

Johnson Controls, Inc., Systems and Services Division and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 120, Petitioner. Case 8-RC-15017

December 9, 1996

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND HIGGINS

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on various dates in March-June 1994 before a duly designated hearing officer of the National Labor Relations Board. On June 17, 1994, pursuant to Section 102.67(h) of the Board's Rules and Regulations, this case was transferred to the Board for decision. The Employer and the Petitioner have filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully reviewed the entire record in this proceeding, including the posthearing briefs filed by the parties, the Board makes the following findings:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the policies of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. Johnson Controls, Inc., Systems and Services Division, the Employer, sells, installs, and services building environmental control systems and fire and security systems. It also services and maintains mechanical equipment. The Employer has approximately 100 branch offices throughout the United States; only the Cleveland branch is involved here. The Petitioner, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 120, seeks a unit including the pipefitters (fitters), system representatives (system reps), preventative maintenance inspectors (PMIs), and service specialists, excluding office personnel, sales employees, project engineers, application engineers, supervisors, and office clericals. In the alternative, the Petitioner would go forward to an election in any of the following units: system reps, PMIs, and service specialists; a wall-to-wall unit; whatever unit is deemed appropriate by the Board. The Employer main-

tains that the only appropriate unit would be a unit including sales engineers, application engineers, project engineers, system reps, PMIs, service assistants, customer service representatives (CSRs), counter line personnel and material employees, excluding office clericals, supervisors, and fitters.

At the hearing, the parties stipulated that the following employees are office clerical employees and are excluded from any unit found appropriate: Kimberly Drenski, Deanna Petrush, Joanne Verner, and Denise Crowley. The parties also stipulated that the following employees are supervisors and are excluded from any unit found appropriate: Richard Wood, Teri McLeod, David Mangano, Daniel Hochendoner, Keith Kohnke, Paul Barger, Mike Simpson, Chuck Keltcka, and Brian Wagner.

There remains at issue the supervisory status of Bob Garcia and Mark Blackmur. Also at issue are whether a self-determination election is necessary and whether the *Daniel/Steiny*¹ eligibility formula is applicable.

I. FACTS

The Employer sells, installs, and services building environmental control systems and fire and security systems and services and maintains mechanical equipment. The Employer's business is divided into the following categories:

— Retrofit	- 20%
— Performance Contracting	- 20%
— Installation	- 20%
— Scheduled Service	- 15%
— Unscheduled Service	- 15%
— Material Sales	- 10%

Retrofit work consists of replacing old fire and security systems with updated systems. In performance contracting, the Employer guarantees that the retrofit work will allow its customers to achieve specified energy cost savings. Installation or construction involves installing control, fire alarm, and security systems in new buildings. Regularly scheduled maintenance includes preventative maintenance of digital control and fire/security systems, pneumatic controls, and mechanical equipment. Unscheduled maintenance service consists of responding to calls to fix malfunctioning digital control and fire/security systems, pneumatic controls, and mechanical equipment. Finally, material sales involves the direct sale of spare parts by telephone or over the counter.

Since 1969, the Employer has been bound by its membership in the Pneumatic Control Systems Council to a collective-bargaining agreement with the United

¹ *Daniel Construction Co.*, 133 NLRB 264 (1961), modified 167 NLRB 1078 (1967), reaff'd. and modified in *Steiny & Co.*, 308 NLRB 1323 (1992).

Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (UA). The agreement covers only the Employer's fitters. By the terms of the National Agreement, wages and benefits of the fitters are those specified in the various local agreements between the locals and the appropriate local employer associations. The parties stipulated that the National Agreement is a prehire agreement governed by the terms of Section 8(f) of the Act.

II. THE APPROPRIATE UNIT

At the conclusion of the hearing, the Petitioner amended the scope of the requested bargaining unit to include all fitters, system representatives (system rep), preventative maintenance inspectors (PMI), and service specialists, excluding customer service representatives, service assistants, dispatchers, materials clerks, counterline clerks, sales engineers, project engineers, application engineers, supervisors, and clericals. In the alternative, the Petitioner seeks a unit consisting of system reps, PMIs, and service specialists, or a wall-to-wall unit. Finally, the Petitioner indicated a willingness to proceed to an election in any unit found to be appropriate by the Board. The Employer maintains that the only appropriate bargaining unit consists of all the Employer's employees excluding fitters, supervisors, and clericals. For the reasons set forth below, we find that a unit comprising fitters, system reps, PMIs, and service specialists is an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

A. Job Descriptions

1. Fitters

Fitters install, service, and repair pneumatic temperature control systems, components, and mechanical equipment including air handling units, boilers, chillers, and condensers. Many of these tasks involve heavy physical labor. Fitters are required to complete a craft apprenticeship program before becoming journeymen. Fitters spend only approximately 5 percent of their time at the branch office. While there, they do such things as attend meetings, turn in timesheets, and obtain paychecks and materials. None of the fitters has a desk or assigned office space. Fitters are hired by referral from the local union hiring hall.

2. System representatives

System reps maintain, install, and commission² computer systems for building environmental control systems that have digitized computer controls. Their other duties include loading, manipulating, and modifying complicated computer software programs; repairing

and servicing the computer system; servicing the digital control systems; and servicing and monitoring the software programming aspects of the control system. System reps require extensive training in computers and knowledge of several computer languages. System reps are required to have at least an associate's degree or equivalent experience in servicing electronic systems, mechanical systems, or both. System reps receive extensive ongoing training through the Johnson Control Institute. System reps work throughout the customer's building, but work predominately at the main control panels and in the customer's computer rooms.

3. Preventative maintenance inspectors and service specialists

PMIs work predominately at customers' jobsites. Their duties include inspecting products such as cooling towers, cooling units, and filters; performing routine tasks such as cleaning and oiling cooling units, and coils in cooling towers; changing belts; lubricating equipment; handling service calls for minor repairs; identifying and listing required replacement or repairs; and performing logging operations, basic test and balance procedures, regular maintenance checks, and minor installation.

Service specialists inspect and diagnose mechanical air-conditioning systems; perform specified preventative maintenance; communicate with the owner on the work performed and the present status of the mechanical system; interpret engineering drawings in reference to layout, location, and operation of the system; and respond to identified customer needs.

PMI work is considered an entry level position and the progression would normally be from a PMI to a service specialist to a system rep.

B. Analysis

In the construction industry, as in all other settings, the Board determines whether the petitioned-for unit is appropriate.³ The Board determines whether the employees in the petitioned-for unit share a sufficient community of interest in view of their duties, functions, supervision, and other terms and conditions of employment, to constitute an appropriate unit.

The Petitioner argues that the unit it seeks—pipe-fitters, system reps, PMIs, and service specialists—is appropriate. It contends that the appropriate-unit standards do not require maintenance of strict jurisdictional lines between craft and noncraft employees. The Petitioner asserts that the highly integrated nature of the work performed by the employees it seeks to represent render the requested unit appropriate. We find that, for the reasons set forth below, the petitioned-for unit constitutes an appropriate unit.

² Commissioning means assembling the computer onsite.

³ *Dezcon, Inc.*, 295 NLRB 109 (1989).

The Employer installs, services, and repairs mechanical heating, ventilating, and air-conditioning (HVAC) equipment in buildings. All the employees in the unit sought by the Petitioner work predominately in the field at customer sites rather than at the Employer's premises. They install, service, and repair the systems. The systems are integrated, meaning that both the electronic and pneumatic ends of the control system are connected.

The fitters perform the repair, maintenance, and inspection of the pneumatic controls as well as the HVAC systems and the mechanical equipment associated with such systems. The fitters are trained. They must complete courses in the installation, repair, and service of piping, pneumatic controls, and other traditional equipment such as boilers, chillers, and compressors. On the electrical end, the system reps repair, replace, and service the digital control equipment; check and tune parameters; and service and monitor the software programming aspects of the control system. PMIs and service specialists perform similar, but less technically advanced work than that of the system reps.

The systems on which the employees work depend on a proper digital control operation and a proper mechanical/pneumatic control operation for the overall system to function properly. This is achieved partly through interaction among the field employees. For example, when the Employer is installing a new temperature control system, the fitter connects the pneumatic lines to the transducer. The system rep then runs the computer system to see that all the equipment is being controlled correctly. If it is not working properly, the fitter and system rep decide who is responsible for the repair and make the necessary corrections. Also, given the integrated nature of the HVAC and control systems, the field classifications have an understanding of the concepts of the entire system.

Thus, we find that the employees in the petitioned-for unit work in an integrated process which requires that they work together in the interrelated process of installing and servicing the Employer's systems.⁴

We also find that the employees in the petitioned-for unit share other community of interest factors. Along with the field employees' similar duties and functions with respect to integrated systems, the field employees share common supervision in the Employer's service group; are provided with vans and trucks; and are required to wear uniforms.

The Employer maintains that the only appropriate unit is a unit of salaried employees, excluding office clericals, supervisors, and fitters. It argues that the salaried employees should be included in the same unit, which should exclude the fitters, because these salaried employees all share a community of interest separate

from that of the fitters. This group includes system reps, PMIs, sales engineers, application engineers, project engineers, service assistants, customer service representatives, counter line personnel, and material employees.

The Employer relies on the following. Several of the salaried employees share common skills including knowledge of electronics, engineering, computer use, and programming. Conversely, the fitters perform no computer software programming and need no computer skills. Moreover, the fitters are not connected to the office computer network as many of the salaried employees are. Next, the Employer argues that the work functions of the fitters—namely, heavy, physical, and often dirty labor—is not similar to the work performed by the salaried employees. Salaried employees, *inter alia*, program, commission, and design systems (application engineers); coordinate cost-effective plans for completing projects (project engineers); dispatch and schedule service and repair calls (service assistants); and handle customer complaints (customer service representative). The Employer also maintains that the fitters should be kept separate from the salaried employees because the latter are organized in teams to accomplish tasks for customers, and fitters are not on these teams. Fourth, the Employer points out that there is no interchange between fitters and salaried employees, practically no physical contact between them, and no overlap in their actual duties. Regarding the difference in their working conditions, the Employer points to the fact that the fitters spend less than 5 percent of their time in the office and do not have desks or office space. Further, even when the fitters and the salaried employees are together, they work under different conditions at the work locations. The majority of the salaried employees spend the bulk of their time in the office, have assigned office spaces or desks, and work under similar conditions at the Employer's premises. Finally, the Employer maintains that its continuous bargaining relationship with the United Association as the representative of the fitters compels the Board to keep the fitters separate from the other salaried employees.

We are not persuaded by the Employer's arguments. First, we reject the Employer's arguments that the fitters share no community of interest with system reps, PMIs, and service specialists. While the fitters may be excluded from the Employer's teams, they clearly play an important role in the installation and maintenance of the Employer's projects. The fitters are part of a functionally integrated process by which the Employer performs its business. Like other field employees the Petitioner seeks to include in the unit, the fitters spend the majority of their time working in the field at customers' buildings or construction sites. Moreover, fitters interact with other field employees. As noted, fitters and other field employees share common super-

⁴ See, e.g., *A. C. Pavement Striping Co.*, 296 NLRB 206 (1989).

vision, use the Employer's vans and trucks, and wear uniforms. The Employer fails to explain why the fact that the fitters are not included in the Employer's official "teams" renders the unit sought an inappropriate one. In any event, we find that the fitters have a sufficient community of interest with the system reps, PMIs, and service specialists to be included in a unit with those employees. An appropriate unit in the construction industry need not be limited to a craft or departmental unit so long as the employees sought are "a clearly identifiable and functionally distinct group with common interests which are distinguishable from those of other employees." *Del-Mont Construction Co.*, 150 NLRB 85, 87 (1965); cf. *S. J. Groves & Sons Co.*, 267 NLRB 175 (1983).

Further, the parties' bargaining history is not controlling here. It is true that the Board accords weight to a prior history of collective bargaining.⁵ However, the 8(f) bargaining history for the fitters is not sufficient to preclude a finding that the unit sought by the Petitioner is appropriate. *Dezcon, Inc.*, supra. Thus, we are not persuaded by the Employer's arguments that the fitters must be excluded from the unit.

The Employer also contends that the salaried employees whom the Petitioner does not seek share a substantial community of interest with the systems reps, PMIs, and service specialists such that they must be included together in any unit found appropriate. Thus, the Employer would include sales engineers, application engineers, project engineers, customer services representatives, counter line personnel, and material employees in the unit. The Board does not approve fractured units—combinations of employees that are too narrow in scope or that have no rational basis.⁶ Contrary to the Employer, however, we find a substantial rational basis for excluding the employees that the Employer seeks to include. The indicia shared by the salaried employees but not by the fitters include, inter alia, common health plan and benefits, holidays and vacations, method of payment, performance reviews, hiring methods, uniforms, and separate call-in lists. Thus, the Employer argues that there is no rational basis for having a unit that includes certain salaried employees but excludes others. According to the Employer, all salaried employees have the same community of interest.

The Employer is correct in pointing out that all the salaried employees share many community of interest factors. But, the fact remains that the focus of the work of the salaried field employees is the hands-on process of installing, repairing, and servicing the Employer's equipment. The other salaried employees that the Employer seeks to include focus primarily on sales, office work, and customer service. Thus, we find that

there is a substantial, rational basis for the Petitioner's dividing line between the salaried employees it would include and those it would exclude. We need go no further because the inquiry ends once we determine that the unit sought by the Petitioner is an appropriate unit. *Dezcon, Inc.*, supra. In light of our previous finding, namely, that a unit consisting of fitters, system reps, PMIs, and service specialists—the unit sought by the Petitioner—is an appropriate one, we find it unnecessary to determine whether the unit sought by the Employer is also appropriate.

III. SUPERVISORY STATUS OF BOB GARCIA

The Petitioner contends that Bob Garcia is not a supervisor and should be included in any unit found appropriate. Conversely, the Employer maintains that Garcia is a supervisor and should be excluded from the bargaining unit.

We find the record both insufficient and unclear as to whether Garcia is a supervisor within the meaning of the Act. We will therefore allow him to vote subject to challenge.⁷

IV. SELF-DETERMINATION ELECTION

A self-determination election is the proper method by which a union may add unrepresented employees to an existing contractual unit. Here, the existing 8(f) unit is limited to the fitters who are covered by a labor contract with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, not the Petitioner. Therefore, the present petition is not an attempt to add previously excluded employees into an existing unit. Instead, the unit we find appropriate for bargaining is a new and different unit, even though it includes some employees who are presently part of a nationwide 8(f) agreement. Therefore, we find the circumstances do not warrant ordering a self-determination election.

V. APPLICATION OF THE *Daniel/Steiny* FORMULA

The Petitioner has requested that the *Daniel* formula for voting eligibility be applied. The Employer did not discuss the issue in its posthearing brief.

The Board finds that the *Daniel* formula is appropriate because the Employer is engaged in the construction industry. As the Board stated in *Steiny*:⁸

Because there is admittedly some degree of variety among construction employers and their hiring patterns, any attempt to distinguish between employers requires an elaborate and burdensome set of criteria to be applied and litigated at each

⁵ *General Electric Co.*, 107 NLRB 70, 72 (1953).

⁶ *Colorado National Bank of Denver*, 204 NLRB 243 (1973).

⁷ The supervisory status of Project Engineer Mark Blackmur was also in dispute. In light of our finding that a unit excluding, inter alia, project engineers is appropriate, we find it unnecessary to reach the issue.

⁸ 308 NLRB at 1327-1328.

hearing. These criteria, for example, must distinguish between employers who hire project-by-project, and those who have a so-called stable or core group of employees. The employers with a stable group would presumably resemble industrial employers and, perhaps, obviate the need for the *Daniel* formula. Our experience, however, indicates that the line between these two types of employers is not distinct. Indeed, many employers are a hybrid of these two models of employment. Moreover, such criteria also would have to define the proper period for examination of the employer's records regarding hiring and layoff "patterns."

Further, we believe this additional level of analysis is unnecessary because application of the *Daniel* formula itself will, to a substantial extent, answer the question whether a particular construction employer is similar or dissimilar to an industrial employer, or whether it operates with or without a stable core of employees. Thus, if no employees are eligible by virtue of the formula, that shows the employer has an entirely stable work force whose voter pool should not and will not be augmented by intermittently employed employees. On the other hand, if application of the formula renders a number of other voters eligible, to that extent it has been demonstrated that the employer hires intermittently from a group of employees with significant contacts to that employer as determined by the formula.

Here, the parties stipulated that the National Agreement covering the fitters is an 8(f) agreement. Such agreements are only permissible within the context of the construction industry. Moreover, the Employer relies on a hiring hall for fitters and routinely recalls laid off employees. Further, the record shows that 20 percent of the Cleveland branch's total sales volume consists of construction work, 20 percent consists of retrofit work, and another 20 percent consists of performance contracting. All three of these areas involve construction-type work. Thus, there could be employees who have worked for the Cleveland Branch who would be disenfranchised if the *Daniel* voter eligibility formula were not applied. Finally, we note that even the salaried employees involved herein are sufficiently re-

lated to the field construction work to be subject to the *Daniel/Steiny* formula. Therefore, we find that the *Daniel/Steiny* formula should be applied.

Thus, in addition to those employees hired and working on the eligibility date, also eligible to vote are those in the unit who have been employed for 30 working days or more within the 12 months preceding the eligibility date for the election, or who had some employment during those 12 months and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Appropriate unit

Accordingly, based on the foregoing and the stipulations of the parties at the hearing, we find that the following employees constitute an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

All pipefitters, system representatives, preventative maintenance inspectors, and service specialists employed at the Employer's Cleveland, Ohio site, excluding all sales engineers, application engineers, project managers, service assistants, system application specialists, customer service representatives, counterline representatives, clerical employees, guards, watchmen and supervisors as defined in the Act.

[Direction of Election omitted from publication.]

Notice Posting

According to the Board's Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Regulations 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.