

ence.” *Town of Boxford*, 35 MLC 113, 119-120 (2008) (citing *Waltham School Committee*, 25 MLC 137, 139 (1999)). No single factor is outcome determinative and community of interest does not require identity of interest. *Id.* (citing *Town of Ludlow*, 27 MLC 34 (2000) and *Town of Somerset*, 25 ML 98 1000 (1999)).

In this case, the record contains insufficient evidence that the DACO Coordinator shares a community of interest with other bargaining unit titles. Although the DACO Coordinator job description, upon which the Petitioner exclusively relies, contains some information about “supervision received” (principal) and exercised (faculty, coaches and students), the Petitioner provided no information regarding the DACO Coordinator’s similarity of pay and working conditions, similarity of training or experience with other positions in its unit, or job descriptions of similar positions as required by the Written Investigation Procedure.

The Petitioner nevertheless asserts that since the disputed position combines all of the duties of the AD with new duties that are professional in nature and since the bargaining unit expressly includes “all other professional employees,” *ipso facto*, the disputed position properly belongs in the bargaining unit. The DACO Coordinator job description, on its face, is insufficient to establish a community of interest with the other titles in this unit. Rather, this job description describes an administrative position without any specific educational requirements⁴ and no direct teaching, counseling, coaching or academic support duties.

Thus, the Union’s argument that the DACO Coordinator should be accreted to its unit simply because the AD was in the unit for a number of years fails to persuade us to grant this accretion petition on community of interest grounds. *Cf. City of Worcester*, 5 MLC 1332,1335 (1978) (Although bargaining history and extent of organization are relevant factors, they are not conclusive in determining an appropriate bargaining unit).

Conclusion

For the above-stated reasons, we deny the petition to accrete the DACO Coordinator position into the existing bargaining unit and dismiss the petition.

SO ORDERED.

* * * * *

4. Section 1 of the Law defines a “Professional employee” as: any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, (ii) involving the consistent exercise of discretion and judgment in its performance, (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes.

In the Matter of MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY

and

INDEPENDENT ASSOCIATION OF MBTA PLUMBERS

and

LOCAL UNION 589, AMALGAMATED TRANSIT UNION,
AFL-CIO,CLC

Case No. CR-07-3731

34.93 *severance*
35.3 *inclusion of professionals and craft severance*
35.42 *craft employees*

January 7, 2011

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

James Lavin, Esq. *Representing the Massachusetts
Bay Transportation Authority*
Allan Wong *Representing the Independent
Association of MBTA Plumbers*
Paul T. Hynes, Esq. *Representing Local Union 589,
Amalgamated Transit Union,*
John F. McMahon, Esq. *AFL-CIO, CLC*

DECISION ¹

Introduction

This severance petition filed by the Independent Association of MBTA Plumbers (Association) raises the issue of whether the Commonwealth Employment Relations Board (Board) should allow the licensed plumbers employed by the Massachusetts Bay Transportation Authority (Authority) to vote on whether to sever from an existing bargaining unit that is represented by Local Union 589, Amalgamated Transit Union AFL-CIO (Local 589). We answer this question in the affirmative based on the craft unit proviso contained in Section 5 (b) of M.G.L. c. 150A (the Law), which we interpret as conferring upon craft employees the right to vote on their continued inclusion in a mixed unit of craft and non-craft employees, regardless of whether they meet the Board’s traditional severance standard.

1. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) “shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission.” The Commonwealth Employment Relations Board (Board) is the body within the Division charged with deciding adjudicatory matters. References in this decision to the Board include the former Labor Relations Commission (Commission). Pursuant to Section 13.02(1) of the Commission’s Rules in effect prior to November 15, 2007, the Commission designated this case as one in which the Commission shall issue a decision in the first instance.

Statement of the Case

On April 19, 2007, the Association filed a petition with the former Labor Relations Commission (Commission) pursuant to Section 5 of the Law seeking to represent all licensed plumbers employed by the Massachusetts Bay Transportation Authority (Authority) who are currently represented by Local Union 589, Amalgamated Transit Union, AFL-CIO, CLC (Local 589). Local 589 filed a motion to intervene on May 7, 2007. The former Commission allowed that motion on May 21, 2007. The Authority and Local 589 seek dismissal of the petition.

On April 4, 2008 and August 5, 2008, Hearing Officer Ann T. Moriarty, Esq. (Hearing Officer) conducted a hearing at which all parties had the opportunity to be heard, to examine witnesses, and to introduce evidence. All parties filed post-hearing briefs on October 31, 2008.²

Parties' Stipulations

The Authority, the Association, and Local 589 stipulated to the following facts:

1. The Massachusetts Bay Transportation Authority (Authority) is a political subdivision of the Commonwealth of Massachusetts (Commonwealth), established and enabled under the provisions of Chapter 161A of the Massachusetts General Laws.³ Pursuant to Section 26 of M.G.L. c. 161A, the provisions of Section 5 of M.G.L. c. 150A (the Law) apply to the Authority and its employees, excepting directors, executives, and those confidential employees representing the Authority and dealing with employee organizations.⁴

2. The Authority owns and operates a mass transportation system in the Commonwealth serving the City of Boston and seventy-eight other cities and towns in eastern Massachusetts. The Authority is managed by a board of seven directors who are appointed pursuant to the provisions of Section 6 of G.L.c.161A.

3. The Independent Association of MBTA Plumbers (Association) is an employee organization within the meaning of Section 2(5) of the Law.

4. Local Division 589, Amalgamated Transit Union, AFL-CIO-CLC (Local 589) is an employee organization within the meaning of Section 2(5) of the Law.

5. Collective bargaining between the Authority and labor organizations is governed, in part, by the provisions of Section 25 and

Sections 28 through 32, inclusive of G.L.c.161A, as amended by Chapter 127 of the Acts of 1999.

6. The Authority employs about 6,500 employees, including nine licensed plumbers.

7. About 6,155 employees of the Authority are included in a bargaining unit and represented by labor organizations for the purposes of collective bargaining. There are twenty-eight bargaining units that include employees of the Authority and twenty-eight different labor organizations represent the employees in these units. A chart that lists the bargaining units, the labor organizations, the year of the first collective bargaining agreement, a general description of each bargaining unit's work jurisdiction, and the number of employees in each bargaining unit is attached to this stipulation and identified as JX-1.⁵

8. The Authority negotiates a total of sixteen collective bargaining agreements that cover all the employees who are represented by labor organizations for the purposes of collective bargaining.

9. Thirteen of the twenty-eight labor organizations that represent employees of the Authority for the purposes of collective bargaining are affiliated with the Building and Construction Trades Council (Council). The Council negotiates one collective bargaining agreement that covers a total of about 359 employees who are in thirteen of the twenty eight bargaining units that exist at the Authority.

10. On April 19, 2007, the Association filed a petition with the Labor Relations Commission (Commission) pursuant to the provisions of Section 5 of the Law seeking to represent all licensed plumbers employed by the Authority. The Commission docketed the petition and assigned Case No.: CR-07-3731, *Massachusetts Bay Transportation Authority*. On May 2, 2007, the Commission issued a Notice of Hearing in Case No.: CR-07-3731, *Massachusetts Bay Transportation Authority*. A copy of the petition and the Commission's Notice of Hearing are attached to this Stipulation and are identified as JX-2.⁶

11. Local 589 is the exclusive representative for a bargaining unit of about 3,621 employees of the Authority, including the nine petitioned-for licensed plumbers.

12. The Authority and Local 589 are parties to a collective bargaining agreement that is effective from July 1, 2003 through June 30, 2006 (Agreement). A copy of the Agreement is attached to this Stipulation and is identified as JX-3.

2. The Association attached a letter from the Authority to an agent of the Building and Construction Trades Council regarding their negotiations for a successor contract. This document is not part of the record and, therefore, it is not considered by the Board.

3. The former M.G.L. c. 161A, Sec. 19A was re-codified as M.G.L. c. 161A, Sec. 26 effective July 1, 2000. There were no changes to the statutory language of the former section 19A or to the former section 19, the so-called management rights law, now codified as M.G.L. c. 161A, Sec. 25.

4. Section 26 of M.G.L. c. 161A provides:

Notwithstanding any provisions of law to the contrary, the provisions of section five of chapter one hundred and fifty A shall so far as apt apply to the

authority and its employees, excepting directors, executives and those confidential employees representing the authority and dealing with employee organizations. Nothing in this section shall be construed as conferring upon the employees of the authority the right to strike, nor as detracting from the obligations of the authority and the employees to submit all grievances and other disputes to arbitration.

5. JX-1 is reproduced and is appended to this decision. See Appendix "A".

6. The attachments identified in the parties' stipulations are not included in this Decision.

13. The Association's petition is timely filed under the Commission's rules and regulations and Commission case law.

14. On May 7, 2007, Local 589 filed a motion to intervene. On May 21, 2007, the Commission allowed Local 589's motion to intervene.

15. Local 589's bargaining unit includes employees in the positions listed in Part Six - Wage Rates of the Agreement, with the exception of collector, now customer service agent. *See* JX-3.⁷

16. Local 589 has been the exclusive bargaining representative for plumbers employed by the Authority and its predecessor since at least May of 1916 as evidenced by the pay schedule for plumbers that appears at Part Five - Schedules of a collective bargaining agreement between Local 589 and the Boston Elevated Railway Company, the predecessor to the Authority (1916-1919 Agreement). A copy of the 1916-1919 Agreement is attached to this Stipulation and is identified as JX-4.

To the extent plumbers have been represented for the purposes of collective bargaining at any time relevant to this proceeding, they have always been represented by Local 589. The plumbers have never been included in a separate bargaining unit of plumbers, only.

17. Part Five - Schedules of the 1916-1919 Agreement includes the pay schedules for other positions, in addition to the plumbers, including motormen and conductors, guards, brakemen, gatemen, blacksmiths and horseshoers, blacksmith helpers, brass finishers, bridgemen and horseshoers, harness makers, linemen, masons, machinists, outside carpenters, painters, pavers, riggers, roofers, steam fitters, structural iron painters, tinsmiths, welders, wiremen and electricians, general helpers, hoisting engineers, boiler room engineers, draw tenders, laborers, and collectors, among others.

18. The Authority is currently facing a multi-billion dollar budgetary shortfall.

19. Repairers are mechanics who work with electronic, electrical and mechanical systems as well as traditional tools of their trade. Repairers repair the electronic, electrical and mechanical systems on subway trains on all lines.

20. Trackpersons perform all tasks associated with the complete installation, maintenance, and repair of track roadways. Trackpersons assist at emergencies and/or events as needed and operate and perform routine operational maintenance on portable rail drills, saws, punch tensor, weld shear, impact gun, and track mounted tie drills/borers.

The pay schedule for trackperson, as provided for in the Agreement between the Authority and Local 589, see JX-3, includes two steps: step 01 - 0-12 months; and, step 02-after 12 months.

21. The current hourly wage for a plumber at the Authority is \$33.24 (Thirty Three Dollars And Twenty Four Cents) per hour or

\$1,329.60 (One Thousand Three Hundred And Twenty Nine Dollars And Sixty Cents) per week for forty hours of work.

22. The Authority and the Council are parties to a collective bargaining agreement in effect from July 1, 2003 to June 30, 2007 (Council's Agreement). A copy of the Council's Agreement is attached to this Stipulation and is identified as JX-5.

As provided for in the Council's Agreement, the Authority's current hourly wage rate for pipefitter is \$37.49 (Thirty Seven Dollars and Forty-Nine Cents) or \$1,499.60 (One Thousand Four Hundred and Ninety-Nine Dollars and Sixty Cents) for a forty hour week.

23. An award in an interest arbitration between the Metropolitan Transit Authority, the Authority's predecessor, and Local 589 entered on July 27, 1951 (Healy Award dated July 27, 1951). An excerpt of the Healy Award dated July 27, 1951 is attached to this Stipulation and is identified as JX-6.

The Healy Award dated July 27, 1951 stated, in part, as follows:

It is hereby ruled that the rates of pay of plumbers shall be adjusted in the following manner:

...

Effective July 1, 1952, the rate for Plumbers shall be no less than 9% below the outside rate for journeyman plumbers as of that time. This rate will include any improvement factors and escalator adjustments so that the rate for the duration of the agreement shall be no more than 9% below the outside rate.

...

24. This parity provision, set forth in paragraph 23, above, remained in the collective bargaining agreements between the Authority and Local 589 for three decades after the Healy Award dated July 27, 1951.

25. G.L. c. 161A, section 19, as then enacted by c.581 of the Acts of 1980 included, among other provisions:

The Authority is prohibited from bargaining collectively or entering into a contract which provides for automatic cost-of-living salary adjustments which are based on changes in the consumer price index or other similar adjustments unless specifically authorized by law.

Section 25 of G.L. c. 161A includes, among other provisions, the same language quoted immediately above.

26. On January 15, 1983, an interest award established the Local 589/Authority collective bargaining agreement 1981-1985 (Healy Award Dated January 15, 1983). The Healy Award Dated January 15, 1983 included general wage increases for all classifications, and provided, in part, as follows:

...All sections and subsections not affected by the terms of the Arbitration Award shall be continued in effect unless modification or

through June 30, 2006 is reproduced and appended to this decision. *See* Appendix "B".

7. The positions listed in Part Six - Wage Rates, of the collective bargaining agreement between the Authority and Local 589 that is effective from July 1, 2003

deletion of any provisions is required to insure compliance with Chapter 161A.

27. After issuance of the Healy Award Dated January 15, 1983, the Authority did not observe the plumbers' wage parity provision established by the Healy Award Dated July 27, 1951. *See* paragraph 23, above. Local 589 submitted a grievance to arbitration before Arbitrator Lawrence T. Holden, Jr. contending "that the contractual provision requiring that plumbers be paid at 91% of the outside rate for journeymen plumbers continue[d] in the contract...."

Arbitrator Holden ruled: "In sum, then, and for the reasons aforesaid, I am persuaded that the special wage rate provision for plumbers runs afoul of Sect.19 of Ch. 161A." Arbitrator Holden awarded: "The grievance by plumbers to be paid in accordance with a special wage rate provisions is denied. The plumbers shall be paid in accordance with the general wage provisions contained in Part IV of the Healey Award dated January 15, 1983." A copy of Arbitrator Holden's award is attached to this Stipulation and is identified as JX-7.

28. The top wage for a full-time Bus operator is currently \$26.55 per hour. JX-3

29. The top wage for a full-time Streetcar Motorperson is \$26.82 per hour. JX-3

30. The top wage for a full-time Rapid Transit (Subway) Motorperson is \$26.19 per hour. JX-3

31. Plumbers employed by the Authority come under the general supervision of the Operations Support Department.

32. Within Operations Support, the Superintendent of Electrical and Mechanical Maintenance, Peter Walworth, oversees the Supervisor of Mechanical Maintenance, Christina Sparich.

33. Ms. Sparich supervises Assistant Mechanical Supervisor Kimberley Van Auken.

34. Ms. VanAuken supervises the outside Machinist Foreperson as well Plumbing Foreperson Steven Sullivan and Pipefitter Foreperson Chuck Lewis and two mechanical engineers.

35. Plumbing Foreperson Steven Sullivan directly supervises the plumbers.

36. In Mr. Sullivan's absence, John Cotter, a plumber, served as foreperson on a temporary change basis.

37. Plumbers, Pipefitters, Pipecoverers and HVAC Technicians have two reporting locations at the start of their shifts: 635 Main Street in Charlestown and Cabot Facility on Dorchester Street in South Boston.

38. From the reporting locations, the plumbers are assigned work throughout the property by their foreperson.

39. The Plumbers and Pipefitters occasionally work together, but not on a daily basis.

40. Occasionally, Plumbers and Pipefitters work at the same site when pipecoverers are needed or when the Authority is excavating

the location of a broken water main, or during the installation of a boiler or furnace.

41. Except for preventative maintenance and special projects, the plumbers daily work assignments are determined by calls received in the Maintenance Control Center (MCC).

42. The Plumber Foreperson daily reviews the MCC screen on computer to determine the outstanding trouble calls.

43. Plumbing assignments are given priority in the following order: 1.) safety related repairs, 2) service related repairs, 3) revenue collection related, i.e. maintaining bus and subway

44. The days and hours of work for plumbers are Monday through Friday, 7:00 a.m. to 3:30 p.m. or 12:00 a.m. to 6:00 a.m. [third shift].

45. The general responsibilities of Authority plumbers include the following tasks in support of the Authority's operations: installation, maintenance and repair of plumbing equipment and fixtures, including sanitary fixtures, sanitary waste piping and related appurtenances in Authority buildings and stations, among other things.

46. More particularly the plumbers work on potable water pipes to bathrooms, kitchens and bubblers, sewage lines, pumps, sewage ejectors, backflow devices, roof drains, catch basins, gas supply lines, and vehicle wash equipment for bus and subway operations.

47. In contrast, the general responsibilities of Pipefitters include the installation, maintenance and repair of lines and pumps associated with fire suppression systems including dry standpipes, sprinklers, fire mains, as well as heating, ventilation and air conditioning equipment including furnace equipment.

48. The MBTA Plumbers submitted to the Authority a bid for System Wide Contract for Service and Emergency Repairs of Plumbing Systems, Specification Number: OS-0107-PLB-01, IFB No. 68-07 dated April 19, 2007 on May 23, 2007. This bid is still pending.

49. Local 589 and the Authority do not have in place a formal training program for plumbers

50. Paul Reardon, the plumber most recently hired to fill a position in the MBTA Plumbing Department by the Authority was hired off the street.

51. Local 589 became aware of IFB No. CAP 46-06 and 47-06 before the close of bidding. *See* JX-12 and JX-13.

52. A member of the Association notified Local 589 of the Authority's Invitation to Bid for System Wide Contract for Service and Emergency Repairs of Plumbing Systems, Specification number: OS-0107-PLB-01, IFB No. 68-07 dated April 19, 2007 on May 18, 2007. *See* JX-22.

53. P.J. Kennedy and Sons, Inc. were awarded from the Authority, Plumbing Service Contract IFB No. CAP 46-06 for the South District. *See* JX-12 and JX-12A.

54. P.J. Kennedy and Sons, Inc. were awarded from the Authority, Plumbing Service Contract IFB No. CAP 47-06 for the North District. *See* JX-13 and JX-13A.

55. Local 589 has invoked the Agreement's grievance-arbitration procedures, *see* JX-3, on behalf of its unit plumbers involving their issues with measured success. *See* JX-21.

56. Bargaining between Local 589 and the Authority for a successor contract to JX-3 commenced after June 30, 2006. An excerpt from Local 589's last best offer, pursuant to M.G.L. c. 161A, Sections 29, 30, 31, and 32, that concerns plumbers is contained in JX-20.

57. The plumbers employed by the Authority are subject to the provisions of M.G.L. c. 142, Section 1 through 21, inclusive, and 248 CMR 1.00 - 11.00, inclusive.

Findings of Fact

The following facts are based on testimonial and documentary evidence.

Plumbers: Duties and Work Locations

All of the Authority's plumbers are assigned to the buildings structures and maintenance division (maintenance division) of the Authority's Operations Support Department.⁸ The maintenance division is subdivided into the three sections, electrical, environmental, and mechanical. The maintenance division is comprised of employees who belong to bargaining units other than Local 589, such as ironworkers, painters, carpenters, and pipefitters,⁹ as well as employees who are included in Local 589's bargaining unit, such as the plumbers, laborers, and system repairers.

The mechanical maintenance section is headed by the Supervisor of Mechanical Maintenance, Christina Sparich (Sparich), who reports directly to the Superintendent of Electrical and Mechanical Maintenance. Reporting directly to Sparich is the assistant mechanical supervisor, who, in turn, supervises the outside machinist foreperson, the plumbing foreperson, and the pipefitter foreperson. In her capacity as the Supervisor of Mechanical Maintenance, Sparich has dealt with several labor organizations that are the exclusive bargaining representatives of employees who work in the mechanical maintenance section, including Local 589, which represents the plumbers.

With very few exceptions, all employees assigned to operations support, including the plumbers, work Monday through Friday, either on the day shift, 7:00 a.m. to 3:30 p.m., or on the night or third shift, 12:00 a.m. to 6:00 a.m. All employees assigned to the night shift receive pay for eight hours of work.

The only plumbers and pipefitters who are employed by the Authority work in the mechanical maintenance section. Both the plumbers and the pipefitters report to an assigned location where they begin and end their work day. These reporting locations are also the same facilities where other Authority employees regularly report and work, including employees in Local 589's bargaining unit, such as bus drivers and motorpersons. For example, one of the reporting locations is Cabot Facilities, which includes a rapid transit yard for repairing red line trains, a bus storage garage, a bus repair garage, a signal repair shop, and a compressed natural gas garage. The Cabot Facilities also houses bus operations' offices and training areas for the bus drivers. There are also several trailers on the Cabot Facilities' grounds, including the trailer shared by the plumber foreperson and the pipefitter foreperson. The plumbers and the pipefitters each have their own tools, which they do not regularly share.

As part of their regular duties, the plumbers repair the restroom facilities at all properties owned by the Authority, including the restroom facilities in the bus drivers' lobby and the trackman's lobby located in the Cabot Facilities.¹⁰ In addition, the plumbers repair the vehicle washers located at several facilities, such as the bus wash at the Cabot Facilities. The plumber foreperson reviews the repair calls and assigns the work to the plumbers. If there is a repair call, such as a water break at reservoir yard, which raises a work jurisdiction question between the plumbers and the pipefitters, the respective foremen inspect the water break and pipe to determine whether the work is appropriately assigned to a plumber(s) or a pipefitter(s).

In addition to responding to repair calls as directed by the plumber foreperson, plumbers are assigned to special projects. For example, if the Authority decides to install a women's restroom in a trackman's lobby, the plumbers will perform work at that site, usually on a sequential basis, with employees in other classifications, such as carpenters. Generally, in these types of projects, the forepersons of each trade involved in the special project discuss the sequential nature of the work to be performed by each trade, with one foreperson calling another to notify them when the site is ready for the next trade group, like the carpenters or the plumbers. Other special projects just involve the plumbers, like the installation of backflow prevention devices.

In the course of resolving pipe breaks, drainage problems, and responding to emergency calls, like flooding at a station caused by sewage ejection, or drainage issues along the right-of-way, Authority employees in System Maintenance and Improvement (SMI)¹¹ work in tandem with, or alongside, the plumbers to resolve the problem to avert or resolve a revenue train service interruption. For example, if the source of the flooding is a break in a pipe, the plumbers first identify where the break is located. Next,

8. Operations Support also has a power division.

9. For example, United Association of Pipefitters, Local 537 (Local 537) represents the pipefitters, Local 6, Insulators and Asbestos Workers, which represents the pipecoverers, Local 3, the International Brotherhood of Firemen, Oilers, Powerhouse Employees, Operators & Maintenance Men, which represents the one boiler/fireman.

10. There are over 400 restroom facilities under the Authority's maintenance.

11. The SMI department is responsible for the maintenance and improvement of the track infrastructure, signals, and communications systems to ensure the safety of the riding public and the reliability of the system.

the laborers, who are in Local 589's bargaining unit, excavate the pipe location, the plumbers then repair the break, and the laborers refill the hole. If the work is in the right-of-way, the employees must follow the right-of-way safety rulebook that requires them to call the operations control center and request permission to access the worksite. At this time, the appropriate flag level is determined, and a flagperson(s), who is in Local 589's bargaining unit, is assigned to the work site.

SMI administers an in-house training program for track laborers, system repair persons and forepersons. The in-house training is conducted by the maintenance of way instructor in SMI and by outside consultants hired by the Authority. As the stipulations note, the Authority and Local 589 do not conduct formal plumbers' training.

License Requirements

The plumbers are required to possess a Massachusetts journeyman plumber license and journeyman gas fitter license at the time of hire. In addition to this licensing requirement, a December of 2006 internal posting announcing a vacancy in a plumber's position and inviting applicants, included the requirement that the applicant hold a classification covered by the Local 589 contract. Eight of the nine plumbers employed by the Authority held other positions in Local 589's bargaining unit before they moved into a plumbers' position.

The plumbers are subject to the provisions of M.G.L. c. 142, Section 1 through 22, which defines, generally, the education and experience required to obtain a plumbing license and a gas fitter license, and the continuing education requirements to maintain these licenses.¹² Section 21 of M.G. L. c. 142 provides that the Massachusetts Board of State Examiners of Plumbers and Gas Fitters (Board of Examiners) "shall formulate rules relative to the construction, alteration, repair and inspection of all plumbing and gas fitting work in buildings owned, used and constructed by Massachusetts Bay Transportation Authority, subject to the approval of the department of public health, and all plans for plumbing and gas fitting in such buildings shall be subject to the approval of the examiners." Under its regulatory authority, the Board of Examiners has promulgated rules and regulations governing plumbers and gas fitters, which are found at 248 CMR 1.00 - 11.00.¹³ The Authority's plumbers are subject to these rules that include, among other things, the provisions governing the conduct of plumbing and gas work in the state, the education and experience standards and requirements for licensure, the grounds for imposition of disciplinary sanctions for any violation or failure to comply with any state laws relating to the practice of plumbing or gas fitting, the ethical standards and professional conduct, with a requirement to respond to the Board of Examiners, and the uniform state plumbing code.

Local 589

Local 589 has been the exclusive bargaining representative for plumbers employed by the Authority and its predecessor since at least May of 1916. Within the most recent fifteen years, Local 589 has represented the plumbers in work jurisdiction disputes with other employee classifications, like the outside machinists who are represented by Lodge 264, and the pipefitters, who are represented by Local 537. For example, in December of 1994, after a November of 1994 meeting and a review of the facts introduced by Local 589 on behalf of the plumbers and by Local 537 on behalf of the pipefitters, the Authority assigned the work in dispute to the plumbers. Further, in April of 1996 and in December of 1997, after Local 589 filed a grievance concerning work disputes with the outside machinists, the Authority recognized that the work in dispute should have been performed the plumbers.

Local 589 delegates have also represented the plumbers regarding the Authority's use of outside vendors to perform certain work the plumbers assert should have been performed by them. For example, in the summer of 2004, Local 589 processed a grievance challenging the Authority's use of an outside vendor to perform work at the Reservoir and Riverside train washes. Sparich denied this grievance in September of 2004. In her written denial, Sparich states that there was no evidence that an outside vendor worked on the plumbing of this train wash and that the work performed by a vendor at the train wash - removing old soap barrels and modifying the washer to use an existing tank for new soap dispensing - did not require a plumbing/gas fitting license. Local 589 pursued this grievance through the contractual grievance procedure. In February of 2009, the Authority's General Manager denied the grievance, stating, in part, that its use of an outside contractor to perform certain work falls within its statutory management rights under M.G.L. c. 161A.

In June of 2006, the Authority awarded two contracts in the amount of \$400,000 each to an outside contractor to provide labor and materials to perform plumbing work. Local 589 knew about the Authority's solicitation of bids for these two contracts before the close of bidding. By letter dated June 19, 2006, Local 589 challenged the Authority's decision to award these two contracts to an outside contractor, asserting that the contracts must be evaluated under the so-called Pacheco Law regarding privatization, and requested information from the Authority regarding the requisite cost comparison analysis. In response, by letter dated October 16, 2006, the Authority informed Local 589 that the two contracts (totaling \$800,000) included all design, materials, and labor costs and were to be expended over a 120 day period as part of a seasonal, short-term \$11 million dollar "Revive and Guide" infrastructure improvement program. In its response, the Authority also stated that it "had hired additional Local 589 plumbers to ensure the Authority can complete the program in the 120 day window and to ensure it can address plumbing needs in the future after this program ends."

12. The Board takes administrative notice of M.G.L. c. 142, Supervision of Plumbing.

13. The Board takes administrative notice of 248 CMR 1:00 - 11.00, Rules and Regulations Governing Plumbers and Gas Fitters.

In May of 2007, a plumber and member of the Association notified Local 589 of the Authority's April 19, 2007 invitation to bid for a contract for service and emergency repairs of the Authority's plumbing systems. In the plumber's May of 2007 letter, he requested that Local 589 investigate the Authority's two contracts in June of 2006 asserting, in part, that the plumbers' overtime was virtually eliminated as a result of these contracts. By letter dated May 29, 2007, Local 589 notified the Authority that it knew about the solicitation of bids from outside contractors to perform work routinely performed by the plumbers in its bargaining unit. Local 589 also requested a copy of the bid solicitation and advised the Authority that any contract that would privatize the plumbers' work should comply with the requisite review. Concurrently, Local 589 filed a grievance protesting the contracting out of the work. The Authority denied the grievance on May 31, 2007 on the grounds that soliciting bids for emergency plumbing services does not violate the agreement and the Authority possesses the management right to solicit bids. On May 23, 2007, the MBTA Plumbers filed their own bid for the emergency plumbing services.¹⁴

In December of 2000 and in November of 2004, the plumbers requested that Local 589 seek a one time raise for the plumbers to address the difference between their wages and the wages of other licensed and unlicensed building trades employees at the Authority. At some point after June 30, 2006, the Authority and Local 589 started bargaining for a successor contract. The parties proceeded to arbitration pursuant to M.G.L. c. 161A, Sections 29, 30, 31, and 32. Local 589's last best offer contained the following section:

51. Rates of Pay - Section 600

- c. Establish wage parity between the Plumber classification and Pipefitters employed by the MBTA by increasing the Plumber's rate by \$4.24 per hour.

The arbitrator did not award the wage parity.

In addition to the arbitration awards described in paragraphs 23 through 27 of the parties' stipulated facts, on January 14, 1984, Arbitrator John T. Conlon issued an Interim Opinion and Award in the interest arbitration between the Authority and the Council. In this award, Conlon decided that he did not have the right to award that wage rates shall be automatically adjusted as a percent of the outside construction trades' rates. Like the Holden award, the Conlon award ended the forty year contract provision that provided that the basic hourly rate paid by the Authority to employees in crafts represented by the Council shall be established at 91% of the uniform basic hourly construction wage rate paid by those union employers in Boston and the vicinity.

14. On March 10, 2008, the Authority returned to the MBTA Plumbers the check they submitted to the Authority as a bid bond. The record is silent on whether the Authority awarded any contract for emergency plumbing services in response to its April of 2007 solicitation.

15. Chapter 318 of the Acts of 1939, "An Act Relative to the Designation of Bargaining Units under the State Labor Relations Law"

A 1943 law review article discussing the legislative history of this provision noted that:

Pipefitters

The pipefitters are represented by Local 537. Generally, pipefitters repair and maintain the heating and pumping systems of the Authority's equipment and buildings, including air systems, heating systems, and sprinkler systems. More specifically, the pipefitters maintain and repair high pressure water lines and fire protection sprinklers. Pipefitters also work on boilers and HVAC pipefitters repair heating ventilation systems. The Authority requires the pipefitters to possess a Massachusetts journey level license at the time of hire into the position of pipefitter.

Opinion

As a preliminary matter, we note that the Board has recently ruled that the Division's jurisdiction over the Authority with respect to representation matters continues to arise under Chapter 150A, notwithstanding the 2009 consolidation of various transportation agencies, including the Authority, under the aegis of MassDot, a newly-created Commonwealth department. *See Ruling On Applicability Of M.G.L. c. 150A to the Massachusetts Bay Transportation Authority After The Passage Of The Transportation Reform Act Of 2009*, 36 MLC 199 (2010) (construing the Transportation Reform Act of 2009, Chapter 25 of the Acts of 2009, in light of the Authority's enabling statute, M.G.L. c. 161A, §§ 25, 26). Accordingly, our analysis here arises under Section 5(b) of Chapter 150A, which specifically addresses unit determinations in representation matters involving craft employees. Section 5(b) of Chapter 150A was added by amendment in 1939¹⁵ and states in pertinent part:

The commission shall decide in each case whether, in order to insure to employees the full benefit of their right to self organization and to collective bargaining and otherwise to effectuate the policies of this chapter, the unit appropriate for the purpose of collective bargaining shall be the employer unit, profession or craft unit, plant unit, or subdivision thereof...; provided that, *in any case where the majority of employees of a particular profession or craft shall so decide, the commission shall designate such profession or craft as a unit appropriate for the purpose of collective bargaining.* (Emphasis added).

Chapter 150E, as we discuss further below, contains no parallel craft unit provision.

The severance petition before the Board raises two issues. First, as a threshold matter, we must determine if the petitioned-for unit of only licensed plumbers comprises an appropriate craft unit subject to Section 5(b)'s craft proviso. Because we find that the plumbers do comprise a craft unit, the Board is obliged to reach a question of first impression: whether Section 5(b)'s craft proviso mandates

This craft unit amendment was sponsored by the A. F. of L. in all of the states then having Labor Relations Acts (Mass., N. Y., Pa., Wisc., and Utah) as well as in Congress. This was part of a national drive by employers and A.F. of L. groups to amend or repeal the Wagner Act. Although effectively aided by the report of the Smith Committee investigation of the N.L.R.B., these proposals were defeated in Congress. However, the Wisconsin Act was modified drastically to meet these proposals and Pa. and N.Y. as well as Mass. adopted this craft unit amendment.

Roitman, *Massachusetts Labor Relations Act*, 3 B.U. L. Rev. 379, 382, n. 17 (1943).

that we grant a severance election without resort to the longstanding two-part test the Board has routinely employed in severance cases governed by Chapter 150E.

Craft Unit Composition

There are no formal definitions for the terms “craft” or “craft employee” contained in Chapter 150E, Chapter 150A or the Division’s regulations. In the absence of direct legislative guidance, we turn to Board and National Labor Relations Board (NLRB) rulings and decisions that address on a case-by-case basis what does or does not comprise a “craft unit”.

Perhaps the clearest guidance is found in the *Statewide Bargaining Unit Rules*, where the Board provided the following explanation for establishing Unit 3, a separate statewide bargaining unit for employees working in the “Building Trades and Crafts:”

As with the basic division between blue-collar and white-collar employees, the creation of a separate bargaining unit for traditional craft employees is justifiable primarily on historical grounds. Unlike other blue-collar employees, workers in the building trades possess highly-developed skills, which traditional trade-entry requirements reflect. Normally, either a formal or informal apprenticeship is a condition precedent to entry into a trade. There is little or no inter-craft transfer - carpenters, for example, do not perform the tasks of an electrician, plumber, painter, pipe-fitter, or bricklayer. Higher-level tradesmen earn significantly more than other blue-collar employees - a factor which evidences their distinct interests. Craft occupations are traditionally jealous of their jurisdiction with the trades, and have always resisted inclusion with other, less skilled employees. In view particularly of their separate bargaining history, their strong concern with the preservation of craft lines, and possession of a high level of skill, the Commission concludes that craft employees have sufficiently distinct interests to warrant their placement in a separate unit.

State Bargaining Unit Rules, 1 MLC 1318, 1337 (1975).

Other guidance may be found in relevant case law. In 1980, the Board considered the appropriateness of representation petitions filed by multiple unions seeking to represent the Authority’s foremen, including foremen who supervised plumbers, pipefitters, carpenters and electricians, many of whom had come through the ranks as a journeymen, but who were not currently working in that craft. The foremen argued that under Section 5(b), they were entitled to a separate vote to determine whether they wished to be included within the larger appropriate unit. *Massachusetts Bay Transportation Authority*, 6 MLC 1419, 1442 (1979). The Board rejected this argument explaining that “there is no such thing as a craft of construction trades foremen or machinist foremen.” *Id.*

More recently, in *Town of Wakefield*, 28 MLC 290 (2002), a case arising under Chapter 150E, the Board, in dicta, set forth a number of standards for determining whether a particular position is a skilled craft position. In that case, the Board declined to preserve what it referred to as a “small craft bargaining unit” comprised of an electrician, a boiler plumbing mechanic and an HVAC Maintenance Mechanic. *Id.* at 296. Instead, it granted a petition by a rival union to represent a merged unit consisting of the three-person craft unit and a unit of all non-supervisory, maintenance and custodial employees. The Board held that even if it were inclined to pre-

serve the separate craft unit, the unit was underinclusive because it did not include a newly-created carpenter’s position that the Town had placed in the larger maintenance/custodial unit. In determining that the carpenter would have appropriately belonged to the craft unit, the Board noted that carpenters have historically been recognized as skilled craft positions. *Id.* The Board further noted that the carpenter used tools standard to the trade and that the Town required the carpenter to possess at hire a construction supervisors’ license or similar license sufficient to apply for and receive requisite building permits. *Id.*

The NLRB, whose treatment of craft severance petitions is discussed below, has defined a craft unit as “one consisting of a distinct and homogeneous group of skilled journeymen craftsmen, who, together with helpers or apprentices, are primarily engaged in the performance of tasks that are not performed by other employees and which require the use of substantial craft skills and specialized tools or equipment.” *Burns & Roe Services Corp.*, 313 NLRB 1307, 1308 (1994).

Viewing this record in light of the principles described above, we conclude that petitioned-for licensed plumbers are craft employees because they meet essentially all of the criteria set forth above including that they: are presently working in their craft; possess highly developed skills; must possess a Massachusetts journeyman plumber license and journeyman gas fitter license at the time of hire; are subject to the provisions of M.G.L. c. 142, §1-21 and 248 CMR 1.00-11.00, inclusive; earn the highest hourly rate among Local 589 bargaining unit members; and use their own tools.

Local 589 does not concede that the licensed plumbers are craft employees, claiming instead that their work is repetitive, routine and integrated into the Authority’s regular operations. We disagree. While the plumbers at times work alongside other Authority employees to resolve pipe breaks or drainage problems, there is no evidence that there is any inter-craft transfer. To the contrary, it would appear that work is carefully divided along craft lines, to the point where the forepersons of each trade consult with one another ahead of time over potential jurisdiction disputes or work site availability when planning special repair projects or reviewing repair calls. Moreover, except for preventative maintenance and special projects, the plumbers’ daily assignments are determined by calls received in the maintenance repair center and, thus, by definition, are unpredictable in terms of time, task and location.

In any event, according to the criteria set forth above, craft status is based on the employees’ specialized skills and training and the exclusivity of tasks performed, not on whether the work is repetitive or routine. The plumbers in this case clearly possess specialized skills that are the result of training that other Authority employees do not possess, and, using those skills perform work other employees do not. For these reasons, we conclude that the licensed plumbers comprise a craft and address the applicability of Section 5(b) to the plumbers’ petition to sever from Local 589’s bargaining unit.

Section 5(b) and Severance Elections

We next analyze the Association’s petition under Section 5(b) to determine whether to carve out the licensed plumbers from Local

589's existing bargaining unit and order a severance election to determine whether they wish to be represented in a separate unit. For the reasons set forth below, we find that the plain language of the last sentence of Section 5(b), which states that the Board "shall" designate a craft as a unit appropriate for the purposes of collective bargaining where a "majority of employees of a particular . . . craft . . . so decide," the Board is mandated to create a separate craft unit when a majority of such employees vote to do so. *See generally, Commonwealth of Massachusetts*, 31 MLC 115, 116 (2005) (citing *Hashimi v. Kalil*, 388 Mass. 607, 609 (1983)) (the word "shall" is ordinarily interpreted as imposing a mandatory or imperative obligation).

Indeed, soon after its passage, the Section 5(b) amendment was described as the "so-called mandatory craft proviso." Roitman, 23 B.U. L. Rev. at 382. At least one early decision, cited by Roitman, construed it as such. In *Malden & Melrose Gas Light Co. and Local # 3, International Brotherhood of Firemen & Oilers, A.F. of L.*, CR-410 (January 21, 1941), a firemen's union petitioned the former Labor Relations Commission (Commission) for a unit consisting of firemen, firemen's helpers and engineers. It appears from excerpted portions of the decision that these petitioned-for employees were existing members of a larger "industrial unit." The Commission granted this petition, stating:

The circumstances which impel the Commission in these proceedings to provide for these employees an opportunity to bargain separately from other production employees in spite of the history of bargaining upon an industrial basis which is here present, is the existence of the *mandatory* provision of the 1939 amendment. That proviso refers to particular crafts, and without attempting to define the word 'craft,' the Commission is of the opinion that the firemen and their helpers constitute a distinct and particular craft and the operating engineers constitute another distinct and particular craft. (Emphasis supplied).

Id. (quoted in Roitman, 23 B.U. L. Rev. at 422).¹⁶

The National Labor Relations Board (NLRB) has similarly described the craft proviso contained in New York State's Labor Relations Act, which is virtually identical to Section 5(b),¹⁷ as "mandatory," i.e., operating to deprive the agency of all discretion involving the unit composition in craft severance elections. *National Tube Co.*, 76 NLRB 1199, 1204 (1948).

We provide this history because for unions falling under the jurisdiction of Chapter 150E, the Board has traditionally required petitioners seeking a severance election to demonstrate: 1) that the petitioned-for employees constitute a functionally distinct appropriate unit; and 2) that special negotiating concerns resulting from those differences have caused or are likely to cause conflicts and divisions within the bargaining unit. *City of Boston*, 25 MLC 105, 119 (1999). Under this standard, the Board generally disfavors severance petitions and has dismissed numerous severance petitions based on the petition's failure to meet either one or

both criteria. *See, e.g., Boston School Committee*, 25 MLC (1998); *City of Springfield*, 19 MLC 1533 (1992) (cited in *City of Boston*, 36 MLC 29, 38 (2009)). However, as we further explain below, the mandatory language of Section 5(b) of Chapter 150A and recent precedent involving professional employees require a different analysis.

Until this petition, the Board has not squarely addressed the issue of whether Section 5(b) mandates a severance election without further inquiry into traditional severance factors. Citing *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966) and two other NLRB craft severance petitions that issued on the same day, Local 589 argues that the Board should, in effect, ignore the mandatory language in Section 5(b) of the Law and construe this provision in the same manner that the NLRB has interpreted and applied the craft proviso language in Section 9(b)(2) of the National Labor Relations Act (NLRA). The Authority argues that the mandatory language of Section 5(b) of the Law should be limited to initial unit determinations only, not severance petitions. In particular, the Authority would have the Board adopt the NLRB's emphasis on bargaining unit history when dealing with severance requests.

The Authority's position is not without some support. In the context of Chapter 150A petitions not involving petitioners seeking to sever a craft or professional unit from a larger unit, the Board has interpreted Section 5 of the Law against the backdrop of the Supreme Judicial Court's direction that bargaining units established pursuant to the applicable provisions of Section 5 of the Law be comprised of "the largest number practically possible of employees having the requisite community of interest." *Massachusetts Bay Transportation Authority (MBTA)*, 6 MLC 1419, 1438 (1979) (quoting *Jordan Marsh Company v. Labor Relations Commission*, 316 Mass. 748, 751 (1944)).

The Board has also continued to "be mindful" of the craft provision contained in Section 5(b), and when holding elections to first establish a unit, interpreted that provision as permitting it "first to determine the appropriate bargaining unit and then, if such a unit includes professional or craft employees, allow such employees to determine by majority vote whether they desire to be included within the unit." *MBTA*, 22 MLC 1111, 1143-1144 (1995). For example, in the 1995 MBTA case the Board dismissed a petition for a unit of previously unorganized attorneys as inappropriate because the evidence was insufficient to show that it was a "discrete, cohesive group with distinct employment interests separate from other organized or unorganized Authority employees, such that the Law mandates the creation of a separate bargaining unit." *Id.* at 1144. Notably, that decision does not discuss, and no party appears to have raised, whether the attorneys were professional employees subject to Section 5(b)'s mandatory language.

We therefore find our recent *City of Boston* decision to conduct a severance election for a group of professional employees more on

16. Certain representation decisions under the Law dating back to 1937 are available in the stacks of the Massachusetts State Library. Unfortunately, a search for this decision in the envelopes retrieved by the librarian was unsuccessful.

17. The craft proviso of the New York Act (Section 705(2)) provides in part:

[P]rovided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining.

point. 36 MLC 29 (2009). In that case, the petitioner sought to represent a unit of professional employees who were already members of a mixed bargaining unit of professional and non professional employees who had not previously had the opportunity to vote on their inclusion in that unit. *Id.* at 29. After reviewing M.G.L. c. 150E, §3's language,¹⁸ the Board held that that Section 3 confers upon all employees in the larger unit that meet the statutory definition of professional employees the right to a self-determination election to determine whether they wish to remain in the mixed unit or be represented in a stand-alone unit. The Board accordingly ordered an election among the petitioned-for professional employees. *Id.* at 37-39, 41.

In so holding, the Board acknowledged that allowing a self-determination vote under those circumstances might cause fragmentation of an existing and long-standing bargaining unit. *Id.* at 38. The Board nevertheless interpreted the statutory grant of a separate vote among professional employees as evincing a legislative determination of a particularly strong community of interest among professionals, which in the end, furthers stable and continuing labor relations, even if it might result in some fragmentation of an existing bargaining unit. *Id.*

The same result should obtain here, where the licensed plumbers have not been previously been given the opportunity to vote in a separate self-determination election. As in the *City of Boston* case, cited above, we recognize that this decision might result in fragmentation of a long-standing unit, in an employer that already bargains with multiple unions. *See id.* at 38. Such concerns are somewhat allayed by the fact that thirteen out of the Authority's twenty-eight bargaining units, including units representing traditional crafts like carpenters and painters, are affiliated with the Building and Construction Trades Council, which negotiates a single collective bargaining agreement with the Authority. Furthermore, as in *City of Boston*, we believe it is reasonable to interpret the statutory grant of a separate vote among craft employees

as a legislative determination that they "share a particularly strong community of interest, which, in the end, furthers stable and continuing labor relations." *Id.* Further, our decision to permit this craft severance election is in accord with at least one other jurisdiction faced with the same issue. *Id.* at 39 (citing *City of Marshfield*, 252 Wis. 2d 656 (2002)) (affirming decision of Wisconsin Employment Relations Commission that granted craft employees who were members of a mixed municipal bargaining unit the right to an election to determine whether they wished to establish a separate bargaining unit comprised exclusively of craft workers).

Despite the express statutory language of Section 5(b) and the case law cited, both the Authority and Local 589 urge the Board to adopt the craft severance test set forth in *Mallinckrodt*,¹⁹ which construes Section 9(b)(2) of the National Labor Relations Act as granting the NLRB the discretion to "balance the interest of the employer and the total employee complement in maintaining the industrial stability and resulting benefits of an historical plant-wide bargaining unit as against the interest of a portion of such complement in having an opportunity break away from the historical unit by a vote for separate representation." 162 NLRB at 392. While we are often guided by NLRB decisions, particularly in cases of first impression, we decline to apply the *Mallinckrodt* criteria here, because, as described above, and as the NLRB itself has recognized, Section 9(b)(2) of the NLRA²⁰ lacks the mandatory language contained in Section 5(b) that requires creation of separate craft units in cases where a majority of employees so desire. *See National Tube Co.*, 76 NLRB at 1041, stating that:

had Congress desired to deprive the Board of all discretion in matters [involving creation of separate craft units], it had only to adopt language similar to the mandatory craft proviso contained in the New York State Labor Relations Act.²¹ Although this was urged at the hearing on the bill, Congress saw fit not to enact it into Law.

18. M.G.L. c. 150E, §3 provides in relevant part that:

The commission shall prescribe rules and regulations and establish procedures for the determination of appropriate bargaining unit which shall be consistent with the purposes of providing for stable and continuing labor relations....No unit shall include both professional and nonprofessional employees unless a majority of such professional employees votes for inclusion in such unit.

19. As set forth in *Mallinckrodt*, the following lines of inquiry are illustrative of the factors the NLRB deems relevant in craft severance cases:

1. Whether or not the proposed unit consists of a distinct and homogeneous group of skilled journeymen craftsmen performing the functions of their craft on a non-repetitive basis, or of employees constituting a functionally distinct department, working in trades or occupations for which a tradition of separate representation exists.

2. The history of collective bargaining of the employees sought and at the plant involved, and at other plants of the employer, with emphasis on whether the existing patterns of bargaining are productive of stability in labor relations, and whether such stability will be unduly disrupted by the destruction of the existing patterns of representation.

3. The extent to which the employees in the proposed unit have established and maintained their separate identity during the period of inclusion in a broader unit, and the extent of their participation or lack of participation in the establishment and maintenance of the existing pattern of representation

and the prior opportunities, if any, afforded them to obtain separate representation.

4. The history and pattern of collective bargaining in the industry involved.

5. The degree of integration of the employer's production processes, including the extent to which the continued normal operation of the production processes is dependent upon the performance of the assigned functions of the employees in the proposed unit.

6. The qualifications of the union seeking to "carve out" a separate unit, including that union's experience in representing employees like those involved in the severance action.

Id. at 397-398.

20. Section 9(b)(2) of the NLRA states:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided, That the Board shall not . . . (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation .*

21. *See* note 17, *supra*.

Conclusion

In sum, we find that a separate craft unit election in the petitioned-for unit is appropriate because, as discussed above, the record shows that the petitioned-for unit of licensed plumbers is a craft unit and the petitioner explicitly seeks a self-determination election among the plumbers who have not previously exercised that right. Under these circumstances, we hold that, in the context of a Board proceeding that raises a question concerning representation, Section 5(b) confers upon this group of licensed plumbers the right to vote on their continued inclusion in a mixed unit of craft and non-craft employees, regardless of whether they meet the traditional two-part severance standard.

Direction of Election

Based on the record and for the reasons stated above, we conclude that a question has arisen concerning the bargaining unit placement and the representation of licensed plumbers employed by the MBTA.

We find that the following employees within the meaning of Section 2 of the Law constitute the appropriate voting group:

All full-time and regular part-time licensed plumbers employed by the Massachusetts Bay Transportation Authority excluding all managerial confidential and casual employees and all other MBTA employees.

IT IS HEREBY DIRECTED that an election shall be held for the purposes of determining: 1) whether a majority of the craft employees in the above-described voting group desire to be included in an overall bargaining unit consisting of both craft and non-craft employees that is represented by Local Union 589, Amalgamated Transit Union, AFL-CIO, CLC; and 2) if a majority vote against such inclusion, whether a majority of the voting group wish to be represented for the purposes of collective bargaining by Local Union 589, Amalgamated Transit Union, AFL-CIO, CLC or by the Independent Association of MBTA Plumbers, or by no employee organization.

The eligible voters shall include all the employees in the voting group whose names appear on the MBTA's payroll for the payroll period for the week ending the Saturday preceding the date of this decision and who have not since quit or been discharged for cause. This list must be either electronic (e.g. Microsoft Access or Excel) or in the form of mailing labels.

All eligible voters shall receive a ballot that asks the following two questions:

1. Do you desire to be included in an overall bargaining unit consisting of both craft employees and non-craft employees that is represented by Local Union 589, Amalgamated Transit Union, AFL-CIO, CLC?
2. Do you desire to be represented for the purpose of collective bargaining by the Local Union 589, Amalgamated Transit Union, AFL-CIO, CLC or by the Independent Plumbers Association or by no employee organization?

If a majority of the employees in the voting group vote "Yes" to question no. 1, above, then they will continue to be represented by

Local Union 589, as part of the existing contractual unit that includes both craft and non-craft employees and the results of question no. 2 will not be counted.

If, on the other hand, a majority of the employees in the voting group vote "No" to question no. 1, above, then, a separate bargaining unit will be established consisting of:

All full-time and regular part-time licensed plumbers employed by the Massachusetts Bay Transportation Authority excluding all managerial confidential and casual employees and all other MBTA employees.

The votes on question no. 2 will be counted to determine whether the eligible voters in the voting group desire to be represented for the purpose of collective bargaining in the above-described unit by the Local 589 or by Independent Association of MBTA Plumbers, or by no employee organization.

To ensure that all eligible voters shall have the opportunity to be informed of the issues and the statutory right to vote, all parties to this election shall have access to a list of voters and their addresses, which may be used to communicate with them.

Accordingly, IT IS HEREBY FURTHER DIRECTED that an election eligibility list containing the names and addresses of all eligible voters must be filed by the Authority with the Executive Secretary of the Division, Charles F. Hurley Building, 19 Staniford Street, 1st Floor, Boston, MA 02114 not later than fourteen days from the date of this decision.

The Executive Secretary shall make the list available to all parties to the election. Failure to submit the list in a timely manner may result in substantial prejudice to the rights of the employees and the parties; therefore, no extension of time for filing the list will be granted except under extraordinary circumstances. Failure to comply with this direction may be grounds for setting aside the election, should proper and timely objections be filed.

SO ORDERED.

[See Appendices on next two pages.]

APPENDIX A - Unions Covered by Collective Bargaining Agreements with the MBTA

The following lists the various unions bargaining with the Authority, together with a general description of the work falling within the jurisdiction of each.

Designation of Union	Year First Contract	Work Jurisdiction	Number of Employees
1. Local 589 Amalgamated Transit Union		Operation of all transit vehicles, maintenance of all vehicles except buses and trucks, maintenance of all rights-of-way of the Transportation Department.	3,621
2. Lodge 264 International Association of Machinists & Aerospace Workers	1913	Maintenance and repair of all buses, trucks, automobiles heavy gasoline and diesel powered equipment. Also machine work shop.	438
3. Local 6 Office & Professional Employees International Union	1956	Office work except confidential secretaries and supervisors	69
4. Local 104 International Brotherhood of Electrical Workers	1918	Maintenance and repair of all trolley wires and third (electrified) rails and maintenance and repair of transmission of power	78
5. Local 651 International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers	1918	Maintenance and repair of all heavy iron and steel Engineering and drafting of plans for all equipment, rights-of-way and facilities of the Authority. Inspection of all capital construction projects to insure compliance with MBTA specifications.	6
6. Local 105 American Federation of Technical Engineers	1946		133
7. Local 3 International Brotherhood of Firemen, Oilers, Powerhouse Employees, Operators & Maintenance Men (1 unit)	1934 (Heating)	Seasonal operation and maintenance heating facilities of the Authority during the heating season.	1
8. Local 717 International Brotherhood of Electrical Workers	1919	Maintenance and repair of electric motors, generators and printed circuit cards for electronic vehicle systems.	40
9. MBTA Police Officers Association	1970	Protection of the Authority's property and employees and the riding public using the Authority's facilities.	198
10. MBTA Police Sergeants Association	1994	Protection of the Authority's property and employees and the riding public using the Authority's facilities.	31
11. MBTA Captains & Lieutenants	1998	Protection of the Authority's property and employees and the riding public using the Authority's facilities.	17
12. Local 453 OPEIU-Management Union	1974	Middle management of administrative, technical and professional functions. Investigation and adjustment of claims against the Authority.	351
13. *Local 51 Carpenter's District Council	1919	Fabrication, construction, maintenance and repair of material and buildings made of wood.	23
14. *Local 103 International Brotherhood of Electrical Workers	1919	Maintenance and repair-electrical wiring of facilities and signal systems. Operation of all switches controlling movements of rapid transit cars.	192
15. *Local 534 Boston Cement Masons & Asphalt Layers	1919	Repair and Maintenance of cement work.	3
16. *Local 4 Hoisting & Portable, Power Shovel & Dredge Engineers	1920	Operation of portable shovels and cranes.	4
17. *Local 22 Eastern Massachusetts Laborers	1919	General labor connected with construction and building maintenance.	22
18. *Local 223 International Hod Carriers, Building and Common Laborers	1919	General labor connected with construction and building maintenance.	0
19. *Local 3 Bricklayers & Masons	1919	Brick work and masonry in building maintenance	2
20. *Local 33 United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association	1919	Maintenance, repair and waterproofing of facilities.	3
21. *Local 17 Sheet Metal Workers International Association	1919	Maintenance and repair of sheet metal work on equipment and in facilities.	40
22. *Local 537 Pipefitters	1919	Maintenance and repair - heavy plumbing and steamfitting.	20
23. *Local 1138 Brotherhood of Painters, Decorators and Paperhangers	1919	Painting of facilities and equipment.	33
24. *Local 7 International Association of, Bridge, Structural and Ornamental Ironworkers	1919	Maintenance and repair of rails, elevated structures.	15
25. *Local 6 Insulators and Asbestos Workers	1919	Pipe covering and building insulation work.	2
26. Local 600 MBTA Inspectors Association Surface And Rapid Transit Lines Starters and Inspectors	1980	Supervision of transit employees in the Transportation	318
27. Alliance of Unions of the MBTA	1980	All former unaffiliated supervisory employees	399
28. United Steelworkers of America		Supervisory and professional employees	91

Key: * Affiliated with Building & Construction Trades Council

APPENDIX B - Positions in Local 589's Bargaining Unit

The following positions are listed in Part Six - Wage Rates, of the collective bargaining agreement between the Authority and Local 589 that is effective from July 1, 2003 through June 30, 2006.

Bus Operations/Revenue Department

One Person Operation (Bus)
Revenue Technician
Revenue Collection Agent
Revenue Counting Agent
Vault Agent
Surface Lines Dispatcher

Light Rail Operations

Streetcar Motorperson (LRV)
Streetcar Motorperson, Pilot's Pay (LRV)

Rapid Transit Operations

Motorperson
Motorperson (Blue Line)
Yard Motorperson
Train Attendant
Collector - now Customer Service Agent
Gateperson
Train Clerk
Towerperson
Towerperson (Tower W)
Spare Towerperson

System Wide Maintenance & Improvements

Laborer
Trackperson
Trackperson "A" (Welder)
System Repairer
Maintenance Clerk
Equipment Operator
Plumber

Non-System Wide Maintenance & Improvements

Car Cleaner
Car Shifter
Clerk
Clerk, Accounting
Clerk, Carhouse and Garage
Clerk, Information
Clerk, Receiving
Clerk, Travelers' Assistance
General Helper
General Helper, Temporary
Carhouse Repairer
Schedule Maker
Stockperson, Roving
Traffic Checker
Truck Driver (RTL)
Truck and Tractor Driver (RTL)

In the Matter of CITY OF MALDEN

and

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 888

Case No. MUP-09-5703

67.3 *furnishing information*

January 20, 2011

Kathleen Goodberlet, Hearing Officer

Thomas E. Brennan, Esq. Representing the City of Malden
Harold Jones, Esq. Representing the Service Employees International Union, Local 888

HEARING OFFICER'S DECISION AND ORDER**SUMMARY**

The issue in this case is whether the City of Malden (City) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to bargain in good faith by delaying the provision of information to the Service Employees International Union, Local 888 (Union). I find that the City violated the Law.

STATEMENT OF THE CASE

On November 20, 2009, the Union filed a charge with the Division of Labor Relations (Division) alleging that the City had violated Sections 10(a)(5) and 10(a)(1) of the Law. Following an investigation, the Division issued a complaint of prohibited practice on February 26, 2010, alleging that the City had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain in good faith by delaying the provision of information that is relevant and reasonably necessary for the Union to execute its duties as collective bargaining representative. The City filed its answer on October 6, 2010. The parties submitted a written joint agreement to have the Division render a decision based on the complaint and the answer without a hearing.

FACTS

The City admitted the following facts in its answer:

1. The [City] is a public employer within the meaning of Section 1 of the Law.
2. The Union is an employee organization within the meaning of Section 1 of the Law.
3. The Union is the exclusive bargaining representative for all of the [City's] custodial employees.
4. At a collective bargaining session that took place in the spring of 2009, the Union requested of the [City] information regarding the [City's] use of private contractors to perform work belonging to