

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

BRENNMAR CONSTRUCTION, INC.

Employer

and

Case 9-RC-18155

OHIO STATE ASSOCIATION OF
PLUMBERS & PIPEFITTERS, UNITED
ASSOCIATION OF THE PLUMBING &
PIPEFITTING INDUSTRY OF THE UNITED
STATES AND CANADA, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION ^{1/}

I. INTRODUCTION

The Employer, a general contractor in the building and construction industry, is headquartered in Jackson, Ohio. The parties agree that an appropriate unit includes all the Employer's full-time and regular part-time employees performing plumbing, pipe fitting and pipe welding work at or from its Jackson, Ohio facility, excluding all office clerical employees, all professional employees, all guards and supervisors as defined in the Act. The parties disagree as to whether the unit description should also indicate that "all other employees" are excluded.

The parties also disagree as to which of the Employer's employees should be included in the petitioned-for unit. The Petitioner contends that only 13 of the Employer's approximately 46 currently active employees are employed as plumbers and pipe fitters and are appropriately included in the unit described above. In contrast, the Employer asserts that its employees do not work along craft lines, but perform a wide range of construction work as necessary to meet the needs of the particular jobs to which they are assigned.

^{1/} The hearing officer adjourned the hearing in this matter *sine die* to give the Employer additional time to comply with the Petitioner's request for subpoenaed documents that the Hearing Officer ruled were relevant to the proceeding and should be produced. The Employer eventually provided the Petitioner with documents that it asserts are responsive to the ruling of the Hearing Officer. On October 3, 2007, I issued an "Order Setting Date For Receipt of Additional Exhibits Produced Pursuant to Subpoena," which I gave the parties until the close of business October 11, 2007, to file a motion to receive any of these documents into the record, together with a description of the specific documents sought to be introduced. No motion was received. Accordingly, the record is hereby closed.

Finally, the parties disagree about the unit placement of Kevin Dulaney, Mike Landrum, Donald “Ike” Dickerson, David Butler, Larry Kemper, and Wilbur Via. ^{2/} The Petitioner contends that Butler and Landrum should be included in the unit based upon the specific type of work they perform. With respect to Dulaney, Dickerson, Kemper and Via, the Petitioner contends that they are statutory supervisors and must be excluded from the unit. The Employer, contrary to the Petitioner, takes the position that none of the individuals are statutory supervisors and are properly included in the petitioned-for unit because they all perform the same function.

It is undisputed that the Employer is a construction industry employer and application of the *Daniels* formula is appropriate for purposes of determining the voting eligibility of the employees herein. ^{3/} There is no history of collective-bargaining affecting any of the employees involved in this proceeding. The record does not disclose whether the Petitioner would be willing to proceed to election in an alternative unit.

As set forth in detail below, I have determined that the Employer’s construction employees perform work that varies from job to job and that the performances of these tasks do not follow traditional craft lines. Moreover, no particular group or subset of the Employer’s construction employees constitute an identifiable and homogenous grouping of employees such that they possess a separate and distinct community of interests warranting a conclusion that they constitute an appropriate unit for bargaining. Accordingly, I find that the smallest appropriate unit as petitioned for must include all of the Employer’s field and shop construction employees.

With regard to the supervisory issues, I have concluded based on the record as a whole that the Petitioner has failed to meet its burden that the individuals named above possess one or more of the factors set forth in Section 2(11) of the Act. However, regarding whether they share a sufficient community of interests with other unit employees in the unit, the evidence is vague and conflicting. Accordingly, these individuals will vote subject to the challenged ballot procedure should they appear at the polls to vote.

In reaching my determination on these issues, I have considered the record evidence as a whole, as well as the arguments made by the parties at the hearing and in their post-hearing briefs. In explaining how I came to my determination on these issues, I will first describe the Employer’s operations, then set forth the applicable legal precedent, and finally analyze the issues in relation to that precedent.

^{2/} There is some dispute in the record whether most of the individuals whose supervisory status is in dispute were designated by the Employer as foremen or leadmen. This notably excludes Via, who was a project manager for the Employer.

^{3/} *Daniels Construction Co.*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967), reaffirmed and further modified in *Steiny & Co.*, 308 NLRB 1323 (1992).

II. FACTUAL OVERVIEW

A. The Employer's Operations and Workforce:

The parties stipulated at the hearing that the Employer's three owners, Todd Ghearing, the Employer's president; Tim Ousley, vice-president; and Andy Graham, the Employer's secretary and treasurer are statutory supervisors. Graham is also responsible for the Employer's human resources functions, although Ghearing and Ousley are also involved in hiring and firing employees. On occasion, all three owners act as project managers for the Employer. There are no other stipulated supervisors, but Terry Green was also identified as a project manager and estimator for the Employer. ^{4/}

The Employer performs a full range of commercial construction work ranging from foundation construction through erection of a structure. The Employer regularly contracts out some of the construction work needed to be performed on various projects. For example, the Employer hires subcontractors for concrete, carpentry, sprinkler work, drywall and flooring work. In addition to new construction, the Employer is engaged in retrofitting, remodeling and renovating construction projects and regularly performs such work at several food processing plants, including Michelina's (also called Luigino's), General Mills, Osco and Bob Evans.

The Employer also employs several employees on its "freezer crew" who work throughout the country building large production line freezers for use in food processing facilities. ^{5/} Approximately 6 to 10 freezer crew employees perform some plumbing and pipefitting work in connection with their freezer work, but most of the piping work done on these freezers is performed by other contractors. ^{6/} The Employer also installs medical gas line piping in hospitals and nursing homes. ^{7/}

In addition to field work, the Employer has a machine shop operation in the same building as its corporate office in Jackson, Ohio. Within the shop are various pieces of equipment used in fabrication, such as a shearer, a press print, a crane, rolls, punches and drill presses. The shop also contains large fabrication tables where parts are fabricated for various purposes, including parts used in machinery and conveyors utilized in food processing plants. According to the Employer, Larry Kemper is the lead man in the shop. The size of the shop workforce fluctuates from 2 to about 12 employees, depending on the amount of work needed to be performed. Kemper assigns tasks to employees in the shop based on oral directions for

^{4/} There is no other mention of Green in the record.

^{5/} Food product typically enters these freezers hot and then is frozen as part of the production process.

^{6/} The exception is that the Employer's employees perform clean in place (CIP) piping, which is piping for water lines that ensure the sanitation of the freezer.

^{7/} Certification is required to perform such work because of the dire health consequences if the installation is faulty.

projects that he receives from Ghearing, Ousley and Graham, and based on his knowledge of each employee's abilities.

The Employer regularly performs construction work on prevailing wage projects. Employees assigned to these projects receive the highest prevailing rate applicable to a job that they are working on regardless of the amount of time that they actually spend working in that particular classification on the project. According to the Employer, it often pays employees a higher rate on prevailing wage jobs than it is legally obligated to pay because it is more cost efficient for it to do so than to attempt to keep detailed records of the actual work performed by each employee.

At the time of the hearing, the Employer's workforce included 46 actively employed construction employees, including 3 employees currently drawing worker's compensation benefits, and 22 laid-off employees. The parties stipulated that at least 13 employees among the 46 active employees are eligible voters based on their performance of plumbing, pipe fitting and pipe welding work. The Employer would also include the remaining 33 actively employed employees based on its contention that employees are assigned to tasks based on the Employer's requirements for each job rather than along traditional craft lines. The parties also stipulated that 13 of the 22 laid-off employees performed sufficient plumbing, pipe fitting and pipe welding work for inclusion in the petitioned for unit, assuming that these employees are eligible voters under the application of the *Daniels* voting eligibility formula. Consistent with its contention regarding its active employees, the Employer would also include all laid off construction employees in the unit who meet the *Daniels* formula.

B. Unit Work and Who Performs It:

The determination as to which of the Employer's employees are engaged in performing plumbing, pipe fitting and pipe welding (pipe work) is affected by how the work is defined. One of the Petitioner's witnesses testified that any work performed in connection with the installation of piping is pipefitting work. This could include putting holes in walls to run pipe, installing pumps on pumping systems, pouring a concrete base for those pumps and manufacturing and installing hangers from which to hang pipe. Pipe fitting was also described as performing work with carbon steel (stainless) pipe.^{8/} Plumbing was described as working with pipe used in drainage, waste, venting, portable water, gas and backflow prevention.

The actively employed employees whom the parties agree are in the petitioned for unit are: Michael Bell, Carl Dray, Brian Dulaney, Richard S. Downey, Jesse Erwin, Matthew Griesheimer, Charles Henry, Carl Jeffries, Christopher Karr, Justin Robinson, Thomas Shea, Gary Whetstone and Larry Whetstone, Jr. The laid-off employees who performed unit work and whom the parties agree should be included if they meet the *Daniels* criteria for eligibility are: Timothy Brown, David Butler, Ralph Hall, James Hopper, Eddie Howery, Ron Jensen, Mike Landrum, Mitch McCartney, Larry McGuire, Jeff Palmer, Anthony Pummel,

^{8/} Pipe fitting includes manufacturing and installing handrail, which is used on conveyor systems in food processing plants.

Chris Pummel and Gerald Webb. In addition to the above employees, the Petitioner conceded at hearing that an unspecified number of employees are dual function employees and that it would include those employees who spend more than 15 percent of their work time engaged in performing plumbing, pipe fitting and pipe welding work in the unit. In its post hearing brief, the Petitioner revised its percentage for inclusion in the unit and contended that the unit should include those employees identified as performing 35 percent or more of their work time engaged in some type of pipe work. It is not clear from the record how the Petitioner arrived at the 15 percent figure or the revised 35 percent figure for inclusion purposes, although it notes that a “bright line” test is not used in determining what constitutes a sufficient percentage. Based upon the 35 percent figure, the Petitioner seeks a unit of approximately 28 plumbers, pipe fitters, and pipe welders. ^{9/}

The record discloses that the Employer does not maintain time and work records detailing the type of work that each individual performs on each job. Rather, the Employer’s records are generally limited to a description of the type of work to be performed on each project and the overall time spent performing the work. Prevailing wage records provide some guidance towards determining the type of work that an employee is primarily engaged in on a given prevailing wage project. However, as indicated above, record testimony discloses that the Employer uses a single classification for an employee on a prevailing wage job and does not change the classification or rate of pay during the employee’s assignment to that project even though the employee may perform a wide range of duties on that particular project. ^{10/} Since a precise written record of the type of work performed by each of the Employer’s construction employees does not exist, the record evidence is limited to the marginal guidance provided by prevailing wage records and anecdotal witness testimony detailing the type of work that each employee performs. I note that the days, hours, and amount of work observed by a witness typically was a small portion of the total body of work performed by many of the disputed employees. Further, for some employees, there is no probative evidence as to the type of work that they perform for the Employer.

The record testimony regarding the amount of plumbing, pipe fitting and pipe welding (pipe work) performed by employees at issue often varied widely among the witnesses. For example, Michael VanMeter was estimated to have spent between 0 percent and 60 percent of his work time in the performance of pipe work, although one witness described him as an “ironworker.” Other witnesses placed his performance of pipe work as taking between 10 percent and 30 percent of his total work time. Several witnesses estimated that Michael Brewer engaged in pipe work between 15 percent and 30 percent of his total work time. However, one witness placed his performance of pipe work at 70 percent. Paul Johnson, an employee who works on the Employer’s freezer crew part of his work time, was estimated by

^{9/} The Petitioner’s method of arriving at a percentage of unit work performed for each employee involves averaging subjective estimates of witnesses rather than objective data.

^{10/} A breakdown of the prevailing wage data entered into the record reflects that employees typically, although not always, received one classification for a job and reporting period. Additionally, employees generally received the same classification from prevailing wage job to prevailing wage job, although it is not unusual for the same employee to be characterized as a plumber on one job and a carpenter or laborer on another.

different witnesses to perform pipe work for 10 percent, 50 percent, and 100 percent of his working hours. Similarly, employee Sherman Whetstone was estimated by witnesses as performing pipe work for 10 percent, 20 percent, 25 percent, and 80 percent of his working hours. Employee Devin Kisor, a sometime welder and freezer crew employee, was estimated to have engaged in pipe work an unspecified small percentage of time, as well as for 20 percent, 30 percent and 40 percent of his total working hours.

Even with regard to those employees whom the parties agree to place in the unit, the witnesses did not agree as to how much of their work time consisted of performing pipe work. Thus, depending on the witness, employee Gerald Webb was described as performing such work 30 percent, 40 percent, 50 percent, 60 percent, or 100 percent of his total work time. Also various witnesses described him as a “welder.” Employee Chris Pummel was described as being engaged in the performance of pipe work for 50 percent and 100 percent of his total working hours. Larry McGuire, according to witness testimony, performed no pipe work while other witnesses claimed that pipe work consisted of either 20 percent, 40 percent or 50 percent of his work day. When not performing pipe work, McGuire spent other work time setting up machinery and operating equipment, including operating a forklift.

Employees who were described as being engaged primarily in the performance of other “craft” work were often also engaged in the performance of pipe work. Thus, Larry Whetstone Sr., and Larry Whetstone Jr., were both described as carpenters, yet some witnesses claimed they also performed plumbing work. In the case of Larry Whetstone Sr., a witness testified that he spent 20 percent of his work time engaged in the performance of pipe work. Ronnie White is primarily an HVAC employee for the Employer; however, one witness stated that 20 percent of his work time involved the performance of pipe work. Ernie Jefferies and Brian Dulaney, who primarily work as a carpenter and an operator, respectively, also perform an unspecified amount of pipe work. Nevertheless, both parties agree to include Brian Dulaney in the petitioned-for unit of plumbers, pipe fitters and pipe welders.

In sum, the record reflects that employees who performed carpentry, HVAC, masonry, and other types of work also perform plumbing, pipe fitting and pipe welding work. Similarly, employees who perform pipe work also perform other work described as, “whatever was needed,” and “they’ve done other types of work.” The record reflects that all employees work with each other and they perform a myriad of tasks, including millwright work, setting equipment, and structural work such as building walkways and platforms on which to set equipment. Additionally, plumbers and pipefitters help pour and set concrete, perform HVAC work, and work on tasks such as “welding, fabricating, [and] carpentry work.”

C. Hours, Wages and Benefits:

It appears from the record that most of the Employer’s employees are hourly paid. However, Kevin Dulaney, who is salaried, is paid about \$89,000 annually; Michael Landrum, David Butler, Ike Dickerson, Wilbur Via and Larry Kemper are also salaried employees. Employees’ hourly wage rates vary within a wide range. For example, rates of pay ranged

between \$11 to \$25 an hour. Moreover, employees who worked in the field on prevailing wage jobs received substantially higher pay when on those jobs. For example, the base rate for plumbers on one recent job in the summer of 2005 was \$36.47 an hour, while the prevailing wage rate for employees designated as carpenters, sheet metal workers or laborers was also over \$30 an hour.

All hourly employees have the same work schedule and enjoy the same benefits. Normal work hours for all non-office employees are 7 a.m. to 3:30 p.m. and full-time employees typically work a 40-hour work week. However, some field employees do not take a ½ hour lunch break and complete their workday by 3 p.m. All hourly employees are eligible to participate in the Employer's group health insurance plan, with a portion of the premium cost paid by the Employer, group life insurance and 401(k) retirement savings plan. All employees are also entitled to a paid vacation ranging from 1 to 2 weeks, depending on length of service, and receive paid holidays recognized by the Employer.

The record reflects that the Employer's hourly employees receive the same insurance benefits. However, in contrast to the insurance benefit provided to its hourly employees, it appears from the record that the Employer offers salaried employees the option of receiving a paid health insurance benefit.^{11/} Additionally, Michael Landrum, Ike Dickerson, Larry Kemper, and Kevin Dulaney are also provided with a company truck, cell phone, gas card and credit card.

Employees receive on the job training but the Employer does not have a formal apprenticeship or training program for employees desiring to master a particular craft. Opportunities for certification training, including med-gas certification training and pipe certification for welding, are provided and employees who obtain pipe welding certifications are eligible to receive a wage increase. Much of this training is of short duration and may take place in just a few hours out of a regular work day. The Employer maintains a record of such certifications. Finally, employees may perform different types of work during the course of their employment. For example, one Petitioner witness testified that he spent about 75 percent of his work time for the Employer performing plumbing work, but his prior experience and employment background was in masonry and carpentry.

D. Additional Facts Bearing on the Supervisory Issue:

There is insufficient evidence in the record that any of the alleged supervisors, or employees grouped with them based on the Employer's assertion that they perform the same functions, have the authority to hire, discharge, transfer, suspend, lay off, recall, promote, reward, discipline, or adjust employee's grievances, or to effectively recommend such action, with the use of independent judgment. As noted above, the Petitioner contends that Dickerson, Kevin Dulaney, Kemper and Via are statutory supervisors. In this regard, the Petitioner describes Dickerson as the supervisor of the Employer's employees employed at Michelina's

^{11/} It is unclear from the record that all salaried employees were offered paid health insurance through the Employer.

food processing plant and asserts that he has the authority to transfer, recall, assign, reward employees with overtime, and to adjust employees' grievances. The Petitioner contends that Kevin Dulaney supervises and signs for employees on prevailing wage projects and that he has the authority to hire, transfer, suspend, lay off, recall, assign, reward employees with overtime and adjust employees' grievances. Kemper is described by the Petitioner as the Employer's shop supervisor and also the supervisor over some field work. The Petitioner thus contends that Kemper has the authority to transfer, assign, reward employees with overtime, discipline and to adjust employees' grievances. Via is described as the project manager over plumbing and pipe fitting. In contrast, the Petitioner asserts that Michael Landrum and Dave Butler are non-supervisory working foremen.

The record reflects that Kevin Dulaney plays a role in adjusting employees' work schedules, job assignments, tasks, and rates of pay, and the layoff and recall of employees. For example, he played a role in shortening the employees' work day by eliminating the ½ hour lunch break and he changed their work schedule from five 8-hour days to four 10-hour days. However, the record does not disclose whether Dulaney made these changes on his own initiative or whether the changes were done pursuant to an Employer directive. With regard to the assignment of tasks, the record reflects that tasks had to be performed in a specific manner and order based on how other work on the job was being performed. There was testimony that Dulaney has on occasion been "in charge" of multiple jobsites at the same time and he has instructed employees to leave one jobsite and report to another jobsite. However, Dulaney explained that his "responsibility" for multiple jobsites is a consequence of one job finishing up and another just beginning. Finally, regarding the adjustment of employees' pay, the record discloses that an employee received a requested \$1 hourly wage increase after complaining to Dulaney that he wanted to make more money. According to Dulaney, he was only the conduit with respect to this request and did not make any recommendation. Dulaney also characterized his action in recalling or laying off different employees as the performance of a conduit or messenger function on behalf of the Employer's owners who directed him to convey the information to the respective employees.

Regarding the assignment or direction of work, the evidence is vague and conflicting regarding whether independent judgment is involved in the making of assignments. For example, there is record testimony that foremen make assignments to employees based on their personal knowledge of employees' skills. However, no specific evidence was provided to support that assertion. In the Employer's shop, Kemper determines who runs errands or makes deliveries based on the availability of employees to perform the task. This type of assignment appears to be routine in nature and not involving the exercise of independent judgment. Like Kemper, Dulaney and Dickerson assign employees to specific tasks on the jobs that they oversee, but there is no evidence that this involves the assignment of an overall task rather than a discrete task. The record discloses that Dickerson has sought volunteers to work overtime, but there is no evidence that he or any of the other putative supervisors have the authority to mandate overtime.

The evidence is also conflicting regarding the foreman's performance of unit work. Thus, it appears from the record that Dulaney rarely works with tools, but rather is engaged in

overseeing the completion of work. Dickerson, on the other hand, operates as a working foreman at least some of the time.

The record testimony with respect to the duties and authority of Wilbur Via is scant. At the time of the hearing he was working in the field for the Employer erecting steel and sheet metal. However, he had only been moved to field work for about 2 weeks before the hearing. Prior to that time, he had been employed as a project manager for the Employer and had worked from the office. At least some of the jobs for which he was project manager were primarily “piping” jobs. The record does not disclose whether his move to the field is temporary or permanent, nor does the record disclose the precise nature and scope of his duties as project manager for the Employer.

Generalized testimony in the record describes the foremen as being responsible for insuring that employees do not work in excess of 40 hours per week. Employees only work overtime on a particular job, if necessary, to ensure that there is no conflict in the order of assignments (e.g. so that plumbing work is not “covered over” by the performance of another contractor’s work, such as concrete work). If employees have to work overtime on a particular day, they are sent home early the following day to keep their work hours within a 40-hour week maximum.

III. UNIT COMPOSITION

Section 9(a) of the Act only requires that a unit sought for bargaining by a petitioning labor organization be an appropriate unit for purposes of collective bargaining, and there is nothing in the statute which requires that the unit sought be the only appropriate unit, or the ultimate unit or even the most appropriate unit. *Morand Brothers Beverage Company*, 91 NLRB 409, 418 (1950). Moreover, the unit sought by the petitioning labor organization is always a relevant consideration and a union is not required to seek representation in the most comprehensive grouping of employees unless an appropriate unit compatible to that requested does not exist. *Overnite Transportation Company*, 322 NLRB 723 (1996); *Purity Food Stores*, 160 NLRB 651 (1966). In making unit determinations, the Board considers whether a community of interest exists among employee groups. In this regard, the Board examines such factors as mutuality of interests in wages, hours and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. See, *Yuengling Brewing Co. of Tampa*, 333 NLRB 892 (2001).

The Board has long held that “in the construction industry units may be appropriate on the basis of a craft, or because they comprise a clearly identifiable and functionally distinct group of employees . . .” *The Longcrier Company*, 277 NLRB 570, 572 (1985); see also, e.g., *Turner Industries Group, LLC*, 349 NLRB No 42, slip op. 3 (2007). Generally, where there is no bargaining history on a more comprehensive basis, a craft or traditional departmental group having a separate identity of functions, skills, and supervision, exercising craft skills or having a craft nucleus, is an appropriate unit. See, e.g., *E.I. DuPont & Co.*, 162 NLRB 413 (1966); see also, *Mirage Casino-Hotel*, 338 NLRB 529 (2002). The Board has described a craft unit as, “one

consisting of a distinct and homogenous group of skilled journeymen craftsmen who, together with helpers or apprentices, are primarily engaged in the performance of tasks which are not performed by other employees and which require the use of substantial craft skills and specialized tools and equipment.” *Burns and Roe Services Corporation*, 313 NLRB 1307, 1308 (1994); citing *Phoenician*, 308 NLRB 826 (1992). Thus, in determining whether a petitioned-for group of employees constitutes a separate craft unit, “the Board examines whether the petitioned-for employees participate in formal training or an apprenticeship program; whether the work is functionally integrated with the work of the excluded employees; whether the duties of the petitioned-for employees overlap with the duties of the excluded employees; whether the Employer assigns work according to need rather than on craft or jurisdictional lines; and whether the petitioned-for employees share common interests with other employees, including wages, benefits, and cross-training.” *Burns and Roe*, supra at 1308 (citation omitted); see also, *Metropolitan Opera Association, Inc.*, 327 NLRB 740, 754 (1999); *Schaus Roofing and Mechanical Contractors, Inc.*, 322 NLRB 781, 783 (1997).

The Board has recognized that units limited to homogenous groups of employees may be appropriate in the construction industry if they constitute a craft or because they comprise a clearly identifiable and functionally distinct group of employees. *Longcrier*, supra at 572. However, “The Board does not permit the arbitrary, heterogeneous, or artificial grouping of employees.” *Turner Industries Group, LLC.*, supra, citing *Moore Business Forms, Inc.*, 204 NLRB 552 (1973); *Glosser Bros., Inc.*, 93 NLRB 1343 (1951). Here, as was the case in *Longcrier*, the employees sought by the Petitioner do not meet either of the above noted tests to conclude that they constitute an appropriate unit for bargaining. *Id.* Thus, I find that the petitioned-for unit, as described, is not an appropriate unit for bargaining.

In *Longcrier*, the petitioner sought to represent a unit of equipment operators. The Board found that the requested unit was inappropriate, in part, because of the “overlapping duties and functional integration of the work performed by the petitioned-for employees with that of the remaining employees.” *Longcrier*, supra at 572. Additionally, it was noted that the employer in *Longcrier* utilized employees to operate equipment according to need rather than following strict job classifications. *Id.* Here, the record discloses that many, if not all, of the Employer’s field and shop employees perform some type of pipe work, as described in the petition, and that the Employer’s employees may perform different functions depending on the needs of a particular job. Additionally, employees performing pipe work regularly work along with other employees who are performing different types of work, such as that of a laborer or carpenter. The record in *Longcrier* also established that the petitioned-for employees, like those sought by the Petitioner here, performed other tasks, worked with other employees as an integrated team and have not participated in or completed any type of formal apprenticeship program. *Id.* Here, the record discloses that nearly all of the petitioned-for employees spend a significant percentage of their working hours engaged in millwright work, carpentry and as laborers or machinists, in addition to their performance of pipe work. Their work tasks may also include fabrication work performed by shop employees and structural welding performed in the field.

The record does not provide a basis on which to draw a distinction between employees along craft lines or as a consequence of some other identifiable and functionally distinct

grouping. In this regard, I note that the evidence, particularly the Employer's records, as to the distinctive type of work actually performed by each of the Employer's employees is vague at best. However, there is lengthy testimony in the record that employees regularly work side-by-side with other employees who perform non-pipe related work; that employees who performed a significant amount of pipe work also performed other types of work; and, that employees who primarily performed work that arguably belongs to another craft group also performed a significant amount of pipe work. Moreover, the unit fashioned by the Petitioner would exclude at least eight employees whom it initially conceded would be in an appropriate unit based on its proposed 15 percent standard for performance of unit work.^{12/} This group, excluded under a 35 percent standard later suggested by the Petitioner, would include five employees estimated under the Petitioner's calculations to have performed pipe work (unit work) for 34 percent (1 employee), 33 percent (3 employees) and 27 percent (1 employee) of their working hours. This fact alone highlights the inappropriate and arbitrary nature of the line that the Petitioner seeks to draw in arriving at an appropriate unit. Additionally, despite the lack of a "bright line" standard, the Board has consistently held that dual function employees performing duties similar to those performed by unit employees for significantly less than 35 percent of their work time have a substantial interest in the working conditions of the unit. See, e.g., *Medlar Electric, Inc.*, 337 NLRB 796 (2002)(Employee who regularly spent 25 to 30 percent of his work time engaged in the performance of unit work found to have substantial interest in the unit's wages, hours, and conditions of employment.) I reference the dual function analysis for illustrative purposes only as I find it has dubious relevance to an employee grouping where employees often perform an array of functions based on need, thereby blurring ostensible craft lines, or where the suggestion of a separate community of interest is based partly on job functions.

While some employees are more likely to perform some types of work than other employees given their experience and abilities, the record discloses that work assignments are based on the Employer's needs for those projects. Employees who are proficient in a particular skill set are more likely to be selected to work on projects requiring their skills. However, there is no evidence that employees are chosen based on craft considerations or any other artificial delineation of employees' duties. Finally, there is no evidence that the wages and benefits for employees who perform pipe work differs from other employees. In addition, all employees have the opportunity to learn and become proficient in other types of work. In this regard, I note that one witness with a background in masonry and carpentry spends approximately 75 percent of his working hours performing plumbing work for the Employer.

Based on the foregoing, and the record as a whole, I find that the petitioned-for unit limited to plumbers, pipe fitters and pipe welders is not an appropriate unit for collective bargaining. Rather, I find that a unit comprised of all the Employer's full-time and regular part-time shop and field construction employees constitutes an appropriate unit as well as the smallest appropriate unit encompassing the employees sought by the Petitioner. In this regard, I note that

^{12/} There may be more employees who would be included under a different method of calculating the estimates contained in the record. In this regard, I note that the work of some employees was not observed by any of the testifying witnesses and thus these individuals would be excluded merely because none of the testifying witnesses observed them in the performance of their job duties, regardless of the amount of pipe work that they performed.

the Employer's three owners jointly provide common overall supervision for shop and field employees; employees possess similar (although differing in type) degrees of skill and exhibit overlapping functions; they have frequent job related interchange with each other regardless of function, moving from the shop to the field and on and off of the Employer's freezer crew; employee tasks are functionally integrated in order to complete the Employer's projects; and, employees share similar hours, wages, and other working conditions. See, *Armco, Inc.*, 271 NLRB 350 (1984); *Atlanta Hilton & Towers*, 273 NLRB 87, 89 (1984); *J.C. Penney Co.*, 328 NLRB 766 (1999). Accordingly, if the Petitioner is willing to proceed to an election in such a unit, I shall direct an election among these employees to determine whether they wish to be represented by the Petitioner for purposes of collective bargaining. ^{13/}

IV. THE SUPERVISORY ISSUE

Supervisors are specifically excluded from the Act's definition of "employee" by Section 2(11) of the Act which defines a "supervisor" as:

any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of "supervisory authority" in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the putative supervisors involved here possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this

¹³ / The Petitioner has made the necessary showing of interest in the larger unit which I have found appropriate and I shall therefore direct an election in the comprehensive unit.

section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Such “minor supervisory duties” do not deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4. In this regard, the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. At 3 (2006); *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB 817, 818 (2003); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Dean & Deluca*, supra at 1047; *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Board recently revisited the issue of supervisory status in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), in light of the Supreme Court’s finding in *Kentucky River*. See also, *Croft Metals, Inc.*, 348 NLRB No. 38 (2006) and *Goldencrest Healthcare Center*, 348 NLRB No. 39 (2006), issued at the same time as *Oakwood*. In *Oakwood*, the Board addressed the Supreme Court’s rejection of the Board’s interpretation of Section 2(11) in the healthcare industry as being overly narrow and adopted “definitions for the term ‘assign,’ ‘responsibly to direct,’ and ‘independent judgment’ as those terms are used in Section 2(11) of the Act.” *Oakwood*, supra, slip op. at 3.

With regard to the Section 2(11) criterion “assign,” the Board considered that this factor shares with other Section 2(11) criteria the “common trait of affecting a term or condition of employment” and determined to construe the term “assign” “to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Id.*, slip op. at 4. The Board reasoned that, “It follows that the decision or effective

recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function.” Id. The Board clarified that, “. . . choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to ‘assign.’” Id.

In *Oakwood*, the Board explained that, “responsible direction,” in contrast to “assignment,” can involve the delegation of discrete tasks as opposed to overall duties. 348 NLRB at slip op. 5-6. The Board reasoned, however that “for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly.” In clarifying the accountability element for “responsibly to direct” the Board noted that, “to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” Id, at slip op. 7.

Assignment or responsible direction will, as noted above, produce a finding of supervisory status only if the exercise of independent judgment is involved. Independent judgment will be found where the alleged supervisor acts free from the control of others, is required to form an opinion by discerning and comparing data, and makes a decision not dictated by circumstances or company policy. Id at slip op. 8. Independent judgment requires that the decision “rise above the merely routine or clerical.” Ibid.

There is insufficient evidence establishing that the six employees in issue, Kevin Dulaney, Mike Landrum, Donald “Ike” Dickerson, David Butler, Larry Kemper and Wilbur Via can hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, or adjust their grievances, or effectively recommend such action. Additionally, although there is evidence that at least some of the foremen and Via are involved in assignment and direction of employees, there is insufficient evidence that they assign employees with the use of independent judgment within the meaning of *Oakwood*, supra, or in directing employees in the performance of discrete tasks, that they do so responsibly. In this regard, the record indicates that foremen and Via have been delegated the authority to direct the work by the assignment of specific tasks to employees on the jobs to which they have been detailed. However, the record evidence is insufficient to permit a determination that they have been delegated the authority to take corrective action if necessary or that there is a prospect of adverse consequences for the foremen or Via if they do not take corrective action.

Based on the above, and the record as a whole, I conclude that the Petitioner has not met its burden of proving that the six employees whose status is in issue are, in fact, supervisors within the meaning of Section 2(11) of the Act. Moreover, I find that the record evidence regarding whether any or all of these employees share a community of interests with other employees in the appropriate bargaining unit is vague and inconclusive. Accordingly, I shall instruct my agent to challenge the ballots of Kevin Dulaney, Mike Landrum,

Donald “Ike” Dickerson, David Butler, Larry Kemper, and Wilbur Via should they appear at the polls to vote.

V. EXCLUSIONS

In accord with the stipulation of the parties and based on the record as a whole, I find that President and Part Owner, Todd Ghearing; Vice-President and Part Owner, Tim Ousley; and Secretary and Treasurer and Part Owner, Andy Graham are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall exclude them from the unit found appropriate herein.

VI. CONCLUSIONS AND FINDINGS

In sum, the unit sought by the Petitioner is simply not a distinct and homogenous group of employees or skilled craftsmen that might be characterized as a craft unit or other clearly identifiable and functionally distinct group. For these reasons, and those more fully described above, I find that the craft unit sought by the Petitioner is not an appropriate unit for purposes of collective bargaining. Additionally, I find that a unit comprised of all of the Employer’s full-time and regular part-time shop and field construction employees is an appropriate unit. Because the Petitioner has not taken a position as to whether it would proceed to an election in a unit other than the one for which it has petitioned, I shall grant the Petitioner 7 days from the date of issuance of this Decision and Direction of Election in which to notify this Regional Office, in writing, whether it wishes to proceed to election in the unit found appropriate or withdraw its petition without prejudice.

Based upon the entire record in this matter and in accordance with the above-referenced narrative, I conclude and find as follows:

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby 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 in this case.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner claims to represent certain employees of the Employer.
5. 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.
6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and all regular part-time shop and field construction employees employed by the Employer working at or from its Jackson, Ohio facility, excluding all other employees, all office clerical employees, all professional employees, and all guards and supervisors as defined in the Act.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate. The employees will vote on whether they wish to be represented for purposes of collective bargaining by Ohio State Association of Plumbers & Pipefitters, United Association of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those employees 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. Also eligible to vote 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 eligibility date for the election and who have not been terminated for cause or quit voluntarily prior to completion of the last job for which they were hired. 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.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **December 11, 2007**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency website, www.nlr.gov,^{14/} by mail, or by facsimile transmission at (513) 684-3946. 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 electronically, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 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.

^{14/} To file the list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the "Accept" button. The user then completes a form with information such as the case name and number, attaches the document containing the request for review, and clicks the Submit Form button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, www.nlr.gov.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received in Washington by **December 18, 2007**. The request may be filed electronically through E-Gov on the Board's web site, www.nlr.gov,^{15/} but may not be filed by facsimile.

DATED: December 4, 2007.

/s/ Gary W. Muffley, Regional Director

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Classification Index

440-1760-9133-1000
440-1760-9167-7200
440-1760-9167-7267
460-5067-4900

^{15/} Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.