

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

**FUTURE ENVIRONMENTAL
INCORPORATED**

Employer

and

Case 13-RC-124781

**INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO**

Petitioner

REGIONAL DIRECTOR'S DECISION, DIRECTED ELECTION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, (“the Act”), a hearing was held on March 31, 2014, and consecutive days thereafter, before a hearing officer of the National Labor Relations Board (“the Board”). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated to the undersigned its authority in this proceeding.¹

I. ISSUES

The instant petition raises two issues: the composition of the unit and the eligibility of Tim Henderson. The Petitioner seeks to represent employees in the following unit: “all full-time and regular part-time drivers/equipment operators currently employed at the Employer’s facility located at 22365 South Center Road, Frankfort, Illinois excluding all laborers, office clerical employees, and guards, professional employees and supervisors as defined by the Act.” There are seven individuals in the petitioned-for unit comprised of four individuals classified by the Employer as “driver/operators” and three individuals classified by the Employer as

¹Upon the entire record in this proceeding, I find:

1. The hearing officer’s rulings, made at the hearing, are free from prejudicial error and are hereby affirmed.
2. The parties stipulated and I find 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 herein.
3. The International Union of Operating Engineers AFL-CIO (“the Petitioner”) is a labor organization within the meaning of the Act.
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. There is no collective-agreement covering any of the employees in the unit the Petitioner seeks to represent or the unit that the Employer proposes, and the parties do not contend that there is any contract bar to this proceeding.

“laborer/hazard tech” employees. The Petitioner maintains that these employees share a community of interest including the fact that they are primarily assigned to operate pieces of equipment used for moving earth. Specifically this equipment includes the hydro excavator, super sucker, skid steer also know as a Bobcat, end loader also known as a pay loader, track hoe, bulldozer, boom truck, mini excavator and long stick but excluding the liqui vac truck. The Petitioner further maintains that Tim Henderson is not a supervisor, manager or agent of the Employer and is therefore eligible to vote.

The Employer takes the position that the petitioned-for unit is arbitrary in that it seeks to include only three of its forty-four laborers and therefore constitutes an unlawful fractured unit. The Employer maintains that the only appropriate unit would include all its driver/operator and laborer employees working at its Frankfort, Illinois facility, comprised of forty-eight individuals². The Employer also takes the position that driver/operator Tim Henderson should be excluded from the bargaining unit because he is a statutory supervisor, agent and/or manager of the Employer.

II. DECISION

Based on the entire record in this proceeding and the parties’ arguments set forth in their post-hearing briefs, as discussed below, I find that the petitioned-for unit is fractured and that the laborers the Petitioner currently seeks to exclude must be included in the unit because they share an overwhelming community of interest with the petitioned-for employees. Additionally, I also find that because the evidence regarding Tim Henderson’s purported supervisory status is inconclusive, he will be permitted to vote subject to challenge.

Accordingly, **IT IS HEREBY ORDERED** that an election be conducted under the direction of the Regional Director for Region 13 in the following appropriate bargaining unit:

All full-time and regular part-time drivers/equipment operators and laborers currently employed at the Employer’s 22365 South Center Road, Frankfort, Illinois facility, excluding office clerical employees, guards, professional employees and supervisors as defined by the Act.

III. STATEMENT OF THE FACTS

Future Environmental is in the business of providing cleaning, disposal and emergency response services to the petroleum industry.³ The Employer’s industrial division is responsible for a wide variety of projects from cleaning oil tanks to responding to emergency oil spills. The division is headquartered in Frankfort, Illinois and services the Chicago-land area. There are approximately 58 employees who work in this division out of the Employer’s Frankfort facility. The parties stipulated that 10 of these individuals are supervisors within the meaning of the Act,

² While there was much discussion on the record regarding a multi-plant unit, the parties stipulated that the unit would be limited to a single location encompassing only the employees at the Employer’s Frankfort, Illinois location.

³ Contrary to the Petitioner’s statement in its brief, the parties did not stipulate that the Employer is engaged in (business) in the construction industry.

4 are classified as “driver/operators” and 44 are classified as “laborer/hazard tech employees. Steve Lempera is President and Dan Quick is Vice President of the Employer's operations.

The Union seeks to represent all the Respondent’s drivers/operators and three additional employees whom the Employer classifies as laborers employed in the industrial division in Frankfort, Illinois. The Petitioner argues that its petitioned-for unit is appropriate because these selected employees have certain skills and abilities that are required of them to operate heavy equipment such as the hydro excavator, super sucker, skid steer also known as a Bobcat, end loader also known as a pay loader, track hoe, bulldozer, boom truck, mini excavator, and the long stick but excluding the liqui vac truck.⁴

A. DRIVERS/OPERATORS

The Employer’s driver/operators are required to possess Commercial Drivers Licenses (CDLs) because they are responsible for driving the heavy equipment identified above from the Employer’s Frankfort location to their assigned client’s address. CDLs are required by the Department of Transportation to move heavy equipment on open roads. CDLs are not required to actually operate heavy equipment on private roads or work sites. Typically driver/operators begin their day by first reporting to the Frankfort facility about 6:00 a.m. to receive their daily work assignment which is posted near the time clock. Their work assignment informs them where they will report for the day and which truck (equipment) they will operate. Driver/operators must conduct a pre-trip inspection of the equipment before operating it and complete a daily mileage log. The Employer’s driver/operators are not required to possess any specialized education, certificates or licenses, apart from a CDL. The Employer has a number of concurrent projects and very seldom do the driver/operators actually work alongside one another on the same project. However, driver/operators do regularly work with crews of the Employer's laborer employees at the various work sites they are assigned.

The driver/operator drives his equipment alone to the work site. A project supervisor and a crew of laborers accompany him to the site. They ride in a separate vehicle and meet the driver/operator at the client’s location. Once on-site, the project supervisor meets with the client to learn the needs of the client. The project supervisor deals directly with the client and receives direction and orders from the client regarding expectations for the day. The project supervisor then relays this information to the driver/operator and to the crew of laborers.

The driver/operator’s daily contact and work interchange with the laborers depends largely upon the project or type of equipment they are operating. For example, both a

⁴ Record evidence shows that driver/operators and laborers, including both the group of laborers the Petitioner seeks to include in the unit as well as the remaining group of laborers the Petitioner seeks to exclude regularly operate the liqui vac truck in their duties. The Employer uses the liqui vac truck to suction hazardous materials such as hydrocarbons, crude oil and other gases from hazardous spills. Employees are not required to have any certain qualification or certificate to operate this machinery. But, per OSHA regulations, all laborers and drivers/operators are required to attend a yearly OSHA Hazmat Training. The liqui vac truck is not to be confused with the hydro excavator, which is both work and equipment the Employer outsources to a company called Badger. Excavator equipment is used for digging. The liqui vac truck is used for vacuuming (i.e. suctioning), and while the Employer routinely uses the liqui vac truck to safely suction and remove liquids, the Petitioner excludes this equipment from its list of "heavy equipment".

driver/operator and a laborer typically work together in order to safely operate the super sucker. The super sucker is used to vacuum excess oil and other liquids, and it has a 50 foot hose that must be attached before operation. The laborers are responsible for hooking-up the hose to the super sucker truck, and the driver typically helps with this task. Once the hose is connected to the vehicle and they are ready to begin the vacuuming process, the laborers remain at the end of the hose opposite the driver to ensure proper suctioning. The driver/operator must remain near the truck's cabin for safety precautions as he must be readily available to turn the machine off should an emergency arise. If the laborer needs to communicate with the driver/operator during this process, he will make a hand gesture to the driver/operator to turn-off the vehicle. Although the Petitioner excluded the liqui vac truck from the list of heavy equipment it used to define the group of employees it seeks to represent, record evidence showed that driver/operators, as well as laborers, regularly operate this piece of equipment. As previously noted, the liqui vac truck is used by the Employer's drivers and operators for vacuuming/suctioning liquid hazardous materials. Employees are not required to have any specialized qualifications or certificates to operate this machinery. However both the Employer's laborers and driver/operators who use this equipment are required to attend annual OSHA hazardous material training.

The Employer estimated that 95% of its Industrial Division projects did not involve the use of heavy equipment. When not operating equipment, driver/operators may perform tasks typically performed by laborers. For example driver/operator John Hawkins testified that when he's not operating equipment he does "labor, carrying hoses, moving pumps, just anything they ask". Driver/operator Mike Hamilton did not dispute the fact that John Hawkins performs laborer tasks when not operating equipment however Hamilton testified that the only "laborer" work he performs when not operating heavy equipment is hooking up and disconnecting hoses from his equipment.

Breaks are taken on an as needed basis. The driver/operator never leaves his equipment running unattended. If he needs a bathroom break he will ask the project supervisor to cover for him, or if a laborer is available, he will ask a laborer. Lunch breaks are handled differently depending upon the project. For example, as of the hearing, the Employer was cleaning up an emergency oil spill in Griffith, Indiana, and on that particular project the client ordered lunch and Operations/Project Manager Kevin Houston blew an air horn to make all the driver/operators and laborers working at the site aware that it was lunch time. For smaller scale projects, both driver/operators and laborers bring their lunch with them and use their common judgment to decide a good stopping point for lunch. There is no set quitting time. The client instructs the project supervisor who in turn advises the driver/operators and laborers on site when their job is satisfactory and when they are free to leave for the day.

For projects that last only a day or so, the driver/operator returns his equipment to the Frankfort location where he reports the following morning for his next assignment. For projects lasting at least five or more days, the driver/operator leaves his truck on-site at the client's location and reports directly to the job site the following morning.

B. LABORERS

The Employer employs roughly 44 employees classified as laborers including the three employees whom the Petitioner seeks to include in the unit-- Tom Hawkins, Derek Randall and Erick Ringbauer. Laborers perform a range of tasks that include “running jobs” (driving the Employer’s equipment), sandblasting, painting, cleaning tanks, preparing the hoses, manning the pump, “fire watching” (serving as the person responsible for monitoring unexpected fires), “shooting grade” (measuring the grade’s elevation) and operating the liqui vac. Like driver/operators, laborers are not required to possess any special certification or training; but, like all employees employed by the Respondent including the driver/operators, they are required to attend yearly safety training sessions, which include the yearly OSHA Hazmat training, CPR training, confined space training and fire watch training.

The Petitioner seeks to represent only three of the Employer’s laborers. All three employees testified during the hearing as to their duties and responsibilities. Tom Hawkins applied for a laborer position with the Employer and has been employed in that position for three years. As of the hearing, he was assigned to work an oil spill in Griffith, Indiana, and, according to his testimony, he has operated the front end loader, excavator and skid steer (Bobcat) at the Griffith site. Hawkins testified that he has used the loader to shuttle clay, wood chips and other supplies back and forth at the Griffith site. Hawkins does not have a CDL and, therefore, unlike the driver/operators but like all of the remainder of the Employer’s laborers the Petitioner seeks to exclude, he cannot drive or operate the Employer’s heavy equipment⁵ on the open road. Each day, prior to operating his assigned equipment, Hawkins conducts a pre-trip inspection to ensure that the equipment is in acceptable working condition. Hawkins testified that he has observed other laborers including Tony Guerrero, Victor Martinez, Christian Marvin, and Gaby Alfaro operate the heavy equipment identified by the Petitioner in its Petition. In the course of his employment Hawkins also performs tasks performed by the group of laborers/haz tech employees the Petitioner seeks to exclude from the unit including operating the liqui vac truck, hooking up hoses to various pieces of equipment, utilizing the Bobcat to move materials and “shooting grade” (measuring piles of dirt using a stick and a laser). Tom Hawkins was the laborer assigned to “shoot grade” when he worked a job with his father, John Hawkins, the assigned driver/operator at a job site in Lockport.

Derek Randall is a two-year employee who applied for the position of and was hired as a hazardous technician (laborer). Randall testified that as a laborer he performed “grunt work” which included cleaning inside tanks, keeping the job site clean and loading and unloading materials and supplies. About fifteen months into his employment, he took it upon himself to get a CDL and immediately informed Ken Houston⁶ of his driver’s permit. Houston paired Randall with driver/operator Mike Hamilton for about two months during which time Hamilton trained him on the liqui vac truck, super sucker and hydro vac. Soon after Randall received his CDL, the Employer allowed him to operate these vehicles without additional training. But at no time,

⁵ Because Tom Hawkins does not possess a CDL he is not qualified to actually drive heavy equipment to a job site or operate heavy equipment on the open road. The record did not state who was responsible for driving the equipment to the job site which Hawkins would eventually operate at the site. Hawkins testified that he typically drove his own personal vehicle to the job site.

⁶ Ken Houston serves as one of the Employer's project manager's and is a stipulated 2(11) supervisor.

did anyone from the Employer inform him that his job classification would change from a laborer to a driver/operator. He also received no additional pay for his “extra” duties and no additional benefits. Because Randall possesses a CDL, he is responsible for driving the equipment he is assigned to the job site. Before operating the Employer’s equipment Randall completes a pre-trip inspection. When he is not operating equipment Randall continues to perform “typical labor work with a shovel and pressure washer.”⁷

Erik Ringbauer is the least senior of the three laborers. He began his employment sometime in September 2013. Ringbauer possesses a CDL and primarily operates the super sucker. He begins his day by reporting to the Frankfort location for his daily assignment where he conducts a pre-trip inspection of the super sucker. He drives the super sucker alone to the job site, and his project supervisor and crew of laborers meet him at their assigned location. For assignments lasting multiple days, he leaves the super sucker on-site overnight and reports directly to the client’s location the next day. Ringbauer testified that when he operates the super sucker, laborers typically hook up the hoses and he remains in the truck to monitor the pressure gauges. If he needs a quick bathroom break either a project supervisor or laborer will monitor the gauges during his brief absence from the machine. Ringbauer estimated that he operated the Employer’s heavy equipment 60 – 75% of his time. The remaining time he operates the liqui vac truck and performs other “normal” laborer duties such as setting up the work site, and hooking up and moving hoses into position.

C. FREQUENCY OF USE/OPERATION OF “HEAVY EQUIPMENT” BY THE EMPLOYER’S EMPLOYEES

The Petitioner seeks to represent the four driver/operators and three laborers, in part, because of the “equipment” that they operate (hydro excavator, super sucker, skid steer also know as a Bobcat, end loader also known as a pay loader, track hoe, bulldozer, boom truck, mini excavator and long stick). Six of these individuals testified regarding their use and frequency of use of this equipment.

Specifically, four-year driver/operator John Hawkins testified that over the course of his employment, he has spent less than 5% of his time operating the end loader, hydro excavator, super sucker, mini excavator or long stick. Only 10-15% of his time has been spent operating the track hoe, skid steer or dozer. As noted previously, when he is not performing his “driver/operator” duties, he has spent the remainder of his time doing “laborer” work such as carrying hoses and cleaning trailers.

Similarly, driver/operator Mike Hamilton testified that he does not operate the long stick, track hoe, boom truck, mini excavator, pay loader, or front end loader. He testified that he spends about 50% of his time operating the skid steer. Hamilton testified that he does not perform laborer work during his down time, however, the record does not specify what other tasks Hamilton performs when not operating the skid steer.

Putative supervisor Tim Henderson has only been employed by the Employer for about a year. As of the hearing, he was working the oil spill in Griffith, where he occasionally operates

⁷ Randall estimated that since “late 2013” he only performs typical labor tasks about 10 – 15% of his time.

the long stick, the loader and the skid steer. He testified that he operates equipment about 80%-90% of his time on the Griffith project, but the record is unclear as to which of these pieces of equipment occupies most of his time.

Laborer Tom Hawkins testified that he has little to no experience operating the long stick or skid steer but, spends about 45-55% of his time operating the front loader. Laborer Derek Randall has never operated the long stick, bulldozer, boom truck, or mini excavator, and laborer Erik Ringbauer primarily operates the super sucker 60 – 75% of his time.

As noted previously, Tom Hawkins has observed other laborers operating this equipment. The Employer estimated that including the seven individuals the Petitioner seeks to represent, approximately 20 – 30 employees in the Industrial Division operate the equipment listed by the Petitioner.

D. COMMON TASKS AND WORKING CONDITIONS SHARED BY ALL OF THE EMPLOYERS DRIVERS & LABORERS

In addition to the three laborers the Petitioner seeks to represent, the record demonstrated that at least a portion of the Employer's other laborer employees operate equipment commonly operated by the drivers/operators. Additionally, both groups of employees operate the Employer's liqui vac truck. Further, the record shows that driver/operators perform tasks regularly performed by laborers, such as moving hoses, setting up the work area and Porta Potties.

Also both classifications punch-in about 6:00 a.m. using the timecards located at the Frankfort facility and are subject to the same dress code. If they are assigned to a project that will last five or more days they report directly to the client, and will record their time on a sheet of paper and give that information to the Employer at a later date. Laborers and driver/operators have separate locker rooms separated by a shared common area and the restrooms are located on the laborers' side.⁸ All employees participate in the same safety programs, confined space training, hazardous materials training course, CPR, "firewatch" and "OQ"⁹ training. They receive the same yearly safety trainings and comparable pay. Driver/operators on average make \$25 per hour and laborers make about \$23. Both are eligible for overtime and receive incentive pay based on their performance. They report to the same project supervisor, report to the same pre-job meeting to get their daily assignments and discuss safety issues, eat lunch together, and their quitting times are the same.

E. PROJECT SUPERVISORS

The Employer employees 11 project supervisors including Tim Henderson. As will be further discussed below, project supervisors are the Employer's first line of contact with clients at the work site. Project supervisors do not have authority to hire, fire, schedule or discipline

⁸ Two of the laborers the Petitioner seeks to represent, Derek Randall and Eric Ringbauer, share a locker room with the driver/operators. The third, Tom Hawkins, shares a locker room with the laborers.

⁹ Tom Hawkins explained that "OQ" training is "Operator Qualified" training that all the Employer's laborers and driver/ operators are required to have in order to safely work around pipelines.

employees. Project supervisors report to project managers at the work site. The parties stipulated that project managers are 2(11) supervisors. The Employer has split project supervisors into two categories based on their level of experience. The Petitioner stipulated during the hearing that with the exception of Henderson, the remaining 10 project supervisors are statutory supervisors under the Act because of their “ability to responsibly direct employees where the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.” The Employer did not present any evidence showing that project supervisors are personally responsible for an employee’s failure to perform. There is also no written job description in the record for project supervisors, and there is no documentary or anecdotal evidence showing that they exercise the authority to hire, fire, transfer, promote, layoff or recall workers. The Employer presented project supervisor and stipulated 2(11) John Jerbis to discuss his duties. And while he testified that he would be the person to “deal” with an employee who is poorly performing, he personally has never “dealt” with any performance issues, and the Employer did not present any evidence showing other project supervisors disciplining an employee or being told that they had the authority to discipline.

Project supervisors can order material necessary for the job or request Ken Houston or any one of the other project managers to order on their behalves. Jerbis testified that the “front office” orders his material. Jerbis simply tells Ken Houston or Dan Quick what he needs, and either of the two will order the material. Quick testified that in his experience project supervisors complete work orders ranging in value, ensure that the employees take breaks throughout the day, ensure the employee assigned to fire watch duty has the requisite fire extinguisher, and make sure that their crew (drivers/operators and laborers) is performing their duties and responsibilities.

Witnesses for both the Petitioner and Employer described a project supervisor as the front line point of contact for the client who directly addresses any of the client’s needs. Based on the project supervisor’s conversations with the client, he implements the project’s “scope of work” for the day and communicates this to their crew. But, the project supervisor does not control the start or finish times of any project; the client does. Also, Ken Houston is responsible for dispatching the workers and either Houston or Dan Quick schedules the workers.

F. TIM HENDERSON’S CONVERSION TO PROJECT SUPERVISOR

Henderson began his career with the Employer in May of 2013. He was hired as a driver/operator and his rate of pay was \$25 per hour. In November of 2013, Henderson asked Dan Quick for a raise. He testified that he could not afford to live off his then current salary and that Quick agreed to give him the raise if he “[stepped] it up a little bit.” Henderson testified that he did not know what Quick was referring to and understood Quick’s comment to mean that perhaps he could simply pick-up the pace of his work. Quick gave Henderson a \$5 raise and, according to the Employer, it promoted him to the project supervisor position. With this raise, Henderson became the highest paid employee in the division next to project supervisor¹⁰ and stipulated 2(11) Supervisor John Jerbis.

¹⁰ With regard to the hourly wages of the ten stipulated project supervisors, the record shows the following: Fred Dilbeck, \$24/hr; John French, \$26/hr; John Jerbis, \$30/hr; Nathan Brown, \$18/hr; William Clark, \$21/hr; Mike Fitzpatrick, \$23/hr; Jim Gaspard, \$21/hr; Matt Grzeskowiak, \$23/hr; Brian Stotts, \$20/hr; Mike Tadey, \$22/hr.

After the \$5 raise went into effect, Henderson has served as a project supervisor on two projects beginning in January, 2014. Sometime in January 2014, he was assigned to a project in Schererville, Indiana, along with project manager and engineer Lana Nesheiwat.¹¹ Nesheiwat did not regularly visit the actual project site where the work was performed. While she was “on-site”, she stayed mostly inside the employee break room and away from the work area. Therefore, she depended heavily upon Henderson and referred to him in her testimony as her “right hand.” On this particular project, the Employer outsourced its hydro excavation service to a company called Badger, and Badger’s employees exclusively operated the hydro excavator equipment. The subcontracted employees reported to Henderson, and he in turn was responsible for informing Nesheiwat of how many subcontracted employees were needed for the day and night shifts.

Employees also testified to working under Henderson as their project supervisor. Tom Hawkins testified that he worked on two projects where Henderson was listed as the project supervisor. Similarly, John Hawkins testified that Henderson was his supervisor on two projects. John worked under Henderson on a project in Griffith, Indiana, and Henderson briefly served as John’s project supervisor on a project in Hartsdale, Indiana.

Henderson also has the authority to order material and other equipment to ensure the project is completed on time. Project Manager Lana Nesheiwat testified that Henderson has the authority to order material if the purchase falls within the normal scope of the project. She described the normal scope of a project to include typical expenses that are needed in order to complete the job. If, however, Henderson needs to order material outside the scope, then prior approval was required. The Employer presented a few examples of where Henderson has signed off on material ranging in value from \$3,000 to approximately \$40,000, and other documents where he is listed as the project supervisor. But, the Employer presented no evidence of him having the authority to hire, fire, transfer, promote, layoff or recall workers; and, admittedly, Henderson cannot bid on contract work.

IV. LEGAL ANALYSIS

The Petitioner seeks to represent all full-time and regular part-time drivers/equipment operators employed by the Employer at its Frankfort, Illinois facility including three employees whom the Employer has classified as laborers but excluding all other laborers who are also employed at the same location. The Petitioner maintains that this constitutes a readily identifiable group of employees who share a community of interest and is therefore an appropriate unit. The Employer contends that this is not an appropriate unit because it fractures the unit into an arbitrary segment of what would otherwise be an appropriate unit, a wall-to wall unit comprised of all driver/operators and laborers employed at its Frankfort, Illinois location. As such, the Employer bears the burden of demonstrating that the employees the Petitioner seeks to exclude share an overwhelming community of interest with the petitioned-for unit. As discussed below, I find that the Employer has met this burden, that the record evidence as a whole establishes that the unit sought by the Petitioner’s unit is fractured and that the excluded

¹¹ The parties stipulated that Nesheiwat is a 2(11) supervisor.

laborers must be included in the unit because they share an overwhelming community of interest with the petitioned-for unit.

A. THE PETITIONED-FOR UNIT IS INAPPROPRIATE BECAUSE IT ARBITRARILY EXCLUDES THE LABORERS WHO SHARE AN OVERWHELMING COMMUNITY OF INTEREST WITH THE RECOMMENDED UNIT EMPLOYEES

The Board's decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011) sets forth the principles applicable in a case such as this in which a party, the Employer herein, contends that the smallest appropriate bargaining unit must include additional employees or job classifications beyond those in the petitioned-for unit. Using the principles and analysis set forth in *Specialty Healthcare*, I will first assess whether the petitioned-for unit is an appropriate bargaining unit, in other words, whether they constitute a "readily identifiable group" which shares a community of interest using the traditional criteria. *Specialty Healthcare, id.*, slip op. at 11 fn 25; *Odwalla, Inc.*, 357 NLRB 132 (2011). Traditional community of interest factors analyze: similarity in employee skills, duties, and working conditions; centralized control of management and supervision; functional integration, including employee interchange; geographic separation of facilities; collective-bargaining history; extent of union organization, and employee choice. In the present case, the evidence establishes that employees in the petitioned-for unit share a community of interest under the Board's traditional test sufficient to constitute a readily identifiable group. Thus, they all operate certain equipment of the Employer at least as a portion of their job duties; all except one of the seven possess a CDL and share a locker room; all report to the same duty station, absent those exceptional times when they are assigned projects that last more than five days; receive comparable benefits and wages; report to work at the same time at about 6:00 a.m.; and share common supervision.

The record having established that employees included in the petitioned-for unit share a community of interest, the burden then lies with the Employer in this case to demonstrate that the additional employees they seek to include, the additional 41 laborers employed by the Employer share an "overwhelming community of interest" with the petitioned for employees such that there "is no legitimate basis upon which to exclude them" from the unit because the traditional community of interest factors "overlap almost completely". *Specialty Healthcare*, slip op. at 11-13 and fn. 28 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F. 3d 417, 421, 422 (D.C. Cir. 2008); *Odwalla, Inc., supra*. Employees inside and outside a proposed unit share an overwhelming community of interest when the proposed unit is a "fractured unit." *Supra*, slip op. at 13. A petitioner cannot fracture a unit, seeking representation in "an arbitrary segment" of what would be an appropriate unit. *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999)

B. THE EVIDENCE ESTABLISHES THAT THE PETITIONED-FOR UNIT IS FRACTURED AND THAT THE LABORERS SHARE AN OVERWHELMING COMMUNITY OF INTEREST WITH THE PETITIONED-FOR UNIT EMPLOYEES

A fractured unit occurs when a petitioned-for unit arbitrarily excludes certain classifications, lacks a distinctive community of interest from the excluded employees, or is too

narrow in scope. *Seaboard Marine, Ltd.*, 327 NLRB 556, 556 (1999); *Pratt & Whitney*, 327 NLRB 1213, 1216-1217 (1999). In the instant case, the Petitioner seeks to carve out and represent only three of the Employer's 44 laborers on the basis that they operate equipment which the Employer's driver/operators operate. This selection in and of itself appears arbitrary and narrow in scope inasmuch as the record demonstrates that at least a portion of the excluded laborers operates the same equipment as the driver/operators and the three laborers sought by the Petitioner. None of this equipment requires any special skills, training or certificates to operate on private right of ways or work projects. With regard to CDLs which are required by the Department of Transportation to transport or use heavy equipment on the open road, only two of the three laborers selected by the Petitioner possess them. The third, Tom Hawkins, like the rest of the 41 Laborers excluded from the petitioned-for unit does not.

Moreover, the petitioned-for unit does not track any lines drawn by the Employer such as classification, department or function; is not structured along lines of supervision; or drawn in accordance with methods of compensation or employee work location. *Odwalla, Inc.*, *supra*. Specifically, the petitioned-for unit wholly ignores how the Employer classifies its workers. The Petitioner argues in its brief that the Employer has "misclassified" the three laborers it seeks to represent and that while the Employer hired them as laborers and classifies them as "laborers", the three employees are, nevertheless, driver/operators. This argument arbitrarily draws fictional lines amongst the laborers and fails to give any deference to the manner in which the employees are classified. See *Specialty Healthcare*, 357 NLRB slip op at 9 fn. 19. (Absent a collective-bargaining history, the Board gives strong deference to how a company is structured and the manner in which an employer groups its employees because the Board wants to ensure that bargaining occurs within certain boundaries that "make sense in the employer's particular workplace"). With regard to the other articulated considerations, all employees share common supervision and work location. At the work site, mixed crews of laborers and driver/operators are supervised by their respective project supervisor and designated project manager. Once at the work site, laborers and driver/operators typically start work at the same time, work side by side throughout the day, share lunch time breaks and end at the same time. Record evidence shows that laborers like the driver/operators operate the Employer's liqui vac truck and equipment identified by the Petitioner in its petition. Similarly, driver/operators have performed typical "laborer" duties such as setting up porta potties and equipment, and attaching hoses. All employees are subject to the same method of compensation. Like the drivers/operators, the laborers are paid hourly, receive bonus incentive opportunities, and qualify for overtime.

Based on the foregoing, I find that the Employer has carried its burden of proving that all of the Employer's laborers share an overwhelming community of interest with employees in the petitioned-for unit because none of the traditional bases for drawing unit boundaries used by the Board supports excluding the remainder of the Employer's laborer employees while only including the three laborers selected by the Petitioner with driver/operators. Accordingly, I find that a wall-to-wall unit including all the Employer's laborers and driver/operators constitutes the only appropriate unit herein.

C. TIM HENDERSON WILL BE PERMITTED TO VOTE SUBJECT TO CHALLENGE

The Employer argues that Tim Henderson should be excluded from the bargaining unit because he is a statutory supervisor or manager/agent for the Employer. Pursuant to Section 2(11) of the Act, individuals are supervisors if they hold the authority to engage in or effectively recommend any of the statutory supervisory functions, they exercise independent judgment in carrying out these functions, and their authority is held “in the interest of the employer.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001) (citing *NLRB v. Health Care & Retirement Corp of America*, 511 U.S. 571, 573-574 (1994)); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006). The Act’s supervisory indicia include the authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign work, reward or discipline employees, responsibly direct work, or adjust grievances. Supervisory status should not be too broadly construed. The Board is cautious in finding an individual to be a supervisor because that individual loses the protections of the Act. *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1138 (1999). It is the intent of Congress not to exclude those employees who perform minor supervisory functions, such as lead persons and straw bosses. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283 (1979); *Oakwood*, 348 NLRB at 690; *NLRB v. Grancare*, 1170 F.3d 662, 666 (7th Cir. 1999). The burden of proof rests on the party asserting supervisory status, and the asserting party must establish by a preponderance of the evidence that such status exists. Purely conclusory evidence does not satisfy this burden; rather, the Board requires that the putative supervisor actually possess the authority at issue. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Where the evidence is conflicting or inconclusive, the burden is not satisfied on that particular indicia in controversy. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

At the time of the hearing, the Employer employed 11 project supervisors. With the exception of Henderson, the Petitioner stipulated that these project supervisors were statutory 2(11) supervisors because of their “ability to responsibly direct employees where the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.” Therefore, the statutory indicium at issue in the present case is Henderson’s ability to responsibly direct work, as there is no evidence in the record of him having the authority to hire, fire, transfer, promote, layoff or recall workers; and, admittedly, Henderson cannot bid on contract work. As will be explained, the record is inconclusive with regard to Henderson’s ability to responsibly direct work. Accordingly, Henderson will be permitted to vote subject to challenge.

Tim Henderson began his employment with the Employer May 2013, and his pay was \$25.00 per hour. Six months into his employment, he asked for a raise which he was granted in exchange for him “stepping it up a bit” which he understood to mean work faster. The Employer maintains that Henderson was granted the raise and promoted to the position of project supervisor. While Henderson denies that he received an actual promotion to the position of project supervisor, the record evidence, such as documents and employee testimony that identified Henderson as a project supervisor, established that Henderson was given the job title and perceived by the employees to be a project supervisor. Additionally, by the Employer

granting Henderson a \$5 raise in a little over six months into his employment, it made him the highest paid employee in the industrial division, next to project supervisor John Jerbis.

Although the secondary indicia of Henderson's pay rate and job title tends to point towards his supervisory status, record evidence regarding his actual supervisory job duties is inconclusive. In this regard, the record shows that project supervisors remain on-site with the client and are responsible for overseeing the daily project until completion. But, they do not schedule their crew's start and finish times, do not dispatch workers, and do schedule who will work with them. While project supervisors deal directly with the client to learn the client's needs and instruct their crew how best to perform the assigned project, there is no conclusive evidence in the record showing that Henderson responsibly directs employees in the performance of their work nor is there evidence of him being responsible for any of his crew members' performance. Specifically, Henderson testified that his job duties and responsibilities did not change after receiving the \$5 raise, and estimated that he continued to operate equipment 80-90% of the time. Henderson testified that he did not have authority to instruct employees on the job site to stop what they were doing and begin another task; discipline employees, schedule lunches, break times, start times, send employees home; or assign employees to a particular crew or project. Henderson explained that the work that they performed at the job site typically was routine, and employees knew what to do. In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006), the assignment of work entailed more than simply choosing the order in which the employee performed discrete tasks within those assignments. The Board held that to "assign" for purposes of Section 2(11), the putative supervisor had to designate significant overall duties to an employee and not simply give ad hoc instructions for the employee to perform a discrete task. *Id.* at 689. The Board also held that for one to responsibly direct, it must be established that the employee "assigned" to the putative supervisor can be disciplined by the supervisor, if necessary, or that there is the potential for adverse consequences against the putative supervisor if he/she does not take corrective measures. *Id.* at 692. Thus, unlike the project supervisors who the parties stipulated were 2(11) supervisors under the Act, Henderson's testimony tends to show that he does not possess the supervisory authority to responsibly direct employees.¹²

The Employer further contends that Henderson is a managerial employee and/or agent of the Employer and should therefore be excluded from the unit. However, I find that neither the record evidence nor Board law supports the Employer's position. Specifically, Houston and Nesheiwat testified that project supervisors have the authority to order material and have exercised this authority within limits established by the Employer. However, longtime project supervisor Jerbis testified that he does not order material. Either Houston or Quick orders his material. Although the Employer admitted into the record a number of work orders with Henderson's signature, according to Nesheiwat's testimony, Henderson was simply ordering this material because it was needed to complete the job and that prior approval would have been required had he ordered material outside the scope of that particular job. Therefore, these facts differ from the cases that the Employer cites in support of its position where the alleged manager executed contracts or implemented company policy using broad independent judgment. See *Eugene Register Guard*, 237 NLRB 205, 206 (1978) (Board held county supervisors were

¹² As has been noted, the Petitioner stipulated that all of the other 10 project supervisors are supervisors within the meaning of the Act and therefore excluded from the unit, however little factual detail was provided in the record to support this stipulation.

managers because they have the ability to execute and terminate employment contracts, and in their own discretion could decide the number of contract employees needed for any project); *Central Main Power Co.*, 151 NLRB 42 (1965) (load dispatchers were excluded from the unit of production and maintenance employees, in part, because they bought and sold utility, determined when, where and how to disconnect utility, scheduled overtime, were paid differently than the unit employees and exercised this authority with no proscribed limits); *Eastern Camera and Photo Corp.*, 140 NLRB 569 (1963) (Board included store managers in the unit because they lacked the discretion to formulate company policy); *Swift & Co.*, 115 NLRB 752 (1956) (Board held procurement drivers were managers because their primary purpose was to make purchases for the employer, perform costs analysis, and seek out and retain new suppliers); and, *Automotive Locomotive Co.*, 92 NLRB 115 (1950) (Board held buyers should be excluded from a unit of office, clerical employees because the purpose for the buyer position was to make substantial purchases for the employer).

Because the record does not show that Henderson is a manager or agent of the Employer and must be excluded from the unit on that basis, yet is inconclusive regarding whether he is a statutory supervisor under Section 2(11) of the Act, he will be permitted to vote subject to challenge in any election conducted resulting from the instant Decision and Order.

V. CONCLUSION AND ORDER

Having determined that the petitioned-for unit is inappropriate, I find that the following unit is appropriate for collective bargaining:¹³

All full-time and regular part-time drivers/equipment operators and laborers currently employed at the Employer's 22365 South Center Road, Frankfort, Illinois facility, excluding office clerical employees, guards, professional employees and supervisors as defined by the Act.

Additionally, I find that Tim Henderson will be permitted to vote subject to challenge in any election conducted as a result of this Decision and Order.

As the unit found appropriate herein is larger than that requested by the Petitioner, and the Petitioner having indicated that it is willing to proceed to an election in any unit found appropriate herein, the Petitioner will be accorded a period of 10 days from the date of this Decision and Order in which to submit the requisite showing of interest to support an election. In the event the Petitioner does not now wish to proceed with an election, it may withdraw its petition without prejudice by notice to the undersigned within 7 days from the date of this decision. See *ACI Corporation d/b/a Atlanta Hilton and Towers*, 275 NLRB 1413 (1985).

VI. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued

¹³ The Union agreed to proceed to an election on any bargaining unit the Region finds appropriate.

subsequently, subject to the Board's Rules and Regulations. Eligible to vote are all full-time and regular part-time drivers/equipment operators and laborers currently employed at the Employer's 22365 South Center Road, Frankfort, Illinois facility, excluding managerial employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act. 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 strikes who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the International Union of Operating Engineers AFL-CIO.

VII. LIST OF ELIGIBLE VOTERS

To insure that all eligible voters 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 Employer*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, 209 South, LaSalle Street, Suite 900, Chicago, Illinois 60604 on or before **May 6, 2014**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. RIGHT TO 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 **May 13, 2014**.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlr.gov. On the home page of the website,

select the E-Gov tab and click on E-Filing. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

DATED at Chicago, Illinois this 30th day of April, 2014.

/s/ Peter Sung Ohr

Peter Sung Ohr, Regional Director
National Labor Relations Board
Region 13
209 South La Salle Street, Suite 900
Chicago, Illinois 60604-1443