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

RAIMORE CONSTRUCTION, LLC

Employer

and **Case 19-RC-300998**

IRON WORKERS DISTRICT COUNCIL OF THE PACIFIC NORTHWEST & AFFILIATED IRON WORKER LOCAL #14, #29 AND #86 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS

Petitioner

DECISION AND DIRECTION OF ELECTION

Raimore Construction, LLC ("Employer") is engaged in the business of providing residential and heavy civil construction services. The Employer operates in the State of Oregon and Clark County in the State of Washington.

On August 8, 2022, Iron Workers District Council of the Pacific Northwest & affiliated Iron Worker Locals #14, #29 and #86 of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers ("Petitioner") filed the instant petition seeking to be certified under the Act as the representative of all iron workers employed by the Employer. The Employer and Petitioner are parties to a Section 8(f) agreement currently in effect. The Employer employs approximately 13 employees in the petitioned-for unit.

The Employer challenges the appropriateness of the petition, contending it is eliminating the steel/iron side of its work after it completes three ongoing jobs and thus will no longer perform work that requires iron workers. Conversely, Petitioner contends that the Employer has failed to meet its burden to prove that its cessation of steel/iron work is definite or immediate because the Employer has, and continues to, bid on construction projects that will require iron workers.

A Hearing Officer of the National Labor Relations Board ("Board") held a videoconference hearing on August 30-31, 2022. Petitioner and the Employer both filed post-hearing briefs.

As set forth below, based on the record, the parties' briefs, and relevant Board law, I find the Employer has not met its burden to prove that the cessation of its steel/iron work is definite or immediate. Therefore, I find that the petitioned-for unit is an appropriate unit, and I am directing an election. I also find that, for eligibility purposes, it is appropriate to use the *Daniel/Steiny*

formula. The eligibility formula set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961), and *Steiny & Co.*, 308 NLRB 1323 (1992) applies to all employees in the construction industry. In *Steiny*, the Board held that the construction industry eligibility formula applies to all construction industry elections unless the parties stipulate not to use it. *Steiny*, supra at 1327-28 and fn. 16. Here, it is undisputed that the Employer operates in the construction industry. Further, the parties have not stipulated to waive the *Daniel/Steiny* formula. Accordingly, I find that the *Daniel/Steiny* eligibility formula is applicable to this case.

Finally, I have also determined that the election will be held by mail ballot. Mail balloting may be used in certain circumstances, such as where the eligible voters are scattered because of their duties or work schedules. *San Diego Gas & Electric*, 325 NLRB 1143 (1998). Moreover, I note the parties stipulated to a mail ballot election. Given the parties' positions, plus the fact that there are a presently unknown number of employees eligible to vote under the *Daniel/Steiny* formula, I find a mail ballot will best allow the unit employees the ability to exercise their right to vote in the election.

I. FACTS

A. Overview of the Employer's Operations

The Employer performs heavy civil construction services throughout the State of Oregon, as well as in Clark County in the State of Washington. Most of its revenue is derived from construction projects where it is the general contractor and performs a substantial portion of the streetscape work. About 11 or 12 years ago, the Employer began doing structural steel projects in addition to construction projects to offset lulls in the heavy-civil side of construction. On projects where it is a general contractor, the Employer tries to perform about 50% of the work directly and subcontract the remainder. It subcontracts work that it does not have expertise in or when it wants to assist a minority subcontractor. At the time of the hearing, the Employer employed approximately 13 iron workers and was engaged in at least three steel projects, including Powell Garage, RiverPlace, and 11west. The steel work on these three projects falls within the scope of work performed by employees in the petitioned-for unit.

B. The Parties Positions

The Employer argues that the petition should be dismissed because the proposed unit is contracting due to a cessation of steel work once its current projects are completed. The Employer contends that it made a final decision in the fourth quarter of 2021 to cease doing steel work because of concerns it had over the quality of work performed by the iron workers sent by the union hall. To support this contention, the Employer states that its last bid on a steel project was made on July 1, 2021, and, in the last 18 months, it has turned down several prospective steel projects. Specifically, in the third quarter of 2021, the Employer declined to bid on a steel project for the Port of Portland's TCORE Project. The Employer's President testified at the hearing that he was still committed to getting out of steel work and projected that the Employer will no longer employ iron workers by the end of November 2022, when he anticipates finishing the current steel

projects. The Employer alleges that any future steel work performed as part of larger construction projects will be *de minimus* and the Employer will subcontract that work out.

The Employer relies on *Davey McKee Corp.*, 308 NLRB 839 to support its argument that due to the imminent cessation of steel operations, directing an election in this case would serve no purpose. The Employer argues, much like the employer in *Davey McKee*, that the cessation of its steel work is definite and imminent because its current steel projects are nearing completion, and it is reasonably anticipated that the petitioned-for unit employees will be laid off by November 2022.

Petitioner contends that the Employer's decision to stop doing steel work is not definite because the Employer has gone back and forth about the possibility of ceasing steel work for years. Additionally, in February 2022, the Employer's President wrote that "as it stands now," he was still committed to shutting down the steel division, but he was open to hearing more on the issue. Subsequently, the Employer's President took a meeting with Petitioner to discuss concerns he had about the iron workers. Moreover, the Employer took no steps towards selling any of its steel equipment, on which it had spent hundreds of thousands of dollars.

Petitioner also argues that the Employer's decision is not imminent because it has ongoing construction projects that include steel work that falls within the scope of the petitioned-for unit and it continues to bid on construction projects that include steel work. This includes the I-5 Rose Quarter Project, which is expected to have 1,000 to 2,000 hours of steel work within the scope of the petitioned-for unit in the streetscape portion of the project. Moreover, the Employer testified that it will continue doing civil streetscape projects, which would include some steel work within the scope of the petitioned-for unit. Additionally, the Employer's own Horizon Report, used to forecast its earnings, projected about $500,000 worth of steel projects in the future. Finally, Petitioner notes that the Employer, pursuant to the Section 8(f) agreement, is bound by the subcontracting provision of the Master Labor Agreement and it failed to explain how it would be able to circumvent that obligation, which undermines its claim that its cessation of steel work is definite and immediate.

Petitioner relies on *Retro Environmental, Inc.*, 364 NLRB 922 (2016) to support its argument that a direction of election is appropriate in this case. In *Retro*, the Board held that the employers failed to meet their burden of proving an imminent cessation of work because they continued to do work in the petitioned-for unit and actively sought new work within the scope of the petitioned-for unit. In doing so, the Board rejected the employers' argument that the election would serve no purpose because the two ongoing projects they had were, at the time of the hearing, scheduled to end shortly. The Board noted that "[u]npredictability and projects of limited duration are typical in the construction industry." *Id* at 7. Internal citations omitted. In the instant case, Petitioner similarly argues that the fact the Employer predicts it will no longer employ iron workers as of November 2022, when it anticipates completing its current steel projects, is not definite given the nature of the construction industry, so an election is appropriate.

II. ANALYSIS

The Act directs the Board, upon the filing of a representation petition, to investigate whether a question of representation exists, including by holding an appropriate hearing, and if a question of representation exists, the Board shall direct an election. 29 U.S.C. § 159 (c)(1). The Board has recognized a narrow exception to this statutory mandate, limited to circumstances in which it is reasonably certain that conducting an election will serve no purpose: it will dismiss an election petition when cessation of the employer's operations is imminent, such as when an employer completely ceases to operate, sells its operations, or fundamentally changes the nature of its business. *See, e.g., Hughes Aircraft Co.,* 308 NLRB 82, 83 (1992); *Martin Marietta Aluminum*, 214 NLRB 646, 646-647 (1974). The party asserting an imminent cessation of operation bears the burden of proving that cessation is both imminent and definite. *Retro Environmental, Inc.*, 364 NLRB at 925. To support a finding of cessation, the Board requires concrete evidence, such as announcements of business closure to the public and the employees, termination of employees, or other evidence that the employer has definitively determined the sale, cessation, or fundamental change in the nature of its operations. *Hughes Aircraft Co.*, 308 NLRB at 83; *Martin Marietta Aluminum*, 214 NLRB at 646-647. The Board will not dismiss an election petition based on conjecture or uncertainty concerning an employer's future operations, an employer's contention that it intends to cease operations or reduce its workload in the future, or evidence of cessation that is conditional or tentative. *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976).

I find that the Employer failed to meet its burden of proving an imminent cessation of its steel/iron work. Similar to the facts in *Fish Engineering & Construction Partners, Ltd.*, 308 NLRB 836, and *Retro Environmental, Inc.*, 364 NLRB 922, I find that an election would serve a useful purpose because it is undisputed that the Employer was working on three steel projects at the time of the hearing, it had secured future work that includes some steel work within the scope of the petitioned-for unit, and it will continue to bid on small steel projects or construction projects that include steel work within the scope of the petitioned-for unit. This ongoing and future work within the scope of the petitioned-for unit distinguishes this case from *Davey McKee Corp.*, 308 NLRB 839 (1992), where there was no evidence that employer had any future work covered by the petitioned-for unit. Accordingly, I find it appropriate to order an election in this case.

III. CONCLUSION

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. Based on the foregoing and the record as a whole, I conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[1]

3. Petitioner is a labor organization as defined in Section 2(5) of the Act.

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

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All full-time and regular part-time iron workers employed by the Employer and performing work in the State of Oregon and Clark County in the State of Washington.

EXCLUDED: All other employees, employees represented by other labor organizations, and guards and supervisors as defined by the Act.

Also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Iron Workers District Council of the Pacific Northwest & affiliated Iron Worker Local #14, #29 and #86 of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers.**

A. Election Details

The election will be conducted by mail.

[1] The Employer, Raimore Construction, LLC, is a State of Oregon limited liability company with an office and place of business in Portland, Oregon, and is engaged in the business of providing residential and heavy civil construction services. Within the past twelve months, a representative period, the Employer received gross revenue valued in excess of $500,000 and purchased and received at its Portland, Oregon, facility goods valued in excess of $50,000 directly from points outside the State of Oregon.

The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit by a designated official of the National Labor Relations Board, Subregion 36, 1220 SW 3rd Avenue, Suite 605, Portland, OR 97204 on **Tuesday, December 6, 2022 at 4:30 p.m.** Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Thursday, December 15, 2022, as well as those employees who require a duplicate ballot, should communicate immediately with the National Labor Relations Board by either calling the Subregion 36 office at 503-326-3085 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Subregion 36 office by **3:00 p.m. on Wednesday, December 28, 2022.** The mail ballots will be comingled and counted by an agent of Subregion 36 of the National Labor Relations Board on **Wednesday, December 28, 2022 at 3:00 p.m.,** with participants being present via electronic means. No party may make a video or audio recording or save any image of the ballot count. If, at a later date, it is determined that a ballot count can be safely held in the Subregion 36 office, the Region will inform the parties with sufficient notice so that they may attend.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending November 18, 2022, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In a mail ballot election, employees are eligible to vote if they are in the unit on both the payroll period ending date and on the date they mail in their ballots to the Board's designated office.

Also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote by mail as directed above.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period, and, in a mail ballot election, before they mail in their ballots to the Board's designated office; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **November 28, 2022.** The list must be accompanied by a certificate of service showing service on all parties.[2] **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

[2] Petitioner waived the full 10 days to which it was entitled to review the voter eligibility list.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

V. RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under

review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Seattle, Washington, this 23rd day of November, 2022.

Ronald K. Hooks

Ronald K. Hooks, Regional Director
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