

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 14

VATTEROTT EDUCATIONAL CENTERS, INC.

Employer<sup>1</sup>

and

Case 14-RC-12813

CARPENTERS' DISTRICT COUNCIL OF  
GREATER ST. LOUIS AND VICINITY

Petitioner

**REGIONAL DIRECTOR'S DECISION AND  
DIRECTION OF ELECTIONS**

The Employer, Vatterott Educational Centers, Inc., is a for-profit career college. The Petitioner, Carpenters' District Council of Greater St. Louis and Vicinity, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent all instructors employed at the Employer's NorthPark Campus in Berkeley, Missouri. A hearing officer of the Board held a hearing, and the parties filed briefs with me, which I have carefully considered.

The parties stipulated that there are two units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act, one unit consisting of all full-time instructors and another unit consisting of all adjunct and part-time instructors employed at the Employer's NorthPark, Berkeley, Missouri facility. As evidenced at the hearing and in the briefs, the parties agree there is only one issue. The Employer contends that the Petitioner is a business rival of the Employer and is disqualified from

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

representing the petitioned-for employees. The Employer further contends that because the Associated Electrical Contractors Local Union 57 Joint Apprenticeship Program contracts with Ranken Technical College (Ranken), a competitor,<sup>2</sup> to provide classroom instruction, collective bargaining with the Petitioner would result in a clear and present danger to the Employer. The Petitioner contends that it is not a business rival of the Employer.<sup>3</sup> The Petitioner argues that the apprenticeship programs that the Employer bases its argument on are unrelated entities and not under the control and domination of the Petitioner; and, even if they are sufficiently under the Petitioner's control, the apprenticeship programs do not compete with the Employer. As discussed more fully below, I find that the Petitioner is qualified to act as the bargaining representative of the Employer's employees.

## I. BACKGROUND

### **A. The Employer's Operations**

The Employer operates a private, for-profit career college with facilities located in various cities and states. The only facility involved is the Employer's NorthPark Campus located in Berkeley, Missouri. The Employer is accredited by the Accrediting Commission of Career Schools and Colleges of Technology, which is listed by the U.S. Department of Education as a nationally recognized accrediting agency. The Employer is certified to operate by the Coordinating Board for Higher Education, State of Missouri.

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<sup>2</sup> The parties stipulated that the Employer and Ranken are business rivals in providing educational programs in the St. Louis, Missouri area.

<sup>3</sup> The Petitioner filed a Motion to Correct the Record as to its initial statement of position on the record, contending Petitioner's counsel was either misquoted or misspoke. The hearing record and the Petitioner's post-hearing brief established that it is the Petitioner's position that it is not in competition with the Employer.

Brandon Shedron is the Employer's senior vice president and chief academic officer and makes all final decisions regarding academic operations, policies, and procedures. There are eight program directors and two directors of education (DOE)<sup>4</sup> who report to the regional academic dean, who, in turn, reports to Shedron. There are approximately 43 full-time instructors and 11 adjunct and part-time instructors who report to their program director.

The Employer's NorthPark Campus offers diplomas in combination welding; computer technology; cosmetology; electrical mechanics; heating, air conditioning, and refrigeration; information systems security; and plumbing. The diploma programs, with the exception of cosmetology, consist of 60 weeks and 72 quarter credit hours<sup>5</sup> of classroom theory and associated lab work, and train students for entry level employment. The Employer also offers an Associate of Occupational Studies, A.O.S., in combination welding technology; computer systems and network technology; electrical mechanics technology; heating, air conditioning, and refrigeration technology; medical assistant;<sup>6</sup> medical billing and coding; plumbing technology; and web design and multimedia application development. The associate programs, with the exception of medical assistant, consist of 90 weeks, 94.5 quarter credit hours of classroom theory and associated lab work and 13.5 quarter credit hours of general education totaling 108 quarter credit hours. The goal of the A.O.S. is to train students for entry level

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<sup>4</sup> The parties stipulated that the program directors and DOEs are supervisors within the meaning of Section 2(11) of the Act.

<sup>5</sup> Quarter credit hours multiplied by two thirds equals the equivalent of semester hours.

<sup>6</sup> The Employer is phasing out its Medical Office Assistant program and is not accepting any new enrollees in the program.

employment as well as learn management skills and advanced techniques in the individual program of study. The credit hours earned in a diploma program are applied to the associate program in the same career field. Finally, the Employer offers a Bachelor of Science, B.S., in Computer Engineering and Network Technology, which consists of 170 weeks and a total of 213 quarter credit hours. The academic calendar provides for course instruction to begin every 10 weeks.

Approximately 1400 students are presently enrolled at NorthPark. There are about 170 students enrolled in the plumbing program; 100 in combination welding; 350 in heating, air conditioning, and refrigeration; 225 electrical mechanics; 180 in cosmetology; 300 in medical; and about 75 in computer technology.

Admission to the Employer is open to the general public. The admission policy requires that the applicant have a high school diploma or a general education diploma (GED). The applicant must also complete a personal interview, an application for admission, an enrollment agreement, request a high school or GED transcript, submit college placement test scores, fill out financial aid forms if applicable,<sup>7</sup> and pay a registration fee.<sup>8</sup> Students pay their own tuition upon enrollment or pay pursuant to a tuition financing proposal. Some students may receive tuition reimbursement from their company. The Employer has Federal and academic grants, Federal and private loans, and scholarships. The Employer is also approved for Veterans' education benefits; for example, the Employer participates in the Veterans' Yellow Ribbon program which gives

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<sup>7</sup> Students are eligible for various grants, loans, and scholarships.

<sup>8</sup> Tuition for the electrical mechanics, as well as the plumbing, combination welding, and heating, air conditioning, and refrigeration programs, is \$21,600 for the diploma and \$33,000 for the A.O.S.

supplemental funding through a matching contribution from the Employer to students that have veterans' benefits. The Employer will evaluate the student's prior education, training, and work experience to determine if any subjects or training activities in the student's program may be waived and thereby reduce the amount of education or training required for the student to reach the educational objective. The Employer also has grade point average and certain attendance requirements for its students.

Career Services provides a graduate placement process that includes the writing of resumes and the interview process, but the Employer does not guarantee employment. The Career Services office also conducts career fairs twice a year inviting 30 to 40 prospective employers seeking to hire the Employer's students, networks in the community for available job opportunities, posts weekly job boards by program, and assists in finding part-time employment for students while in school. The Employer's Retention Department works to ensure student success through use of internal and external campus resources such as student transportation to attend classes, tutoring, and faculty advising. The Employer has articulation agreements with Phoenix University and Southwest University, and other area, regional, and state institutions setting forth mutual agreements to facilitate the transfer of students' academic credits between the schools.

The Employer uses various marketing methods to attract students, including television, newspapers, direct print mailings, billboards, and radio, and sets up information booths at high schools, career fairs, and community outreach programs. The Employer partners with governmental agencies in its recruiting efforts, including Vocational Rehabilitation and the Department of Veterans' Affairs.

## **B. The Petitioner**

The Petitioner, with more than 24,000 members, is a not-for-profit, tax exempt labor organization with a geographical jurisdiction covering Missouri, Kansas, and Southern Illinois. The Petitioner is governed by approximately 300 delegates representing 57 Locals. The delegates elect the Petitioner's 10 member Executive Board. Terry Nelson serves as the Executive Secretary-Treasurer and Albert Bond serves as Assistant Executive Secretary-Treasurer. The Petitioner maintains its own financial books and records separate from its health, welfare, and apprenticeship funds and has its own Federal Tax Identification number, files separate tax and Department of Labor (DOL) forms, and contracts and pays for its own audits.

The Petitioner employs Dr. John Gaal as its Director of Training and Workforce Development. Gaal's duties include overseeing the training of Petitioner's members, advising the various training and apprenticeship programs operated by the Carpenters Joint Training Fund (the Fund) on direction, process and procedure, and researching the development of the Carpenters' workforce. Gaal's office is responsible for monitoring and reimbursing tuition for members who take advanced courses at one of the joint apprenticeship programs or at area colleges and schools. The Local Unions reimburse the Petitioner for 50 percent of its members' tuition. Gaal has no role in the appointment of Fund trustees, joint apprenticeship committee members, or the coordinators of the joint apprenticeship programs; however, he advises all of the committees and is a member of the Southeastern Missouri Carpenters Joint Apprenticeship Committee (SEMO CJAP).

Though not a function of his position as the Petitioner's Director of Training and Workforce Development, Gaal is also an adjunct professor at Webster University in the School of Business and Technology, is a member of Ranken's Bachelor of Science advisory program board, and participated in the Secretary of Labor's Advisory Committee on Apprenticeship, which revised the DOL's apprenticeship standards for the first time in 30 years. When the Fund established the Associated Electrical Contractors Local Union 57 Apprenticeship Committee and Program in 2008, Gaal attended two meetings held between the new program coordinator, Mike Short, and Ranken over instructional classes to be taught at Ranken. Gaal advises various area secondary school trade programs including the Construction Career Center, North and South County Special School District programs, Bayless Middle and High School, Rolla Technical Institute, and Lewis and Clark vocational-technological school.

**C. The Carpenters Joint Training Fund (The Fund)**

The Constitution of the United Brotherhood of Carpenters and Joiners of America provides among its Objects "to organize workers, to encourage an apprenticeship system and a higher standard of skill." It also provides the following:

Apprenticeship

A. Section 43. The United Brotherhood may establish Standards for apprenticeship and training programs, including skill upgrading, covering trades and industries within the United Brotherhood's jurisdiction. Where such Standards have been established, it shall be the responsibility of District Councils or Regional Councils, or of Local Unions where no District or Regional Council exists, to develop and implement programs complying with the Standards and approved by the United Brotherhood. A graduate of an approved apprenticeship program shall be recognized within the United Brotherhood as a journeyman at his or her trade.

The collective-bargaining agreements between the Petitioner and signatory employers and employer associations provide for the continuation of the joint training

trust fund known as the "Carpenters Joint Training Fund of St. Louis", previously called the Fund. The Board of Trustees for the Fund consists of 12 persons: 6 trustees designated by the Petitioner, referred to as Union Trustees; and 6 trustees designated by the employers, referred to as Employer Trustees. Two of the Employer Trustees are appointed by the Associated General Contractors, two by the Home Builders Association, one by the Flooring Industry Council of St. Louis, and one by the Southern Illinois Builders' Association. The Union Trustees include Terry Nelson, the Petitioner's Executive Secretary-Treasurer and Albert Bond, Assistant Executive Secretary-Treasurer. Nelson serves as a trustee pursuant to the Petitioner's By-Laws and Trade Rules. The remaining four Union Trustees are members and business representatives of the Petitioner. The Petitioner has no input into the selection of the Employer Trustees. The trustees elect a chair and secretary from among themselves. No trustee is paid for his services to the Fund.

The Fund is a 501(d) not-for-profit, tax exempt organization, independent of the Petitioner, which provides the Joint Apprenticeship Programs to members of the Petitioner. The Fund is primarily financed by contributions made by signatory contractors for each hour worked by employees covered by a collective-bargaining agreement. Approximately 10 contractors have collective-bargaining agreements with the Petitioner that do not provide for contributions to the Fund. The Fund also earns income from investments. The Fund's financial statements are separate and independent from the Petitioner and the Fund has its own Federal Tax Identification number. While the Fund uses the same auditor as the Petitioner, the Fund pays for its own audits.

According to the Carpenters National Guidelines for Apprenticeship Standards, the Joint Apprenticeship Programs are registered with the DOL Bureau of Apprenticeship and Training (DOL BAT), and are administered by the five joint apprenticeship committees: the St. Louis Carpenters' Joint Apprenticeship Committee (CJAC); the Floor Layers Joint Apprenticeship Committee (FLJAC); the Southeast Missouri Carpenters' Joint Apprenticeship Committee (SEMO CJAC), which provides both carpenter and millwright training programs; the Southern Illinois Carpenters' Joint Apprenticeship Committee (So IL CJAC), which also provides both carpenter and millwright training programs; and the Associated Electrical Contractors Local Union 57 Joint Apprenticeship Committee (EJAC). Each committee consists of an equal number of labor representatives and management representatives from their respective programs. Nelson and Bond are two of the six labor members of CJAC and the two labor members of EJAC. The Fund employs a coordinator to oversee each program, which coordinators are selected by their committee members.

The Fund maintains offices and classrooms at the Fund's Nelson-Mulligan Carpenters' Training Center located at 8300 Valcour Avenue in Affton, Missouri, here called the Valcour facility, which is located a few miles from the Petitioner's offices in St. Louis City. The Valcour facility is used by the St. Louis Carpenters' Joint Apprenticeship Program (CJAP), the Cabinetmakers', Display and Millwork Joint Apprenticeship Program (CDM), the Floor Layers Joint Apprenticeship Program (FLJAP), and the Associated Electrical Contractors Local Union 57 Joint Apprenticeship Program (EJAP). The Petitioner loaned the Fund money to purchase the Valcour facility, which the Fund is repaying. There are also training centers in Cape Girardeau,

Missouri and Belleville, Illinois, which houses SEMO CJAP and So IL CJAP, respectively. These training centers are utilized by all of the Petitioner's members during their apprenticeship and by journeymen for continuing education. The Petitioner lists its training opportunities on its website and in its quarterly newsletter, including the apprenticeship programs and training center. Each of the five joint apprenticeship committees also maintains their own websites on which they advertise their programs. Each apprenticeship committee created its own DOL-registered programs which are the property of the individual committees and not the Petitioner.

**D. Associated Electrical Contractors Local Union 57 Joint Apprenticeship Committee and Program (EJAC and EJAP) and Ranken**

Apprenticeship Committee and Program. The EJAC was formed in mid-2008 and the documentation for the EJAP was submitted to the DOL BAT for approval and registration. EJAC made changes requested by the DOL BAT, and the program was approved in October 2008. The apprentices started in January 2009. The EJAC is comprised of four committee members and two alternates with an equal number of labor and management representatives. Petitioner's Nelson and Bond serve as labor representatives on the EJAC. The record is silent as to the identity of the alternate labor committee member. The EJAC is financed by contributions to the Fund made by signatory contractors in the electrical industry for each hour worked by employees covered by the collective-bargaining agreement. The hourly contribution to the Fund by electrical contractors is \$.41 per reported hour.

The EJAP is an approximately 5-year classroom instruction and on-the-training program for careers in the electrical industry. The EJAP consists of 10 terms starting with a 2-week orientation program held at the Valcour facility, which includes an OSHA

certification course and aerial and forklift training. Orientation is followed by 9 terms consisting of 2 weeks of 40 hours per week of classroom instruction conducted at Ranken followed by 6 months of on-the-job training with a sponsoring electrical contractor. Applicants must be 18 years old, a U.S. citizen, and have a high school diploma, GED or obtain either within 1 year of starting the program. Apprentices must maintain membership in the Petitioner to participate in the EJAP. An apprentice's program starts after receiving a letter of intent to hire from a signatory contractor where the apprentice will perform the on-the-job training portion of the program. While in the program, during the 2-week classroom instruction, apprentices receive a small educational grant to help offset travel expenses related to the full-time training. During the on-the-job training portion, they receive apprentice wages from their employer. If an apprentice is laid off during the course of the program, the EJAP coordinator will assist the apprentice in finding another sponsoring contractor.

The EJAP will accept and consider prior related coursework completed by apprentices which may allow an apprentice to start the program at a higher level. The EJAP also has articulation agreements with other colleges and educational institutions allowing for apprentices' EJAP coursework to be applied to higher degree programs. Apprentices graduate from the EJAP when they are able to demonstrate completion of the program and compliance with the DOL's apprenticeship standards. Successful completion of the EJAP provides the apprentice with a journeyman certificate from the DOL. Currently there are 87 apprentices in the EJAP. In addition to the EJAP, the EJAC provides advanced skill courses for journeymen or apprentices, which are taught

by instructors at the Valcour facility or at Ranken. The EJAC advertises the EJAP through TV commercials, radio ads, brochures, and attendance at career and job fairs.

Mike Short is employed by the Fund as the coordinator of the EJAP. Short is a 20-year member of the Petitioner. Short's duties and responsibilities include overseeing day-to-day operations; coordinating apprentice activities including scheduling, discipline, employment, and guidance and assistance; ensuring that the courses taught are relevant to industry needs, that the apprentices have the knowledge and skills to work for the electrical contractors by whom they are employed, and that the training school is efficient and productive. Short drafts an operating budget for the EJAP and submits it to the EJAC for approval. Short is paid by the Fund and his earnings are determined by the EJAC guidelines. Short is authorized to make expenditures of less than \$2500 without prior approval, but expenditures in excess of that must be approved by the EJAC and the Fund. Short maintains an office and classroom at the Valcour facility. When apprentices are engaged in the 2-week courses held at Ranken, Short visits the campus 2 to 3 times per week. Short hires the Carpenters' Joint Apprenticeship Program instructors to teach orientation portions of the EJAP and occasionally uses CJAP administrative staff. The instructors and administrative staff wages are deducted from the EJAP's operating budget and paid by the Fund to the CJAC.

Ranken. The nine 2-week classroom instruction portion of the EJAP is held at Ranken. Ranken is a not-for-profit career technical college providing certificates, associate degrees, and bachelor of science degrees. According to its catalog, Ranken offers 4 automotive programs; 5 construction programs, including carpentry and building construction, heating, ventilation, air conditioning and refrigeration, and plumbing

technology; 5 electrical programs; information technology, 3 manufacturing programs, and general education. Ranken is accredited by The Higher Learning Commission and is a member of the North Central Association of Colleges and Schools, a regional accreditation association. Accreditation standards are determined by the U.S. Department of Education. Ranken currently has approximately 2200 students. Ranken is overseen by a Board of Directors. No one from the Petitioner sits on the Board of Directors and neither the Petitioner nor the Fund has any ownership interest in Ranken.

When the EJAC created the EJAP in 2008, it inquired of Ranken about providing a classroom and laboratory instruction program specifically designed for its apprentices to be completed in short intervals followed by on-the-job training. Petitioner's Director of Training and Workforce Development Gaal was the only representative of Petitioner who advised EJAC on the program curriculum and twice met with EJAC Coordinator Short and a Ranken representative about setting up this program specifically for the EJAP. Ranken then presented a proposed course schedule for the EJAP and advised that it would charge the EJAC \$1000 per student for each 2-week course. There is no written agreement between Petitioner, the Fund or the EJAC and Ranken covering the coursework that Ranken provides.

One Ranken instructor, Daniel Fitzsimmons,<sup>9</sup> is assigned to teach all of the EJAP courses including classroom instruction and complementary lab work. Fitzsimmons also teaches other courses at Ranken unrelated to the EJAP. The Petitioner, Fund, and EJAC did not have any input in Ranken's selection of the instructor. Ranken provides

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<sup>9</sup> Fitzsimmons is listed as one of nine full-time electrical technology instructors. There is also a full-time division chair and two adjunct instructors of electrical technology. About 134 individuals have faculty credentials.

laboratory space for the EJAP students to demonstrate proficiency in the application of coursework to actual electrical settings. While other Ranken students enrolled in similar Ranken programs might use the same laboratory space as the EJAP apprentices, they do not use it while the EJAP program is in session. Only EJAP apprentices attend these 2-week EJAP courses and EJAP apprentices do not take any other Ranken courses that are open to its general student body.

Ranken does not consider the EJAP apprentices to be “students” of the college. The apprentice’s enrollment in the course is determined by the EJAP, and Ranken bills EJAP for each apprentice’s tuition. The apprentices are not entered into Ranken’s student database, are not provided student identification cards, do not have access to Ranken’s student services, and do not participate in student organizations, nor can they check out materials from Ranken’s library. Ranken does not have the authority to remove apprentices from the EJAP for non-attendance; however, apprentices must comply with Ranken’s Code of Conduct and are subject to its public safety procedures while on campus. Prior to the beginning of each term, EJAP Coordinator Short provides Ranken with a list of apprentices attending the course. The EJAP apprentices are given visitor parking passes when on campus.

**E. Carpenters Joint Apprenticeship Committee and Program (CJAC and CJAP)**

The CJAC, the Fund’s largest apprenticeship committee, has 12 members comprised equally of labor and management representatives. The CJAP is an independent apprenticeship program separate from the other apprenticeship programs that also fall under the auspices of the Fund. The CJAC oversees the CJAP, which occupies the majority of the Valcour facility where it provides a general carpenter

apprenticeship program including classroom instruction and on-the-job training. The CJAC is financed by the Fund from contributions from signatory contractors in the industry for each hour worked by employees covered by a collective-bargaining agreement. The contribution to the Fund for CJAC signatory contractors is \$.35 per reported hour worked by each employee. The Fund allocates \$.10 of that amount to maintenance of the Valcour facility. The remaining \$.25 is used by the CJAC to finance the CJAP. The CJAC also receives various grants for use in implementing its training programs.

The CJAP consists of an approximately 4-year program requiring apprentices to take 2 weeks, 40 hours per week, of training for every 750 hours (6 months) of on-the-job training. Applicants must be 18 years old, U.S. citizens, have a high school diploma or GED or obtain one within a year of starting the apprenticeship program, able to perform physical tasks, and be employed by a signatory contractor. Apprentices also must be members of the Petitioner. All classroom instruction for the CJAP occurs at the Valcour facility. The on-the-job training occurs with the sponsoring signatory contractor. During the 2-week classroom instruction, apprentices receive a \$50 stipend and a \$60 contribution to their health and welfare benefits. During the on-the-job training, apprentices receive apprentice wages from the contractor. The CJAP coordinator will assist an apprentice in finding a replacement sponsoring employer if laid off in order to help the apprentice achieve the 750 hours of required on-the-job training.

Like the EJAP, the CJAP will accept and consider prior related coursework completed by apprentices which may allow an apprentice to start the program at a higher level. The CJAP also has articulation agreements with other colleges and

educational institutions allowing for apprentices' CJAP coursework to be applied to higher degree programs. Apprentices graduate from the CJAP when they are able to demonstrate to the CJAC the completion of the program and compliance with the DOL's apprenticeship standards. Upon successful completion of the CJAP, the apprentice receives a journeyman certificate from the DOL. Currently there are 700 apprentices in the CJAP. In addition to the CJAP day program for apprentices, the CJAC also provides evening advanced skill classes for journeyman carpenters as well as interested apprentices which are taught by instructors at the Valcour facility. There are 12 full-time and 6 adjunct instructors as well as 4 office staff. All of the full-time instructors are members of the Petitioner and some of the part-time adjunct faculty are members. The office staff are not unionized or members of Petitioner. The CJAC employs one individual whose primary responsibility is to attend all career and job fairs and promote the program to potential apprentices and employers. CJAC also markets its program through informational television and radio ads.

Mark Fuchs is employed by the Fund as the coordinator of the CJAP. Fuchs has been a member of the Petitioner since 1978. As the coordinator, Fuchs oversees the day-to-day operations and objectives of the program and coordinates the schedules, attendance, and discipline of the apprentices. Fuchs is also responsible for ensuring the upkeep and maintenance of the Valcour facility and parking lots. Like EJAP's Short, Fuchs annually creates the CJAP's operating budget and submits it to the CJAC for review and approval by the Fund. Fuchs can only authorize expenditures of less than \$2500 and expenditures in excess of that are authorized and approved by the CJAC and the Fund. Only the Fund writes checks on behalf of the CJAC and CJAP.

## II. ANALYSIS

I find that the Petitioner is not a business rival nor does it control or dominate an organization that is a business rival of the Employer under the Board's conflict of interest doctrine and is qualified to represent the Employer's employees.

### **A. The Petitioner is Not a Business Rival of the Employer**

Since the first Decision and Direction of Elections in Case 14-RC-12738 involving the same Employer (Vatterott I),<sup>10</sup> no new case authority in the area of business rivals or competitors has developed. As cited in the previous decision, it is well settled that a union may not represent the employees of an employer if a conflict of interest exists on the part of the union such that good-faith collective bargaining between the union and the employer could be jeopardized. *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954). The conflict of interest doctrine is not limited to cases where a union and employer are in the same business; a union may also be disqualified when an enterprise controlled and dominated by the union engages in business with the employer. *Guardian Armored Assets, LLC*, 337 NLRB 556, 558 (2002), citing *St. John's Hospital and Health Center*, 264 NLRB 990 (1982). In order to find that a union has a disqualifying conflict of interest, the Board requires a showing of a "clear and present" danger of interfering with the bargaining process. *Alanis Airport Services*, 316 NLRB 1233 (1995). The burden to prove a conflict of interest is on the employer and it is a heavy one because of the strong public policy favoring the free choice of a bargaining agent by employees. *Garrison Nursing Home*, 293 NLRB 122 (1989), citing *Quality Inn Waikiki*, 272 NLRB 1, 6 (1984), *enfd.* 783 F.2d 1444 (9<sup>th</sup> Cir. 1986).

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<sup>10</sup> The hearing officer took administrative notice of this case. The Employer requested review of that decision but the majority denied review.

First, with respect to the Petitioner, it is not directly engaged in a business similar to the Employer, rather, as stipulated by the parties, is a Section 2(5) labor organization with 24,000 members covering a geographical area of three states and thus is not a business competitor of the Employer. Significantly, only approximately 1,157 of Petitioner's members are currently enrolled in Fund apprenticeship programs, less than one-half of one percent of Petitioner's total membership.

Secondly, with respect to the Fund, it is a creation of a trust agreement pursuant to the terms of collective-bargaining agreements between the Petitioner and various signatory contractors. Pursuant to 29 U.S.C. §186(c), the Fund is governed by a board of trustees comprised of an equal number of Union and Employer Trustees who elect their officers from the board. The Fund created the apprenticeship committees which are comprised of an equal number of labor and management representatives whose role it is to form, operate, and govern the apprenticeship programs. While the Petitioner's Executive Secretary-Treasurer serves as a trustee for the Fund and sits on the apprenticeship committees, other Union Trustees are elected to their trustee positions by the 300 delegates of the Petitioner and thus are subject to being voted out. The Petitioner has no input into the selection of the Employer Trustees or the management apprenticeship committee members. Moreover, the separate apprenticeship committees' day-to-day operations are overseen by coordinators employed by the Fund. None of the program coordinators are officers or employees of

the Petitioner but are merely members.<sup>11</sup>

The Fund and the apprenticeship committees are financed by contributions from signatory contractors, not by the Petitioner. Also, pursuant to the Trust Agreement, the signatory employers' contributions must only be used for apprenticeship programs. The Petitioner has no say in the Fund's or the apprenticeship committees' expenditure of those funds. While the Petitioner loaned the Fund money that enabled the Fund to purchase the Valcour facility, the Fund has made payments to the Petitioner on that loan. The Petitioner and the Fund are located in different facilities, file separate and distinct tax and DOL forms, have separate Federal Tax Identification numbers, and submit to and pay for separate audits. Finally, the Petitioner and the Fund have no ownership interest in each other.

The Board has held that a trustee is presumed to be a fiduciary safeguarding the trust rather than an agent of the appointing party and "a trustee is not acting for the union or the employer unless contrary evidence shows otherwise." *Commercial Property Services*, 304 NLRB 134 (1991); see also, *Garland-Sherman Masonry*, 305 NLRB 511 fn. 1, 513 (1991). The Board has further held, affirmed by the Supreme Court, that the trustees of a trust fund, similar to the Fund here, are solely fiduciaries,

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<sup>11</sup> In *Vatterott I*, the petitioner and the Plumbers and Pipefitters' Welfare Educational Fund (fund) were found to be intermingled. In that case, unlike here, the apprenticeship fund training director, Mark Collum, was a fund employee and a fund trustee, having been recommended by petitioner's business manager. As training director for the fund, when problems arose, Collum consulted with a petitioner's executive board member who was also a trustee of the fund. Collum was a member and elected officer of the petitioner, its Examining Board, and a committeeman on the Joint Apprentice Training Committee. Collum also served as the petitioner's apprentice training program coordinator. In addition to the three roles Collum played for the petitioner, the fund and the committee, the fund instructors were all members of petitioner and covered by a collective-bargaining agreement. Three of the instructors were also officers of the petitioner and two of them were Examining Board members. Besides providing apprenticeship and training benefits, the fund also provided health and welfare benefits for members.

owing undivided loyalty to the beneficiaries and are not collective-bargaining representatives. *United Mine Workers of America, Local 1854*, 238 NLRB 1583, 1588 (1978), *enfd. in part, denied in part*, 614 F.2d 872 (3d Cir. 1980), judgment *revd. sub nom. NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). See also, *Sheet Metal Workers' International Association*, 234 NLRB 1238, 1247 (1978). The Employer did not present any evidence at hearing that the Fund trustees have breached their fiduciary duties to the Fund or that Fund trustees have held themselves out as representatives or agents of the Petitioner.

In *Bausch and Lomb Optical Co.*, relied upon by the Employer, the petitioning union established a business that manufactured and distributed eyeglasses, the same business as the employer. The Board held the employer was not obligated to bargain with the union because the petitioner had become a direct business competitor of the employer and the union could derive financial benefits separate and distinct from employee interests by causing and prolonging a strike or even driving the employer out of business. 108 NLRB at 1561. Here, the Petitioner is clearly not engaged in the business of providing diploma and degree educational programs to the general public and is not a direct business competitor of the Employer.

In both *St. John's Hospital and Health Center*, *supra* and *Visiting Nurses Association, Inc.*, 254 NLRB 49 (1981), also cited by the Employer, the petitioning union operated nurse registries that were solely governed and operated by the petitioning union or an affiliated association of the petitioning union and no management or other third party representative had any input into the petitioning union's operation of the registries. Also, the petitioner and the registries shared offices and staff and the

registries held themselves out to the public as the petitioner's registries. The petitioners in those cases exercised considerable control over the registries, authorizing their formation and their dissolution if deemed appropriate. *St. John's Hospital and Health Center*, supra. at 991 and *Visiting Nurses Association, Inc.*, supra. at 50. As set forth above, the Petitioner and the Fund and its apprenticeship committees are separate and distinct organizations and the Petitioner does not control or dominate the Fund and the committees.

**B. Assuming the Petitioner Controls and Dominates the Fund and Apprenticeship Committees, there is No Disqualifying Conflict of Interest**

Even assuming that the Petitioner and the Fund and its apprenticeship committees are intermingled such that Petitioner exercises control over and dominates the Fund and the apprenticeship programs, those programs do not compete with the Employer so as to disqualify the Petitioner as a bargaining representative. As cited above, in order to find that a union has a disqualifying conflict of interest, the Board requires a showing of a "clear and present" danger of interfering with the bargaining process. *Alanis Airport Services*, supra. The burden to prove a conflict of interest is on the employer and it is a heavy one because of the strong public policy favoring the free choice of a bargaining agent by employees. *Garrison Nursing Home*, supra, citing *Quality Inn Waikiki*, supra. Hypothetical and speculative testimony lack probative value. *CMT, Inc.*, 333 NLRB 1307, 1308 (2001). The Employer here has not met its heavy burden to show that the Petitioner's representation would pose such a clear and present danger sufficient to justify limiting employees' statutory right of free choice.

The Employer has 1400 students participating in seven diploma programs and eight A.O.S. programs, which it offers to the general public. There are 225 students in

the Employer's electrical mechanics program, who pay tuition of \$21,600 for a diploma and \$33,000 for an A.O.S. The Employer presented evidence at hearing that in its construction trades programs (combination welding, electrical mechanics, plumbing, and heating, air conditioning, and refrigeration), it teaches basic carpentry skills. The Employer does not have a separate carpentry diploma or degree program. The purpose of teaching basic carpentry skills to students in other trades is to provide them a general familiarity of carpentry to enable them to perform their specific tasks better, and it is not to teach them to perform carpentry tasks. While the Employer has a career services program that will assist students in obtaining employment, it does not guarantee that the student will obtain employment. The diploma and associate programs are 60 and 90 weeks long, respectively, and the Employer offers two 170-week bachelor programs in the computer field. The students divide their time between classroom theory and lab work. Programs are not limited in size and graduates of the diploma program are prepared for entry-level employment in their career field. Graduates of the Employer's diploma and associate electrical program may test into a higher level of the Fund's apprenticeship program.

In contrast, the Fund has apprenticeship programs in carpentry, millwright, floor laying, and electrical, which overlaps with only one of the Employer's programs – electrical mechanics. There are 87 apprentices currently enrolled in the EJAP. The apprenticeship programs are a benefit to the Petitioner's members who are employed by signatory contractors, who are the primary contributors to the Fund. Apprentices in the electrical and carpentry programs generally have 2 weeks of classroom instruction followed by 6 months of on-the-job training with a sponsoring signatory employer. The

apprentices pay no tuition for participation in an apprenticeship program. Instead, the apprentices receive a stipend while attending classroom instruction and apprentice wages during the 6 months of on-the-job training portion. The electrical apprentice program takes 5 years to complete and the carpentry program takes 4 years. Graduates of the programs are certified as journeymen by the DOL BAT. The number of apprentices admitted to the programs is limited to the number of apprentices signatory contractors will sponsor. In most cases, the sponsoring contractors also employ the apprentices upon completion of their apprenticeship program. The fact that both the Employer and the apprentice programs may recruit from similar sources and have some similar courses does not establish that the Petitioner and its apprentice programs have a disqualifying conflict of interest with the Employer. See *CMT, Inc.*, supra at 1310.

With respect to Ranken, the Employer argues that the EJAC's use of Ranken as a resource for providing specifically designed classroom instruction is further evidence that the Petitioner or the Fund and its apprenticeship committees are in competition with the Employer. Contrary to the Employer's assertion, the oral agreement between the EJAC and Ranken to provide classroom instruction at Ranken's campus is an arms-length transaction. The EJAC pays Ranken for each apprentice to attend class. Also, EJAC has only sent 87 apprentices to Ranken, which is insignificant in light of Ranken's general student population of 2200. Notably, those apprentices are only on Ranken's campus for 2 weeks every 6 months and participate in classes attended only by apprentices and no Ranken students. Ranken does not consider the apprentices part of its student body – they are not in Ranken's student database, are ineligible for financial

aid, do not have library or other student service privileges, and are provided with visitor parking passes for the limited time they are on campus. Ranken has no financial ownership interest in the Petitioner, the Fund or the apprenticeship program and vice versa. In addition, the Petitioner has no direct role in selecting the coursework the EJAC requested Ranken teach its apprentices. Nor does Ranken have any input into the apprentices selected by the EJAP to attend Ranken courses.

The Employer has failed to establish that the Petitioner has a “clear and present” danger of interfering with the bargaining process and will sacrifice the interests of represented employees for its own financial interests. The Employer has not established that the Petitioner would in any way alter its bargaining proposals to benefit its apprentice program. In fact, if the Petitioner were to cause a strike or drive the Employer out of business, that would not benefit either the Petitioner or its apprentice program because admittance into the apprentice program is limited to those apprentices who have been hired by signatory employers and not to the general public from which the Employer generates its student body. The apprentice program is of no direct economic benefit to the Petitioner as an institution and the elimination of the program would not directly affect the Petitioner’s financial interest.

The Employer contends that any student choosing to enter the apprenticeship program instead of the Employer’s school is a direct benefit to the Petitioner in the form of dues, initiation fees, and increased contractor contributions. The Board will not deprive employees of their right to select their collective-bargaining representative based on such speculation or conjecture. There is nothing in the record to suggest that employees educated by the Employer are any less likely to desire union representation

and be willing to pay dues than the universe of employees in general. Again, contractor contributions to the apprentice program are of no direct financial benefit to the Petitioner per se.

At hearing and on brief, the Employer argued that its offer of proof regarding its “clear and present danger” evidence was improperly rejected by the hearing officer<sup>12</sup>. The Employer’s evidence on clear and present danger is prefaced on the incorrect assumption that the Petitioner and the Fund and its apprenticeship committees are intermingled as the Regional Director found in Case 14-RC-12738. The Employer’s assertion that it would be harmed by bargaining with the Petitioner because of a possibility that it would have to disclose to the Petitioner highly confidential and proprietary information fails because it assumes that any information it would disclose to the Petitioner in negotiations is de facto disclosed to the Fund, the apprenticeship committees, and to Ranken. In this case however, as set forth in detail above, the Petitioner and the Fund and apprenticeship committees are not intermingled and the evidence shows that the Petitioner does not have control over or dominate the Fund.

As to Ranken, no evidence was presented or included in the Employer’s offer of proof that Ranken has any connection to or input in the Petitioner’s collective bargaining with signatory contractors. The record is also devoid of any evidence that the only representative of Petitioner that is or was remotely connected to Ranken, Director of Training and Workforce Development Gaal, has any role in Petitioner’s collective bargaining with signatory contractors. Rather, Gaal was only involved in the initial

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<sup>12</sup> Upon rejection of the Employer’s offer of proof, the hearing officer inquired whether the Employer desired to seek a special appeal, which the Employer declined. Where the Employer can request review of this decision, the Employer is not denied due process.

discussions with Ranken on the appropriate coursework that Ranken would provide as a vendor to the EJAP. Gaal has had no further input in EJAP's operation of its apprenticeship program including Ranken's participation.

With respect to the apprenticeship committees and their programs, the offer of proof presented no evidence that EJAP Coordinator Short or CJAP Coordinator Fuchs play any role in Petitioner's collective bargaining with signatory contractors. Neither Short nor Fuchs are officers of Petitioner and they were selected for the positions by their respective joint apprenticeship committee members that are comprised of both labor and management committeemen. The Employer did not assert in its offer of proof evidence that the mere presence of Petitioner's Executive Secretary-Treasurer and Assistant Executive Secretary-Treasurer on the apprenticeship committees signifies that any information disclosed to the Petitioner in negotiations would be provided to the Fund, the committees, or Ranken.

Further, as set forth above, the Fund and its committees are not direct competitors of the Employer. The Employer offers diploma and degree programs which are governed by Department of Education guidelines while the apprenticeship programs are governed by Department of Labor standards. The Employer's programs are designed to be completed in 60 or 90 weeks and designed to provide entry level employment. The Fund and its committees training programs seek to provide on-the-job training and classroom instruction over several years with the goal of attaining journeyman status.

With respect to the Employer's assertion that it would have to contribute to the Petitioner's joint training fund, this argument fails where participation in the fund is

subject to negotiations, the Employer is not required to agree to those provisions, and there are at least 10 other signatory contractors whose collective-bargaining agreements do not provide for contributions to the Fund.

Accordingly, in these circumstances, I find that the Petitioner's representation of the Employer's employees does not constitute a "clear and present danger" to the collective bargaining process and no disqualifying conflict of interest exists based on the Petitioner's affiliation with the apprentice program. See *Guardian Armored Assets, LLC*, supra; *CMT, Inc.*, supra; *Alanis Airport Services, Inc.*, supra; *Associated Dry Goods Corp.*, 150 NLRB 812, 813 fn. 4 (1965) (Board declined to apply the *Bausch & Lomb* principle where it found that the alleged rival business was a cooperative store operated by the union for the use of the members only and could not be regarded as being in competition with the employer). If an actual conflict of interest should arise after the certification of the Petitioner, a party may raise that issue at that time through appropriate procedures under the Act. *CMT, Inc.*, supra at 1309 fn. 7; *Alanis Airport Services, Inc.*, supra at 1234.

### **III. CONCLUSIONS AND FINDINGS**

Based on the entire record in this matter and in accordance with the discussion above, 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 here.
3. The Petitioner 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. The following employees of the Employer constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

The Full-Time Instructors Unit

All full-time instructors employed by the Employer at its NorthPark, Berkeley, Missouri facility, EXCLUDING adjunct and part-time instructors, temporary employees employed by ADECCO, office clerical employees, guards, and supervisors as defined in the Act.

The Adjunct and Part-Time Instructors Unit

All adjunct and part-time instructors employed by the Employer at its NorthPark, Berkeley, Missouri facility, EXCLUDING full-time instructors, temporary employees employed by ADECCO, office clerical employees, guards, and supervisors as defined in the Act.

**IV. DIRECTION OF ELECTIONS**

The National Labor Relations Board will conduct secret ballot elections among the employees in the units found appropriate above. The employees in these units will vote on whether or not they wish to be represented for purposes of collective bargaining by Carpenters' District Council of Greater St. Louis and Vicinity. The date, time, and place of the elections will be specified in the Notice of Election that the Regional Office will issue subsequent to this Decision.

**A. Voting Eligibility**

Eligible to vote in the election are those in the units who were employed during the payroll period ending immediately prior to 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. Those 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 in each unit. *North Macon Health*

*Care Facility*, 315 NLRB 359, 361 (1994). These lists must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the lists should be alphabetized (overall or by department, etc.). Upon receipt of the lists, I will make them available to all parties to the election.

To be timely filed, the lists must be received in the Regional Office, 1222 Spruce Street, Room 8.302, St. Louis, MO 63103, on or before **February 7, 2011**. No extension of time to file the lists will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file the lists. Failure to comply with this requirement will be grounds for setting aside the elections whenever proper objections are filed. The lists may be submitted to the Regional Office by electronic filing through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>13</sup> by mail, or by facsimile transmission at (314) 539-7794. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the lists will be made available to all parties to the election, please furnish a total of **two** copies, unless the lists are submitted by facsimile or electronic 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 a minimum of 3 days prior to the date of the elections. Failure to follow the posting requirement may result in additional litigation if proper objections to

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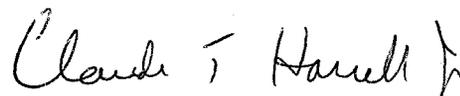
<sup>13</sup> To file the eligibility list electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

the elections are filed. Section 103.20(c) requires an employer to notify the Board at least 5 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.

#### **V. 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, D.C. 20570-0001. This request must be received by the Board in Washington by **February 14, 2011**. The request may be filed electronically through E-Gov on the Agency's website, [www.nlr.gov](http://www.nlr.gov)<sup>14</sup>, but may not be filed by facsimile.

Dated: January 31, 2011  
at: Saint Louis, Missouri



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Claude T. Harrell Jr., Regional Director  
National Labor Relations Board  
Region 14  
1222 Spruce Street, Room 8.302  
St. Louis, MO 63103-2829

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<sup>14</sup> To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, [www.nlr.gov](http://www.nlr.gov).