

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

MECHANICAL CONTROL SERVICES, INC.¹

Employer

and

Case 19-RC-264452

**UNITED ASSOCIATION OF PLUMBERS &
PIPEFITTERS, LOCAL 32**

Petitioner

DECISION AND ORDER

The Petition in this matter was filed by United Association of Plumbers & Pipefitters, Local 32 (Petitioner) under Section 9(c) of the National Labor Relations Act, as amended (the Act). Petitioner seeks to represent a unit of all full-time and regular part-time maintenance technicians and service technicians employed by Mechanical Control Services, Inc., (the Employer)² at its Fife, Washington facility. The Employer maintains that the unit sought by Petitioner is not appropriate because the unit should include project technicians and control technicians. Petitioner and the Employer agree that the unit should include service maintenance technicians.

A hearing was held via videoconference in this matter on August 31, 2020³ before a hearing officer of the National Labor Relations Board and the parties subsequently filed briefs. As explained below, based on the record and relevant Board law, I find that the unit sought by Petitioner is not appropriate insofar as the classification of project and control technicians should be included. Because the Petitioner expressed an unwillingness at the hearing to proceed to an election in an alternate unit, I also dismiss the petition.

I. Statement of Facts

a. The Employer's Operation

The Employer designs, installs and services commercial, industrial and institutional heating, ventilation and air conditioning (HVAC), and builds automation systems in Fife, Washington. Travis Hull, Employer's president, started the company 15-years ago. The Employer

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

² The parties stipulated, and I find, that the Employer is a State of Washington limited liability company that provides commercial heating, ventilation, and air conditioning services with an office and place of business in Fife, Washington. Within the last 12 months, a representative period, the Employer derived gross revenue in excess of \$500,000 and purchased and received goods valued in excess of \$50,000 directly from points outside the State of Washington.

³ All dates herein are in 2020, unless specified otherwise.

employees approximately 28 employees, including eight service technicians⁴, six project technicians and two control technicians, for a total of 16 HVAC technicians. Hull is responsible for the company's operation. Project Manager Nick De la Cruz, Project Engineer John Merrill⁵, sales personnel and all technicians report directly to Hull. Hull is also responsible for performance evaluations, hiring and terminations. In the past, the Employer had a service manager overseeing the service and control technicians, but the position has been vacant for two years.⁶ Angela Hull, Hull's wife, is responsible for the company's administration as the Chief Financial Officer (CFO). The Administrative Manager and Accounting Supervisor report directly to her. A service coordinator, Tonya Richards, and a project coordinator⁷, Julia Rempfer, report to Administrative Manager Danelle Rempfer.

The bulk of the Employer's work is done away from the Employer's facility. The majority of the Employer's clients have existing HVAC units in buildings, and the Employer offers maintenance to those units, and ultimately, when the unit is no longer efficient to operate, the Employer would replace it with a brand-new unit. Additionally, it modifies HVAC systems in existing buildings where the layout or offices within the building are being changed by Employer's clients. According to President Hull, Project work accounts for about thirty-three percent (33%) of the Employer's business, and service work about thirty-two percent (32%). Control work amounts to one percent (1%) of the Employer's revenue.

Nick De la Cruz is responsible for dispatching, scheduling and providing support to technicians by making sure they have everything they need to perform the work. He has been working for the Employer for a short period of time, a little over 90 days. He uses a dispatching platform or software program called ESC, and works with the client, with the technician, the salesperson, and Hull to determine the service schedules and enters those into the dispatching system. He includes in the dispatch the information regarding scope of work, in other words, the services that has been agreed upon with the client. He tries to assign a day's worth of work to technicians, but if a technician completes the work earlier than expected, they must contact De La Cruz and Hull. Tonya Richards, the service coordinator, is also responsible for dispatching and scheduling of service/maintenance jobs. The Employer's jobs vary in length and its coordination also varies, a project may be scheduled anywhere from months to just a day in advance. With regards to routine maintenance work, the Employer has a schedule of the that work in advance.

b. Employee skills, functions and working conditions

i. Skills and Training

To be hired as a technician by the Employer no prior experience is required in any of the three classifications. The Employer has job descriptions that were created in 2015 for service,

⁴ Service technicians include and/or is used interchangeably to refer also to maintenance technicians.

⁵ He is responsible for permits and drawings.

⁶ The Employer has no plans to fill the vacant position.

⁷ The project coordinator enters projects into the Employer's software systems and handles close-outs, warranty, and similar matters; it is responsible for administrative tasks.

project and control technicians. The descriptions are the same for the three job classifications. President Hull explained that he wanted to create flexibility between the technicians; the ability among them to perform all job duties and crossover among the different work groups. Skills levels of the technicians vary, as the Employer hires employees with and without years of experience in the industry. Currently, most of the service technicians were hired without prior experience.

All technicians have the EPA certification required to handle refrigerants. Technicians that work with electrical components inside the HVAC equipment must have a 06a license. Technicians in all three classifications, including the two control technicians, have the 06a license, but not all technicians have it. This license is required in the State of Washington under the Washington Administrative Code to work with 600 volts or less. There are other certifications related to safety that the technicians must have such as crane operation and other similar certifications.⁸

Several technicians are certified in Niagara, a control platform used by the Employer. Control technicians Robert Davidson and Trevor Nichols are Niagara AX and Niagara N4 certified. To receive the AX certification, they were required to take a full week class, and for the N4, it was a two to three-day online course. Three service technicians have taken Niagara training, although only one is still currently employed by the Employer. Service technician Lyn Cade has taken Niagara training, but he does not have the same certification that Davidson and Nichols holds.⁹

Technicians take safety training, which is the same for all technicians, but there is also specialized training geared to type of work.¹⁰ The Employer also provides training to technicians that are administered at the Employer's facility or at a different location depending on the training and the training provider. Regardless of the location, Employer provided training is the same for all technicians.

ii. Job Functions and Work

The technicians provide different types of services to the Employer's client. Service technicians focus on service and maintenance of HVAC equipment. The project technicians perform replacements, upgrades, and modifications in the HVAC units. The Employer's two control technicians work on building automation and temperature control. Because the control work amounts to a small percent of the Employer's business, there is not enough work to keep the control technicians busy performing that line of work exclusively. Thus, Hull explained, they perform project and service work regularly.

Technicians work independently most of the time. Although there are instances where technicians must work together on large or time sensitive projects. Technicians have company -

⁸ Details of these other certifications were not discussed in the record.

⁹ The record does not reflect the certification that this employee holds.

¹⁰ Details about these other specialized training was not discussed in the record.

owned vans that they drive directly from their homes to the clients' location. Control technician Davidson explained that he carries tools in this van to perform all kinds of work, like sheet metal, refrigeration, control, and service work. He stated that all technicians' van are always stocked with the tools necessary for the different jobs that may arise. They receive their dispatch information through the ESC application that is downloaded in their company mobile phones. If they need to stock up on materials, they will stop at the Employer's facility to restock, otherwise, the work takes place at the client's business. The Employer tries to use its manpower efficiently. For example, if a technician has the skill set, training, and experience to perform control work as well as service work, the employee will be assigned to perform all duties in a job, instead of sending an additional technician in a different classification. Hull explained that they are a small business with a limited number of technicians, so they work as a team. Once a technician arrives at a job it begins by planning the work and collaborates with Project Manager De La Cruz to order materials to begin the work.

Control work is when a client with multiple HVAC systems wants to control the units as a single unit; a collective control for all the systems for energy management, load sharing, etc. This type of work requires working with software and understanding of the control system that is involved. The knowledge required to work with the different control systems is acquired by either formal training, on-the-job training or self-research training. The control technicians are the only ones that have the formal training to work with control systems. Since the control technicians are the only ones with the formal training to deal with control systems, they will work with other technicians as needed in that area. Service and project technicians cannot perform programming work without the oversight of the control technicians.

Control technician Davidson explained that he began working for the Employer as an entry level service technician. After about 5-years, he transitioned to control technician. He has been working for the Employer for about 12 years. As a control technician he designs, installs and programs building automation systems. He also perform additional duties, he installs, starts up, and tests HVAC systems, maintains the systems, performs diagnostic repair and leads training courses for the service technicians. He spends about twenty percent of his time performing control work, and the rest of his time is split in half between service and project work. According to Davidson, there are several service technicians that are certified in Niagara. Those service techs can log on to work on the controls on their own. In addition, he has taken the time to train some of the journey-level service techs to take care of their own control issues. Davidson is also always receiving calls from service and project technicians for advice and help. While it may not be training in a formal setting, he provides guidance and knowledge continually to other employees.

Davidson explained that all techs support each other as needed and it is not unusual for him to have a project technician or a service technician working side-by-side with him. He has had projects that have lasted 6-months, in which he has been working on control and service technicians have been with him helping for the entire length of the project because these employees have the qualifications and electrical license to help him. They helped installing hardware, running cables, installing controllers, etc., because while the employees may not have the Niagara certification, that knowledge is not required until the final programming is performed.

Hull explained that project technicians work with sheet metal modifying the sheet metal duct work to fit the equipment if there is a need, but that the fabrication work is subcontracted to a company named QuickTin. The measurements for the fabrication of duct work is primarily performed by the project technicians, but on occasions a service technician may encounter a damaged filter rack, and they take the measurements and prepared the drawings to turn it to QuickTin to be built.

The Employer has an on-call rotation system in place for calls outside the regular business hours, from 5:00 p.m. to 7:00a.m. from Monday to Fridays and on weekends. Service, project and control technicians participate in the on-call list. Technicians respond to emergencies, generally service related, although there could be instances where a call is associated to an existing project that requires immediate assistance. The technicians in the on-call list should have an 06A electrical license and enough knowledge to recognize issues and make repairs. Therefore, although technicians in all three classifications are in the on-call list rotation, not all Employer's technicians participate in the on-call list. For example, only two out of the six project technicians participated in the on-call list rotation until September 2019. President Hull explained that these two project technicians participated in the on-call rotation because the type of work that they perform on projects is similar to the work performed in service, thus they have the knowledge necessary to respond to emergency calls and make repairs. These two employees have not participated in the on-call rotation since September 2019. The record does not reflect the reasons why these two employees have not participated in the rotation since September 2019, but when discussing other employees, he explained that assignments to the on-call rotation in some instances depends on the bulk of work at the time. Control technician Davidson is on the on-call list, and he explained that most of the calls are service related and added that it is unusual to receive calls for projects or control during the emergency hours.

iii. Terms and Conditions of Employment

The Employer's employee handbook, dated February 1, 2018, details the Employer's policies and benefits applicable to all its employees. Some of the fringe benefits offered are medical and dental insurance, 401k program, paid holidays, paid personal time off, bereavement leave, maternity leave, and unpaid personal leave. Technicians have an annual tool allowance of \$600 that can be utilized for tools and clothing, such as boots. The Employer provides them with eleven sets of uniform shirts and pants, and an outside vendor cleans and mends the uniforms weekly. It reimburses to employees, half of the cost of continuing education credits. Training programs to enhance the skills of employees are offered at the Employer premises and other facilities at no cost to the technicians. The Employer also may compensate technicians for participation in non-required relevant training programs if requested with enough time prior to registration.

The handbook also speaks to company vehicle policies, disciplinary procedure, safety policy, company cellular phone policy, smoking, and termination of employment among other topics.

Hull mentioned three examples of employees that have move from one classification to

another. A technician that went from service to projects, another from service to control, and a third one from projects to service. If a technician expresses an interest in a different technician classification to the Employer, they would discuss the career path and take into consideration the employee's job performance to see if it's feasible to make the transition. The Employer would then allow them to grow or develop in that area of interest by assisting technicians in the area of interest.

According to the Employer's employee handbook, technicians¹¹ are expected to work 40 hours a week generally scheduled from 7:30 a.m. to 4:00 p.m. with a ½ hour lunch period between the fourth and fifth hour of working, although these may vary depending on workload and customer requirements. The Employer pays technicians travel time based on several scenarios detailed in the handbook, i.e. if leaving the office, traveling directly from home passing the shop, traveling directly from home not passing shop. Overtime pay is paid for hours worked in excess of forty (40) hours in one week from Sunday to Saturday. The on-call assignments begin at 7:00 a.m. on Friday and end at 7:00 a.m. on the following Friday. When technicians are dispatched for on-call assignments, they are paid for hours work, travel time, and received an on-call compensation of \$50.00. Technicians record their work hours using a software system, ESC, that is downloaded to company phones.

All technicians use the same uniform. Service technicians wage rates differ among each other, with the lowest hourly wage rate been \$20 an hour and the highest \$42.50, with an average rate of \$34. The control technicians earn \$45 and \$49 an hour, respectively. The project technicians' hourly wages rates also fluctuate with the highest paid technician at a rate of \$50 per hour and the lowest paid at \$20 per hour, with an average rate of \$41. Wages are determined by previous work experience, ability to perform and tenure with the Employer, but not one factor appears to be determinative. For example, the highest paid project technician, at \$50 an hour, has been working for the Employer 13 years, yet another project technician with 16 years of service earns \$44 an hour. Similarly, with the service technicians, the highest paid at \$44 an hour has only two years of service with the Employer, while the most senior of the service technicians with 12-years of service, earns \$42.50 an hour. There are also, among the service technicians, two employees that have 1-year of service, but one makes \$40 an hour and the other \$25 an hour. These variations in wages are also seen across technician classifications, for example, there is a service technician with 2-years in service that earns \$44 an hour, the same rate per hour of one project technician with 16-years of service with the Employer. Notwithstanding, it appears that on average, the service technicians earn less per hour. In this regard, Hull explained that the service technicians' team is a younger group in terms of prior experience in the industry. He further described that wages are reviewed at the 90-day mark after hire, and during the yearly performance reviews, to determine whether a wage increase is necessary. Wage increases are granted irrespective of job classification. According to the Employer's handbook, salary decisions are based on attendance, level of performance, self-development, increased valued to the organization, general attitude and the Employer's financial situation.

¹¹ The handbook only refers to two groups of employees, service technicians and sales, administrative and office staff. Since all technicians participate in the on-call list for emergencies outside regular business hours,

As a result of COVID-19 the Employer recently laid off four technicians, one service and three project technicians.¹² Hull explained that the Employer's projects area has been the most affected by COVID-19, hence, more project technicians were laid off. In this regard, the employee handbook states that layoff decisions and whom would be affected rests at the discretion of the Employer.

II. Analysis

a. Board Law

Where, as here, a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit, it is necessary to apply the three-step analysis set forth in *The Boeing Company*, 368 NLRB No. 67 slip op. at 2 (2019): (1) whether the petitioned-for employees share an internal community of interest; (2) whether the petitioned-for employees are "sufficiently distinct" from the excluded employees; and (3) whether any guidelines the Board has established for appropriate unit configurations in specific industries are applicable. Steps one and three of *Boeing*, the requirement that any appropriate unit have an internal community of interest, and that consideration must be given to the Board's decisions on appropriate units in the particular industry involved, reference broad principles that are generally applicable to unit determinations. Step two considers "whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit," *ibid.* (internal quotations omitted.) "The relevant inquiry under the second step is whether the petitioned-for employees have a sufficiently distinct community of interest, not whether petitioned-for and excluded employees have *any* community of interest." *Audio Visual Services Group*, 05-RC-232347, fn. 1 (February 26, 2020) (Unpublished order).

To assess community of interest, the Board considers its traditional factors, such as whether employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work (including job overlap between classifications); are functionally integrated with other employees; have interchange and frequent contact with other employees; have distinct terms and conditions of employment; and separate supervision. *PCC Structural, Inc.*, 365 NLRB No. 160 (2017), slip op. at 11 (citing *United Operations, Inc.*, 338 NLRB 123, 123 (2002)). *Accord Boeing Co.*, 368 NLRB No. 67, slip op. at 3. No one factor is dispositive. *Id.*

¹² The parties stipulated that employees on furlough have no expectation of rehire and therefore, are not eligible to vote.

b. Application of Board Law to the Facts of the Case

i. The service and maintenance technicians do not share a community of interest distinct from the project and control technicians.

There is no dispute that the service and maintenance technicians share an internal community of interest. Therefore, I continue with the second step of the analysis in this case.

Service and maintenance technicians are part of the Employer's operational area, along with the project and control technicians. They are all part of one group of employees, HVAC technicians, in the Employer's operation which job duties are focused on providing services to HVAC units. The other groups of employees within the Employer's operations are centered in sales, dispatch, and coordination of the services provided by these technicians. All technicians share common supervision. President Hull supervises the day-to-day work of service, control and project technicians, including rating performance, directing work, scheduling work, and he is the one who has the authority to hire, fire and discipline employees. Common supervision weighs in favor of placing the employees in dispute in one unit.

The service technicians cannot be distinguished from the employees the Petitioner contends should be excluded from the unit based on job functions, duties, skills or working conditions. More specifically, the record reveals that technicians share the same basic skills; no industry or job experience is required, although some may possess more industry experience at the time of hire. Their job descriptions are identical, and all technicians are required to have an EPA certificate permitting them to handle refrigerant. Additionally, those technicians that handle electrical work are required to have an o6a electrical license, but having the electrical license is not a requirement to work for the Employer. There are service and maintenance technicians, project technicians and control technicians that either have the electrical license or are working towards getting the license. While the control technicians are the only ones that have the Niagara AX and Niagara N4 certifications this distinction is not sufficient to overcome their community of interest with the petitioned-for employees. Furthermore, the control technicians regularly perform service work and are on the on-call rotation along with the service employees.

All technicians are dispatched from their homes, they are not required to come to the office, and receive their work assignments through a dispatch application downloaded in their company owned mobile phones. The Employer also provides them with company vans equipped with the same tools that allows them to respond to all services provided by the company, project, control and service.

While the technicians provide different types of service to the HVAC units, there is no rigid line of demarcation among the three types of services. In this regard, President Hull explained that decisions regarding which HVAC technician to send to a given job are made by considering who has the necessary technical ability and experience to perform the job. Thus, if a job, for example, requires repair and project knowledge, they will send a technician that can perform all duties instead of sending multiples technicians to work in one unit. All three types of HVAC

technicians participate in the on-call rotation to provide emergency services to the Employer's clients. Control technicians are assigned on a regular basis project and service work, since there is not enough control work. Moreover, service and project technicians often contact control technician Davidson for direction and advice while out on a job. And he has worked side-by-side with service technicians, for 6-months at a time, that are sent out to help him in his work assignments. Because of the nature of the work, there is not significant evidence of day-to-day contact among the technicians, as employees do not report to the Employer's facility and instead go to their clients directly but the record shows, as previously discussed that there is overlap between the three different type of technicians. Notwithstanding, the evidence shows that there is overlap in job functions, and that disputed employees work together as a crew on occasions with the service and maintenance technicians, all supporting a finding of similarity of functions. They also have similar requirements to obtain employment; they have similar job descriptions and licensure requirements; they participate in the same Employer training programs; and they use similar equipment, further supporting a finding of similarity of skills. *Casino Aztar*, 349 NLRB 603 (2007); *J.C. Penny Company, Inc.*, 328 NLRB 766 (1999); *Brand Precision Services*, 313 NLRB 657 (1994); *Phoenician*, 308 NLRB 826 (1992). Additionally, the record shows that there is some evidence of interchange, Davidson transferred permanently from service to control technicians, and although President Hull did not provide much details, he testified without contravention of two additional instances of technicians transferring permanently from one classification to another.

The record shows that all HVAC technicians share identical conditions of employment. They have the same work hours, are subject to participation in the on-call rotation, receive the same fringe benefits, receive similar wages, are subject to the same work rules and policies, and wear the same uniforms. They also receive similar wages, while the service technicians as a whole on average earned less money, it appears the difference responds to the lack of prior experience in the industry of the employees currently employed in that position, and not because the position pays less than the rest of the technicians.

Accordingly, after applying the Board's traditional community-of-interest factors, I find that service technicians do not, by themselves, share a community of interest that is sufficiently separate and distinct from that of the project and control technicians to warrant the establishment of a separate group. Therefore, I find that the petitioned-for unit, by itself, is not an appropriate unit for purposes of collective bargaining. An appropriate unit, based on this record, is one that also includes control and project technicians.

ii. Industry specific guidelines

There is no industry specific standard applicable in this case. The Petitioner argues that the service technicians are a craft unit. In *Burns & Roe Services Corp.*, 313 NLRB 1307, 1308 (1994), the Board defined a craft unit as a "distinct and homogeneous" unit of journeymen, apprentices, and helpers who are primarily engaged in tasks not performed by others that require substantial craft skills and the use of specialized tools and equipment. The factors the Board considers are formal training or apprenticeship programs, functional integration, overlap of duties,

whether work assignments are based on need or made along craft lines, and common interests in wages and other terms and conditions of employment.

The record does not support a finding that the service technicians are a craft unit distinct from the control and project technicians. As previously discussed at length, these three types of technicians perform similar work, they all provide services to HVAC units, use similar tools and equipment and the Employer does not required any specialized training distinct from the other technicians.

The Petitioner contends that the service technicians have been recognized as an appropriate craft unit by the Board in *Waldinger Corp.*, 331 NLRB 544, fn. 5 (2000). *Waldinger Corp.* is an unfair labor practice case, where the main controversy was an employer's withdrawal of recognition. The employer was also an HVAC service company and its workforce was comprised of a general manager, three (3) administrative employees and thirteen (13) service technicians. The General Counsel and the employer in the case stipulated that the appropriate unit was all "HVAC service technicians." The Board adopted the stipulation finding that the unit was an appropriate unit. The issue in *Waldinger* was not related to the appropriateness of the unit, unlike this case, and there was no discussion on whether the technicians in the unit offered different services to the customers. In this case, the petitioned-for employees, as well as the excluded employees are HVAC technicians, the difference is the focus of the HVAC service that they provide within the Employer's operations. *Anheuser-Busch, Inc.*, 170 NLRB 46 (1968) cited by the Petitioner is also inapposite. The issue in that case was whether a contract between an incumbent union and the employer, that included production employees, and purported to include maintenance employees after the contract was executed, constituted or not a bar to an election of a unit of electricians and apprentice electricians providing electrical maintenance. The Board found that the contract was not a bar, and that a unit of maintenance electricians could constitute a separate unit from a production unit. Again, this case is distinguishable, as all employees, those petitioned-for as well as the excluded employees are HVAC technicians that provide HVAC services to the Employer's clients.

CONCLUSION

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

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The petitioned-for unit is inappropriate because its community of interests are not sufficiently distinct from the interests of excluded employees. It is hereby ordered that the petition in this matter is dismissed.

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 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, any request for review must be filed by **October 14, 2020**. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and 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, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. 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.

Dated: September 29, 2020

Ronald K. Hooks

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