

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 18 – SUBREGION 30

G.M.S. EXCAVATORS, INC.<sup>1</sup>

Employer

And

DILLON R. BEECHLER, AN  
INDIVIDUAL

Petitioner

And

LABORERS INTERNATIONAL UNION  
OF NORTH AMERICA, LOCAL 464<sup>2</sup>

Union

Case 18-RD-125379

**DECISION AND DIRECTION OF ELECTION**

Petitioner seeks an election to determine whether the Union should continue to represent certain employees of the Employer. The Union seeks to have the petition dismissed, contending that (1) the petitioned-for unit is not coextensive with the currently recognized multi-employer bargaining unit and (2) the Union is the Section 9(a) representative of the petitioned-for employees based on language in the collective-bargaining agreement. The Union advances alternative arguments in the event that the petitioned-for unit is found appropriate. First, the Union argues that the petitioned-for unit is a permanent one-person unit, barring the Board from directing an election.

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<sup>1</sup> The Employer's name appears as amended at the hearing.

<sup>2</sup> The Union's name appears as amended at the hearing.

Second, and in conflict to its first argument, the Union argues that the election should be held at some future point in time when the Employer's workforce reaches its peak employment level.

On the other hand the Employer contends that an election should be scheduled promptly and that the petitioned-for unit is appropriate. The Employer argues that it was never part of a multi-employer bargaining unit. The Employer asserts that it terminated its Section 8(f) bargaining relationship with the Union in March 2001, and that since then it has not been bound to any collective-bargaining agreements, and that it only paid the wage rates and fringe benefit contributions set forth in those agreements as a way to provide its employees with appropriate benefits. To the extent the Employer continues to have a bargaining relationship with the Union, the Employer argues it is a Section 8(f) relationship. The Employer argues that in March 2014, it again terminated any alleged collective bargaining relationship and agreements with the Union.

As explained more fully below, I direct that an election be scheduled in the petitioned-for unit. I find that the Employer's conduct of abiding by certain terms of a collective-bargaining agreement does not, without more, rebut the presumption that the Employer and Union have a bargaining relationship governed by Section 8(f). Additionally, I find that while the Union has established that the Employer is bound by its conduct to the most recent collective-bargaining agreement between the Union and a multi-employer association, the recognition language in that agreement does not, on its own, establish a Section 9(a) relationship, as it fails to meet the standards set forth in *Stanton Fuel and Material (Central Illinois)*, 335 NLRB 717 (2001). Finally, I conclude that the petitioned-for unit is not a permanent one-person unit and that the evidence

does not establish that Employer will hire additional employees at any point in the future. As such, I conclude that there is no need to delay the scheduling of the election.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Based on the record in this proceeding, I find:

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

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.<sup>3</sup>

3. The Union is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

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. I begin this decision by summarizing the relevant facts regarding the Employer's operations and the relevant collective bargaining history of the Union and the Employer. I then apply the relevant case law to the facts and explain how I reach my conclusion that the petitioned-for unit is appropriate because a Section 8(f) multi-employer bargaining unit cannot preclude the processing of a decertification petition for a single employer unit. At the end of the decision, I discuss the facts and apply the

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<sup>3</sup> The Employer, G.M.S. Excavators, Inc., a Wisconsin corporation with an office located at 10248 North County Road F, Edgerton, Wisconsin, is engaged in the construction industry. During the past calendar year, a representative period, the Employer has purchased and received goods valued in excess of \$50,000 from other enterprises located within the State of Wisconsin which in turn purchased those goods directly from outside the State of Wisconsin.

relevant case law addressing the Union's arguments about the size of bargaining unit and whether it is appropriate to promptly schedule an election. In that discussion, I conclude that the petitioned-for unit is not a permanent one-person unit and that there is no need to delay the election based on the Union's speculative arguments that the Employer's workforce may increase in the future. I note that even assuming the Union's arguments amount to something beyond mere speculation, that the current workforce comprises a substantial and representative complement of the Employer's unit employees.

## **FACTS**

### ***The Employer's Business Operations***

The Employer performs various construction work including utility road construction, road excavation, storm sewer, sanitary sewer and water main installation in southern Wisconsin. For the last four to five years, the Employer has employed two laborers to perform this work, in addition to the Employer's Owner and President, Michael Shumaker, who also works on the construction projects.

### ***Collective Bargaining History***

#### ***1991-1996 Collective-Bargaining Agreement***

The Employer commenced its business operations in April 1994. On April 15, 1995, the Employer signed an Assumption of Agreement, by which the Employer agreed to accept and abide by the terms of the 1991-1996 collective-bargaining agreement. The 1991-1996 agreement was between the Municipal/Utilities Division, Wisconsin Chapter, Associated General Contractors of America, Inc. (AGC) and the Wisconsin Laborers' District Council (District Council). It was effective from June 5,

1991 to May 31, 1996. The District Council is the bargaining representative for various Laborers locals, including the Union involved in this matter. The parties in this proceeding stipulated that the Union is the party in interest and that the District Council negotiated the various collective-bargaining agreements on behalf of the Union, as well as other locals.

The 1991-1996 agreement contained language stating that individual employers that became party to the agreement also became party to the multi-employer bargaining unit represented by the AGC. The 1991-1996 agreement stated that an individual employer could only withdraw from the multi-employer bargaining unit by providing written notice to the District Council and the AGC at least 60 but no more than 90 days prior to the expiration date of the agreement.

#### ***1996-2001 Collective-Bargaining Agreement***

On July 24, 1996, the Employer signed a Letter of Assent in which the Employer agreed to adopt and to be bound by all terms and conditions of the 1996-2001 collective-bargaining agreement. The 1996-2001 agreement contained the multi-employer language found in the 1991-1996 agreement.

Employer Owner/President Shumaker testified without challenge that the Union never provided the Employer with copies of any collective-bargaining agreement, including the 1991-1996 agreement or the 1996-2001 agreement.

#### ***2001 Notice of Withdrawal From Multi-Employer Unit***

On March 30, 2001, the Employer, by its attorney, provided timely written notice that effective May 31, 2001, it was terminating its Letter of Assent, collective-bargaining agreement, the Assumption of Agreement, and withdrawing from the multi-employer

bargaining unit. Shumaker testified that a Federal lawsuit had been filed against the Employer for alleged nonpayment of fringe benefits, and that this lawsuit prompted the Employer's March 30, 2001 termination letter. It is undisputed that since March 30, 2001, the Employer has not signed any further collective-bargaining agreements, letters of assent, assumptions of agreement, or other such documents.

Notwithstanding the March 30, 2001 termination letter, the Employer continued to apply the terms of the 1996-2001 agreement, and its successor agreements, in the following years, including by paying the increased wage rates and fringe benefit fund contributions. The Employer received annual notices of the increases from the Union and paid the increased amounts. As such, the Employer complied with the mid-term increases in the collective-bargaining agreements in addition to the increases that were set forth in the successor collective-bargaining agreements.

In the years since March 30, 2001, the Employer continued to check off dues and initiation fees from its employees' paychecks and remit those to the Union; informed the Union of new hires; agreed to and participated in audits conducted by the Wisconsin Laborers' Fringe Benefit Funds (Funds); granted the Union access to its jobsites; and gave the Union notice of its new projects. The record demonstrates that the Employer engaged in these actions in a consistent fashion both before and after the 2001 termination letter.

The Union believed that the Employer was a party to the collective-bargaining agreements and granted the Employer various benefits due a signatory contractor. One such benefit included Owner/President Shumaker's participation in the fringe benefit funds, a benefit only available to owners of Union signatory contractors and employees

covered by the collective-bargaining agreements. The Employer also sought the Union's assistance with work-related matters on multiple occasions. On a monthly basis, the Employer received remittance reports setting forth the contributions it owed to the Funds. On at least an annual basis, the Employer received letters from the Union stating the increased wage rates and fund contributions. The Employer received these monthly reports and annual notices in the same manner following its 2001 termination letter as it did prior to 2001.

In the years following the 2001 termination letter, the Employer was subjected to a number of audits from the Funds, as often as once per year. During these audits, the Employer allowed a Fund auditor access to its office to examine its records and Owner/President Shumaker responded to the auditor's questions. At no point did the Employer refuse to participate in the audits or assert to the Funds that it had no obligation to comply with the audits.

After the 2001 termination letter, the Employer continued to notify the Union of new hires. It invited the Union to meet with the new hires and have them sign various forms, including dues check-off authorization cards so that the employees' dues could be withheld from their paychecks and remitted to the Union.

In the years since the 2001 termination letter, Shumaker continued to participate in the fringe benefit funds as an owner. The owners of non-signatory contractors are not permitted to participate in the Funds or to receive these benefits.

Shumaker testified that he was not bound to any collective-bargaining agreements since 2001. Shumaker testified that he advises the Union of new hires so that the employees can receive their benefit packages. Shumaker testified that he

participated in the audits conducted by the Funds because he is easy to get along with. Shumaker testified that many, although not all, of his projects are prevailing wage projects, but that he pays the same wages and benefits to his employees regardless of whether they are working on a prevailing wage project. Shumaker's testimony did not explain why he pays his employees the wage rates and fringe benefit contributions communicated to him by the Union and the Funds as opposed to the prevailing wage rates set forth by State law for certain projects. Shumaker's testimony did not explain why he checks off dues and initiation fees from his employees' paychecks and remits them to the Union when he is not obligated to do so under any collective-bargaining agreement, other than his indication that he wants his employees to receive their benefit packages.

***Section 9(a) Language in 2006-2011 and 2011-2014 Agreements<sup>4</sup>***

The District Council and the AGC negotiated successor collective-bargaining agreements with effective durations from June 5, 2006 to May 31, 2011 and from June 2, 2011 to May 31, 2014.<sup>5</sup> The recognition language in the 2006-2011 and 2011-2014 agreements differs from both the 1991-1996 and the 1996-2001 agreements, in that the language in the 2006-2011 and 2011-2014 agreements purports to create a Section 9(a) bargaining relationship, and the language in the preceding agreements did not.

In pertinent part, the 2006-2011 and 2011-2014 agreements state:

The Union has claimed and demonstrated and the employer is satisfied and acknowledges that the Union represents a majority of the employer's employees

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<sup>4</sup> The copy of the 2006-2011 agreement submitted into evidence in this proceeding is an unsigned version of the document. The 2011-2014 agreement submitted into evidence in this proceeding is signed. The asserted Section 9(a) language and the multi-employer language in both the 2006-2011 and 2011-2014 agreements are identical.

<sup>5</sup> No collective-bargaining agreement covering the period of June 1, 2001 to June 4, 2006 was submitted into the record.

in the bargaining unit covered by this labor agreement. The employer hereby recognizes the Union as the exclusive bargaining agent under 9(a) of the National Labor Relations Act for all employees performing work within such collective bargaining unit of all present and future jobs sites within the geographic jurisdiction covered by this labor agreement.

The 2006-2011 and 2011-2014 agreements contain the same multi-employer bargaining unit language as the prior agreements, except that the time period for providing written notice to withdraw from the multi-employer bargaining unit increased from 60 to 90 days prior to the expiration of the agreements to 90 to 120 days.

***December 2013 Settlement of Lawsuit Regarding Fringe Benefit Payments***

In December 2013, the Employer entered into a settlement agreement with the Funds concerning the Employer's alleged failure to fully pay the required contributions on behalf of its employees. Pursuant to the settlement agreement, the Employer agreed to pay the Funds \$37,351.32 in principal and \$3,053.36 in interest covering the time period March 1, 2010 through December 31, 2012, as well as to pay the Funds any principal and interest due for and owing for covered work performed in calendar year 2013.

***2014 Attempted Withdrawal From the Multi-Employer Unit***

On March 4, 2014, the Employer transmitted three separate letters attempting to withdraw from the multi-employer bargaining unit and terminate all collective-bargaining agreements. One letter was sent to the District Council, another letter was sent to the AGC, and another letter was sent to the District Council and the Funds. The letters to the District Council and the AGC noted that the Employer was willing to negotiate on an individual basis a successor agreement "to the extent required by law." The date that

the letters were sent, March 4, 2014, was less than 90 days prior to the expiration date of the 2011-2014 agreement.

## **ANALYSIS**

### ***Adoption by Conduct Doctrine***

The Board has held that an employer may adopt a collective-bargaining agreement by its conduct even if the parties have not reduced to writing their intent to be bound. *DST Insulation, Inc.*, 351 NLRB 19 (2007); *Haberman Construction Co.*, 236 NLRB 79, 85-86 (1978), enf'd. 641 F.2d 351 (5th Cir. 1981). At issue is whether an employer has engaged in conduct that manifests its intention to abide by the terms of the agreement. The "adoption by conduct" doctrine applies to bargaining relationships arising under both Section 8(f) and 9(a) of the Act. *E.S.P. Concrete Plumbing*, 327 NLRB 711, 712 (1999).

In *DST Insulation*, a case involving strikingly similar facts to the present matter, the Board found that an employer was part of a multi-employer bargaining unit because it had adopted the collective-bargaining agreement by its conduct, including paying new wage rates under the agreement; making the required fringe benefit contributions; acquiescing to and paying the amounts owed under a stipulated judgment in Federal court; deducting and remitting union dues pursuant to a contractual union-security clause; using the union's exclusive hiring hall to secure employees as a union contractor; and corresponding and meeting with the union in a manner consistent with the status of a union contractor. The employer in *DST Insulation* did not sign the collective-bargaining agreement or participate in the multi-employer negotiations for the agreement.

Consistent with *DST Insulation, Inc.*, I find that the Employer has adopted the 2006-2011 and the 2011-2014 agreements by its conduct, including by paying new wage rates under the agreements; making fringe benefit contributions in accordance with the rates in those agreements; entering into a settlement agreement involving a Federal court action regarding alleged nonpayment of fringe benefits payments arising under the agreements; honoring the contractual union-security clause and deducting and remitting union dues to the Union; and communicating and meeting with the Union in a manner consistent with its status as a signatory contractor.

Furthermore, the Employer has gained various benefits from its contractual relationship with the Union, which is “a significant factor in determining whether there has been adoption by conduct, because an employer could otherwise secure all the benefits of labor stability without any corresponding obligations.” *DST Insulation, Inc.*, supra at 22.

#### ***Overview of Board Law Related to Multi-Employer Bargaining Units***

The Board has long held that the petitioned-for unit in a decertification petition must be co-extensive with the certified or recognized unit and that a decertification petition filed for a single employer that has historically been part of a multi-employer bargaining unit will be dismissed. *Mo’s West*, 283 NLRB 130 (1987); *Campbell Soup Co.*, 111 NLRB 234 (1955). However, if the parties’ collective bargaining relationship is governed by Section 8(f) of the Act, a petition will not be dismissed on the basis that the employees are part of a multi-employer bargaining unit. *John Deklewa & Sons*, 282 NLRB 1375, 1390 fn. 42 (1987).

In the context of Section 9(a) bargaining relationships, a withdrawal from multi-employer bargaining by any party can only be accomplished by providing adequate written notice given prior to the date set by the contract for modification, or the agreed-upon date to begin the multiemployer negotiations. *Retail Associates*, 120 NLRB 388, 395 (1958). However, the rules set forth in *Retail Associates* for withdrawing from multi-employer bargaining do not apply to Section 8(f) bargaining relationships. *James Luterbach Construction Co.*, 315 NLRB 976, 979-980 (1994). In a Section 8(f) context, “in order for an employer to obligate itself to be bound by multiemployer bargaining, there must be more than inaction, i.e., the absence of a timely withdrawal.” *Id.* at 979.

#### ***Section 8(f) vs. 9(a) Bargaining Relationship***

In the construction industry there is a rebuttable presumption that the parties have a Section 8(f) relationship. The party asserting that there is a Section 9(a) relationship bears the burden of proof. *H.Y. Floors & Gameline Painting*, 331 NLRB 304 (2000); *Deklewa*, *supra* at 1387 fn. 41.

In the construction industry, a Section 9(a) bargaining relationship can be established exclusively by contractual language in certain circumstances. Specifically, the Board has held that a “recognition agreement or contract provision will be independently sufficient to establish a union’s 9(a) representation status where the language unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer’s recognition was based on the union’s having shown, or having offered to show,

evidence of its majority support.” *Staunton Fuel & Material, Inc. (Central Illinois)*, 335 NLRB 717, 719-720 (2001).

The Union’s assertion of Section 9(a) status in the instant case is based solely on the language in the 2006-2011 and 2011-2014 agreements.

***Adoption by Conduct and Central Illinois Doctrines Are Incompatible***

For the purposes of the following immediate discussion, I assume that the recognition language in the collective-bargaining agreement satisfies the *Central Illinois* test. However, as discussed in the next section, I conclude that it does not.

While an employer can be bound to a collective-bargaining agreement by its conduct, and contractual language alone can establish Section 9(a) status, there is no Board precedent to establish that these two doctrines are simultaneously applicable. Such a finding would undercut the strict protections created by the *Central Illinois* test.

The Union has not submitted any precedent finding Section 9(a) status in the construction industry based on a party’s adoption by conduct of a contract containing language that satisfies *Central Illinois*, and I am aware of none.<sup>6</sup> It is axiomatic that one cannot discern conclusive notice or intent from contractual language if a party has not signed, or even seen, the contract. As noted above, the record evidence established that the Employer never received or saw a copy of either the 2006-2011 agreement or the 2011-2014 agreement, which included the language purporting to establish the Section 9(a) relationship.

In short, as there is no evidence that the Employer signed, or even saw, the language purporting to establish Section 9(a) recognition, I would not find that such

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<sup>6</sup> Although not controlling in a representation case matter, the General Counsel’s Division of Advice reached a similar conclusion in *Fine Finishes Unlimited, Inc.*, Case 30-CA-18169 (February 24, 2009).

recognition has been granted based on such language. To merge the “adoption by conduct” doctrine and the *Central Illinois* principle in this fashion would be an expansion of the law in this area that I am unwilling to make. Accordingly, I conclude that the Union has failed to demonstrate that based on the 2011-2014 agreement, or any predecessor agreement, its relationship with the Employer was governed by Section 9(a) of the Act. As such, there is no impediment to the petition.

***2011-2014 Agreement Language Fails to Establish 9(a) Bargaining Status***

In order to establish that a union and employer in the construction industry have a Section 9(a) relationship based exclusively on contractual language, the language must meet all three parts of the *Central Illinois* test. I find that the language in the parties’ agreement fails to satisfy the third part of that test.

The pertinent language from the agreement is:

The Union has claimed and demonstrated and the employer is satisfied and acknowledges that the Union represents a majority of the employer’s employees in the bargaining unit covered by this labor agreement. The employer hereby recognizes the Union as the exclusive bargaining agent under 9(a) of the National Labor Relations Act for all employees performing work within such collective bargaining unit of all present and future jobs sites within the geographic jurisdiction covered by this labor agreement.

Section 9(a) status cannot be established if a recognition provision states that the employer recognizes the union as the majority representative of its employees, but fails to state that the recognition was based on a contemporaneous showing or an offer to show evidence that it had majority employee support. *Austin Fire Equip., LLC*, 359 NLRB No. 60 (2013); *USA Fire Protection*, 359 NLRB No. 59 (2013); *Central Illinois*, supra. In this regard, the third part of the *Central Illinois* test encompasses two ideas:

- (1) that the union has the authorization or support of a majority of the employees, and
- (2) that the union has shown or offered to show evidence of that support.

Nothing in the contractual language quoted above indicates that the Union's recognition was based on a showing or an offer to show that the Union had majority support. In *Central Illinois*, the Board stated that with regard to a union's claim of majority support, "there is a significant difference between a contractual statement that the union 'represents' a majority of unit employees—which would be accurate under either an 8(f) or a 9(a) agreement—and a statement to the effect that, for example, the union 'has the support' or 'has the authorization' of a majority to represent them." Id. at 720. The agreement in this case only states that the Union has demonstrated that it "represents" a majority of the employees, and it says nothing to indicate that the Union has the support or the authorization of a majority of the employees.

The Board has recently found that other contracts with similar recognition clauses do not rebut the presumption of Section 8(f) status. *Austin Fire Equip., LLC*, supra; *USA Fire Protection*, supra. In those cases, the Board found the following recognition language insufficient to establish 9(a) status: "[t]he Employer . . . has, on the basis of objective and reliable information, confirmed that a clear majority of the [employees] are members of, **and represented** by [the Union]." (Emphasis added.) *Austin Fire Equip., LLC*, supra at 1, *USA Fire Protection*, supra at 1.

The fact that the recognition clause in the 2011-2014 agreement contains a reference to Section 9(a) does not obviate the need for the contract to pass all three requirements of the test set forth in *Central Illinois*. The mere assertion in a contract that it is governed by Section 9(a) does not alter the need for the contractual language

to establish that the union has been authorized by a majority of employees to represent them, and has shown or offered to show proof of that authorization. *Id.*

Accordingly, even if it were appropriate to apply the “adoption by conduct” doctrine and the *Central Illinois* doctrine in the same instance, I would direct an election in this case as the collective-bargaining agreement at issue does not establish that the parties have a Section 9(a) relationship, and the Union has provided no other evidence to demonstrate its Section 9(a) status.

***The Petitioned-for Unit is Not a One-Person Unit***

During the hearing, the Union argued that in the event the single-employer unit is found to be appropriate, that the petitioned-for unit is a permanent one-person unit. The uncontroverted record evidence was clear that the unit currently consists of two employees and has consisted of at least two employees for the last four or five years. No evidence was introduced to suggest that the Employer’s workforce will diminish to one employee at any point in the future. Accordingly, I find that the petitioned-for unit is not a permanent one-person unit.

***Expanding Size of Unit***

At the hearing and in its post-hearing brief, the Union argued that because the Employer offers seasonal employment to its employees, the election should not be held until the Employer reaches its peak employment for the season. *Bogus Basin Recreation Assn.*, 212 NLRB 833 (1974).

During the hearing, evidence was produced regarding the Employer’s current work project involving the installation of a new water main, storm sewer, and sanitary sewer on Forton Street in Stoughton, Wisconsin. The Employer submitted a bid for this

project and was awarded the job. The Employer has already commenced work on the project, but had only concluded approximately 1 percent of the expected work as of the date of the hearing. The Union argues that based on the dollar amounts included in the Stoughton project bid, and the amount that labor costs typically figure into such bids, that the Employer will be required to hire additional employees to complete the Stoughton project and whatever other work the Employer will perform during the upcoming construction season.

However, the Union's argument does not amount to anything more than speculation. There are a number of potential variables that could result in the Employer completing the Stoughton project and its other work without hiring any additional unit employees, including completing the project at a later date than anticipated by the Union, having its current employees work overtime, or subcontracting additional work. There are surely other possibilities not listed here that could result in the Employer's completion of the Stoughton job and its other pending and potential projects without hiring additional employees. In this regard, Employer Owner/President Shumaker testified that the amount of work that the Employer is currently under contract to perform this year is similar to what was performed in 2013. As noted above, the Employer employed only two unit employees in 2013.

Furthermore, the Union's arguments are based on the premise that the percentage of the labor costs included in the bid will equal the actual labor costs at the completion of the project. There is nothing in the record to establish such a certainty. Shumaker's testimony indicated the high potential for unforeseen events that can alter the final costs compared to the expected bid costs.

The Board has held that mere speculation about an expanding unit will not bar the proceeding. See, e.g., *Meramec Mining Co.*, 134 NLRB 1675 (1962); *General Engineering*, 123 NLRB 586 (1959).

In its arguments, the Union appears to have combined elements of the Board's seasonal employment doctrine and its expanding unit doctrine. With respect to seasonal employees, the Board has held that in certain circumstances involving seasonal employees, elections should be held near the peak of the season in order to provide as many voters as possible with the opportunity to cast their ballots. *Brooksville Citrus Growers Assn.*, 112 NLRB 707 (1955); *Libby, McNeill & Libby*, 90 NLRB 279, 281 (1950). However, the *highest* peak is not necessarily required. *Saltwater, Inc.*, 324 NLRB 343 (1997); *Elsa Canning Co.*, 154 NLRB 1810 (1965). In cases where the size of the unit may expand due to the Employer's impending increases in work or scope, the Board has held that a petition may be dismissed if the Employer's present complement of employees is not substantial and representative.

The Union's argument that the election should be delayed based on the seasonal nature of the Employer's work is misplaced, as the Employer is currently in its peak employment season. The Employer commences its operations in the spring and concludes its operations in the fall, with the precise dates of these occurrences varying year to year based on the weather, temperature, and when the ground thaws. Furthermore, the seasonal nature of work in the construction industry is generally handled through the use of the *Daniel/Steiny* eligibility formula, which allows employees who may not currently be working for the employer, but who have performed sufficient work during the preceding year or two years, to retain their eligibility to vote in a Board

election. *Steiny & Co.*, 308 NLRB 1323 (1992); *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967). The fact that during the last four or five years, the Employer has not employed more than two unit employees for any length of time undercuts the Union's assertions that the size of the unit will increase at some point during the coming months.

The Union has not established to any reasonable certainty that the Employer's workforce will increase by any amount in the coming year. Even assuming that the Union's arguments amounted to something more than speculation, they fail to indicate that the Employer's work force would grow to such an extent that the two current employees would represent less than 30 percent of the eventual workforce. Accordingly, even accepting the Union's arguments as fact and not speculation, it is nevertheless appropriate to schedule a prompt election, as the Employer's current workforce is a substantial and representative complement. *Shares, Inc.*, 343 NLRB 455 fn. 2 (2004).

In view of the foregoing and the record as a whole, and consistent with the unit description in the collective-bargaining agreement, I find the following employees constitute an appropriate unit for collective bargaining:

All full-time and regular part-time employees performing public works construction including construction, excavation, installation maintenance or repair of sewer and water mains, laterals, systems, and curb and gutters, sidewalks, streets, landscaping, tunnels, shafts and appurtenances and related work, as well as excavation coming within the jurisdiction of the Union and contracted for or performed by the Employer within the State of Wisconsin except for work contracted for by the State of Wisconsin Department of Transportation, excluding guards and supervisors as defined in the Act as amended.

## **DIRECTION OF ELECTION**

An election by secret ballot will 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 subsequently, subject to the Board's Rules and Regulations.

### **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 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.

Also eligible to vote in this matter are all unit employees that have been employed by the Employer for a total of 30 working days or more within the period of 12 months, or who have had some employment in that period and who have been employed 45 working days or more within the 24 months immediately preceding the date of this Decision, and who have not been terminated for cause or quit voluntarily prior to completion of the last job for which they were hired.<sup>7</sup>

Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **Laborers International Union of North America, Local 464.**

#### **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 Co.*, 394 U.S. 759 (1969).

Accordingly, it is 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

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<sup>7</sup> During the hearing, a question arose regarding former employee Scott Roush and whether he should be eligible to vote in the election pursuant to the *Daniel/Steiny* formula. Although there is record evidence regarding this issue, it is not clear if the parties were fully aware of this potential issue prior to the hearing and whether they were prepared to fully litigate this matter. Accordingly, I make no determination regarding Scott Roush's voting eligibility at this time. To the extent that he is eligible under the *Daniel/Steiny* formula or on any other basis, he may vote in the election, subject to the normal challenged ballot procedures should any party wish to contest his eligibility.

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 on or before **June 10, 2014**. No extension of time to file this list will be granted by the Regional Director 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.nlr.gov](http://www.nlr.gov),<sup>8</sup> by mail, or by facsimile transmission at (414) 297-3880. 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.

### **C. Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of 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

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<sup>8</sup> To file the eligibility list electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

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, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **June 17, 2014**.

*The request may be filed electronically through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>9</sup> but may not be filed by facsimile.*

Signed at Minneapolis, Minnesota, this 3rd day of June, 2014.

/s/Marlin O. Osthus

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Marlin O. Osthus, Regional Director  
National Labor Relations Board  
Region 18  
330 South Second Avenue, Suite 790  
Minneapolis, MN 55401-2221

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<sup>9</sup> To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.