Steiny and Company, Inc. *and* Local Union No. 11, International Brotherhood of Electrical Workers, AFL–CIO, Petitioner. Cases 21–RC–18897, 21–RC–18898, and 21–RC–18899

September 30, 1992

DECISION ON REVIEW AND DIRECTION OF ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

The issues in this case are (1) whether the Board should continue to apply an eligibility formula to construction industry elections; and (2) if so, what formula should be used.

On December 12, 1991, the Regional Director for Region 21 issued a Decision and Direction of Election in which she found two separate units appropriate for collective bargaining. The first unit included employees working in the Employer's commercial and industrial division;[1] the second included employees working in the traffic and signal division.[2]

After concluding that the Employer had not shown compelling reasons why its operations should be distinguished from others in the construction industry, the Regional Director applied to both units the eligibility formula in *S. K. Whitty & Co.*, 304 NLRB 776 (1991), modifying *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967).

The Employer filed a timely request for review of the Regional Director's decision to apply the eligibility formula, arguing that she erred in applying the formula, that the Board should clarify when, if at all, such a formula should be used, and that the Board should overrule or substantially modify *S. K. Whitty*. The Employer also requested that the Board stay the election and hold oral argument. On January 21, 1992, the Board granted the Employer's request for review, and its requests for oral argument and to stay the election.

On March 4, 1992, the Board scheduled oral argument in this case. The notice of hearing requested that the parties address the following questions:

> 1. What should be the appropriate standard for voter eligibility on the facts of this case? Is this Employer properly characterized as one who has a nucleus of regular employees who work year-round from job to job but also hires additional employees on a project-by-project basis?
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> 2. Should the Board reconsider the *Daniel Construction* (133 NLRB 264 (1961)), modified at 167 NLRB 1078 (1967)) eligibility formula as revised by *S. K. Whitty*, 304 NLRB 776 (1991)?
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> 3. To what extent should representation principles, especially eligibility formulae developed in the nonconstruction industry context under Section 9(a), be applied in construction industry cases? See *John Deklewa & Sons*, 282 NLRB 1375, 1386 fn. 45 (1987).

On April 8, 1992, the Employer, the Petitioner, the Building and Construction Trades Department (AFL–CIO), the Associated General Contractors of America, Inc. (AGC), and the Associated Builders and Contractors, Inc. (ABC) presented oral argument before the Board.[3] The parties have filed briefs on review and the amici curiae have filed statements of position.

I. FACTS AND CONTENTIONS OF THE PARTIES

The Employer is an electrical contractor involved in projects throughout the State of California. For at least 30 years, the Employer and the Petitioner have been parties to a series of agreements under Section 8(f) of the Act that cover a number of classifications. Virtually all the employees in the units found appropriate are covered by 8(f) agreements effective by their terms from June 1, 1989, to May 31, 1992. The Employer obtains employees exclusively from the Petitioner's hiring hall pursuant to the terms of the collective-bargaining agreements.

The commercial and industrial division unit works primarily on long-term projects lasting from approximately 1 to 4 years, while the traffic and signal division unit works primarily on short-term projects lasting from 30 to 60 days. Although the Employer operates from project to project, it attempts to ''hang on'' to or transfer employees from one project to another when a project ends or another needs assistance. When transfers of existing employees do not meet its employment needs, the Employer contacts Petitioner's hiring hall for referrals. Employees are then referred from the Petitioner's hiring hall ''out-of-work'' list.

If the Employer has no further work, an employee is ''terminated.'' Terminated employees can be rehired by the Employer if their name comes up for referral by the Petitioner from the out-of-work list.[4] But according to Robert H. Alston, the Employer's vice president and manager of the commercial and industrial division, referral of former employees at the current time would be ''highly unusual'' as local condi-

[1] All journeymen wiremen, apprentices, material handlers, journeymen alarm installation technicians, alarm installation technicians, communication and systems installers, communication and systems technicians, senior communication and systems technicians, and journeymen sound electricians employed by the Employer within Los Angeles County.

[2] All journeymen traffic signal installers, utility technicians and utility technician trainees employed by the Employer within Los Angeles County.

[3] The AFL–CIO, the AGC, and the ABC appeared as amici curiae.

[4] No provision in the agreements provides for specifying particular employees from the list. Employees discharged for cause are ineligible for rehire.

tions in the construction industry have caused ''a lot'' of individuals (300) to be placed on the out-of-work list.

The Employer introduced a list of all unit employees employed during the past 2-1/2 years.[5] The list indicates that during the period covered, 201 individuals had been employed in the commercial and industrial division, with 92 having been terminated and 109 being currently employed. Eighty-three individuals had been employed in the traffic unit; 63 of those had been terminated and 20 are currently employed. The list did not indicate the number of projects worked by each employee.

The Employer and amici AGC and ABC generally contend that the Board should abandon the eligibility formula of *Daniel/S. K. Whitty*, supra, and apply the criteria traditionally used for determining the eligibility of laid-off employees when formulas developed on the basis of characteristics of a particular industry do not resolve the eligibility issue.[6] In so contending, the Employer argues that the construction industry is not now materially different from other industries, and, thus the traditional individualized multifactor eligibility test for laid-off employees would adequately address the needs in construction industry elections as it has for nonconstruction industry elections. Amici ABC and AGC argue that construction industry employment practices are so diverse that no rigid formula could properly take them into account. The traditional test calling for consideration of numerous factors to determine eligibility of each laid-off individual, these amici contend, is a more flexible test than any numerical formula and thus one that can better take into account distinct characteristics of each employer and assure that only those employees who have a continuing interest in the employer's terms and conditions of employment will be deemed eligible. Both the Employer and the two amici argue that a numerical formula such as *Daniel/S. K. Whitty* would improperly permit laid-off employees who may never work again for the Employer to vote in the election.

Alternatively, the Employer argues that even if the Board adheres to the *Daniel/S. K. Whitty* formula, the evidence does not support application of the formula here, because the record fails to show policies under which terminated employees had customarily been reemployed on the Employer's subsequent projects.

The Petitioner argues that the Board should return to the formula in *Daniel* and overrule *S. K. Whitty*. Amicus AFL–CIO argues that eligibility should be determined by the *Daniel* formula for all construction industry elections unless it is shown that an employer does not hire a substantial portion of its employees on an intermittent basis. The AFL–CIO also proposes that, should the Board conclude that the *Daniel* formula gives insufficient weight to the interests of future employees, it should simply expand the *Daniel* formula to add employees who have a recent history of reemployment.

II. DISCUSSION AND CONCLUSION

The Regional Director applied the *Daniel/S. K. Whitty* formula to this Employer because she considered the Employer's ''sporadic'' employment patterns to be typical of the construction industry. Because the Regional Director also found that the Employer had a ''relatively stable work'' force, we granted review to determine what eligibility formula, if any, should be applied. We then broadened our inquiry to consider the additional questions set forth in the notice announcing the oral argument. After a careful review of the record, including the briefs and oral argument by the parties and amici, we have decided to: (1) continue use of an eligibility formula in the construction industry; (2) return to the *Daniel* formula; and (3) apply the formula to virtually all construction employers.

A. *Use of a Formula*

We continue to believe that a formula is necessary and appropriate for determining eligibility in the construction industry. The construction industry is different from many other industries in the way it hires and lays off employees. We recognized these differences in the first *Daniel* decision and again in our decisions modifying the *Daniel* formula when we stated that construction employees may experience intermittent employment, be employed for short periods on different projects, and work for several different employers during the course of a year. *Daniel*, 133 NLRB at 267; *Daniel*, 167 NLRB at 1079; *S. K. Whitty*, 304 NLRB at 777. We also have recognized the fluctuating nature and unpredictable duration of construction projects. See generally *Clement-Blythe Cos.*, 182 NLRB 502 (1970). Recent cases in which we have applied the *Daniel/S. K. Whitty* formula belie the Employer's argument that the industry has significantly changed in this respect, as they all have involved employers whose employees engage in various degrees of intermittent employment. See, e.g., *Oklahoma Installation Co.*, 305 NLRB 812 (1991); *S. K. Whitty*, supra; *Wilson & Dean Construction Co.*, 295 NLRB 484 (1989); and *Dezcon, Inc.*, 295 NLRB 109 (1989).

We note that numerical formulas have also proved their worth in some sectors outside the construction industry. The common denominator in these other spe-

[5] The hearing began September 3 and concluded September 23, 1991.

[6] See, e.g., *Atlas Metal Spinning Co.*, 266 NLRB 180 (1983), where the Board stated that laid-off employees who have a reasonable expectancy of recall in the near future are eligible to vote, and that in determining this expectancy, the Board looks to the employer's past experience and future plans, the circumstances of the layoff, and what the employees were told about the likelihood of recall.

cial industries is a pattern of employment that does not reflect a prevalence of employees working regular workweeks for extended uninterrupted periods of time with the same employer. In fact, use of a formula is consistent with the Board's approach when faced with other unusual employment patterns in other special industries. Thus, the Board has used eligibility formulae to address short-term, sporadic, and intermittent employment in *American Zoetrope Productions*, 207 NLRB 621, 623 (1973) (entertainment); *Hondo Drilling Co.*, 164 NLRB 416 (1967), enfd. 428 F.2d 943 (5th Cir. 1970) (oil drilling); *Seaboard Terminal Co.*, 109 NLRB 1095 (1954) (longshore); *Berlitz School of Languages*, 231 NLRB 766 (1977) (teachers); and *Avis Rent a Car System*, 173 NLRB 1366 (1968) (auto shuttlers). Indeed, citing *American Zoetrope* as one example, the Board recognized in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988), that in general terms the Board is ''not inexperienced in developing election rules and procedures to accommodate short-term and sporadic employment patterns.'' Id. at fn. 45. Our experience in this industry and others indicates that we should continue to use an eligibility formula.

A formula here also satisfies the Board's objective of simplifying and expediting the election process and of assuring employees ''the constant availability of an electoral mechanism for expressing their representational desires.'' *John Deklewa & Sons*, 282 NLRB at 1386. If a formula is not used for this industry, the intermittent nature of work will require the individual determination of the eligibility status of large numbers of laid-off employees; in this case alone approximately 155 employees have been terminated or laid off. Individualized eligibility determinations necessarily would result in greatly prolonged litigation without, we believe, sufficient improvement in the accuracy of our determinations of the reasonable expectancy of the future employment of the particular individuals involved to warrant such an expenditure of investigative resources. Because use of an all-encompassing eligibility formula would lessen this prolonged litigation, it is preferable in this respect to individualized determinations. Any delay in the election process caused by extended litigation would be especially critical in the construction industry because of the limited duration of many projects. See *Clement-Blythe*, supra.[7]

[7] Our concern over the potential for prolonged litigation and greater expenditure of investigative resources is heightened by the burgeoning number of elections in the construction industry after *John Deklewa & Sons*, 282 NLRB 1374 (1987). In the years since *Deklewa*, the number of construction industry elections has increased from 199 in 1986 to 255 in 1987, 365 in 1988, 500 in 1989, and 434 in 1990. And the number of eligible voters increased from 4346 in 1986 to 11,253 in 1990. See 51–55 NLRB Ann. Reps., Appendices, Table 16 (Construction).

Although amici AGC and ABC point to an alleged ''diversity'' of construction industry employers and their employment patterns as an argument for individualized determinations of laid-off employees,[8] we do not find their arguments persuasive. Neither of these amici have established that any changes in the industry have resulted in an elimination of common denominators for the industry: intermittent employment, work for short periods or work for different employers. Although we recognize that there are variations in how pronounced these characteristics are among employers and employees, it does not follow that these variations are a reason for not applying a formula at all, or for applying the formula to some construction employers and not to others. See section C, infra.

The Employer and amici ABC and AGC argue that a formula enfranchises laid-off employees who may never work again for the Employer, to the detriment of current employees. But there is no assurance under any method of determining eligibility that the employees found eligible to vote will continue to work for the Employer for a significant period after the election. Even eligible employees working on the day of the election may soon quit, or be discharged or laid off; yet, their votes will determine the representation rights of future employees. Nor, even if we were to make individual determinations with respect to the likelihood of recurrent employment of each employee not currently working, would those determinations be guaranteed to be foolproof. An election necessarily occurs at a single moment in an employer's otherwise fluid work force history. A formula serves as an easily ascertain-

[8] Amici cite two studies of construction industry employment patterns. See Northrup, *Open Shop Revisited*, 11, 32, 407 (1983); and ''Annual Hours of Construction Workers. Analysis of Worker Characteristics.'' Construction Labor Research Council at p. 7 (1983). The Northrup study notes the diversity of the employers in the industry while also noting that some segments of the industry are able to maintain a more stable work force. The Labor Research Council study similarly indicates that while there is a wide range of work experiences, there are a sizable number of construction workers who work close to a full year and are likely to work for one employer. According to the study, the opposite is true of employees working a low number of hours. Both studies, however, acknowledge that turnover is still an element in segments of the construction labor market. Because turnover is an indicator of sporadic employment, neither study in our view establishes that employment in the industry is no longer intermittent. Amicus AGC cites a third study of unionized construction workers which found that in the single year covered, employees on average worked for two contractors, were laid off 1.5 times and worked 25.2 weeks per project. Mahoney and McFillen, Univ. of Michigan Center for Construction Engineering and Management, *Unionized Construction Workers and Their Work Environment* 60 (1984). Although this study may indicate limited intermittent employment and work for just a few contractors for the employees surveyed, the study was limited to construction workers in a single major midwestern city over a 1-year period and therefore, cannot be applied to the industry as a whole. Id. at 45. In any event, the study still confirms that construction employees even in this particular city on average work for more than one contractor and are subject to layoffs and rehire by projects.

able, short-hand, and predictable method of enabling the Board expeditiously to determine eligibility by adopting ''a period of time which will likely insure eligibility to the greatest possible number of employees having a direct and substantial interest in the choice of representatives.'' See *Alabama Drydock Co.*, 5 NLRB 149, 156 (1938). We conclude that continued adherence to use of a formula in the construction industry is not only warranted but can best meet this goal.

B. *Return to the Daniel formula*

We have decided to re-adopt the *Daniel* formula because it has proven to be an effective, efficient, and familiar means of determining voter eligibility in this industry for over 30 years. The *Daniel* formula provides that, in addition to those eligible to vote under the standard criteria, unit employees are eligible if they have been employed for 30 days or more within the 12 months preceding the eligibility date for the election, or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date. 133 NLRB at 267. The *Daniel* formula was later clarified to exclude those employees who had been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. 167 NLRB at 1081.

Very recently, in *S. K. Whitty*, the Board modified the *Daniel* formula.[9] First, the Board added a ''recurrency'' factor. Under *Daniel* it was sufficient to have worked one period totaling at least 30 days within the 12 months immediately preceding the eligibility date, or to have had some employment within the past year and at least 45 total days in the 2 years preceding the eligibility date.[10] *S. K. Whitty* modified this formula in two ways. First, for employees who had worked less than 90 days, it added a recurrency factor so that the employee must have worked for more than one period of employment to be eligible to vote. Second, if the employee had worked for only one period, it must have been 90 days rather than 30 days, to demonstrate a ''sustained'' period of employment. Id., slip op. at 7.

In *S. K. Whitty* we attempted to establish, through a priori reasoning, a revised formula we believed to be more likely to identify employees with a reasonable expectancy of future employment. We added the recurrency factor because we thought *Daniel* was overinclusive. We increased the single period of employment to 90 days because we thought 30 days might be an insufficient period. But it now appears that *S. K. Whitty* may have created more problems than it solved. Our careful reconsideration of the issue now causes us to believe our decision in *Whitty* may have operated unfairly, in practice, to deny eligibility to construction employees who had as direct and substantial interest in the choice of a representative as others we have enfranchised.

For example, the retention of an employee for a single sustained period may suggest employer satisfaction and likelihood of recall should a layoff occur. Yet, the *S. K. Whitty* modifications would deny eligibility to an employee with up to 89 days of consecutive employment in the past year who is laid off shortly before the election, while it would grant eligibility to an employee with a total of 30 days of employment who meets the recurrency test by having worked a minimum of two periods of employment. In this example, the recurrency requirement would operate to deny eligibility to an employee with nearly three times the total amount of employment as the employee who meets the recurrency requirement. Moreover, in this example, the employee with 89 days of employment would be denied eligibility even if he or she had worked more recently than the recurrent employee. Although the recurrency requirement represented a good-faith effort by the Board to add a measure of reasonable expectancy of reemployment to the *Daniel* formula, we fear that in practice it has not taken into account the employees who, despite the absence of *recurrent* employment, nevertheless have a direct and substantial interest in the selection of a representative because of their single, long-term period of employment.

We also note that each of the parties and amici in this case reject the modifications made to *Daniel* by *S. K. Whitty*, albeit for different reasons. The Employer and amici ABC and AGC see *S. K. Whitty* as a further extension of the use of an unnecessary eligibility formula. Petitioner and amicus AFL–CIO see the *S. K. Whitty* modifications as being without any foundation and unnecessary in view of the 30-year use of the *Daniel* formula. In any event, it is clear that all parties and amici are dissatisfied with this *S. K. Whitty* modification of *Daniel*.[11]

Our own concerns over the result of the *S. K. Whitty* modifications, as well as the rejection of those modifications by the parties and amici, have led us to

[9] Member Devaney dissented in *S. K. Whitty*, as he would have adhered to the *Daniel* formula. He has continued to believe that the *Daniel* formula constitutes the best vehicle for determining voter eligibility in the construction industry.

[10] An employee could have worked for several periods to achieve the 30 or 45 days, but this was not required; a single employment stint would suffice.

[11] None of the parties or amici suggested any viable alternative formula. The Employer and the ABC suggested use of a formula but only as part of the traditional test, which we have rejected. While urging a return to the *Daniel* formula, the AFL–CIO suggested expanding the formula to include employees who have a recent history of reemployment, regardless of their total period of employment. Because we have decided to return to *Daniel*, and the AFL–CIO's alternative is not significantly different, we find no valid reason to engraft this modification onto the familiar *Daniel* test.

rethink the issue, and to conclude that we should return to the *Daniel* formula. The *Daniel* formula is well-settled, time-tested, and familiar to construction industry employers and unions alike. It has been used in elections and administered by the Board for over 30 years.[12] It is our considered judgment that the ease of administering the *Daniel* formula and the familiarity to all concerned outweigh any perceived limitations. As the Board noted in one of its earliest decisions establishing an eligibility formula, ''absolute accuracy [in determining eligibility] is probably unattainable here.'' *Alabama Drydock, supra at 156. As Daniel* has stood the test of time and proven to be an effective formula for determining voter eligibility in the construction industry, we choose at this time to return to it.[13]

We do not disagree with our concurring colleague's expression of interest in ultimately utilizing the Board's rulemaking procedures to base future decisions in this area on a more empirical footing. We note, however, that, both in oral argument and in their briefs, no party or amicus seemed particularly anxious to engage in rulemaking as a means of studying this issue afresh.[14] And, because of the short-term duration of most construction projects, to defer resolution of a particular case for the relatively extended rulemaking process is unfair to the parties in that case.

[12] The Board has conducted over 6000 elections in the construction industry in the past 30 years with a minimum amount of reported difficulty regarding eligibility. See 26–55 NLRB Ann. Reps., Table 16 (Construction).

[13] Although we return to the *Daniel* formula, as modified, and overrule the *S. K. Whitty* modification, we make one slight modification to *Daniel*. To avoid any confusion regarding the meaning of the Board's use of the term ''days,'' all references to the number of days of employment necessary within the periods specified in the formula will be revised to add the words ''working'' days, i.e., ''30 working days,'' and ''45 working days.'' The purpose of this change is to make clear that if an employee works any portion of a working day, it is counted as 1 day for purposes of the formula.

[14] At oral argument, counsel for the Employer stated that the Board did ''not need rulemaking'' to take into account the diversity of the construction industry, that such an approach would ''bog'' down the Board and would constitute an ''unnecessary approach.'' Counsel for the AGC stated that rulemaking was ''not the most desirable approach . . . for the Board to take here.'' Similarly, counsel for the ABC stated that rulemaking was not needed, as it would serve ''no useful purpose.'' Furthermore, neither the Petitioner nor the AFL–CIO forcefully urged that the Board engage in rulemaking. At oral argument, counsel for the Petitioner stated that rulemaking might be an ''option'' the Board would have to pursue. In its brief, the AFL–CIO noted that Congress had sanctioned the model of the construction industry as one characterized by short-term, transient employment, and that any attempt to modify that model should ''require extremely strong proof developed on a record with the full opportunity for all parties to challenge the presentation of others.'' The AFL–CIO suggested that rulemaking would be of no avail to the Employer's, AGC's, and ABC's assertion that intermittent employment was no longer the norm.

C. *Breadth of Application of the Formula*

We have decided that the *Daniel* formula is applicable in all construction industry elections. We find no reasonable, feasible, or practical means by which to distinguish among construction industry employers in deciding whether a formula should be applied.

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 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.'' Even assuming that reasonable criteria could be established, we believe the litigation required at the hearing would be an undue burden on the parties and the Board.[15]

Adoption of a set of criteria for deciding whether *Daniel* applies would mean, in effect, application of yet another formula—a formula on top of a formula. Engrafting another level of analysis onto eligibility determinations in this industry would undermine our objective of simplifying and speeding the election process.

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 signifi-

[15] We note that in *John Deklewa & Sons*, 282 NLRB at 1383, where the Board abandoned the so-called conversion doctrine, it pointed to the practical difficulties associated with use of the doctrine. More specifically, the Board noted the ''complex and protracted nature'' of the litigation necessary to demonstrate preliminarily whether a work force is permanent and stable or project by project. Id. at fn. 37, citing *Construction Erectors*, 265 NLRB 786 (1982).

cant contacts to that employer as determined by the formula.

Use of a formula by no means excludes core employees, however that term may be defined; it simply enfranchises employees who, although working on an intermittent basis, have sufficient interest in the employers' terms and conditions of employment to warrant being eligible to vote and included in the unit. For these reasons, we have decided to apply the *Daniel* formula regardless of the construction employer's method of operation.[16]

Accordingly, for the reasons set forth above, the eligibility formula in *S. K. Whitty* is overruled, and the Regional Director's Decision and Direction of Election is modified to apply the eligibility formula of *Daniel Construction*, 133 NLRB 264 (1961), as modified, 167 NLRB 1078 (1967), and consistent with this decision.[17] This case is remanded to the Regional Director with instructions to conduct an election pursuant to her Decision and Direction of Election as modified, except that the payroll eligibility period shall be that period ending immediately before the date of this decision, and the Employer shall furnish an *Excelsior* list (*Excelsior Underwear*, 156 NLRB 1236 (1966)) within 7 days from the date of this decision, as otherwise described in the Regional Director's decision.

[16] One exception to the application of the formula in the construction industry exists where the employer clearly operates on a seasonal basis. See *Dick Kelchner Excavating Co.*, 236 NLRB 1414, 1416 fn. 10 (1978). The parties also are free to stipulate not to use the *Daniel* formula. Of course, all employees eligible under the Board's traditional eligibility standard also would be eligible.

[17] That aspect of *S. K. Whitty* concerning whether any eligibility formula should be applied when a construction employer has no successful bid or committed work for the immediate future is not disturbed by our decision here. Cf. *Fish Engineering & Construction*, 308 NLRB 836 (1992) (Member Devaney, dissenting); *Davey McKee Corp.*, 308 NLRB 839 (1992).

ORDER

It is ordered that Cases 21–RC–18897, 21–RC–18898, and 21–RC–18899 be remanded to Region 21 for action consistent with these findings.

MEMBER RAUDABAUGH, concurring.

I concur with my colleagues' decision to return to the eligibility formula used in *Daniel Construction Co.*[1] However, I believe that the Board should engage in rulemaking in this area. The Board applies the *Daniel* formula to all employers in the construction industry. Without a broad empirical study of employment patterns in the industry, it is difficult to say whether that formula is appropriate and whether there should be some exceptions to it for certain segments of that industry. My colleagues note that the parties and amici are not ''particularly anxious'' to engage in rulemaking. In my view, this is simply reflective of the particular result that each organization seeks to achieve. I believe that from an objective and neutral standpoint, there are insufficient data to establish any particular rule, and there are insufficient data to establish the all-encompassing rule established by my colleagues. However, in the absence of such a study, I agree that the *Daniel* formula should be applied. It has the advantage of historical usage and familiarity. Hence, I concur.

[1] 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967).