

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 08

NOLL FISHER, INC.,

EMPLOYER,

AND

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 683,

PETITIONER.

Case No. 08-RC 107099

**PETITIONER'S REQUEST FOR NLRB REVIEW OF REGIONAL DIRECTOR'S
SEPTEMBER 13, 2013 DECISION AND DIRECTION OF ELECTION**

I. Introduction.

This case is a representation election dispute. Petitioner International Union of Electrical Workers, Local 683 (“Local 683”) and the employer, Noll-Fisher, Inc. (the “Employer”), have stipulated to the definition of the appropriate bargaining unit (the “Stipulated Bargaining Unit”) for purposes of the subject election – “all full-time electricians.” *See* Official Record of Proceedings (“R”), p. 10-line 2 to p. 10-line 14.¹ Local 683 and the Employer also have stipulated that five (5) of the Employer’s employees are included in the Stipulated Bargaining Unit: Dustin Berry, Stephen Hirby, Jeff Rosebrook, Steve Butt, and Steve Poppe.² R., p. 10-15 to p. 10-10-24. The only issue in dispute in this case is whether three (3) of the Employer’s other employees, Ron Hausfeld, Jason Shaffer, and Bruce Fisher, are “full-time electricians” who are members of the Stipulated Bargaining

¹ An evidentiary hearing (the “Hearing”) before a hearing officer for Region 08 of the National Labor Relations Board was held on July 23, 2013 in Columbus, Ohio.

² The parties also stipulated that Danny Keen, a former employee fired by the Employer on June 12, 2013, was an electrician. R., p. 11-1 to 11-18. Local 683 has filed an unfair labor practice charge against the Employer relating to the firing of Mr. Keen. That ULP charge is currently pending.

Unit for purposes of the election. R. 11-11 to 11-19. That was the only issue litigated at the Hearing in this case.

On September 13, 2013, the Regional Director entered his Decision and Direction of Election (the “Decision”) in this case. Pursuant to the Decision, the Regional Director ignored the parties’ Stipulated Bargaining Unit, creating a unit of “full-time and regular part-time electricians” based upon his own, independent “community of interest” analysis – an issue that was not litigated at the Hearing in this case. *See* the Decision, p. 7 (a copy of the Decision is attached hereto as **Exhibit A**). The Regional Director then included employees Ron Hansfield, Jason Shaffer, and Bruce Fisher in the bargaining unit he created. Decision, p. 7.

Pursuant to sections 102.57(c)(1) and 102.57(c)(2) of the National Labor Relations Board’s (the “Board”) Rules and Regulations, Local 683 requests that the Board review the Regional Director’s Decision. That Decision is (a) a departure from controlling law,³ as the Regional Director improperly refused to implement the parties’ intent in limiting the Stipulated Bargaining Unit to full-time electricians, *i.e.*, employees who spend virtually all of their time performing electrical work; and (b) clearly erroneous on the record, to the prejudice of Local 683. As a result, compelling reasons exist for the Board to grant Local 683’s request to review the Decision.

II. The Regional Director Refused to Implement the Parties’ Stipulation That “Full-Time Electricians” Is The Appropriate Bargaining Unit for Purposes of The Subject Election.

As noted, Local 683 and the Employer stipulated at the commencement of the Hearing before the hearing officer that the appropriate bargaining unit for the election in this case is “*full-time electricians* employed by the Employer at its facility located at 310 West Main Street, Anna, Ohio . . .” (emphasis added). R., p. 10-2 to 10-14. The term “full-time” is not ambiguous. Indeed, by simply resorting to an English dictionary, the Regional Director could have confirmed that the plain

³ *See Assoc. Milke Producers v. Nat’l Labor Relations Bd.*, 193 F.3d 539 (D.C. Cir. 1999) discussed *infra* at pp. 3-4.

meaning of “full-time” is [“occupying all of one’s time.”]. Webster’s New Twentieth Century Dictionary Unabridged (Collins World 1978).

Moreover, the stipulation of Local 683 and the Employer that five (5) employees (and former employee Danny Keen) were members of the Stipulated Bargaining Unit made clear the intent of the parties’ stipulation -- “full-time electricians” means employees who spend virtually all of their time performing electrical work for the Employer; only a *de minimis* portion of their time is spent doing anything other than electrical work. The time records of Steve Hirby, Jeff Rosebrook, Dustin Berry, and Danny Keen were admitted in the evidence at the Hearing. The time records for these persons, who the parties agree meet the definition of “full-time electrician,” confirm that they have spent virtually all of their time performing electrical work:

<u>Unit Member</u>	<u>% of Electrical Work</u>	<u>% Other Work</u>
Steve Hirby	97.92%	2.08%
Jeff Rosebrook	96.83%	3.17%
Dustin Berry	96.05%	3.96%
Danny Keen	98.30%	1.70%

See Local 683’s Exhibit 1 from the Hearing, Tabs 2, 3, 4 and 5.

Pursuant to the controlling law, the Regional Director was required to implement the intent of the parties when they stipulated that “full-time electricians” is the appropriate bargaining unit; *i.e.*, to be a full-time electrician, an employee must spend virtually all of his time performing electrical work. See *Assoc. Milk Producers, supra*.

In *Assoc. Milk Producers*, the union and the employer stipulated that the appropriate bargaining unit for the election in that case was “[a]ll full-time and regular part-time⁴ production and maintenance employees . . . employed by the Employer at its Arlington, Iowa facility.”

⁴ The parties’ Stipulated Bargaining Unit in this case does not include regular part-time employees as there are no such employees eligible for inclusion in the unit.

As in this case, the only issue in dispute in *Assoc. Milk Producers* was whether three (3) of the employer's employees should be included in the agreed-upon unit. The Court of Appeals for the District of Columbia Circuit held that where the parties stipulate to the definition of the bargaining unit, it is the duty of the Board to implement the parties' intent; the Board is not to ignore the stipulated unit and engage in its own, independent, "community of interest" analysis:

* * * The Board's studious aversion to admitting that the stipulation is ambiguous suggests that it also believes that an ambiguous stipulation must be disregarded in favor of a community of interest inquiry. ***This belief is a misunderstanding of this court's holding in *Avecor, Inc. v. NLRB*, 931 F.2d 924 (D.C. Cir. 1991), which we will now clarify.***

In *Avecor*, this court noted that when the Board creates a bargaining unit *de novo*, it "determines which employees share common interests such that they could fruitfully bargain in concert." 931 F.2d at 932. But, the court held "[w]hen the parties stipulate the bargaining unit . . . the Board has a more limited role. First it must ensure that the stipulated terms do not conflict with fundamental labor principles. Having done so, *its task is simply to enforce the agreement. If the terms of the stipulation are unambiguous, the Board must hold the parties to its text.* If the terms are ambiguous, the Board may look to the usual factors governing the definition of an 'appropriate unit,' including the community-of-interest standard." *Id.* ***Avecor did not mean, however, that any time a stipulation is ambiguous, the Board must ignore it and turn to the community of interest standard. In a stipulated unit case, the Board's primary responsibility is to discern the parties' intent. That responsibility does not fall away at the first hint of ambiguity.*** Rather, the Board should only turn to the community of interest test when it is unable to discern the parties' intent from the stipulation. In other words, the ambiguity to which *Avecor* refers is ambiguity about the parties' intent, not ambiguity in the stipulation itself. (Emphasis added).

193 F.3d at 543.

Thus, under *Assoc. Milk Producers*, the Regional Director's duty was clear -- he was required to implement the parties' intent in stipulating that the appropriate bargaining unit is "full-time electricians." And the intent of the parties by that stipulation, especially when illuminated by the parties' stipulation that Steve Hirby, Jeff Rosebrook, and Dustin Berry are properly members of the agreed-upon unit (and fired employee Danny Keen would meet that definition as well), is equally

clear: “full-time electricians” means employees who spend virtually all of their time doing electrical work, and only a *de minimis* portion of their time doing other work. The Stipulated Bargaining Unit is not ambiguous.

The Regional Director in this case completely abrogated his legal duty to implement the bargaining unit definition stipulated to by the parties. Instead, he disingenuously asserted, contrary to the evidence at the Hearing, that the intent of the parties could not be discerned by the stipulation they entered into. As a result, he completely ignored the parties stipulation -- contrary to controlling law -- and devised his own definition of the bargaining unit based upon an independent “community of interest” analysis that was not litigated by the parties at the hearing:

* * * While I can reasonably assume that the unit should be limited to employees who perform electrical work, *there is not much else to be gleaned from the unit stipulation*. The use of the term “full-time” is particularly cryptic. The Petitioner cannot be asking that I include only employees who perform nothing but electrical work, because the record is clear that none of them do. * * * Having no clear guidance from the parties, I will follow well established Board practice and include both full-time and regular part-time employees in the unit *I find appropriate*.

* * *

Applying *this test, I find* that Fisher, Hausfeld, and Shaffer should be included in the unit, based upon the percentage of time each spends doing electrical work. All three disputed employees spend *more than 25%* of their work time performing combined high-skilled and low-skilled electrical work. * * * (Underline in original; other emphasis added).

Thus, in a case where both Local 683 and the Employer agreed that the appropriate bargaining unit includes only “full-time electricians,” the Regional Director has ignored the parties’ agreement and on his own, in violation of law, created a unit that adds “part-time” employees -- the very opposite of the agreed-upon “full-time” electricians -- and includes in his newly-created unit anyone who spends as little as 25% or more of his time on electrical work. Decision, p. 7.

The Regional Director’s creation of a new unit by personal fiat violates controlling law and is clearly erroneous on the record. By the Regional Director’s usurpation of the parties’ Stipulated Bargaining Unit, the definition of “full-time electricians” is subverted to include disputed employees Ron Hausfeld, Jason Shaffer, and Bruce Fisher, who spent the following percentages of their time doing electrical work:

<u>Disputed Employee</u>	<u>% Electrical Work</u>	<u>% Other Work</u>
Jason Shaffer	24.86% ⁵	75.14%
Ron Hausfeld	52.40% ⁶	47.60%
Bruce Fisher	64.15% ⁷	35.85%

In summary, Local 683 and the Employer stipulated that the appropriate bargaining unit for the subject election is “full-time electricians.” The parties also stipulated that Hirby (97.92% electrical work), Rosebrook (96.83%), Berry (96.05%), and former employee Keen (98.30%) constitute “full-time” electricians. The intent of the parties’ stipulations is clear -- “full time” electricians means employees who spend virtually all of their time performing electrical work. Only a *de minimis* amount of a “full-time” electrician’s time is spent on non-electrical work. Accordingly, employees Shaffer (24.86% electrical work), Hausfeld (52.40%), and Fisher (64.15%) are not “full-time” electricians in the Stipulated Bargaining Unit.

The Regional Director violated the controlling law by ignoring the parties’ Stipulated Bargaining Unit and unilaterally creating his own unit. His self-created bargaining unit is also clearly erroneous on the record in this case, which establishes that Messrs. Shaffer, Hausfeld, and Fisher did spend sufficient portions of the time performing electrical work to constitute “full-time” electricians. The Board should accept this appeal and reverse the Regional Director’s erroneous Decision.

⁵ Local 683’s Exhibit 1 from the Hearing, Tab 7.

⁶ Local 683’s Exhibit 1 from the Hearing, Tab 8.

⁷ Local 683’s Exhibit 1 from the Hearing, Tab 6.

III. Messrs. Hausfeld and Fisher Have Admitted That They Are Not Sufficiently Competent To Qualify As “Full-Time Electricians.”

The testimony at the evidentiary Hearing in this case revealed that Messrs. Hausfeld and Fisher have acknowledged to admittedly qualified electricians Berry and Rosebrook that they are not sufficiently competent at performing electrical work to be included in the stipulated-to bargaining unit of “full-time electricians.”

Stipulated-to full-time electrician Dustin Berry testified at the hearing that he had recently worked on a construction project that required the Employer to wire an electrical panel. Mr. Hausfeld could not wire the panel, and asked Mr. Berry to perform the electrical work, expressly acknowledging to Mr. Berry that he was not competent to perform the work because he is “a plumber”:

Q. [Local 683’s counsel] And that is on November -- Monday, November 5, and Tuesday, November 6.

A. [Mr. Berry] That sounds -- that’s correct.

Q. Okay. Now, on your first two days of work, did you work with Ron Hausfeld?

A. Yes, I did.

Q. Okay. You heard me question him about an incident with wiring a box with wires coming across a trough or a gutter. Would you explain to us what took place?

A. Well, what took place, that day I showed up. Ron took me in the -- in the building. He was running that job. He took me in the building and showed me the -- some of the stuff that we needed to do that day.

Q. Okay.

A. * * * And then he said there’s a trough there with a bunch of wires that I don’t -- I’m pretty sure he said he pulled some of them to that box.

And he needed my help, since I was an electrician, to try to help figure out some of the issues that were in that box. And he said *I’m a plumber, not an electrician*.

So, basically, I saw him get in that box, and he was just kind of touching some wires together and there was some sparking going on. And it kind of made me nervous, *so*

I kind of just took over and figured out, you know, what the issues were. (Emphasis added).

R. pp. 214-7 to p. 215-11.

On cross-examination, Mr. Hausfeld could not deny that he had admitted to Mr. Berry that he is “a plumber, not an electrician”:

Q. [Local 683’s counsel] Did you deny -- do you deny that you said it?

A. [Mr. Hausfeld] I can’t deny that, no.

Q. Okay.

A. I don’t know if I said it or not.

Q. Okay. And, in fact, you had Mr. Berry, who was on the job for the first day, do the wiring for the box; correct?

A. Correct.

R., pp. 157-24 to 158-6.

Similarly, on a job just a few weeks before the Hearing, Mr. Hausfeld refused to assist stipulated-to full-time electrician Jeff Rosebrook in performing electrical work, also admitting to Mr. Rosebrook that he is “a plumber,” not an electrician:

Q. [Local 683’s counsel] Okay. Now, on July 2nd of this year, were you working at the Marysville Dialysis Lab for Noll-Fisher?

A. [Mr. Rosebrook] Yeah.

Q. What were you doing up there?

A. Running conduit and pulling wire and working on a panel.

Q. Okay. On that day, was Ron Hausfeld working at that --

A. Yeah, he was doing - -

Q. -- job site?

A. Yeah, *he was doing plumbing.*

Q. Okay. At any point in time during that day did you ask Mr. Hausfeld to assist you in the work you were doing on the panel?

A. Yeah. We were actually outside putting -- we had to pull the big wire out and put some, per the inspector, put bonding bushings on.

And the wires are kind of heavy, and I asked him if he'd help, and *he said he was a plumber*. So, actually, I got the general contractor to help me while I screwed them on.

Q. So when you asked Mr. Hausfeld to assist you, he said he wouldn't?

A. He said, *no, I'm a plumber*. (Emphasis added).

R. pp. 206-22 to 207-20.

Thus, on multiple occasions, Mr. Hausfeld has admitted that he is "a plumber," not a "full-time electrician." Despite these startling admissions, the Regional Director improperly dismissed Local 683's argument that Mr. Hausfeld was not sufficiently competent to be included in the stipulated "full-time electricians" unit by erroneously asserting that Mr. Hausfeld's incompetence was only based on Mr. Hirby's "... low opinion of the skill level of some of the disputed individuals . . ." Decision, p. 8, note 25. This conclusion is clearly erroneous on the record and prejudiced to Local 683. Mr. Hausfeld's incompetence and disqualification from being categorized as a "full-time electrician," is established by his own admissions, not the mere "opinions" of the stipulated-to full-time electricians.

Similarly, Mr. Fisher has admitted to stipulated-to full-time electrician Steve Hirby that he is not competent to perform a "saddle bend" -- a task that any competent third-year apprentice electrician should be able to perform:

Q. [Local 683's counsel] Okay. Now, you heard me ask Mr. Fisher on cross-examination about doing a simple box offset at the SWACO job on November 26th or 27th [2012].

Do you recall an interaction with Mr. Fisher on that job?

A. [Mr. Hirby] Yes.

Q. Okay. Relate to us what took place with respect to that simple box offset.

A. We were actually pulling wire and there's two boxes with probably five feet apart from each other. We needed the wire to be from one side -- from one box to the other.

Q. Uh-huh.

A. So I just needed a piece of conduit to go. But what there was, is there was a pipe dropped down in between them and there needed to be a saddle bend.

* * *

Q. Okay.

A. I -- I didn't really want to -- I don't know if I was just kind of short with him, *but I was like, well, you know, go ahead and throw that pipe up there and we can get that wire into the other box. And he's like, well, I think you should do that.*

And -- and I -- at the time, I had, I believe, Cody and Shane working with us, and I was with them pulling wire and I didn't -- so I had to kind of stop what I was doing with them to bend a piece of pipe so he can get it in between the boxes.

I bent the pipe. There's take-up on a pipe when you bend it. It'll actually take up the length of the pipe.

Q. Uh-huh.

A. I didn't get up there and measure it. So I just handed him the pipe and I said, well, just cut to fit it and make it work, and he did.

Q. Okay. Did you have -- did he make any statement about why he didn't want to do the bend?

A. *Because he didn't know how.*

Q. *Is that what he said?*

A. *Yes.*

Q. Okay. Now, with respect to skill level for an electrician, what skill level is required to -- would you call this a simple box offset? What would you call it?

A. Well, it's not quite as simple as a box offset, but --

Q. Okay. You would call it a four point bend?

A. Yeah, a three point or a four point saddle, yes.

Q. Okay. And what skill level for electricians is that?

A. A journeyman should know how to do it. A third or fourth year apprentice should know how to do it.

Q. Okay. *And he said he did not know how to do it?*

A. Correct. (Emphasis added).

R., pp. 191-19 to 194-3.

Mr. Fisher could not deny that he had made this admission to Mr. Hirby:

Q. [Local 683's counsel] Didn't you say words to the effect to Mr. Hirby that you might as well do this [the saddle bend], I won't do it in the way you want?

A. [Mr. Fisher] *I could have*. I don't remember those words. (Emphasis added).

R., p. 176-22 to 176-25.

Again, both Hausfeld and Fisher have admitted to the stipulated-to "full-time electricians" that they are not sufficiently competent in performing electrical work to be included in the parties' Stipulated Bargaining Unit.

IV. Mr. Fisher Is Both A Former Owner Of The Employer And A Current Owner Of A Competing Contractor. He Cannot Have Any "Community Of Interest" With "Full-Time Electrician" Employees.

The record from the Hearing in this case establishes that Mr. Fisher is both a former owner of the Employer (he is the "Fisher" in "Noll-Fisher"), and a current owner of a competing construction contractor, Russell Contracting. R., p. 80-8 to 80-15. The record further establishes that:

- Mr. Fisher did not want the Employer to be unionized when he was a co-owner (R., pp. 170-22 to 171-8);
- Mr. Fisher's competing contracting business, Russell Contracting, is not unionized (R., p. 171-20 to 171-25);
- While working in the Employer's office, Mr. Fisher has performed confidential tasks of relating to preparation of the timecards of the Employer's employees and compiling information so that taxes can be taken out of the employees' paychecks (R., p. 85-16 to 86-14);
- Although the Employer's employee handbook prohibits employees from operating a competing contracting business, the Employer has done nothing to prohibit Mr. Fisher from owning and operating competing Russell Contracting (R., pp. 102-10 to 103-16).

As a result, and putting aside for the moment the Regional Director's violation of controlling law by ignoring the parties' Stipulated Bargaining Unit, the Regional Director also departed from controlling law by finding that this Mr. Fisher has a "community of interest" with full-time electrician employees of the Employer.

V. Conclusion

Pursuant to the parties' Stipulated Bargaining Unit, only "full-time electricians" may vote in the subject representation election. The Regional Director violated controlling law, and committed substantial error prejudicial to Local 683, by refusing to implement the parties' Stipulated Bargaining Unit. Instead, the Regional Director improperly created his own bargaining unit of "full-time and regular part-time electricians" and included in that new unit Ron Hausfeld, Jason Shaffer, and Bruce Fisher – employees who do not spend virtually all of their time, their "full-time," performing electrical work. These are compelling reasons for the Board to accept review of the Regional Director's Decision, and to reverse that Decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Request for NLRB Review was served on September 26, 2013 upon the following by ordinary U.S. mail and email to:

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

NOLL-FISHER, INC.¹

Employer

and

Case 08-RC-107099

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 683
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition for election filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.² 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 regular part-time electricians, employed by the Employer at its facility located at 310 West Main Street, Anna, Ohio, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

There are approximately eight employees in the unit found to be appropriate.

¹ The Employer's name appears as amended at the hearing.

² The hearing officer's rulings at the hearing are free from prejudicial error and are affirmed. 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 matter. The labor organization involved claims to represent certain employees of the Employer, and a question affecting commerce exists concerning representation of certain employees within the meaning Section 9(c)(1) and Section 2(6) and (7) of the Act. The parties filed post-hearing briefs which I carefully considered.

I. THE ISSUES

The issue in this matter is whether employees Ron Hausfeld, Jason Shaffer and Bruce Fisher are electricians eligible to vote in the election.³

The Petitioner takes the position that employees Hausfeld, Shaffer and Fisher are not electricians and therefore should be excluded from the unit. The Employer seeks to include those three individuals as electricians sharing a community of interest with others in the unit.

II. DECISION SUMMARY

I conclude that employees Ron Hausfeld, Jason Shaffer and Bruce Fisher perform electrician work on a regular basis for a sufficient amount of time to warrant that they be included in the unit found appropriate.

III. FACTS

The Employer is engaged in the performance of commercial and residential electrical contract work, as well as other trade work associated with the construction industry, such as plumbing and HVAC. The Employer operates primarily from a facility located in Anna, Ohio.

The Employer is owned by brothers Mark and Mike Noll. Bruce Fisher, one of the individuals whose eligibility is at issue, is a former co-owner.⁴

There are approximately sixteen employees working for the Employer, two in the office and fourteen in the field. Employees are classified into groups identified as "Office," "HVAC," "Plumbers" and "Electricians."⁵ The Employer also has a Service Department that handles warranty work and customer call-in repairs. Mark Noll oversees the Electrician and HVAC crews. Mike Noll oversees the Plumbing crew and Service Department.

Employees are normally hired to work in a primary trade classification, such as "electrical," "plumbing," or "HVAC," but occasionally "cross trades" and perform work in other classifications. The amount and type of available work and the relative skill and experience of the individual employee dictate how much cross trades work employees perform. No evidence

³ The Parties stipulated that the following employees should be included in any unit found appropriate: Dustin Berry, Steve Butt, Stephen Hirby, Steve Poppe and Jeff Rosebrook. The Parties also stipulated that former employee Danny Keen was terminated on June 12, 2013, the same date that the Petitioner filed the instant Petition in Case No. 08-RC-107099. On August 23, 2013, the Union filed an unfair labor practice charge in Case No. 08-CA-111859, alleging, in part, that the Employer discharged Keen in violation of Section 8(a)(3) and (1) of the Act.

⁴ Fisher was an original, one-third co-owner of the Employer until 2008. He has not had an ownership interest in the Employer since that time. Based upon the lack of evidence to the contrary, I find that Fisher is not a Supervisor or Confidential employee under the Act.

⁵ See Employer Exh 1, EEO Reports.

was presented at hearing to establish that the Employer requires any particular training, schooling or certification of the employees hired/working within any of its trade classifications.

Employees complete weekly timecards that record hours worked on a particular project or jobsite. On most occasions, the timecards will identify the type of work performed by the employee by trade classification.⁶

A. Scope of Work Performed by Electricians at Noll-Fisher

Employees performing electrical jobs for the Employer engage in both so-called “high-skilled” and “low-skilled” electrical work. The distinctions between the two are noted below:

High-Skilled Electrician Work

High-Skilled Electrician work is consistent with electrical work performed by journeyman-level electricians, and typically involves work with electrical systems of more than 25 volts. Examples of such electrical systems may include fire alarm systems, nurse call systems and temperature control systems.

Low-Skilled Electrician Work

Low-Skilled Electrician work consists of installing low-voltage electrical systems of 25 volts or less. Such work is sometimes referred to as “technician” work. Other low-skilled electrician work includes pulling wire and running electrical conduit, as well as installing lighting and wall receptacles.

The amount and degree of high and low skilled work performed by the employees in the proposed unit is discussed in greater detail below.

B. Scope of Work Performed By Employees Stipulated as Included in the Unit⁷

Dustin Berry

Dustin Berry began working for the Employer in November, 2012. He was hired as an Electrician. Berry had previously worked as an Electrician for approximately 14 years. Berry’s primary electrical experience is in mounting panels, running conduit, pulling wire. By his own admission, he does not have much experience working with high voltage systems.

⁶ For example, a timecard marked “P” will reflect hours worked in the plumbing trade classification; an “E” will reflect hours worked in the electrician classification; and an “H” for HVAC.

⁷ Steve Butt and Steve Poppe did not testify at the hearing. Their time cards were not offered as exhibits. Scant testimony was provided regarding the scope of work performed by Butt and Poppe. Ron Hausfeld testified that Steve Poppe acted as an electrical foreman on a project at Marysville Hospital. No testimony was offered regarding projects on which Butt participated.

Berry does not hold any apprenticeship certificate. He completed one year of the four-year apprenticeship training program at ABC (Associated Builders and Contractors). Berry has never run a job as an Electrical crew working foreman. He testified that he learned his trade through “hands-on” experience.

An analysis of Berry’s timecards⁸ from November, 2012 through June, 2013 reflects that he has performed over 1,200 hours of combined high-skilled and low-skilled electrical work, accounting for approximately 96% of his total hours worked. He has performed little cross-trade work, with less than 4% of his combined hours performed in the HVAC and Plumbing trades.

Stephen Hirby⁹

Stephen Hirby began working as an Electrician for the Employer in July, 2010. Hirby had substantial work experience as an Electrician prior to starting with the Employer. Hirby has worked as an Electrical crew working foreman on large jobs for the Employer. He can read detailed “e-drawings,” or electrical blueprints for jobs and helps communicate and establish job duties, responsibilities and material lists for other Electricians assigned to a particular project.

An analysis of Hirby’s timecards from January, 2012 through June, 2013 reflects that he has performed well over 2,500 hours of combined high-skilled and low-skilled electrical work, accounting for approximately 97% of his total hours worked. He has performed little cross-trade work, with less than 3% of his time performed in HVAC or other trades.

Jeff Rosebrook

Jeff Rosebrook was hired as an Electrician by the Employer on or about November 12, 2012. Prior to working for Noll-Fisher, Rosebrook worked for two other electrical contractors. In total, he has worked as an Electrician for approximately 17 years. Rosebrook received a “Certificate of Completion” from the ABC Electrician Apprenticeship Program, which he attended from 1997 to 2001. He performs wire pulling and running electrical conduit in addition to other electrician duties.

An analysis of Rosebrook’s timecards from November, 2012 through June, 2013 reflects that he has performed over 1,200 hours of combined high-skilled and low-skilled electrical work, accounting for approximately 97% of his total hours worked. He has performed little cross-trade work, with just over 3% of his time performed in the HVAC trades.

C. Scope of Work Performed by the Disputed Employees¹⁰

⁸ See Petitioner’s Exh. 1 for a summary of hours worked and supporting timecards for employees Hirby, Rosebrook, Berry, Keen, Fisher, Shaffer and Hausfeld (at Tabs 2 – 8).

⁹ Stephen Hirby is also commonly referred to as “Scott” Hirby.

¹⁰ As noted in footnote 3, supra, former employee Danny Keen was employed by the Employer as an electrician until June 12, 2013. Keen did not testify at the hearing. Keen’s timecards from July, 2012 through May, 2013 reflect that he performed approximately 1,600 hours of work as an electrician, or approximately 98% of his total hours reported for that time period (See Petitioner’s Exh. 1 at Tab 5). No other evidence was presented regarding work performed by Keen.

Ron Hausfeld

Ron Hausfeld was hired by the Employer on or about December 30, 2000 as a carpenter.¹¹ He did not list any prior experience in electrical work on his job application. Hausfeld testified that at the time he applied for work with the Employer, he considered himself to have "minor" electrical skills.

According to Mark Noll, Hausfeld learned the Electrician trade by experience gained on-the-job. Noll testified that Hausfeld has not been tested for specific electrician skill sets. However, Noll asserts that Hausfeld's work experience over the past 12 years enables him to now perform electrical work at a journeyman level.

Stephen Hirby testified that he considered Hausfeld's primary skill to be that of a plumber, but that he did work with Hausfeld as a co-electrical foreman on a project. Stephen Hirby testified he considers Hausfeld's electrical skills to be consistent with those of a 2nd-year apprentice.

An analysis of Hausfeld's timecards from January, 2012 through June, 2013 reflect that he performed over 1,500 hours of combined high-skilled and low-skilled electrical work, accounting for approximately 52% of his total hours worked. He also performed a substantial amount of cross-trade work, with just over 23% of his time performed in the plumbing trade.¹²

Jason Shaffer

Jason Shaffer has been employed by the Employer for approximately 19 years. Shaffer is a graduate of the ABC Electrician Apprenticeship Program. He has performed electrical blueprint reading, run conduit, pulled wire, and completed electrical equipment line termination, including the installation of lighting and receptacles.

Since October, 2012, Shaffer has performed a substantial amount of service call work, filling in after the Employer's primary Service Department employee quit.¹³ Electrical service work includes troubleshooting, customer call-in repairs and warranty work. Shaffer has also performed service work in other trades.

An analysis of Shaffer's timecards from January, 2012 through June, 2013 reflected that he performed over 800 hours of combined high-skilled and low-skilled electrical work, accounting for approximately 25% of his total hours worked. He also performed a substantial amount of cross-trade work, with approximately 14% of his time classified as construction work and 13% of his time classified as HVAC. Shaffer also has large quantities of time designated as

¹¹ Noll-Fisher used to have a Carpentry Department, but has not had a Carpentry Department for approximately 7 years.

¹² Hausfeld has also performed work in the service department (2.39%), HVAC (1.51%), construction (2.18%), and shop (0.16%) trades. Hausfeld's timecards also reflect 519 hours (17.99%) of time with no specific trade or department notation.

¹³ The Employer has since hired Matt Kindle as the primary Service Department / Maintenance employee on a full-time basis and Shaffer has returned to his normal duties.

service work (634 hours, or 19%), and a number of hours that have no designation listed (665.25 hours, or 20%).¹⁴

Bruce Fisher

Bruce Fisher was an original co-owner of the Employer, along with Mike and Mark Noll in 1994. In 2008, he ceased working for the Employer and sold his ownership interest in the company. He returned to work for the Employer as an electrician in October, 2012. Since returning to Noll-Fisher, he has performed a variety of job functions, including low-voltage temperature control systems, pulling wire, installing lighting and receptacles and helping to run certain commercial jobs. He also performed office work for most of January, 2013, filling in for an employee on medical leave.

Fisher held an Electrical Contractor's license for Noll-Fisher that expired on December 31, 2012. He subsequently obtained contractor's licenses in the following trades: hydronics, plumbing, HVAC and electrical.¹⁵ He does not have any formal electrical training or schooling.¹⁶

Fisher is also currently the owner and sole employee of Russell Contracting. Much of the work he performs under this trade name appears to be for churches and impoverished individuals for which Fisher receives little or no compensation. Fisher testified that over the last three years, Russell Contracting performed limited contracting services that generated a total of approximately \$10,000 of income.

An analysis of Fisher's timecards from October, 2012 through April, 2013¹⁷ reflected that he performed just over 600 hours of combined high-skilled and low-skilled electrical work, accounting for approximately 64% of his total hours worked. He also performed a substantial amount of office work, accounting for 246 hours (25.59%) of his reported time. Fisher performed little work in other trades.¹⁸ The record evidence reflected that Fisher worked a total of 961.5 hours from October, 2012 through April, 2013.¹⁹

IV. ANALYSIS

The parties stipulated to a unit of "full-time electricians". Instead of resolving the question of unit scope, the parties almost immediately stated, on the record, different view of what that stipulation meant. They then spent a day of hearing making the full extent of their disagreement even more apparent. While I can reasonably assume that the unit should be limited

¹⁴ A large percentage of the service work performed by Shaffer involved high-skilled and low-skilled electrical work.

¹⁵ All current licenses list Russell Contracting as the employer.

¹⁶ Fisher testified that he learned the electrician trade at the "school of hard knocks."

¹⁷ No timecards were admitted into evidence for Fisher for the months May and June, 2013.

¹⁸ Fisher's timecards reflect 34.5 hours of service work (3.48%), 40 hours of plumbing work (4.16%), and 24 hours of work without a specific designation (2.5%).

¹⁹ A detailed examination of Fisher's timecards revealed that he worked forty hours per week on three separate occasions from October, 2012 through April, 2013, but regularly worked in excess of 30 hours per week during that same timeframe. By comparison, Jason Shaffer and Ron Hausfeld regularly worked forty hours or more per week.

to employees who perform electrician work, there is not much else to be gleaned from the unit stipulation. The use of the term “full-time” is particularly cryptic. The Petitioner cannot be asking that I include only employees who perform nothing but electrical work, because the record is clear that none of them do. There is also a question of whether regular part-time employees should be included in the unit I deem appropriate. The Board routinely includes regular part-time employees in a bargaining unit because they normally share a close community of interest with full-time employees performing the same or similar work.²⁰ I cannot conclude on this record that the Petitioner (or the Employer) is seeking to exclude any employee, otherwise eligible to vote, because they are regular part-time, but not “full time”. First, there is no probative record evidence regarding what the Employer considers to be full-time employment. Second, the record evidence does not establish that all the employees stipulated to be in the unit work at least 40 hours each and every week. Most of them clearly do not. Having no clear guidance from the parties, I will follow well established Board practice and include both full-time and regular part-time employees in the unit I find appropriate.²¹

Having addressed what is unclear about the unit stipulation, let me now turn to what is clear. The Union seeks to exclude three employees on the basis that they do not perform a substantial amount of electrician work. It claims instead that the disputed employees perform electrician work for only a very limited percentage of their overall work time and that they primarily perform work in other trades. The Employer argues that these individuals work regularly as electricians and should be included in the unit.

The appropriate standard for making this determination is a dual-function analysis of the work of the three disputed employees.²² A dual-function analysis is a variant of the community of interest test. The test for determining whether a dual-function employee should be included in a unit is “whether the employee [performs unit work] for sufficient periods of time to demonstrate that he ... has a substantial interest in the unit's wages, hours, and conditions of employment.” Air Liquide America Corp., 324 NLRB 661, 662 (1997), quoting Berea Publishing Co., 140 NLRB 516, 518-519 (1963).

Applying this test, I find that Fisher, Hausfeld and Shaffer should be included in the unit, based upon the percentage of time each spends doing electrician work. All three disputed employees spend more than 25% of their work time performing combined high-skilled and low-skilled electrical work. Specifically, the timecards in Petitioner’s Exhibit 1 (at tabs 6-8),

²⁰ Part-time employees are included in a unit with full-time employees whenever the part-time employees perform work within the unit on a regular basis for a sufficient period of time during each week or other appropriate calendar period to demonstrate that they have a substantial and continuing interest in the wages, hours and working conditions of the full-time employees in the unit. Such part-time employees are described as “regular part-time employees.” New York Display & Die Cutting Corp., 341 NLRB 930 (2004); Arlington Masonry Supply, Inc., 339 NLRB 817 (2003); Fleming Foods, 313 NLRB 948 (1994); Pat’s Blue Ribbons, 286 NLRB 918 (1987); and Farmers Insurance Group, 143 NLRB 240, 245 (1979).

²¹ I also find that none of the three disputed employees qualify as “irregular part-time employees,” as they do not perform electrician work on a sporadic or casual basis. Royal Hearth Restaurant, 153 NLRB 1331 (1965); Pat’s Blue Ribbons, supra; Tri-State Transportation Co., 289 NLRB 356, 357 (1988); and Manncraft Exhibitors Services, 212 NLRB 923 (1974). Specifically, Fisher is not ineligible merely because he worked a temporary assignment in the office.

²² I decline to apply the standard set forth in Viacom Cablevision, 268 NLRB 633 (1984) and other cases dealing with interpretation of stipulated election agreements as there is no such agreement at issue in this matter.

demonstrate that both Fisher and Hausfeld spent over 50% of their time performing combined high-skilled and low-skilled electrician work, while Shaffer spent over 25% of his time performing combined high-skilled and low-skilled electrician work.²³ While the Board has not established a set percentage of work time that must be met for inclusion under a dual function analysis, it has consistently found that 25% or more usually is sufficient. WLVI, Inc., 349 NLRB 683 fn. 5 (2007).

An examination of the work of all three disputed employees reveals that they perform electrician work with sufficient regularity to demonstrate a community of interest with the other electricians.²⁴ All three are listed as “Electricians” on the Employer’s EEO reports. It is clear that both the included and disputed employees perform both high skilled and low skilled electrical work.²⁵ Both the included and disputed employees have similar working conditions, common supervision, and frequently interact. Both included and disputed employees do some cross-over work in other trades. None of the employees stipulated to be “included” in the unit perform exclusively Electrician work. Therefore, it is clear to me that all three disputed employees should be found eligible to vote under the standards set out in Berea Publishing, supra.²⁶ To the extent that two of the three employees have recently been doing office or other non-electrician work on a short-term basis, such temporary assignments are not to be considered in determining voting eligibility. Eastern Rock Products, 239 NLRB 892, fn 5 (1978).

In so finding, I reject the Petitioner’s arguments to the contrary. It’s assertion that the included employees have a separate identity based on a claim that they perform more high skilled electricians’ work is simply not supported by the record. To split the electrician’s group based on some arbitrary percentage of high skilled work performed would not only run afoul of the dual function standard, but would also constitute the sort of unit fracturing that the Board rejects.²⁷

Therefore, based on the above and the record as a whole, I find Fisher, Hausfeld and Shaffer are properly included in the unit found appropriate and are eligible to vote in the election directed.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board’s Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding 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 an economic strike, who have retained

²³ Analysis of Shaffer’s timecards, coupled with relevant testimony, demonstrated that he performed additional amounts of combined electrician work in the “service” and “no designation” timecard summary classifications.

²⁴ Pat’s Blue Ribbons, supra.

²⁵ The fact that some electricians may hold a low opinion of the skill level of some of the disputed individuals does not change this fact.

²⁶ In so finding, I disagree with the Petitioner that the record establishes the Bruce Fisher is a casual employee. He clearly works enough to be, at least, a regular part time employee.

²⁷ See generally, Odwalla, Inc., 357 NLRB No. 132 (2011)

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, 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 employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by *International Brotherhood of Electrical Workers, Local Union 683*.

LIST OF VOTERS

In order 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 in 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 v. Wyman-Gordon Company, 394 U.S. 759 (1969)*. Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days from the date of this Decision. *North Macon Health Care Facility, 315 NLRB 359 (1994)*. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by September 27, 2013. The request may be filed electronically through the Agency's website, www.nlr.gov,²⁸ but may not be filed by facsimile.

Dated at Cleveland, Ohio this 13th day of September, 2013.

/s/ Frederick J. Calatrello
Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

²⁸ To file the request for review electronically, go to www.nlr.gov, select File Case Documents, enter the NLRB Case Number and follow the detailed instructions.