Turner Industries Group, LLC *and* Baton Rouge Building & Construction Trades Council, AFL–CIO, Petioner. Case 15–RC–8596

February 28, 2007

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The issues presented in this case are (1) whether the Regional Director correctly found that the petitioned-for multicraft unit at the Employer's BASF Geismar, Louisiana facility is appropriate, excluding all insulators, electricians, and Daily Support Team (DST) employees, and (2) whether the Regional Director correctly found that the Employer is engaged in the building and construction industry as defined by the Board, and thus that the construction industry eligibility formula as set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967), reaffirmed and further modified in *Steiny & Co.*, 308 NLRB 1323 (1992), is applicable.[1] As explained below, we find, contrary to the Regional Director, that the appropriate unit also must include the insulators, electricians, and DST employees. In addition, we affirm the Regional Director's finding that the *Daniel/Steiny* eligibility formula is appropriate under the circumstances presented in this case, but find it unnecessary to pass on the issue of whether the Employer meets the definition of a construction employer under the Act.

On May 10, 2005, the Regional Director for Region 15 issued a Decision and Direction of Election (pertinent portions of which are attached as an appendix), in which he found the petitioned-for multicraft unit comprised of approximately 67 boilermakers, carpenters, scaffold builders, ironworkers, laborers, millwrights, painters, pipefitters, welders, and cement masons employed by the Employer at its BASF Geismar, Louisiana project, excluding all insulators, electricians, and DST employees, to be an appropriate unit for bargaining. In finding the unit to be appropriate, the Regional Director gave determinative weight to the bargaining history involving this unit prior to the Employer's taking over the maintenance operations. The Regional Director further found that the Employer is engaged in the building and construction industry as defined by the Board, and that the *Daniel/Steiny* eligibility formula is applicable.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision. The Employer contended that the only appropriate unit must include all of its approximately 163 employees at the Geismar site, including the electricians (15 electricians and 1 instrument technician), insulators (23), and DST employees (57). The Employer also claimed that the Regional Director improperly applied the *Daniel/Steiny* formula, since the Employer is not in the construction industry, and, in any event, does not employ intermittent employees. On June 15, 2005, the Board granted the Employer's request for review. Thereafter, the Employer filed a brief on review.

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

We have carefully reviewed the entire record, including the brief on review. Contrary to the Regional Director, we find, for the reasons set forth below, that the appropriate unit must also include the insulators, electricians, and DST employees excluded by the Regional Director.[2] However, we agree with the Regional Director that use of the *Daniel/Steiny* eligibility formula is reasonable, where, as here, the Employer performs more than a de minimis amount of construction work and its work patterns are comparable to a construction industry employer. We therefore find it unnecessary to pass on the issue of whether the Employer is engaged in the building and construction industry as defined under the Act.

I. BACKGROUND

The Employer is a contractor that provides maintenance support services for various chemical plants. As more fully described below, the Employer took over maintenance and other work at BASF's Geismar site in late 2004/early 2005. The BASF Geismar operation is a complex of 11 chemical plants situated on 2600 acres. The work performed by the Employer at BASF includes carpentry, structural steel erection, concrete work, drill shafts/piling, excavation, road repair, building repair, plumbing, welding, boilermaking, pipe fabrication, pipefitting, pipe erecting and general labor. About 70 percent of the work orders involve maintenance work, which includes such functions as rebuilding pumps, changing valves, performing reactor chain swap outs, dumping catalyst, performing internal work on towers, installing pipelines, and building scaffolds. The remaining 30 percent involves "small cap" projects that involve modifying existing equipment to improve BASF's efficiency and productivity. The Employer maintains a core work

[1] The formula defining voter eligibility in the construction industry includes those employed during the payroll period immediately preceding the date of the decision and direction of election, as well as those employed for a total of 30 days in the preceding 12 months or 45 days in the preceding 24 months.

[2] The Petitioner indicated it would proceed to an election in any unit found appropriate.

force of approximately 210 employees who, on a daily basis, perform the maintenance support services and "small cap" projects.

In addition to the daily maintenance work and "small cap" projects, the Employer also works "turnarounds" and "outages." Turnarounds are scheduled preventive maintenance projects or structural modifications that require production in a designated section of BASF to be partially or fully shut down. The Employer uses its core work force to complete this work (working overtime, if needed), and may supplement its core work force with "turnaround employees" hired through the Employer's personnel office.[3] Outages, which are similar to turnarounds, are unscheduled projects due to operational emergencies. The Employer also uses its core work force to complete this work. Historically, there have been 20 to 30 turnarounds and outages per year at BASF.

The Employer has organized its operation into two sections: Alliance Contract Services (ACS) and Daily Maintenance Support, also known as Daily Support Team (DST). A site manager oversees both sections. The ACS section has department supervisors and planner/schedulers, both of which are excluded from the unit, and foremen, who are included in the unit. The DST section is comprised of zone supervisors and zone planner/coordinators, both of which are excluded from the unit, and foremen, who are included in the unit.

The ACS section is organized into four departments, each separately supervised, comprised of approximately 106 employees: Civil (31 employees, including 5 carpenters, 3 laborers, 19 scaffold builders, and 4 cement masons); Insulation/Paint (31 employees, including 23 insulators and 8 painters); Mechanical (28 employees, including 4 boilermakers, 2 ironworkers, 1 millwright, 12 pipefitters, 9 welders); and Electrical (15 electricians and 1 instrument tech). Equipment mechanic operators are also considered part of the ACS section.[4] All employees in the ACS section, except laborers, are required to possess skill certification in at least one craft. However, ACS employees have voluntarily upgraded their skill levels to become certified in additional crafts.[5]

In 1995, National Maintenance, a predecessor of the Employer, created a multiskilled mechanic job classification. Employees in the multiskilled mechanic job classification are required to attain skill certifications in at least three crafts. The Employer continues to employ multiskilled employees and assigns them to work in the DST section. These employees are primarily responsible for preventive maintenance and repairs and are the highest-skilled employees at BASF.[6] Although a small number of ACS employees (mechanical and electrical) perform most of the small cap project work, DST employees also perform small cap work.

Unlike ACS employees who report to departments, DST employees report to one of five zones[7] and typically function within that zone on a day-to-day basis. In addition, "nesters," who are ACS employees certified in only one craft—i.e., painters, scaffold builders, or insulators—are assigned to each of the five zones and, during this assignment, report to the designated DST supervisor. Although the "nesters" are assigned to the DST section, they are not paid the same higher hourly rate as the DST employees (the DST hourly rate ranges from $19.05 to $21.40 per hour, and the ACS hourly rate ranges from $9.25 to $17.80 per hour). Throughout the day, "nesters" may also report to ACS supervisors in the civil and insulation/paint departments. Overall, the DST section is comprised of approximately 57 multiskilled employees and approximately 24 "nesters."

The Employer recognizes differences between various crafts in terms of skills and responsibilities, and uses craft employees to perform functions within their training. Nevertheless, the Employer makes its job assignments according to which employees are available and able to perform the work and the Employer's preference is to get the job done with the crew set, consisting of various crafts, that is assigned the job. Thus, ACS employees often perform tasks which are not included in their skill certification. For example, in the mechanical department, pipefitters perform boilermaker work and put up structural steel, while boilermakers weld pipes,

[3] For example, in February 2005, the Employer completed a turnaround which lasted about 2 weeks and required the hiring of 100 temporary employees to complement its core work force.

[4] The equipment operators are separately represented by the International Union of Operating Engineers, Local 406, and the parties agree they are to be excluded from any unit found appropriate.

[5] For example, painters have acquired skills to become pipefitters, and a carpenter has acquired the skills to become a scaffold builder.

[6] Any employee interested in this mechanic position must possess at least one skill certification, which rules out apprentices and helpers. As part of the selection process, an employee must successfully complete an interview, undergo a pulmonary function test, and pass a psychometric test (used as a barometer to indicate how an individual handles conflict resolution, makes decisions, and works as a member of a team). If the employee does not already possess certifications in three job classifications, the employee must agree to attain the certifications by attending training classes on his or her own time. The employee must maintain a B average in the class, and upon completion of the classes, complete 6 months of on-the-job training in the targeted skill classification. The employee then receives a pay upgrade. The ultimate goal is to have him at the $21.40 rate, which is the top rate for those certified in three skills.

[7] Zones are organized as groupings of plants. Zone 1 includes the waste water treatment plant and the utilities; zone 2 includes the urethane plants; zone 3 includes the diols and amines plants; zone 4 includes the polyol, chlorine, and aniline plants; and zone 5 includes the Carboxy and Acetylene plants.

and ironworkers fit pipes. If there is painting to be done, the Employer would not necessarily choose a painter to do the work. Rather, insulators, scaffold builders, and millwrights would do painting if there are more painting jobs scheduled than painters available on a given day.

The Petitioner's representation of employees at BASF extends back to at least 1958. In the 1980s, the Petitioner represented employees at BASF who were employed by National Maintenance. This relationship extended through the 1990s and apparently into the early 2000s. During this period, a series of collective-bargaining agreements were executed in which the Petitioner was recognized as the representative of all "maintenance employees," but multiskilled employees (i.e., DST employees) were excluded from the unit.[8]

In 2000, National Maintenance evolved into International Maintenance Corporation (IMC), a subsidiary of Turner Industries Holding Company L.L.C. Like National Maintenance, IMC recognized the Petitioner as the bargaining representative for its employees at BASF. The most recent agreement between IMC and the Petitioner became effective in June 2004. This agreement, like previous agreements, covered maintenance employees, but excluded all multiskilled employees. The recognition clauses of these contracts do not specifically state whether the collective-bargaining relationship is governed under Section 9(a) or Section 8(f) of the Act.

In November 2004, IMC lost its contract to perform the maintenance work at BASF to Turner Company L.L. C., a non-union contractor that is also a subsidiary of Turner Industries Holding Company L.L.C. This contract was awarded to Turner Company L.L.C. on an open-shop basis. Due to this development, the Petitioner and IMC mutually agreed to terminate their collective-bargaining agreement. As part of the termination agreement, all IMC employees covered by the contract received $200 severance pay and the opportunity to work with Turner Company. Forty-two of the fifty-five former IMC employees accepted Turner Company's employment offer and began working with Turner Company without any break in service. Effective January 1, 2005, Turner Holding (the parent company of 11 subsidiaries, including Turner Company and IMC) changed its name to Turner Industry Group L.L.C., the Employer in this case, and merged with Turner Company, IMC and six other subsidiaries. The effect of the merger was in name only and did not affect the benefits or pay rates of employees working for the respective former subsidiaries of Turner Holding.[9] As of January 1, 2005, the Employer, not IMC or Turner Company, holds the contract to perform work at BASF.

Moreover, in November 2004, pursuant to a contract between the Employer and BASF, the Employer assumed responsibility for performing all maintenance and/or construction tasks at BASF, including electrical work that was previously performed by Davis International Electrical Company and insulation work that was previously done by Petrin Corporation. The Employer purchased Davis Industrial Electric Company in November 2004 and Petrin Corporation in December 2004, and hired the electricians and insulators formerly employed by these companies.

II. DISCUSSION

A. Unit Determination

The Board has long found that units may be appropriate based on craft status, or where the requested employees are a clearly identifiable and homogenous group with a community of interest separate and apart from other employees. In making unit determinations, the Board considers whether a community of interest exists, and examines such factors as mutuality of interests in wages, hours and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. See, e.g., *Yuengling Brewing Co. of Tampa*, 333 NLRB 892 (2001). The Board does not permit the arbitrary, heterogeneous, or artificial grouping of employees. *Moore Business Forms, Inc.,* 204 NLRB 552 (1973); *Glosser Bros., Inc.,* 93 NLRB 1343 (1951). The Board also considers prior bargaining history. However, the weight given to a prior history of collective bargaining is "substantial" not "conclusive." *A.C. Pavement Stripping Co.*, 296 NLRB 206, 210 (1989). Moreover, the Board "will not adhere to the historical bargaining unit where that unit does not conform

[8] In May 1990, National Maintenance executed a collective-bargaining agreement with the Petitioner in which it recognized the Petitioner as the bargaining representative for "all maintenance employees." In 1995, at the request of BASF, National Maintenance created the job classification of multiskilled mechanic to better meet the needs of BASF. In September 1995, National Maintenance executed another collective-bargaining agreement with the Petitioner, and the recognition clause included "all maintenance employees" and specifically excluded "all multiskilled employees assigned to Direct Manufacturing Support Teams (DMS)." Subsequent agreements between the Petitioner and National Maintenance executed on May 1996, December 1996, and October 2001 also specifically excluded multiskilled employees. The Petitioner also executed a collective-bargaining agreement in February 1998, but the agreement introduced in the record did not include a recognition clause.

[9] Additionally, the Employer became the parent company of Turner International L.L.C and Turner Industrial Maintenance L.L.C. Turner Industrial Technical L.L.C. and Turner Industrial Services L.L.C. merged to form Turner Specialty Services L.L.C., which also became a subsidiary of the Employer.

reasonably well to other standards of appropriateness." *Crown Zellerbach Corp.*, 246 NLRB 202, 203 (1979); accord *A.C. Pavement Stripping*, 296 NLRB at 210 ("[T]he Board . . . long held that it will not give controlling weight to a history of collective bargaining 'to the extent that it departs from statutory provisions or clearly established Board policy concerning the composition and scope of bargaining units.'") (quoting *William J. Keller, Inc.*, 198 NLRB 1144, 1145 (1972)).

The Regional Director found appropriate the petitioned-for unit, which encompassed only the historical unit previously represented by the Petitioner. We find, however, that the Regional Director erroneously exalted bargaining history as the determinative factor in supporting his unit determination. In this case, as correctly pointed out by the Employer, there is no assertion or finding that the Employer is a successor employer to its predecessor. Indeed, the Petitioner abandoned its successorship claim when it agreed to end its contract with the predecessor company in November 2004, and did not seek recognition from the Employer as a successor. Inasmuch as there is not even a claim of successorship, the Regional Director erred in placing a heavy evidentiary burden on the Employer in challenging the historical unit. For the same reason, he erred in relying upon the proposition that "a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective-bargaining unless the units no longer conform reasonably well to other standards of appropriateness."[10] See *Yuengling Brewing Co. of Tampa,* 333 NLRB 892 (2001).[11]

Moreover, as discussed below, we find, contrary to the Regional Director, that the petitioned-for multicraft unit is not an appropriate unit for bargaining, and that the unit must also include the insulators, electricians and DST employees. See *A.C. Pavement Striping Co*., supra (only appropriate unit included all employees engaged in pavement coatings and pavement markings, not the two separate historical bargaining units); *Atlanta Division of S.J. Groves & Sons Co.*, 267 NLRB 175 (1983) (petitioned-for grouping of four craft groups, excluding other craft groups, found to be arbitrary; there, all classifications of employees worked together on integrated crews, and there were no factors that warranted finding the four crafts to constitute a separate craft, departmental, or functional unit). See also *Publix Super Markets,* 343 NLRB 1023 (2004) (Board found insufficient evidence to warrant finding that a separate fluid processing unit was appropriate apart from other production and maintenance employees); *Buckhorn, Inc.,* 343 NLRB 201 (2004) (petitioned-for maintenance unit not appropriate separate from production employees); *TDK Ferrites Corp.*, 342 NLRB 1006 (2004) (same).

In making our unit determination, we find it significant that the scope and organization of the Employer's operations expanded in November 2004 when it took over all electrical and insulation work being performed at BASF and hired the employees who were performing that work at that time. Prior to the takeover, the electrical and insulation employees had worked for other employers. Now, the Employer employs all of the employees, and any prior differences in terms and conditions of employment are eliminated.

We also find it significant that the terms and conditions of employment for all of the employees, ACS and DST, are substantially similar. Employees receive the same disability and health benefits, and 401(k) savings plan; are subject to the same discrimination policy and alcohol contraband policy; and bring complaints to the same personnel representative. The site manager is the final authority regarding employee discipline for all employees, and all other supervisors may recommend discipline. All employees receive the same flexible break periods, based upon crew assignments; are paid biweekly; and are paid an hourly rate based on their experience level. All employees park in the same lot and enter BASF through the same security point. All employees have identification badges that are used to enter BASF through the same gates, and use the same buses to travel to their designated work area. All employees are

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[10] See *Trident Seafoods, Inc.*, 318 NLRB 738 (1995), enfd. in part 101 F.3d 111, 118 (D.C. Cir. 1996). However, in contrast to *Trident Seafoods*, the instant case involves a nonsuccessor employer, and thus bargaining history is simply a factor to be considered along with others, and no special weight should be attached to it. Further, even accepting the principle quoted above, the unit sought by the petitioner unreasonably excludes some crafts from a multicraft unit and thus does not "conform reasonably well to other standards of appropriateness." See *Crown Zellerbach Corp.*, supra. at 203.

The Regional Director's reliance on *Canal Carting*, 339 NLRB 969 (2003) is also misplaced. That case did not involve a change in ownership at all. In *Canal Carting*, the petitioner sought to merge two groups of employees that were historically represented in two separate units by two separate unions. The Board found that bargaining history supported maintaining the existing units, and there was nothing intrinsically inappropriate about the existing units. Thus, the existing collective-bargaining agreement between the intervenor and the employer barred the petition.

[11] In *Yeungling*, the Board found that a 30-year bargaining history was one of the factors that favored a finding that petitioned-for maintenance unit was appropriate for bargaining, notwithstanding that the successorship issue was not litigated, where the employer continued the same business as its predecessor, bought all of the equipment, and hired a majority of the employees. In that case, the other community of interest factors also supported a separate maintenance unit.

required to wear uniforms, and wear hard hats in various colors.[12]

In addition, all employees attend the same required training courses (24 Occupational, Safety, and Health Administration (OSHA) courses), and other training required by the Employer. All employees have access to the services of a training coordinator who helps place employees in skill training classes offered by the Associated Builder Contract (ABC) school. The Employer provides tools for all employees, both ACS and DST, albeit some employees may bring and work with their own personal tools. Since January 1, 2005, the Employer has required new employees to provide their personal hand tools, such as tape measures, tri-squares, torpedo levels, and channel locks. In addition to these factors in support of a broader unit, there are other factors relating to the particular employees at issue that also support a broader unit.

1. Insulators

Insulators are part of the Insulation/Paint department. They are generally responsible for installing and removing insulation at BASF. Only insulators perform asbestos treatment. Insulators also perform hole watch,[13] fire watch and fireproofing, tear down scaffolds, paint, and move furniture. In the performance of their duties, insulators use hand saws, cordless rivets, drills, personal protective clothing for asbestos work, vacuums, and benders.

We conclude that the Regional Director erred by excluding the insulators from the multicraft unit. The Regional Director acknowledged, and the record shows, that the insulators' frequency of contact and interchange, similar terms and conditions of employment, and degree of functional integration with ACS employees favor including them in the petitioned-for unit. Indeed, the insulators are assigned to the same department as painters, who are included in the unit. Painters also perform similar tasks, such as hole watch, fire watch, and painting.

The Regional Director's emphasized that there are three times as many insulators (23) as there are painters (8). However, this fact is not a convincing distinction considering all of the commonalities between the two classifications. The other factual distinctions—insulators may perform painting but there is no evidence that painters also perform insulation; only insulators perform asbestos abatement; and insulators and painters use different tools—are similarly not persuasive in light of the commonalities between the two classifications.

In addition, the insulation work was previously performed by Petrin Corporation, which was purchased by the Employer in December 2004. Thus, as discussed above, the scope of the Employer's operations has expanded, and the insulation employees are now, unlike before, working for the same employer and in the same department as other unit employees. There is no principled reason for excluding the craft-employee insulators while including other craft employees. Accordingly, we find that the insulators must be included in the bargaining unit.

2. Electricians

Electricians receive their assignments from maintenance work orders that are issued by DST supervisors. They perform preventive maintenance on switch gears, upgrades on wire pulls, change configurations and install loops in the control rooms, install cable trays, change light bulbs, install electrical tracing and contra-tracing (which is normally mechanical department work), and weld on brackets used to support cable trays. Electricians also do "small cap" work. They perform specialized tasks to their craft such as all electrical preventive maintenance on heavy switch gears rated 480 and above and the maintenance and operation of 11 switch gears. They use electric saws, tripods, squares, levels, hammers, center punches, drills, wire snips, and volt meters.

We find that the Regional Director erred by excluding the electricians from the unit. The Regional Director declined to include the electricians based on their historical exclusion and their specialized work, finding that they could constitute a separate historical craft unit. However, as with the insulators, the Regional Director acknowledged, and the record shows, that the electricians' frequency of contact and interchange and their receipt of similar terms and conditions of employment as other ACS employees favor their inclusion. In addition, significantly, as mentioned above, Davis Industrial Electrical Company previously performed the electrical work for BASF before the Employer purchased this company in November 2004. Thus, the electricians are now working for the same employer as the other unit employees, in the same ACS section (albeit in this instance a separate department). Again, the Petitioner is seeking a multicraft unit, and there is no basis for excluding the craft-employee electricians but including other craft employees. Under these circumstances, we find that the electricians must be included in the unit.

[12] Historically, ACS employees wore brown hardhats and DST employees wore gold hats. Likewise, the electricians normally wore yellow hardhats when they were employed by David Electric Company, and the insulators wore green hardhats when they were employed by Petrin Corporation. Currently, when an employee needs to replace a hardhat, the color is determined by what color is available when the Employer places the order. Brown has been the color available in recent years.

[13] "Hole watch" is a duty that involves standing by the vessel entry when inside a tower.

3. DST employees

We find that DST employees share a strong community of interest with employees in the unit and that there is no rational basis to exclude this classification from the overall maintenance unit. As discussed above, DST employees share many of the same terms and conditions of employment and benefits with ACS employees, and attend the same required training courses. Only a few of the terms and conditions of employment are different, including vacation time, holiday benefits, and overtime.[14] It is true that DST employees are the most highly skilled employees because they are certified in three crafts when they reach the top of their ladder.[15] Nonetheless, ACS journeymen are also highly skilled in their particular craft and in some cases have become certified in more than one craft. In addition, ACS employees perform overlapping functions with other crafts due to the Employer's system of assignment based on need.

In addition, DST employees work closely in the same Zones and share some overlapping supervision with ACS "nesters," albeit they perform different functions. Specifically, three "nesters" are regularly assigned to zone 1 (one painter, one scaffold builder, and one insulator), eight "nesters" to zone 2 (one painter, four insulators, three scaffold builders), six "nesters" to zone 3 (all insulators), three nesters to zone 4 (one painter, two insulators), and four "nesters" to zone 5 (all insulators). All of these "nesters" report to DST supervisors. Thus, most (about 17) of the 23 insulators are assigned to work in Zones with the DST employees. Some of the insulators are permanently assigned to work in the zones, and insulators have shops in each of the DST zones. Also, three of the eight painters are assigned to work in the zones alongside the DST mechanics. Moreover, scaffold builders have contact with both ACS and DST employees, and are assigned to DST zones as needed.

Further, there are occasions when DST and ACS employees who are not "nesters" work together. Thus, the Employer uses ACS pipefitters and boilermakers, who possess a single skill certification, to supplement DST crews when extra people are needed. Occasionally, during "small cap" projects, DST mechanics may help ACS employees complete a final alignment on an installed pump. Also, during turnarounds, ACS and DST employees may be required to work together to complete a project as soon as possible.

In sum, we find that there exists a strong community of interest between DST employees and the other craft employees in the overall unit. DST employees share many of the same terms and conditions of employment with the included employees, work closely with "nesters," share some overlapping supervision, and on occasion work with other ACS craft employees on projects. The bargaining history is only one factor to be considered, and, in this case, the factors in favor of inclusion strongly outweigh this history. Thus, we find that that DST craft-employees must be included in the multicraft unit found appropriate. See *A.C. Pavement*, supra; *Atlanta Division of S.J. Groves & Sons Co.*, supra. See also *Publix Super Markets*, supra; *Buckhorn*, supra; *TDK Ferrites*, supra.

B. Whether the Daniel/Steiny Eligibility Formula is Applicable

Having determined the appropriate unit, we next consider whether the Regional Director correctly found that the *Daniel/Steiny* eligibility formula should be utilized. As discussed below, the record does not precisely establish the percentage of construction work performed by the Employer and, thus, whether or not this work is substantial. At the same time, the Employer's performance of construction work is clearly more than de minimis or incidental: it is integral to its overall work, and the pattern of the Employer's operation of hiring turnaround employees on an intermittent basis approximates that in the construction industry. Under the circumstances of this case, we find that use of the *Daniel/Steiny* eligibility formula is reasonable irrespective of whether the Employer meets the definition of a construction employer under the Act. Thus, it is unnecessary to determine whether the Employer is engaged primarily in the construction industry.

1. The Regional Director's decision and contentions of the parties

The Regional Director rejected the Employer's narrow definition of construction work,[16] and found that the

[14] ACS employees do not receive the same vacation time and holiday benefits as DST employees. ACS employees receive a maximum of 1-week paid vacation after 1 year of continuous service. DST employees also receive this benefit after 1 year of continuous service, but are also eligible to receive 2 weeks of paid vacation after 3 years of continuous service and then 3 weeks after 10 years of continuous service. ACS employees receive 10 nonpaid holidays, but DST employees receive 10 paid holidays. DST employees are subject to mandatory overtime and are required to wear pagers, unlike the ACS employees. DST employees are eligible for overtime pay after completing 8 hours of work in a day, while the ACS employees are eligible after the completion of 40 hours of work in a week.

[15] This fact is reflected in their higher pay scale—the journeyman ACS earns $17.80 per hour, but the DST employees earn between $19.05 and $21.40 per hour.

[16] The Employer limited its definition of construction work to building a new facility and did not include making additions to existing structures, and claimed that its small cap projects are not considered construction because these projects do not involve driving pilings and hanging steel. The Regional Director noted, however, that in the Em-

Board defines construction work in broad terms. See *Painters Local 1247 (Indio Paint & Rug Center)*, 156 NLRB 951, 959 (1966) (Board held that the statutory definition of the building and construction industry "subsumes the provision of labor whereby materials and constituent parts may be combined on the building site to form, make, or build a structure"); *South Alabama Plumbing*, 333 NLRB 16 (2001) (an employer that makes repairs to, and replaces integral parts of an immovable structure is engaged in construction work within the meaning of Section 8(f) of the Act).[17] The Regional Director found that because the Employer uses turnaround employees on an intermittent basis for short periods of time and then lays these employees off when the work is complete, the Employer is engaged in the building and construction industry.

In its brief on review, the Employer reiterates its claim, without elaboration, that the Regional Director erroneously found the Employer to be a construction employer. Instead, the Employer assumes arguendo that it could be defined as a construction employer, but claims that *Daniel/Steiny* does not apply, where, as here, the Employer does not employ an intermittent work force. Thus, the Employer asserts that the turnaround employees are more appropriately categorized either as seasonal employees, as the most recent shutdowns occurred at approximately the same time in 2004 and 2005, or as temporary employees, as the turnaround employees are aware upon hiring that the duration of their employment will be brief.

The Employer's contention that the extra employees hired for turnarounds are seasonal or temporary, and thus not intermittent, is not persuasive. The Employer is not a seasonal employer, and the extra employees are clearly hired on an as-needed, and not seasonal, basis. Further, the *Daniel/Steiny* formula by its application necessarily includes those who would be temporary because of the intermittent nature of the construction industry and the fact that employees may work for more than one employer. Thus, the Employer's distinction between temporary and intermittent employees is not relevant here. Notably, although the Employer does not necessarily recall the same employees for turnarounds, the Employer's site manager testified that "a lot of them are recalls." Moreover, some insulators hired for a turnaround have thereafter been hired as permanent employees.

Inasmuch as the Employer assumes arguendo that it is in the construction industry, its argument implicitly is based on the premise that a distinction should be drawn on the basis of differing hiring patterns within that industry. That approach is inconsistent with Board precedent. Indeed, in *Steiny & Co.,* 308 NLRB 1323 (1992), the Board found that the *Daniel* formula is applicable in *all* construction cases, regardless of the construction employer's method of operation, i.e., whether the employer is similar or dissimilar to an industrial employer, or whether or not it operates with a stable core of employees or project-by-project employees.

2. Analysis

As stated above, we find it unnecessary to decide whether the Employer is actually engaged in the construction industry. We find that even assuming that the Employer is not a construction employer, the use of the *Daniel/Steiny* formula is reasonable.

Here, the record shows that the Employer performs more than an incidental or de minimis amount of construction work and that such work is integral to its operations, albeit the exact percentage of construction work performed by the Employer is unclear. In this regard, construction projects are clearly performed within the context of the "small cap" projects and various maintenance projects. According to the site manager, "small cap" projects are designed to make an existing process or piece of equipment function better. This could involve any small internal work on a vessel, such as adding a pump or adding an impeller on a pump, or installing an additional header on the reactor. In describing a "small cap" project, the site manager was asked by counsel whether a small cap project is like "adding a room onto your house when you're still living in it." The site manager replied "that's a good example." Furthermore, as noted by the Regional Director, the Employer's most recent "small cap" project involved upgrading the plant in the glycol unit where the Employer "added some support steel and ran a 24-inch line."[18]

In addition, work performed at the Geismar site since January 2005 has included tasks such as rebuilding pumps, installing pipelines, and building scaffolds that appear to come under the Board's broad definition of construction.[19]

ployer's most recent small cap project, the Employer "added some support steel and ran a 24-inch line," which was valued at $200,000.

[17] In that case, the employer, a plumbing business, employed four regular permanent employees, with three performing service work and one performing construction. Thus, the employer contended that it performed 75-percent service work, and 25-percent construction work.

[18] Additional examples of construction projects include the Employer's addition of a new structure to the PVP building in 2003 and the building of a flare stack foundation.

[19] The Act contains no precise definition of the building and construction industry. As discussed above, however, the Board has adopted a broad definition of construction work. See *F.H.E. Services,* 338 NLRB 1095, 1098 (2003) and cases discussed therein citing the broad definitions of construction contained in the Standard Industrial Classification Manual and the *Construction Review*, volume 3. See also *Carpenters Local 623 (Atlantic Exposition Services)*, 335 NLRB 586, 591–

Notably, the Employer was going through a process at the time of the hearing of finding and removing all of the asbestos on old pipelines and replacing it with nonasbestos insulation, a function that the Board has clearly been held to be construction. See *U.S. Abatement*, 303 NLRB 451 (1991) (Board found that the removal of asbestos and the installation of insulation was construction work as it affected the structure of buildings and equipment which became part of the structure; because the asbestos was being removed for reinsulation, a function which the employer conceded was construction, the Board determined that "removal and substitution are but two halves of the whole." Id. at 456).

Thus, while the record does not establish with precision the extent of the construction work performed by the Employer at the Geismar site, it is nevertheless clear that the Employer performs more than a de minimis amount of construction work at Geismar, and such functions are integral to the Employer's work at this site.

Furthermore, the Employer's pattern of hiring "turnaround" employees on an intermittent basis is similar to the hiring pattern in the construction industry. Thus, when extra employees are needed during turnarounds, the Employer hires employees for the duration of the turnaround and then lays them off when the turnaround is over. Indeed, in February 2005, the Employer completed a turnaround which lasted about 2 weeks and required the hiring of 100 temporary employees to complement its core work force. Although the Employer does not necessarily hire the same employees for subsequent turnarounds, the site manager testified that "a lot of them are recalls."[20] Moreover, some insulators who have been hired for a turnaround were subsequently hired as permanent employees. Under these circumstances, we believe that the use of the *Daniel/Steiny* eligibility formula "will likely insure eligibility to the greatest number of employees having a direct and substantial interest in the choice of representatives." *Steiny*, 308 NLRB at 1326, quoting *Alabama Drydock Co.*, 5 NLRB 149, 156 (1938).

Under these particular circumstances, in agreement with the Regional Director, we find that the application of the *Daniel/Steiny* formula is reasonable, regardless of whether the Employer meets the definition of construction employer under the Act. See generally *Trump Taj Mahal Casino*, 306 NLRB 294 (1992), enfd. 2 F.3d 35 (3d Cir. 1993) (Board stated that it "has been flexible in carrying out its responsibility to devise formulas suited to its unique conditions in the entertainment industry, as in other specialized industries, to afford employees with a continuing interest in employment the optimum opportunity for meaningful representation." Id. at 296).[21]

CONCLUSION

For the foregoing reasons, we find that the petitioned-for multicraft unit is not an appropriate unit for bargaining. Accordingly, we reverse the Regional Director's finding that a unit consisting of boilermakers, carpenters, scaffold builders, ironworkers, laborers, millwrights, painters, welders, and cement masons employed by the Employer at its Geismar, Louisiana project is an appropriate unit for bargaining, and find that the unit must also include insulators, electricians, and DSTs. In addition, we affirm the Regional Director's finding that the application of the *Daniel/Steiny* formula is appropriate.[22]

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592 (2001), enfd. 320 F.3d 385 (3d Cir. 2002). The Board has stated that the term "building and construction industry" is very general in nature and susceptible to various interpretations. *C.I.M. Mechanical Co.*, 275 NLRB 685, 689 (1985). See also *Forest City/Dillon-Tecon Pacific*, 209 NLRB 867 (1974), enfd. in relevant part and remanded in part 522 F.2d 1107 (9th Cir. 1975); *Painters Local 1247 (Indigo Paint & Rug Center)*, supra at 957–959. As discussed, the Board's definition "subsumes the provision of labor whereby materials and constituent parts may be combined on the building site to form, make, or build a structure." See *Painters Local 1247 (Indio Paint & Rug Center)*, supra at 959. It encompasses employers that make repairs to, and replace integral parts of a immovable structure. See *South Alabama Plumbing*, supra.

[20] Although it is not clear from the record how many turnarounds occur each year or how often extra employees are hired, the record shows that historically, there have been about 20 to 30 turnarounds and outages each year. In addition, the fact that a lot of employees are recalled suggests an ongoing need for such employees.

[21] The Employer also contended that the formula should only be applied to those employees who have worked since January 1, 2005, when this Employer took over the operations, and points out that the Petitioner, at the hearing only asked that the formula be applied to "all employees within the last year that have worked at the BASF/Geismar site and that are employed by any of the Turner companies." In its brief on review, the Employer reiterates the contention that the Petitioner sought to apply the formula only 1 year back, and thus claims that the Regional Director erred by applying the formula 2 years back, consistent with the *Daniel/Steiny* eligibility formula. We find that the Employer has not provided convincing reasons to alter the historical *Daniel/Steiny* formula, and thus the Regional Director did not err in his application of the formula.

[22] The Employer claims that it has been prejudiced by the Regional Director's decision, subsequent to the issuance of the Decision and Direction of Election, to permit 149 ineligible voters to use mail ballots in this proceeding. According to the Employer, on May 23, 2005, the Petitioner submitted a list of additional names (115) that it alleged, without evidentiary support, were eligible to vote under the *Daniel/Steiny* formula. The Employer promptly objected and requested that the Regional Director require the Petitioner to produce supporting evidence, and claimed that neither the Petitioner nor the Regional Director had the authority to amend or expand the *Excelsior* list. The Employer also claimed that its payroll and timekeeping records indicated that the individuals were not eligible voters. The Regional Director did not respond to the Employer's objections, but subsequently permitted the Petitioner to resubmit the same names with addresses for receipt of mail ballots despite the Employer's contention that they were not eligible voters. The Regional Director thereafter faxed the Employer a supplemental list of 33 individuals who were also to receive

ORDER

The Regional Director's Decision and Direction and Election is reversed with respect to the issue of unit determination, and affirmed in its application of the *Daniel/Steiny* eligibility formula. This case is remanded to the Regional Director for further appropriate action consistent with the Order.

APPENDIX

DECISION AND DIRECTION OF ELECTION

. . . .

I. ISSUES

The Baton Rouge Building & Construction Trades Council, AFL–CIO (herein the Petitioner) filed the petition in this matter seeking to represent a unit comprised of all boilermakers, carpenters, ironworkers, laborers, millwrights, painters, pipefitters, and welders employed by Turner Industries Group, L.L.C. (herein the Employer) at its BASF Project in Geismar, Louisiana; excluding all office clerical employees, guards, professional employees, and supervisors as defined in the Act, and DMS employees. The Petitioner amended its petition at the hearing to include cement masons in the unit. The record reflects that the Petitioner seeks to represent employees who were historically included in the bargaining unit represented by the Petitioner at the BASF project plants in Geismar, Louisiana. Scaffold builders have been included in the historical unit. Electricians and Insulators have not been part of the historical unit. The Petitioner expressly seeks to exclude electricians from the unit. The Petitioner does not seek to represent insulators but is not opposed to their inclusion in the unit if found appropriate by the Board.

There are two issues to be decided in this matter. The central issue involves the Employer's contention that the petitioned-for historical unit of approximately sixty-seven (67)[2] employees comprised of four (4) boilermakers, five (5) carpenters, nineteen (19) scaffold builders, two (2) ironworkers, three (3) laborers, one (1) millwright, eight (8) painters, twelve (12) pipefitters, nine (9) welders, and four (4) cement masons is an inappropriate unit for collective-bargaining. The Employer contends that the only appropriate unit would include all of its approximately one hundred seventy (170) employees working at the BASF Geismar site, including all of the employees sought by the Petitioner, but also the electricians and insulators referred to collectively as the Alliance Contract Services ("ACS") employees and all Daily Maintenance Support ("DMS") employees, also known as Daily Support Team ("DST") employees. The Employer asserts that employees in the disputed electrician and insulator classifications, and DST employees, share a community of interest with employees in the petitioned-for unit that warrants their inclusion in the unit.

The Employer and the Union, herein the Parties, stipulate and I find that the six (6) equipment mechanic operators employed by the Employer are excluded from any unit found appropriate as they are and have been represented by the International Union of Operating Engineers, Local 406 since November 30, 2004. Additionally, the Parties agree and I find that the Site Manager and all individuals designated as Supervisors exercise independent judgment in making work assignments and effectively recommending discipline and are statutory supervisors that are excluded from any unit found appropriate. Further, the Parties stipulate and I find that all individuals designated as Planner/Scheduler and Zone Planner/Coordinator are salaried employees that do not share a community of interest with the petitioned-for hourly employees and are excluded from any unit found appropriate.

The secondary issue involves the Employer's contention that it is not engaged in the construction industry, and that therefore, the *Daniel/Steiny* formula is not applicable in determining voter eligibility.

II. DECISION

Based on the entire record in this proceeding and for the reasons set forth below, I find that the petitioned-for historical unit, including scaffold builders, is an appropriate unit under Section 9(b) of the Act.

Accordingly, it is hereby ordered that an election be conducted under the direction of the Regional Director for Region 15 in the following unit:

> All boilermakers, carpenters, scaffold builders, ironworkers, laborers, millwrights, painters, pipefitters, welders, and cement masons employed by the Employer at its BASF Geismar, Louisiana project; excluding all electricians, insulators, DST employees, office clerical employees, guards, professional employees and supervisors as defined in the Act.

Further, it is ordered in addition to those employees in the unit who were employed during the payroll period immediately preceding the date of this Decision and Direction of Election, all employees performing work in the unit set forth above are eligible to vote if they have been employed at BASF for a total of 30 working days or more within the period of 12 months, 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 hereinafter directed, and who have not been terminated for cause or quit voluntarily prior to completion of the last job for which they were hired.

III. RECORD EVIDENCE AND ANALYSIS

In reaching my determination that the petitioned-for historical unit, which includes scaffold builders and excludes electricians, insulators, and DST employees, is an appropriate unit for the purposes of collective-bargaining, I considered a community-of-interest analysis. Additionally, I considered whether there are present any compelling circumstances that warrant

mail ballots. The Employer asserts that it promptly objected in writing to each list submitted by the Union.

We do not believe that the Employer has been prejudiced. The Employer may challenge any mail ballots of employees that it regards as ineligible to vote, and those challenges will be resolved in subsequent proceedings. See *Casehandling Manual (Representation Proceedings)*, Sec. 11338.9.

[2] Site Manager Danny Price used the term carpenters and scaffold builders interchangeably in his testimony.

disturbing the historical bargaining unit in this case. My determination is consistent with the principle that "[i]t is well settled that the existence of significant bargaining history weighs heavily in favor of a finding that a historical unit is appropriate, and that the party challenging the historical unit bears the burden of showing that the unit is no longer appropriate." *Canal Carting, Inc*., 339 NLRB 969, 970 (2003).

A. Operations and Bargaining History at BASF

The record evidence reflects that dating back to at least 1958, the Petitioner has represented employees at the BASF chemical plants located in Geismar, Louisiana (hereinafter "BASF"). In the 1980s, the Petitioner represented employees at BASF who were employed by National Maintenance Corporation, referred to herein as National Maintenance.

The record discloses that on May 11, 1990, National Maintenance executed a collective-bargaining agreement with the Petitioner in which it recognized the Petitioner as the bargaining representative for "all maintenance employees." Thereafter, in 1995, at the request of BASF, National Maintenance created the job classification of multi-skilled mechanic to better meet the needs of BASF. Subsequently, on September 1, 1995, National Maintenance executed another collective-bargaining agreement with the Petitioner. The recognition clause of the agreement included "all maintenance employees" and specifically excluded "all multi-skilled employees assigned to Direct Manufacturing Support Teams (DMS)." On May 31, 1996, National Maintenance executed another collective-bargaining agreement with the Petitioner in which all multi-skilled employees assigned to DMS were again specifically excluded. Likewise, collective-bargaining agreements executed by National Maintenance and the Petitioner on December 23, 1996 and October 31, 2001 specifically excluded multi-skilled DMS employees. National Maintenance and the Petitioner also executed a collective-bargaining agreement on February 30, 1998; however, the agreement as contained in the record does not include a recognition clause.

Some time during 2000, National Maintenance evolved into International Maintenance Corporation, referred to herein as IMC, a subsidiary of Turner Industries Holding Company L.L.C. However, the record does not contain any documentation reflecting how or when National Maintenance became IMC. Notably, even after 2000, the Petitioner executed a collective-bargaining agreement with National Maintenance on October 31, 2001 that covers work at BASF.

Like National Maintenance, IMC also recognized the Petitioner as the bargaining representative for its employees at BASF. The most recent collective-bargaining agreement between IMC and the Petitioner became effective June 7, 2004. The agreement provided that it did not "extend to construction work or any work other than maintenance." Pursuant to the agreement, IMC recognized the Petitioner as the "exclusive bargaining representative for all maintenance employees employed by [IMC], excluding all office clerical employees, guards, watchmen and supervisors as defined by the National Labor Relations Act, and all multi-skill employees assigned to Direct Manufacturing Teams (DMS)." The agreement also provided that the Petitioner "will be the primary source of manpower" and that when hiring employees to work turnarounds, IMC "will notify the [Petitioner] of the number of applicants required from each Local Union." IMC then did acquire its turnaround employees through the union hall. Many of the employees IMC hired to work turnarounds were former turnaround employees who were recalled. The Petitioner provided the turnaround employees, but the employees still had to be "hired in" through IMC's personnel department. As part of the process, Danny Price, who was the Site Superintendent for IMC, sent labor requisitions, which contained the employee's name, craft, rate of pay, and report date, to the personnel department.

The record evidence reflects that in 2004, IMC lost its contract to perform the maintenance work at BASF to a nonunion contractor. BASF awarded the contract to Turner Company L.L.C., referred to herein as Turner, on an open-shop basis. Turner is also a subsidiary of Turner Industries Holding Company L.L.C. Thereafter, on November 8, 2004, IMC and the Petitioner mutually agreed to terminate the June 7, 2004 collective-bargaining agreement. As part of the Petitioner's agreement to terminate the collective-bargaining agreement, all IMC employees covered by the terminated collective-bargaining agreement received a $200.00 severance payment and the opportunity to work with Turner. Forty-two (42) of the fifty-five (55) former IMC employees accepted Turner's employment offer and began working with Turner without any break in service.

As employees for Turner, the forty-two employees no longer paid into the Petitioner's benefit program, but were offered Turner's short-term and long-term disability insurance, Blue Cross/Blue Shield health insurance, dental and eye insurance, and 401(k) savings plan. The record evidence does not reflect any changes in the nature of the work performed by employees. Further, the record evidence does not expressly disclose what hourly rate Turner paid to the former IMC employees. I note that the record reflects IMC paid its represented employees an hourly rate of $19.15 per hour plus an additional ninety-five cents ($0.95) per hour for health insurance.

On November 19, 2004, Turner executed a contract with BASF to perform work "consisting of certain maintenance and/or construction tasks or procedures, or to accomplish certain maintenance or construction results" at BASF on a nonunion basis. Turner assumed responsibility for performing all maintenance and/or construction tasks at BASF, including electrical work that was previously done by Davis International Electrical Company and insulation work that was previously done by Petrin Corporation. Turner purchased Davis International Electrical Company on November 11, 2004 and Petrin Corporation on December 20, 2004. Turner, as it did with the former IMC employees, hired the electricians formerly employed by Davis Electrical Company and the insulators formerly employed by Petrin Corporation. Turner completed its transition of employees from IMC on about December 21, 2004.

As of, at least, December 31, 2004, Turner Industries Holding Company L.L.C., referred to herein as Turner Holding, was also the parent company of (1) Harmony L.L.C., (2) Harmony Industrial Maintenance L.L.C., (3) IMC, (4) International Piping Systems L.L.C., (5) Nichols Construction Company L.L.C.,

(6) Scafco L.L.C., (7) Turner International Piping Systems L.L.C., (8) Turner International L.L.C., (9) Turner Industrial Maintenance L.L.C., (10) Turner Industrial Technical L.L.C., and (11) Turner Industrial Service L.L.C. Turner and IMC, however, were the only subsidiary companies of Turner Holding actually at BASF as of December 31, 2004.

Effective January 1, 2005, Turner Holding changed its name to Turner Industries Group L.L.C., the Employer in this case. Simultaneous with the name change, Turner, along with IMC, Harmony L.L.C., Harmony Industrial Maintenance L.L.C., International Piping Systems L.L.C., Nichols Construction L.L.C., Scafco L.L.C., and Turner International Piping Systems L.L.C., merged into the Employer. The effect of the merger was in name only and did not in any way affect the benefits or pay rates of employees working for the respective former subsidiaries of Turner Holding.

Additionally, the Employer became the parent company of Turner International L.L.C. and Turner Industrial Maintenance L.L.C. Turner Industrial Technical L.L.C. and Turner Industrial Services L.L.C. merged to form Turner Specialty Services L.L.C., which also became a subsidiary company of the Employer. As of January 1, 2005, the Employer, not IMC or Turner, holds the contract to perform work at BASF.

B. The Employer's Current Operation at BASF

The Employer is a time and material contractor that provides maintenance support services for various chemical plants, including BASF. BASF is a complex of eleven (11) chemical plants situated on 2600 acres. The Employer is responsible for performing maintenance work that is necessary to keep BASF operational. The Employer also performs "small cap" projects at BASF. Small cap projects are projects valued at up to ten million dollars and involve modifying existing equipment to improve BASF's efficiency and productivity. The Employer maintains a core work force of approximately 210 employees on a daily basis that performs the maintenance support services and the "small cap" projects. The work performed by the Employer at BASF includes the following tasks: carpentry work, structural steel erection, concrete work, drill shafts/piling, excavation, road repair, building repairs, plumbing, welding, boilermaking, pipe fabrications, pipefitting and pipe erection, and general labor.

In addition to providing daily maintenance support and performing "small cap" projects, the Employer also works "turnarounds" and "outages" at BASF. Turnarounds are scheduled projects that require production in a designated section of BASF to be partially or fully shut down during the completion of preventative maintenance or structural modifications. The average duration of a turnaround project is two (2) weeks. Outages, which are similar to turnarounds, are unscheduled projects that become necessary due to operational emergencies. Historically, there have been twenty (20) to thirty (30) turnarounds and outages per year at BASF.

The record discloses that when performing outage work, the Employer normally uses its core work force to complete the work. During turnarounds, the Employer, when necessary, requires its core work force to work overtime. Additionally, the Employer may supplement its core work force with "turnaround employees." The "turnaround employees" are hired through the Employer's personnel office. As part of their hiring process, "turnaround employees" must score at least seventy percent (70%) on the Employer administered skill assessment test to be considered certified in a designated craft. Further, the Employer informs the "turnaround employees" that their employment is limited to the duration of the turnaround. Nonetheless, the record evidence reflects that the Employer uses "turnaround employees" to replace under achieving employees in its core work force or to fill vacancies in the core work force.

The record reflects that at the time of the hearing, the Employer had performed one turnaround in February 2005. For this turnaround, which lasted about 2 weeks, the Employer hired one-hundred (100) "turnaround employees" to complement its core work force. Upon completion of the turnaround, the Employer retained some of the "turnaround employees," which included insulators, a pipefitter, and four to six other employees certified in one of the Mechanical Department crafts as set forth below.

The Employer has organized its operation at the facility into two sections: Alliance Contract Services ("ACS") and Daily Maintenance Support ("DMS"), also known as Daily Support Team ("DST"). Site Manager Danny Price oversees both the ACS and DST sections. The ACS section has department supervisors, planner/schedulers, and foremen. The DST section has zone supervisors, zone planner/coordinators, and foremen. The Parties stipulate and I find that the foremen are hourly paid employees who work with tools of the trade and are to be included in any unit found appropriate.

The ACS section is organized into four departments comprised of approximately seventy (70) employees: Civil, Insulation/Paint, Mechanical, and Electrical. Each employee in the ACS section, except laborers, is required to possess skill certification in at least one craft. Employees gain the required skill certification by scoring at least 70% on a skill assessment test administered by the Employer. Journeyman level ACS employees are paid an hourly wage of $17.80 per hour.

The Civil Department consists of approximately thirty-one (31) employees: five (5) carpenters, three (3) laborers, nineteen (19) scaffold builders and four (4) cement masons. Scott Cassard is the Supervisor. Danny Guitreau is the Planner/Scheduler for the Civil and the Insulation/Paint Departments.

The Insulation/Paint Department consists of approximately thirty-one (31) employees, including twenty-three (23) insulators and eight (8) painters. Kelly Cortez is the Supervisor.

The Mechanical Department consists of approximately twenty-eight (28) employees: four (4) boilermakers, two (2) ironworkers, (1) millwright, twelve (12) pipefitters, and nine (9) welders. James Guice is the Supervisor. Larry Wellman and Steven Brassett serve as the Planner/Schedulers for the Mechanical and the Electrical Departments.

The Electrical Department consists of approximately sixteen (16) employees, including fifteen (15) Electricians and one (1) Instrument Tech. Pete Baker is the Supervisor.

The record reflects that equipment mechanic operators are also considered a part of the ACS section. As noted above,

they are represented by the International Union of Operating Engineers, Local 406 and are to be excluded from any unit found appropriate. I note that the equipment mechanic operators are paid the same $17.80 hourly wage as the petitioned-for journeyman level ACS employees.

In 1995, National Maintenance Corporation created a multi-skilled mechanic job classification. The multi-skilled employees were assigned to work as Direct Manufacturing Support Teams (DMS). Currently, the Employer continues to employ multi-skilled employees who are required to attain skill certifications in at least three crafts. The multi-skilled employees presently are assigned to work in the Daily Support Team ("DST") section.

Whereas the ACS employees report to departments on a daily basis, DST employees report to one of the five (5) assigned zones and typically function within that zone on a day-to-day basis. Additionally, "nesters," which are ACS employees certified in only one craft, specifically painters, scaffold builders, and insulators, are assigned to each of the five zones and, during this assignment, report to the designated DST Supervisor. Although the "nesters" are assigned to the DST section, they are not paid the same hourly wage as the DST employees, which range from $19.05 to $21.40 per hour. Nesters continue to be paid as ACS employees. Throughout the day, the "nesters" may also report to ACS supervisors in the Civil and Insulation/Paint Departments. Overall, the DST section is comprised of approximately 57 multiskilled employees and approximately 24 "nesters."

The five zones are as follows: Zone 1, which includes the waste water treatment plant and the utilities, is supervised by Gene Higginbotham and Charles Monson. Leonard James is the planner assigned to Zone 1. Fifteen multiskilled employees are assigned to Zone 1. Three "nesters" are also regularly assigned to Zone 1: painter Bennie Ennis, a scaffold builder, and an insulator.

Zone 2 includes the urethane plants. Wayne Sharp supervises the fourteen (14) multi-skilled employees and eight (8) "nesters" that are assigned to Zone 2. The "nesters" include painter Bob Underwood, four (4) insulators, and three (3) scaffold builders. Neal Bullion is the planner assigned to Zone 2.

Zone 3 includes the Diols and Amines plants. J.J. Fontenot and David Egnew supervise the fifteen (15) multi-skilled employees that are assigned to Zone 3. Six (6) "nesters," all insulators, are also assigned to Zone 3.

Zone 4, which includes the Polyol, Chlorine, and Aniline plants, is supervised by Mike Lamber. Larry Daigle is the planner for Zone 4. Eight (8) multi-skilled employees and three (3) "nesters," a painter and two (2) insulators, are assigned to Zone 4.

Zone 5 includes the Carboxy and Acetylene plants. Geza Kovach supervises the seven (7) multi-skilled employees and four (4) "nesters," all insulators, which are assigned to Zone 5. Mervin McConn is the planner.

C. Community of Interest

Neither the Act nor Board policy requires a petitioner to seek the optimum unit. The Board considers only whether the petitioned-for unit is an appropriate unit. *Black & Decker Mfg. Co.*, 147 NLRB 825, 828 (1964). As the Board noted in *Overnite Transportation Co.*, 322 NLRB 723 (1996):

> Section 9(b) of the Act provides that the Board 'shall decide in each case whether … the unit appropriate for the purposes of collective-bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.' The plain language of the Act clearly indicates that the same employees of an employer may be grouped together for purposes of collective bargaining in more than one appropriate unit. For example, under Section 9(b), the same employees who may constitute part of an appropriate employer wide unit also may constitute an appropriate unit if they are a craft unit or are a plant wide unit. The statute further provides that units different from these three, or 'subdivisions thereof,' also may be appropriate. It is well-settled then that there is more than one way in which employees of a given employer may be appropriately grouped for purposes of collective bargaining." *Overnite* at 723.

Therefore, the Petitioner is not required to seek the most comprehensive unit of employees unless a unit compatible with its requested unit does not exist. *P. Ballentine Packing Co.*, 141 NLRB 1103, 1107 (1963). Indeed, the Board has determined that it is not its function "to compel all employees to be represented or unrepresented at the same time or to require that a labor organization represent employees it does not wish to represent, unless an appropriate unit does not otherwise exist." *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 701 (1967), quoting *Ballentine Packing Co*., 132 NLRB at 925 (1961). As such, the Board first examines the petitioned-for unit to determine if it is an appropriate unit. "If that unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties." *Barlett Collins Co.*, 334 NLRB 484, 484 (2001). I note that the Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employee classifications. *Barlett* at 484.

In establishing an appropriate bargaining unit, the Board considers whether the petitioned-for employees share a community-of-interest. Community-of-interest factors considered by the Board include (a) bargaining history, (b) the nature of employee skills and supervision, (c) the degree of functional integration, (d) frequency of contact and interchange with other employees, and (e) the terms and conditions of employment. *Kalamazoo Paper Box Corp*., 136 NLRB 134, 137 (1962*); Brand Precision Svcs.*, 313 NLRB 657 (1994); *Ore-Ida Foods*, 313 NLRB 1016 (1994), affd. 66 F.3d 328 (7th Cir. 1995). The Board generally looks to the totality of the circumstances or the overall community of interest in making unit determinations. *Johnson Controls, Inc.*, 322 NLRB 669 (1996). Additionally, where a craft or departmental group is sought, the Board considers whether the petitioned-for employees participate in a formal training or apprenticeship program; whether the duties of the petitioned-for employees overlap with the duties of the excluded employees; and whether the employer assigns work according to need rather than on craft or jurisdictional lines. *Burns & Roe Services Corp.*, 313 NLRB 1307, 1308 (1994).

The Petitioner in this case seeks to represent a unit comprising ACS section employees, but excluding electricians, insulators, operators, and multi-skilled DST employees. As noted above, the Employer contends that the only appropriate unit in this matter is one that includes all maintenance employees at BASF, including electricians, insulators, and DST employees because the employees share common interests and conditions of employment.

(a) Bargaining history and history of operations

In determining the appropriateness of a bargaining unit, prior bargaining history is given substantial weight. Generally, the Board is reluctant to disturb a unit established by collective-bargaining that is not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act. *Red Coats, Inc*., 328 NLRB 205 (1999). Therefore, a party challenging the appropriateness of a historical unit has a heavy evidentiary burden. *Trident Seafoods, Inc*., 318 NLRB 738 (1995). Further, "a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness." *Trident* at 738.

The Petitioner has not enjoyed a history of collective-bargaining with the Employer. Indeed, the record evidence reflects that prior to January 1, 2005, the Employer did not exist in its present name or form. Nonetheless, the record reflects that dating back to at least 1990, the Petitioner has enjoyed a collective-bargaining relationship at BASF with various subsidiary companies of Turner Holding, the Employer's predecessor in name, but not form.

It is clear from the record that the Petitioner's bargaining history in the petitioned-for unit was interrupted in November 2004 when the Petitioner agreed to terminate its collective-bargaining agreement with IMC. Prior to November 2004, employees in the petitioned-for unit were paid a journeyman level hourly rate of $19.15 per hour, plus an additional ninety-five cent ($0.95) per hour for health insurance. Additionally, the employees receive their insurance and benefits through the Petitioner. Presently, the Employer pays journeyman level employees in the petitioned-for unit an hourly rate of $17.80, and provides its benefit package to the employees. Other than wages and benefits, the record evidence fails to show that the nature of the work performed by the Employer's ACS employees differ substantially from the work performed by employees represented by the Petitioner at BASF with the various subsidiary companies of Turner Holding.

Further, to the extent that the electricians and insulators are now employed by the Employer, they have not been historically represented by the Petitioner at BASF. Furthermore, as discussed in more detail below, neither the electricians nor the insulators share a community of interest so overwhelming with the petitioned-for historical unit that the unit must be broadened to include them. Indeed, like the operating engineers, both the electricians and the insulators each could constitute a separate appropriate craft unit.

Accordingly, I conclude that the record evidence reflects that the Employer has failed to show the existence of any compelling circumstances that warrant disturbing the historical bargaining unit.

Furthermore, in support of the appropriateness of maintaining a historical unit, the bargaining pattern at other plants of the same employer, although not controlling in relation to the bargaining unit of a particular plant, is a factor to be considered in unit determination. *Spartan Department Stores*, 140 NLRB 608 (1963). The record evidence reflects that in addition to BASF, the Petitioner has executed collective-bargaining agreements with various subsidiaries of Turner Industries Holding Company L.L.C. at other chemical facilities. The recognition clause in those agreements have substantially mirrored the recognition clause in the agreements the Petitioner has executed at BASF. For instance, at Dow Chemical, National Maintenance's June 7, 1999 agreement recognition clause included "all maintenance employees." The recognition clause is the same in agreements that IMC had with the Petitioner at PCS Nitrogen and Williams Olefins and Vulcan Chemicals and Honeywell International and Louisiana Generating and DSM Elastomers, all effective January 29, 2001. IMC's agreement with the Petitioner at Borden Chemicals and Plastics effective December 28, 1999 also included "all maintenance employees" in the recognized unit.

Thus, I conclude that the bargaining history in the petitioned-for unit weighs heavily in favor of a finding that the historical unit continues to be an appropriate unit for the purposes of collective-bargaining.

The Employer relies upon *The Boeing Co.***,** 337 NLRB 152 (2001), to support its contention that the petitioned-for unit should be enlarged to include electricians, insulators, and DST employees because the slight differences with the petitioned-for unit is outweighed by the factors they have in common. Notably, the petitioner in *The Boeing Company* did not have an extensive collective-bargaining relationship with the employer, and therefore, did not seek to represent a historical unit. Thus, bargaining history was not a part of the analysis utilized by the Board in reaching its decision in that case. Accordingly, I find the Board's conclusion in *The Boeing Company* was based upon facts inapposite to the instant case.

(b) Nature of employee skills and supervision

All employees, ACS and DST, attend twenty-four (24) Occupational, Safety, and Health Administration ("OSHA") required training courses and attend other training required by the Employer. All employees have access to the services of a training coordinator who helps place employees in skill training classes offered by the Associated Builders Contract ("ABC") school. The Employer contributes $30 for interested employees, both ACS and DST, to attend classes on their own time. ACS employees have voluntarily utilized such classes to upgrade their skill levels and to become certified in additional crafts within the ACS section. Specifically, painters have acquired the skills to become pipefitters and a carpenter acquired the skills to become a scaffold builder.

As a condition of employment, all ACS employees, except laborers, must score at least a seventy percent (70%) on the Employer administered skill assessment test to be certified in at least one skill classification. The skill assessment tests verify

that a person is proficient in the job classification designated and is capable of performing the work. Once ACS employees possess at least one skill certification, they are not subject to any additional skill or psychological testing and are not required to be certified or licensed by the State.

The record reflects that the Employer recognizes differences between various crafts in terms of skills and responsibilities. Nonetheless, notwithstanding an ACS employee's skill certification, the Employer makes its job assignments according to which employees are available and able to perform the work required to meet the needs of BASF. Thus, the record reflects that ACS employees often perform tasks which are not included in their skill certification. For instance, in the mechanical department, pipefitters do boilermaker work, boilermakers weld pipes, ironworkers fit pipes, and pipefitters put up structural steel.

In the Civil Department, scaffold builders generally erect scaffolds and build platforms that are used by and enable other employees to perform their work. The record evidence reflects that carpenters do re-bar work, run jackhammers, build forms, move furniture, build containment boxes, and unload trucks. Carpenters use claw-hammers and scaffold wrenches in the performance of their duties.

The record evidence discloses that laborers are not required initially to grade out on an Employer administered skill assessment test. To progress, however, laborers must score at least 70% on the skill assessment test. Laborers also complete a 40-hour HAZMAT training and work on the HAZMAT team cleaning up spills. Laborers do shovel work, perform clean-up, unload catalyst, and move furniture. Similar to laborers, the record reflects that cement masons perform general labor work and work with the HAZMAT team. Cement masons also finish cement, dig forms, dispose of paint waste, and refuel equipment.

The record evidence discloses that in the Insulation/Paint Department, insulators are generally responsible for installing and removing insulation at BASF. Only insulators perform asbestos abatement. Insulators also perform hole watch, fire watch and fireproofing, tear down scaffolds, do paint work, and move furniture. In the performance of their duties, insulators use hand saws, cordless rivets, drills, personal protective clothing on asbestos work, vacuums, and benders.

Like the insulators, the painters also perform hole watch and fire watch. Additionally, the painters do mostly "touch-up" painting. In the performance of their tasks, painters use brushes, rollers, and chipping guns. The painters also operate forklifts, perform warehousing work, and work in tool rooms.

In the Mechanical Department, ironworkers, welders, pipefitters, and boilermakers perform torque work, weld pipelines, change out valves and do outages. In the performance of their tasks, boilermakers use hand wrenches, impacts, and channel-locks, and millwrights use socket sets and shims.

In the Electrical Department, electricians receive their assignments via maintenance work orders. Electricians do preventive maintenance on switch gears, upgrades on wire pulls, change configurations and install loops in the control rooms, install cable trays (trays hold wires together), and change light bulbs. They install electrical tracing and contra-tracing (which is normally mechanical department work), and weld on brackets used to support cable trays. Electricians also do "small cap" work. Significantly, electricians perform tasks specialized to their craft, such as all electrical preventive maintenance on heavy switch gears rated 480 and above and the maintenance and operation of all 11 switch gears. In the performance of their craft, electricians use electric saws, tripods, squares, levels, hammers, center punches, drills, wire snips and volt meters. The record evidence reflects that instrumentation work is done by BASF.

The DST multi-skilled employees are primarily responsible for preventive maintenance and repairs at BASF. The DST employees report to their DST zone supervisor. DST mechanics are the highest skilled employees at BASF. Any employee interested in becoming a DST mechanic must possess at least one skill certification, which rules out apprentices and helpers. As part of the selection process, an employee must successfully complete an interview, undergo a pulmonary function test, and pass a psychometric test. The psychometric test is used as a barometer to indicate how an individual handles conflict resolution, makes decision, and works as a member of a team. Additionally, if the employee does not possess certifications in three job classifications, the employee must agree to attain the certifications by attending training classes on their own time. The employee must maintain a B average in the classes, and upon completion of the classes, complete 6 months of on-the-job training in the targeted skill classification.

Clearly, the DST employees' skills and separate supervision weigh in favor of excluding them from the petitioned-for unit.

(c) Degree of functional integration

The Employer provides tools for all employees, both ACS and DST, but some employees may bring and work with their own personal tools. Employees have their own toolboxes. Since January 1, 2005, the Employer has begun requiring newly hired employees to have their own personal hand tools, such as tape measures, tri-squares, torpedo levels, and channel locks.

The ACS employees have shops in their respective departments where they perform tasks according to their crafts before deploying to perform "small cap" or maintenance work throughout BASF. ACS employees are assigned job tasks according to what is required to supply the needs of BASF. For instance, the record reflects that boilermakers perform the following tasks at BASF: blinding (isolating a pipe and working with end wrenches), removing pipe, installing valves, rigging, tower work, bolt-up work, small fabrication, installing structural steel, unloading trucks, material handling, building scaffolds up to 20 feet, removing scaffolds, fiberglass work, applying resin on fiberglass wraps, some touch-up painting on spray applications, some catalyst handling, cane removal on reactors, hooking up air compressors and welding machines, and flight plants. Additionally, millwrights apply coatings to pump housings, insulators apply paint or coatings, painters build cabinet boxes, pipefitters apply paint or resin, and mechanics apply fiberglass resin. Further, laborers work with cement masons and carpenters. Thus, the record does reflect some overlapping of job functions.

At times, the Employer uses ACS pipefitters and boilermakers, who possess a single skill certification, to supplement DST

crews when extra people are needed. Likewise, insulators, when working with DST employees, put on steam tracing and fill it in, pull pumps, and bolt up valves. Additionally, "nesters" periodically assist DST employees. DST employees, however, generally do not perform the skill work of the "nesters." Occasionally, during "small cap" projects, DST mechanics may help ACS employees complete a final alignment on an installed pump. Further, during turnarounds, ACS employees and DST employees are required to work together to complete a project as soon as possible. During these turnarounds, ACS employees, regardless of skill certification, work as a group to complete the turnaround work as soon as possible. ACS employees, particularly Mechanical Department employees, may be assigned to work alongside DST employees during turnarounds. ACS employees, however, do not generally perform the exact same work as the DST employees during turnarounds. This occasional overlapping of trades involving lesser skilled duties does not preclude a separate unit. *Schaus Roofing*, 323 NLRB No. 146 (1997). Further, the use of teams composed of mixed skill employees does not make a separate unit inappropriate. *Burns & Roe Svcs. Corp*., 313 NLRB 1307, 1308 (1994).

(d) Frequency of contact and interchange with other employees

ACS employees report to shops located in one of four departments: Civil, Insulation/Paint, Mechanical, and Electrical. However, their work is not confined to the shops. In the performance of their jobs, particularly "small cap" projects, they work throughout all the eleven plants located in the five zones at BASF. As such, they come into contact with and work around DST mechanics assigned to perform the maintenance support work in the zones. ACS employees generally do not, however, work with DST employees or perform the work of DST employees. As reflected above in the skills section, many of the ACS employees perform work in crafts other than the one in which they are certified.

In contrast to the ACS employees, DST mechanics report to one of five zones at BASF and generally do not perform work outside of a designated zone. Other than "nesters," which are painters, scaffold builders, and insulators, DST mechanics have limited interaction with other ACS employees. Three (3) of the eight (8) painters are assigned to work in the zones alongside DST mechanics, and they report to DST supervisors. The record evidence does not reflect that the painters perform the same tasks as DST employees.

Scaffold builders, in performing their duties, have work-related contact with other ACS section employees as well as with DST mechanics. Scaffold builders are assigned to DST zones as needed and report to DST supervisors. Scaffold builders generally do not actually perform the same tasks as the DST mechanics, but during turnarounds, scaffold builders string pipe, bolt up flanges, install blinds, and, as needed, are assigned to perform other work they are qualified to do.

Further, the record discloses that fourteen (14) of the twenty-three (23) insulators are assigned to work in zones with the DST employees and report to DST supervisors. Indeed, some of the insulators are permanently assigned to work in the zones, and insulators have shops in each of the DST zones.

Notably, although "nesters" are assigned to work in DST zones, they are not paid the same wage rate as DST employees. Nesters continue to be paid as ACS employees.

(e) Terms and conditions of employment

All employees, ACS and DST, park in the West Contractor Entrance and enter BASF through the same security point. All employees have identification badges that are used to enter BASF through the same gates. All employees use the same buses to travel to their designated work areas.

The Employer has fourteen (14) lunchrooms located throughout BASF that are accessible to any employee, ACS or DST. Employees generally eat lunch in the area in which they are working, yet, some employees return to a specific lunchroom to eat lunch. The record reflects that where employees eat lunch is a matter of geographic and personal preference. The same is true regarding restrooms.

Since December 20, 2004, all employees, ACS and DST, receive the same short-term and long-term disability insurance, Blue Cross/Blue Shield health insurance, dental and eye insurance, and 401(k) savings plan. All employees are also subject to the same discrimination policy and alcohol contraband policy. All employees express their concerns and present complaints to the same personnel representative. Site Manager Danny Price is the final authority for discipline of all employees, with all other supervisors having authority to recommend discipline. All employees receive the same flexible break periods, which are based upon crew assignments.

Notably, ACS employees do not receive the same vacation and holiday benefits as DST employees. ACS employees, regardless of skill certification, receive a maximum of one (1) week paid vacation after 1 year of continuous service. In contrast, DST employees receive two (2) weeks of paid vacation after 3 years of continuous service and three (3) weeks of paid vacation after 10 years of continuous service. Further, ACS employees receive ten (10) non-paid holidays, but DST employees receive ten (10) paid holidays.

All employees, ACS and DST, are paid biweekly and receive an hourly rate according to their experience level. The specific rate of pay an ACS employee receives is based upon the employee's experience level in the craft, which "A" signifies journeyman level at $17.80 per hour. In contrast, DST mechanics receive an entry level pay rate of $19.05, which progresses up to $21.40 per hour based on the experience of the employee. Thus, there is a considerable difference in the pay received by ACS employees and DST employees.

Employees are not required to wear uniforms. All employees, ACS and DST, wear hard hats in various colors. Historically, ACS employees wore brown hardhats and DST employees wore gold hats. Likewise, the electricians normally wore yellow hardhats when they were employed by Davis Electrical Company, and the insulators wore green hardhats when they were employed by Petrin Corporation. Presently, whenever an ACS or DST employee needs to replace a hardhat, the color is determined by what color is available when the Employer

places its order. Brown has been the color available in recent years.

The ACS employees have shops in their respective departments and the DST employees have shops in their respective zones. The DST shops, however, are better equipped than the ACS shops.

IV. SUMMARY

(a) Electricians

While the electricians' frequency of contact and interchange with other ACS employees and their receipt of similar terms and conditions of employment as the other ACS employees may favor including them in the petitioned-for unit, their historical independence and particularly specialized work are determinative in excluding them from the petitioned-for unit. Electricians perform all electrical preventive maintenance on heavy switch gear rated 480 and above. Such electrical maintenance work is a task specialized to the electrician craft. The record is void of any evidence that other ACS employees perform electrical maintenance on heavy switch gears rated 480 and above. To the extent the record reflects that other ACS employees perform electrical work, it is limited to work that does not require the expertise of a skilled electrician, such as installing cable trays to hold wires. The record evidence discloses and I find that the electricians could constitute a separate appropriate craft unit. Additionally, I note that the electricians have not been included in the bargaining unit historically represented by the Petitioner at BASF.

Thus, I conclude that the electricians are appropriately excluded from the petitioned-for unit.

(b) Insulators

Like the electricians, the insulators' frequency of contact and interchange with other ACS employees, their receipt of similar terms and conditions of employment as other ACS employees, and their degree of functional integration with other ACS employees favor including them in the petitioned-for unit. Particularly, the insulators are assigned to the same department as painters and perform substantially similar tasks as the painters. There are, however, nearly three times as many insulators (23) as there are painters (8). The record discloses that the insulators may do paint work, but the evidence does not reflect that painters perform any installation or removal of insulation. Indeed, the record evidence discloses that only insulators perform asbestos abatement. Additionally, the record reflects that the insulators and painters use different tools to perform their respective tasks. Further, fourteen (14) insulators are assigned to work with DST employees in zones, whereas only three (3) painters are so assigned. The determinative factor, however, is that the insulators, unlike the painters, have not been included in the bargaining unit historically represented by the Petitioner at BASF.

I conclude, therefore, that the insulators are appropriately excluded from the petitioned-for unit.

(c) DST

Contrary to the Employer's position at the hearing and in its brief, it is clear from the record that the DST employees, generally known as multi-skilled mechanics, constitute a clearly identifiable and functionally distinct craft group with common interests that distinguishes them from ACS section employees. *Johnson Controls*, supra at 672, citing *Del-Mont Construction Co.*, 150 NLRB 85, 87 (1965). DST mechanics are the highest skilled employees at BASF; primarily perform their work in designated zones; report to DST zone supervisors; do not perform the work of ACS "nesters'; wear gold hardhats; generally work 5 days per week/eight hours per day; wear pagers and are subject to mandatory overtime; receive overtime pay after eight hours per day; receive ten (10) paid holidays per year; receive up to three (3) weeks of vacation based upon the number of continuous years of service; and receive the highest pay at $21.40 per hour. Furthermore, DST employees are not a part of bargaining unit historically represented by the Petitioner and prior to December 22, 2004, received a separate benefit package than the ACS employees.

In sum, the record evidence supports the Petitioner's claim that the DST employees are a clearly identifiable and functionally distinct group with common interests which are distinguishable from those of the ACS employees at BASF. I conclude, therefore, that the DST employees are appropriately excluded from the petitioned-for unit.

D. Construction Industry

In 1967, the Board noted that in the construction industry, many employees experience intermittent employment and may work for short periods on different projects for several different employers in a year. *Daniel Construction Co.*, 167 NLRB 1078 (1967). Therefore, the Board established the following eligibility formula to insure that all employees with a reasonable expectation of future employment with an employer engaged in the construction industry would have the fullest opportunity to participate in a representation election:

> Accordingly, we find that, in addition to those employees in the unit who were employed during the payroll period immediately preceding the date of the issuance of the Regional Director's Notice of Second Election in this proceeding, all employees in the unit who have been employed for a total of 30 days or more within the period of 12 months, or who have had some employment in that period and who have been employed 45 days or more within the 24 months immediately preceding the eligibility date for the election hereinafter directed, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed, shall be eligible to vote. [*Daniel* at 1081.]

In 1992, the Board confirmed the appropriateness of applying the *Daniel* formula when an employer has a relatively stable work force but also experiences sporadic employment patterns typical of the construction industry. *Steiny & Co*., 308 NLRB 1323 (1992).

The Employer contends that it is not engaged in the construction industry, and that therefore, the *Daniel/Steiny* formula is not applicable in determining voter eligibility. Rather, the Employer contends that the maintenance services it provides at BASF, which includes rebuilding pumps, changing valves,

swapping out reactor chains, dumping catalyst, internal work on towers, installing pipelines, building scaffolds, touch up painting, asbestos abatement, firewater leaks, underground works, form work, moving furniture and unloading trucks, is governed by OSHA standards for General Industry or Maintenance and is not construction work. The Employer's definition of construction work is limited to building a new facility and does not include making additions onto existing units. Further, the Employer contends that the "small cap" projects it performs are not considered construction because it does not involve driving pilings and hanging steel. Yet, for the Employer's most recent "small cap" project, the Employer "added some support steel and ran a 24-inch line", which was valued at $200,000.

In contrast to the Employer's limited and narrow definition of construction work, the Board defines construction work in broad terms. For instance, the Board has held that the statutory definition of the "building and construction industry" encompasses "the provision of labor whereby materials and constituent parts may be combined on the building site to form, make, or build a structure." *Carpet, Linoleum and Soft Tile (Indio Paint and Rug Center)*, 156 NLRB 951, 959 (1966). Additionally, the Board has found that an employer who makes repairs to and replaces integral parts of an immovable structure is engaged in "construction" as used in Section 8(f) of the Act. *Garab d/b/a South Alabama Plumbing*, 333 NLRB 16 (2001). Moreover, the Board has established a set of factors it considers when determining whether an employer is engaged in the construction industry: (a) intermittent employment; (b) short periods of employment on different projects; (c) several different employers in one year; and (d) short layoffs due to material shortages or because the work is dependent on the work of various crafts. *Steiny and Co*., 308 NLRB 1323 (1992).

The record evidence reflects that the Employer has a core work force of approximately 210 employees that it maintains throughout the year. Clearly, the use of the *Daniel* 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 employer's terms and conditions of employment to warrant being eligible to vote and included in the unit." *Steiny* at 1328. Indeed, if an employer has an entirely stable work force, then no employees will be eligible by virtue of a *Daniel/Steiny* formula. *Brown & Root*, 314 NLRB 19 (1994) citing *Steiny* at 1327–1328. The record discloses, however, that in addition to its core work force, the Employer has employed "turnaround employees" on an intermittent basis for a short period of employment. In February 2005, the Employer hired approximately one hundred (100) "turnaround employees" for a turnaround project at BASF that lasted about 2 weeks. Most of the "turnaround employees" were released at the conclusion of the project and were free to seek employment with a different employer. Historically, nearly twenty (20) turnarounds are performed each year at BASF that last an average of 2 weeks. Thus, the record shows that the Employer employs "turnaround employees" on an intermittent basis for short periods of time and that the "turnaround employees" are laid off when the work is complete. Accordingly, I find that the Employer is engaged in the building and construction industry as defined by the Board.

The Employer further contends that even if it is involved in the construction industry, the *Daniel/Steiny* formula does not apply because the "turnaround employees," as temporary employees, do not have a reasonable expectation of future employment or possess a substantial interest in working conditions. Site Manager Danny Price testified that "turnaround employees" are told that their employment is for a short and definite duration and that the Employer does not necessarily re-hire the same employees for turnarounds. Price acknowledged, nonetheless, that the Employer's preference is to re-hire turnaround employees that have worked at BASF due to the time it takes to process new employees. Additionally, the evidence reflects that 20 to 30 turnarounds per year have been performed historically at BASF, which further increases the "turnaround employees" likelihood of future employment. Moreover, the evidence discloses that as recently as February 2005, the Employer has hired "turnaround employees" to replace poor performing employees in its core work force or to fill vacancies. Accordingly, the record establishes and I find that "turnaround employees" can reasonably expect to be re-hired when they are released upon the completion of a project. Indeed, I find that the fact pattern in this case is similar to the fact pattern considered by the Board in *Wilson & Dean Construction Co*., 295 NLRB 484 (189).

In *Wilson & Dean*, the employer was engaged in commercial and industrial construction. The Employer had an 8(f) collective-bargaining relationship with the union for approximately thirty (30) years. Pursuant to a collective-bargaining agreement, the employer obtained the employees it needed for its construction projects from the union's hiring hall. The Employer properly terminated its collective-bargaining agreement with the union, and afterwards, discontinued using the union as the source for its employees. The union filed a petition to represent employees in the unit as set forth in the expired collective-bargaining agreement. The Board noted, "[u]nder Deklewa, an employer can terminate its collective-bargaining relationship after its 8(f) contract with the union has hired. This does not diminish the short-term construction employee's substantial interest in the employer's conditions of employment or change the existing electoral mechanism for expressing representation desires." *Wilson & Dean* at 484–485. The Board concluded that "the employer's former employees who meet the *Daniel* eligibility requirements have a reasonable expectation of future employment with a substantial continuing interest in the employer's conditions of employment and are eligible to participate in the election." Id.

Further, the record evidence does not reflect that the terms and conditions of employment of "turnaround employees" are any different than those of the Employer's core work force. Rather, the record reflects that turnaround employees, like ACS employees in the core work force, must possess at least one skill certification. Thus, I conclude that turnaround employees have sufficient interest in the Employer's terms and conditions of employment to warrant being eligible to vote and included in the unit.

Accordingly, eligible to vote in this matter are all unit employees that have been employed by the Employer for a total of 30 working days or more within the period of 12 months, 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 date of this Decision and Direction of Election, and who have not been terminated for cause or quit voluntarily prior to completion of the last job for which they were hired.

IV. THE UNIT

Based on the foregoing, the record as a whole and careful consideration of the arguments of the parties at the hearing and in their briefs, I shall direct an election in the unit as set forth below:

> All boilermakers, carpenters, scaffold builders, ironworkers, laborers, millwrights, painters, pipefitters, welders, and cement masons employed by the Employer at its BASF Geismar, Louisiana project; excluding all electricians, insulators, DST employees, office clerical employees, guards, professional employees and supervisors as defined in the Act.