appear as Employer's Exhibit 7(a), (b) and (c).⁴

The record clearly indicates that the employees have never chosen to be represented by Local 17-18. The Employer conceded at the hearing that there was neither an election, nor a presentation of authorization cards, nor any other showing of majority support for Local 17-18, at any time from 1999 to the present. The Employer conceded, both at the hearing and in its post-hearing brief, that its employees came to be represented

³ At the hearing, the Petitioner amended its petition to reflect the correct plant locations. The undersigned will also correct the relevant information in the "commerce facts" in paragraph 2 of the Findings below.

⁴ The Petitioner's petition mistakenly indicated the current contract as expiring in 2016 rather than 2014. This mistake is completely immaterial. I hereby reject the argument in the Employer's post-hearing brief that this mistake constitutes a basis for dismissing the petition.

by Local 17-18 by virtue of the fact that the *Employer* chose to join the multi-employer Association. Despite the Employer's claim to the contrary, Local 17-18 was never shown to have achieved majority status under Section 9(a) of the Act.

The Employer's attorney seems to misunderstand a central tenet of federal labor law, i.e., that *employees* must choose whether to be represented by a union for collective-bargaining purposes. It is not up to their employer to choose for them. In fact, an employer who recognizes a union as the collective-bargaining representative of employees who have *not* shown majority support for the union clearly runs afoul of Section 8(a)(2) of the Act. Section 8(f) of the Act creates only a *limited* exception to this rule, by allowing construction-industry employers to enter into so-called "pre-hire agreements", without regard to whether the labor organization had established majority support among the relevant employees. However, Section 8(f) does not bind construction employees forever to representation by that particular union. For example, a contract executed pursuant to a Section 8(f) relationship will not have bar quality.

Under prior Board law, if a construction-industry employer joined a multi-employer association for collective bargaining purposes, the single-employer unit was deemed to have "merged" with the multi-employer unit. However, in John Deklewa et al., d/b/a John Deklewa & Sons, 282 NLRB 1375 (1987), the Board rejected the merger doctrine, noting that it unduly limited employee free choice:

Assuming that the merger doctrine fosters a certain amount of stability in labor relations, we believe that in the construction industry the cost of achieving that stability in terms of employee free choice is too high. As we have explained, in this industry the merger doctrine can operate to bind a single employer and its employees to full 9(a) status without providing the employees any opportunity to express their representational preferences because Section 8(f) eliminates majority status as a prerequisite for signing a contract.... [W]e 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., 282 NLRB at fn. 42. Accordingly, the Board in Deklewa announced that, for election purposes, “single employer units will normally be appropriate.” Id., 282 NLRB at 1385. *See also* Maramount Corp., 310 NLRB 508 (1993).

The record in this case clearly indicates that the Employer started its collective-bargaining relationship with Local 17-18 (via the Association) under Section 8(f) of the Act, and that the 8(f) status never changed. Given the Board’s clear ruling in Deklewa, there is no basis for precluding the employees of the Employer from expressing their representational desires in a single-employer unit. Thus, I reject the Employer’s contention that the only appropriate unit would be the Association-wide, multi-employer unit. Furthermore, the issue of whether this Employer actually bound itself to collective-bargaining agreements negotiated by the Association with Local 17-18 need not be addressed herein.⁵ Whether or not the Employer did so, its employees clearly have a right under Deklewa to make their own choice regarding union representation, notwithstanding the Employer’s long history of bargaining with Local 17-18 via the Association.

Accordingly, I will direct an election below in a unit of drivers employed by Kings Ready Mix Inc., not in an Association-wide unit.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, the undersigned finds and concludes as follows:

⁵ The case cited in the Employer’s post-hearing brief, The Kroger Co., 148 NLRB 569 (1964), did not involve an employer in the construction industry, and therefore has no bearing on the issue presented here.

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that Kings Ready Mix Inc. is a domestic corporation with its principal corporate office at 703 Third Avenue in Brooklyn, New York, and four concrete plants located in Brooklyn, Staten Island and Inwood, New York. During the past year, which period represents its annual operations generally, the Employer purchased and received at its New York facilities goods and materials valued in excess of \$50,000 directly from points outside the State of New York.

Based on the foregoing, I find that the Employer is engaged in commerce within the meaning of the Act. It will therefore effectuate purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization as defined in Section 2(5) of the Act. The Petitioner claims to represent certain employees of the Employer.

4. A question concerning 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. As discussed *supra*, I find that the following employees constitute a unit appropriate for the purposes of collective bargaining:

All ready-mix drivers employed by Kings Ready Mix Inc. at its facilities located at 692 McDonald Avenue, Brooklyn, NY; 303 Johnson Avenue, Brooklyn, NY; 16 Derick Court, Staten Island, NY; and 280 Henry Street, Inwood, NY; but excluding office clerical employees, sales employees, guards and supervisors defined in Section 2(11) 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 they wish to be represented for purposes of collective bargaining by the Building Material Teamsters, Local 282, affiliated with the 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.

A. 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 a 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 who are employed in the unit 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.

B. 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). This 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 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, Two MetroTech Center, 5th Floor, Brooklyn, New York 11201, on or before **February 4, 2014**. 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.nrlb.gov,⁶ by mail, or by facsimile transmission at (718) 330-7579. 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, unless the list is submitted by facsimile or electronic filing, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. 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 three (3) working days prior to 12:01 of the date 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,

⁶ To file the eligibility list electronically, go to www.nrlb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **February 11, 2014**. The request may be filed electronically through E-Gov on the Agency's website, www.nlr.gov,⁷ but may **not** be filed by facsimile.

Dated: January 28, 2014.



James G. Paulsen
Regional Director, Region 29
National Labor Relations Board
Two MetroTech Center, 5th Floor
Brooklyn, New York 11201

⁷ To file the request for review 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. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter, and is also located under "E-Gov" on the Agency's website, www.nlr.gov.