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

In the Matter of

THE ARDIT COMPANY

Employer

and Case 9-RC-083978

INTERNATIONAL UNION OF BRICKLAYERS AND
ALLIED CRAFTWORKERS, OHIO KENTUCKY
ADMINISTRATIVE DISTRICT COUNCIL,
LOCAL UNION NO. 18

Petitioner

REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION:

The Employer, a commercial terrazzo tile subcontractor, provides terrazzo, marble, and tile installation services from its facility in Columbus, Ohio. The Petitioner has filed a petition with the National Labor Relations Board under Section 9(a) of the National Labor Relations Act seeking to represent a bargaining unit consisting of the Employer's tile, marble, and terrazzo installers and helpers, excluding office clerical employees, all professional employees, and guards and supervisors as defined in the Act. The Employer does not dispute the appropriateness of the proposed bargaining unit but asserts that the Petitioner, based out of Cincinnati, Ohio, is not the appropriate labor organization to represent the Employer's employees because of the Petitioner's territorial and jurisdictional limits. The Employer is signatory to a Section 8(f) agreement between the Tile, Marble, and Terrazzo Contractors Association of Greater Cincinnati and the Petitioner effective from September 1, 2010 through August 31, 2012.

I have carefully reviewed and considered the record evidence and the arguments of the parties at the hearing and in their post-hearing briefs. [1]/ I find that all of the Employer's tile setters, terrazzo workers, tile finishers, terrazzo finishers, floor grinders, and base grinders constitute an appropriate bargaining unit and the Petitioner is capable of representing the unit. In explaining how I came to my determination on this issue, I will describe the Employer's operations, discuss the duties of the employees in the unit found appropriate, set out the applicable legal precedent and then analyze the issue in relation to that precedent. There are approximately eight employees in the bargaining unit that I have found to be appropriate.

[1]/ Petitioner timely filed its post-hearing brief, and the arguments contained within were considered in making my decision. The Employer failed to file a post-hearing brief.

II. FACTUAL OVERVIEW:

Michelle Johnson, president and co-owner, Norma Martina, co-owner, Alex Johnson and Jim Traverse work at the Employer's Columbus, Ohio facility and direct the Employer's operations. Michelle Johnson is responsible for day-to-day office work, including billing, receiving, and payroll. Norma Martina, in conjunction with Michelle Johnson, determines issues regarding the hiring, discipline and termination of employees. Alex Johnson is responsible for determining the Employer's staffing needs. Johnson, with input from Michelle Johnson and Norma Martina, also has the added responsibility for laying off employees if dictated by the Employer's volume of business. Jim Traverse, an estimator, assesses project costs and provides estimates when the Employer intends to bid on a project.

The Employer's job projects are primarily in Franklin County in central Ohio but does have some projects in other Ohio counties. The majority of the Employer's business is obtained through bids on public work projects, including projects with universities, and counties and state governmental entities. The Employer rarely performs work on private or non-commercial jobs. Because the Employer is engaged in a finish trade, its work is usually conducted indoors and under cover. Layoffs occur as a consequence of a reduction in available work rather than on a seasonal basis.

The record discloses that the Employer employs approximately eight field employees who complete the actual installation of terrazzo floors, tile, marble, stone, and installation of materials that are installed on walls up to a specific height. Of the eight field employees, three are classified as a tile setter/terrazzo worker, and the remaining five are classified as finishers. Within the finisher classification, the record shows the Employer further classifies employees as tile finishers, terrazzo finishers, floor grinders and base grinders. The tile setter actually sets and installs the tile in place. The tile finisher unloads and stages materials on the job site, obtains the necessary materials for the tile setter, and completes grouting work after the tile is set. The terrazzo worker, similar to the tile setter, actually installs the terrazzo onto the floor. The terrazzo finisher obtains the materials and prepares the mixes that are needed by the terrazzo worker. The floor grinder operates the floor grinding machine which is a larger machine used on the bare areas of the floor to grind the terrazzo. The base grinder operates a machine that grinds the edges of the tile. Tile finishers operate mixers and floats that are used in the finishing process. Field employees also use tile cutters, several types of trowels, tile nips, base and floor grinders, straight edges, chalk lines, levels, sponges, rollers, and water saws. These machines and tools are used throughout the setting and finishing processes.

There is no distinction between field employees regarding what they wear while working. Field employees are not required to wear a uniform and generally dress in construction-type clothing: jeans, shirts, appropriate footwear, and safety equipment, including hardhats and safety glasses. The record does not reflect information about the wages or benefits that the employees receive when they are not working under the terms of the 8(f) agreement.

As previously noted, the parties are signatory to an 8(f) agreement that covers essentially the same job classifications as the bargaining unit sought by the Petitioner. Article 3 of the

Agreement specifies the jurisdictional area for tile, terrazzo and marble mechanics, which includes all of Brown, Butler, Clermont, Hamilton, and Warren Counties in Ohio and the Townships of Dixon, Israel, Gasper, Lanier, Somers and Gratis in Preble County. The jurisdictional area for finishers includes all of Adams, Athens, Brown, Butler, Clermont, Clinton, Fayette, Gallia, Hamilton, Highland, Jackson, Lawrence, Meigs, Pike, Ross, Scioto, Vinton, Warren, and Washington Counties in Ohio and the Townships of Dixon, Israel, Gasper, Lanier, Somers and Gratis in Preble County.

III. LEGAL ANALYSIS:

I note that no objection has been raised regarding the appropriateness of the bargaining unit sought by the Petitioner. Based on the record as a whole, I find that the tile setters, terrazzo workers, tile finishers, terrazzo finishers, floor grinders, and base grinders are a readily identifiable group who share a community of interest, and constitute an appropriate unit for purposes of collective bargaining. In addition, I note that the Board has made clear that the unit sought for collective bargaining need only be an appropriate unit. Thus, the unit sought need not be the ultimate, or the only, or even the most appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996). When deciding whether the unit sought in a petition is appropriate, the Board focuses on whether the employees share a "community of interest." *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985). In turn, when deciding whether a group of employees shares a community of interest, the Board considers whether the employees sought are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *United Operations, Inc.*, 338 NLRB 123 (2002).

Here, the record reflects that the Employer's field employees share a community of interest under the Board's traditional criteria. Their work has a shared purpose and is functionally integrated; the employees work as a group in order to complete projects. In order for the tile setter to complete his specific portion of the job, the tile finisher obtains and stages the necessary materials; once the tile setter completes the installation, the tile finisher then completes the grouting work. Similarly, the terrazzo worker relies upon the terrazzo finisher to obtain materials and prepare mixes in order to install the terrazzo. The floor grinder is responsible for grinding pieces of terrazzo, and the base grinder handles grinding on the edges of the tile work. All the field employees work together to complete projects and are the only employees whose job functions require manual labor and the physical installation of tile, marble, and terrazzo. In addition, all the field employees wear similar construction clothing and utilize the same safety equipment. In contrast, the Employer's other personnel spend a majority of their time in an office setting. Finally, these same job classifications are generally included under the parties' existing Section 8(f) Agreement.

The Employer argues that the Petitioner is not the appropriate labor organization to represent its employees because those employees primarily work in Franklin County and the surrounding counties, none of which are included in Article 3 of the parties' Agreement. Further, the Employer contends that another local affiliate traditionally represents employees in

the Columbus, Ohio area and would be a more appropriate union to represent its employees. However, "the Board has long held that a Union's territorial jurisdiction and limitations do not generally affect the determination of the appropriate unit." *Laboratory Corporation of America Holdings*, 341 NLRB 1079, 1083 fn. 12 (2004). See, *Groendyke Transport*, 171 NLRB 997, 998 (1968); *Alley Drywall*, *Inc.*, 333 NLRB 1005, 1008 (2001).

In *CCI Construction Co., Inc.*, the Board, in response to an employer's argument that certain employer job sites were outside of the union's geographical jurisdiction and thus should not be included in the unit, stated that "[t]he geographical representational limitations of Local 19 or any other local, however, are not relevant to the determination of an appropriate unit." *CCI Construction Co., Inc.*, 326 NLRB 1319, 1323 (1998). In addition, "the Board has consistently held that it is a labor organization's 'willingness, rather than its constitutional ability' to represent employees 'which is the controlling factor.'" *Mariah, Inc.*, 322 NLRB 586, 587 fn. 3 (1996), citing *Mayfield Industries, Incorporated*, 126 NLRB 223, 224 fn. 1 (1960). See also, *Community Service Publishing*, 216 NLRB 997, 1000 (1975) ("the willingness of a union to represent employees, rather than the eligibility of the employees to membership in that union, is controlling"); *"M" Systems*, 115 NLRB 1316, 1320 fn. 2 (1956) ("the Board has uniformly held that the willingness of a petitioner to represent employees, rather than the eligibility of employees to membership in the petitioner, is controlling under the Act"); *Hazelton Laboratories*, 136 NLRB 1609, 1612 (1962) ("well established that the willingness of a union to represent employees, rather than the eligibility of the employees to membership in that union, is controlling").

At the hearing, the Petitioner's president, Freddy Ray Hubbard, Sr., testified that the Petitioner is willing to represent the petitioned-for employees regardless of where the employees work. Accordingly, based on Hubbard's testimony and the above-cited precedent, I find the geographical limitations in the Agreement cited by the Employer are not relevant to the determination of an appropriate unit.

IV. EXCLUSIONS:

The parties agreed and the record shows that Michelle Johnson, President and Co-Owner, Norma Martina, Co-Owner, and Alex Johnson, are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I will exclude them from the unit found appropriate. [2]/ In addition, the parties agreed that Jim Traverse, Estimator, should be excluded from the proposed bargaining unit because he primarily works in the office, does not perform any tile, marble, or terrazzo work in the field and his job function is to estimate bids for the Employer's projects. Since he lacks a community of interest with the field employees, I will also exclude Traverse from the unit found appropriate.

[2]/ The parties stipulated that these individuals possess and exercise one or more of the following indicia of supervisory status: the ability to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them or to adjust their grievances, or effectively, to recommend such action utilizing independent judgment in exercising such authority and, therefore, should be excluded from the bargaining unit.

V. CONCLUSIONS AND FINDINGS:

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

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed. [3]/

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The 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 tile, marble, and terrazzo installers and helpers employed by the Employer at or out of its facility in Columbus, Ohio, excluding office clerical employees and all professional 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. The employees will vote on whether they wish to be represented for purposes of collective bargaining by the International Union of Bricklayers and Allied Craftworkers, Ohio Kentucky Administrative District Council, Local Union No. 18. The date, time, and place of the election will be specified in the notice of election that the Boards' Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY:

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in

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[3]/ Prior to hearing, the Employer served a subpoena duces tecum on Petitioner's president, seeking, among other documents, the Constitution and by-laws of the Petitioner, the International Union of Bricklayers and Allied Craftworkers, and the bylaws of the Ohio Kentucky Administrative District Council. The Petitioner filed a Petition to Revoke the Employer's subpoena duces tecum on several grounds, including that the information sought by the Employer was not relevant to the issues being litigated at hearing. At the hearing, the Hearing Officer recommended that I grant the Petition to Revoke because the information sought was not relevant to a determination of issues in the hearing. As I have noted above, it is the Union's willingness and ability to represent employees rather than its constitutional territorial limitations that are relevant considerations. Having fully considered the Employer's arguments and based on the record as a whole, I agree with the Hearing Officer's recommendation and grant the Petitioner's Petition to Revoke the Employer's subpoena duces tecum.

an economic strike which commenced less then 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.

Also eligible to vote shall be all employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months preceding the eligibility date for the election or who have had some employment in that period and who have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified in 167 NLRB 1078 (1967), and *Steiny & Co.*, 308 NLRB 1323 (1992). [4]/

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

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS:

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

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

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **July 20, 2012**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the

[4]/ This formula is used in all construction industry elections unless the parties stipulate not to use it. *Signet Testing Laboratories*, 330 NLRB 1 (1999).

Regional Office by electronic filing through the Agency's website, www.nlrb.gov [5]/ by mail, or by facsimile transmission at 513-684-3946. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of two copies of the list, unless the list is submitted electronically or by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. NOTICE OF POSTING OBLIGATIONS:

According to Section 103.20 of the Board's Rules and Regulations, the Employer, if an election is subsequently ordered, must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VII. RIGHT TO REQUEST REVIEW:

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by **July 27, 2012**. The request may be filed electronically through the Agency's website, www.nlrb.gov [6]/, but may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 13th day of July 2012.

/s/ Gary W. Muffley

Gary W. Muffley, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

[5]/ To file the eligibility list electronically, go to the Agency's website at www.nlrb.gov, select **File Case Documents**, enter the NLRB Case Number and follow the detailed instructions.

[6]/ To file the request for review electronically, go to www.nlrb.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.