

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

STARBEST CONSTRUCTION, LLC

Employer

And

Case 25-RC-184895

INDIANA/KENTUCKY/OHIO REGIONAL
COUNCIL OF CARPENTERS

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing to determine an appropriate unit for collective bargaining was held on October 4, 2016, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board.¹

I. ISSUES

The Petitioner seeks to represent a unit comprised of all full-time and part-time carpenters employed by the Employer at the Employer's jobsites in Northwest Indiana. The petitioned-for unit would include approximately fourteen employees. The Employer provides construction management services for a single client, Amerilodge Group, LLC. At issue is whether the Employer will continue to have operations in Northwest Indiana and whether there is a reasonable expectation of future employment for employees in the petitioned-for unit. The Employer contends that as a captive contractor for Amerilodge, it does not seek work from non-Amerilodge customers and it has only two remaining jobs in Northwest Indiana that will be completed by December 2016.² Therefore, the Employer argues that it does not have the

¹ Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. 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.

² All dates contained herein are 2016 unless otherwise noted.

necessary ongoing operations in Northwest Indiana to give employees in the petitioned-for unit a reasonable expectation of future employment. Based thereon, the Employer argues that it would be inappropriate to conduct an election in this matter. The Petitioner contends that although the Employer is engaged in construction work on hotels that may be unpredictable and with projects of limited duration, this is typical of the industry and does not constitute a cessation of operations. The Petitioner further argues that the employees in the petitioned-for unit do have a reasonable expectation of future employment with the Employer and that an election should be conducted among those employees.

II. DECISION

Based on the record and relevant Board cases, I am directing an election in this matter because a question concerning representation exists under Section 9(c) of the Act. I conclude that a unit of carpenters employed by the Employer is appropriate for collective bargaining.

Thus, the following constitutes a unit appropriate for purposes of collective-bargaining:

All full-time and regular part-time carpenters employed by the Employer at its jobsites in Northwest Indiana; BUT EXCLUDING office clerical employees, confidential employees, and guards and supervisors as defined in the Act.

The unit found appropriate herein consists of approximately fourteen employees for whom no history of collective bargaining exists.

III. STATEMENT OF THE FACTS

The Employer is a Michigan limited liability company engaged in providing construction management services for Amerilodge Group, LLC. The Employer has an office and place of business in Bloomfield Hills, Michigan, and it has construction projects within the Northwest Indiana geographical area. The Employer is a captive construction management company in that it oversees construction for Amerilodge and does no work for other clients. Amerilodge manages, operates, and owns hotels in the Midwest including in Michigan, Indiana, and Ohio, and the Employer manages the building of those hotels. The Employer has overseen the building of approximately twenty hotels for Amerilodge. Before construction of a hotel begins, the Employer or Amerilodge must purchase land and secure permits and franchise agreements. Amerilodge gives the Employer projected completion dates for its projects. The Employer's Project Manager, Mike Al Shuweili oversees all of the construction projects and is responsible along with another employee, Mark Green, for hiring subcontractors to actually perform the work on those construction projects.

The Employer currently has two active projects in Northwest Indiana: the construction of a Holiday Inn Express in La Porte, Indiana (the La Porte project), and a Holiday Inn Express in Portage, Indiana (the Portage project). Around February 23 the Employer entered into a

“Framing Service Agreement” with Choice One Carpentry, a carpentry subcontractor, to perform carpentry work at the La Porte project. The Employer’s La Porte Project Site Superintendent, John Taylor, was initially given an October 1 completion date for the La Porte project. However, Choice One was unable to acceptably complete the carpentry work and was removed from the La Porte project around August 5. Site Superintendent Taylor contacted a former Choice One employee, Christopher Blouir, to correct the mistakes made by Choice One and complete the La Porte project. Taylor provided Blouir a list of correctional work from Choice One and items to be completed at the La Porte project. At the time Blouir was hired, the Employer asked Blouir to complete the rough carpentry work in three weeks, which included framing, building walls, and trusses. However, more time was required in order to address corrections from Choice One’s work, and carpentry work is estimated to be completed by mid-November.

Around August 9 Blouir hired an initial crew of around five employees, which expanded up to as many as fourteen employees.³ Gabriel Schmidt was hired by Blouir to work at the La Porte project on about August 29. At the time he was hired, Schmidt was told by Blouir that the Employer had upcoming projects in Portage and Michigan City as well as a house project in Bloomfield Hills, Michigan that Schmidt might also be able to work. Timothy Walsh was also hired by Blouir to perform carpentry work at the La Porte project. Blouir told Walsh at the time he was hired that after they finished the La Porte job, the employees would move to job in Portage, and that the best employees would also work constructing a home in Michigan for the boss. Nick Fabian was also hired by Blouir to perform carpentry work at the La Porte project. When he was hired, Blouir told Fabian that after the La Porte project was finished, the employees would move to a job in Portage and that there were also upcoming jobs in Michigan City, Chesterston, and job building a house for the boss in Michigan. Blouir testified that in asking employees if they were interested in moving to these jobs it was done so to offer potential future employment and to see if employees could travel. Blouir also told employees that their pay would increase from \$18 to \$20 an hour if they were selected as part of the crew. Site Superintendent Taylor also testified that there were possibilities of other projects such as in Auburn and a house project in Bloomfield Hills, Michigan. However, there have been no permits pulled, no land purchased, no franchise agreements, or no site approvals for any potential Michigan City or Auburn projects.

The Employer is currently managing the construction of a Holiday Inn Express in Portage, Indiana. The Portage project is similar to the La Porte project in that it is the same building design. The Site Supervisor for the Portage project is Joel Foster. The Employer entered into a subcontract with GCW, Inc., a carpentry subcontractor, on September 12, 2016 to perform carpentry work at the Portage project. The subcontract listed the commencement of work date on the project as October 10, and the completion of work date as December 9. The projected total completion date for the Portage project is Fall 2017. GCW, Inc. maintains its own employees. The Employer asserted that there are no other projects planned in Northwest Indiana at this time.

³ In addition to hiring employees for the La Porte project, Blouir also discharged employees from that same project.

IV. DISCUSSION AND APPLICATION OF BOARD LAW

Based on the above, the Employer has failed to meet its burden of proving that cessation of operations is both imminent and definite under *Retro Environmental, Inc.*, 364 NLRB No. 70 (2016). The evidence demonstrates that the Employer is currently engaged in ongoing projects in La Porte and Portage, Indiana. In addition, the evidence demonstrates that there was a reasonable expectation of future employment for employees given that the Employer informed multiple employees of possible continued work in Northwest Indiana.

The Board has held that it will dismiss an election petition if cessation of the employer's operations is imminent, "such as when an employer completely ceases to operate, sells its operations, or fundamentally changes the nature of its business." *Retro Environmental, Inc.*, at 4, citing *Hughes Aircraft Co.*, 308 NLRB 82, 83 (1992); *Martin Marietta Aluminum*, 214 NLRB 646, 646-647 (1974); *Cooper International*, 205 NLRB 1057, 1057 (1973). The burden of proving that cessation of operations is both imminent and definite rests with the party asserting an imminent cessation of operations. *Retro Environmental, Inc.*, at 4. In determining whether cessation of operations is both imminent and definite, the Board requires "concrete evidence, such as announcements of business closure to the public and the employees, termination of employees, or other evidence that the employer has definitely determined the sale, cessation, or fundamental change in the nature of its operations." *Id.* Election petitions will not be dismissed based on "conjecture or uncertainty concerning an employer's future operations, an employer's contention that it intends to cease operations or reduce its workload sometime in the future, or evidence of cessation that is conditional or tentative." *Id.*

The Employer relies on *Davey McKee Corp.*, 308 NLRB 839 (1992) and *M.B. Kahn Construction Co.*, 210 NLRB 1050 (1974), in which the Board found an imminent cessation of company operations within the geographic area of the petitioned-for units. However, the instant case, similar to *Retro Environmental*, can be distinguished from *Davey McKee* and *M.B. Kahn* in that the Employer here is not ceasing its operations, it is not selling its operations, and it is not fundamentally changing the nature of its business. Despite the fact that the carpentry work at the La Porte project and Portage project may be scheduled to be completed in the next few months, that does not outweigh the fact that the Employer is still engaged in management construction services and is still actively working at the La Porte project and the Portage project. See *Retro Environmental* at 5. As has long been established in this type of work, "[u]predictability and projects of limited duration are typical in the construction industry." *Id.* Ultimately, the Employer failed to meet its burden of proving that there would be no ongoing operations in Northwest Indiana. There is no evidence that the Employer intends to sell its business or fundamentally change the nature of its operations, which is to provide construction management services for Amerilodge in Michigan, Indiana, and Ohio. No evidence was presented that the Employer intends to cease operations with Amerilodge, or that Amerilodge is ceasing operations in Northwest Indiana. Furthermore, the evidence demonstrates that the Employer informed employees on multiple occasions of possible future projects in Northwest Indiana including Portage, Auburn, Michigan City, and Chesterton, Indiana. Despite the Employer's claims that (1) the Employer has entered into an agreement with carpentry subcontractor GCW for the Portage project and (2) the Employer normally operates without direct employees for this work,

this does not preclude the Employer from using its employees at the Portage project.⁴ For these reasons, I conclude that the Employer has not met its burden to show that it has no ongoing projects in Northwest Indiana and that employees do not have a reasonable expectation of future employment.

V. CONCLUSION

In view of the foregoing and the record as a whole, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time carpenters employed by the Employer at its jobsites in Northwest Indiana; BUT EXCLUDING office clerical employees, confidential employees, and guards and supervisors as defined in the Act.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by INDIANA/KENTUCKY/OHIO REGIONAL COUNCIL OF CARPENTERS.

A. Election Details

The election will be held on October 31, 2016 from 7:00 am until 9:00 am in the Employer's jobsite trailer located at 101 East Shore Court, La Porte, Indiana.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending on October 16, 2016, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date, or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.

⁴ It must be noted that the Employer originally subcontracted the work at the La Porte project to Choice One. It was only after Choice One failed to adequately perform the work that the Employer brought in the employees in the petitioned-for unit to finish the work. The potential for another such incident in the future exists even on projects where other carpentry subcontractors have been hired.

Employees engaged in an 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 that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **October 20, 2016**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

VII. RIGHT TO REQUEST REVIEW

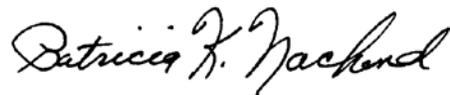
Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

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Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: October 18, 2016



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