

**Tree of Life, Inc., d/b/a Gourmet Award Foods,  
Northeast and Teamsters Local 294, Interna-  
tional Brotherhood of Teamsters, AFL-CIO.**  
Case 3-CA-21569.

September 20, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX  
AND LIEBMAN

On March 9, 2000, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, except as set forth below, and to adopt the recommended Order as modified.

The General Counsel and the Charging Party except to the judge's conclusion that the Respondent did not violate Section 8(a)(1) and (5) when it failed to apply the provisions of the parties' collective-bargaining agreement to temporary employees supplied by Accustaff and other referral agencies performing unit work at the Respondent's facility, and his dismissal of the complaint allegations pertaining to that conduct. On August 25, 2000, the Board issued its decision in *M.B. Sturgis, Inc.*, 331 NLRB No. 173, which overruled *Lee Hospital*, 300 NLRB 947 (1990), and clarified *Greenhoot, Inc.*, 205 NLRB 250 (1973). The Board has decided to remand this issue to the judge for further consideration consistent with *M.B. Sturgis*, including a reopening of the record, if necessary, and the issuance of a supplemental decision concerning, inter alia, whether the supplied employees are included in the unit described in the collective-bargaining agreement.

The judge also found that the Respondent violated Section 8(a)(1) and (5) by failing and refusing to furnish the Union requested information that was relevant and necessary to administer the parties' collective-bargaining agreement. No exceptions were filed to the judge's findings and conclusion regarding this matter, which does not implicate our decision in *M.B. Sturgis*. Accordingly, we sever this uncontested finding from the issues remanded, and we adopt the judge's conclusion and recommended Order concerning this violation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as

modified below and orders that the Respondent, Tree of Life, Inc., d/b/a Gourmet Award Foods, Northeast, Albany, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Delete the final paragraph of the Order, which dismisses the complaint insofar as it alleges violations not specifically found.

IT IS FURTHER ORDERED that the issue of whether the Respondent violated Section 8(a)(1) and (5) by failing to apply the provisions of its collective-bargaining agreement to temporary employees supplied by Accustaff and other referral agencies performing unit work at the Respondent's Albany, New York facility is severed from the rest of this proceeding and remanded to the administrative law judge for appropriate action as noted above.

IT IS FURTHER ORDERED that the administrative law judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

*Alfred M. Norek, Esq.*, for the General Counsel.

*William H. Andrews, Esq.*, of Jacksonville, Florida, for the Respondent-Employer.

*Bruce C. Bramley, Esq.*, of Albany, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on November 16, 1999, in Albany, New York, pursuant to a complaint and notice of hearing (the complaint) issued by the Regional Director for Region 3 of the National Labor Relations Board (the Board) on February 2, 1999. Thereafter, the complaint was amended on April 27, 1999, and again on November 2, 1999. The complaint, based on an original charge filed on October 9, 1998,<sup>1</sup> by Teamsters Local 294, International Brotherhood of Teamsters, AFL-CIO (the Charging Party or Union) alleges that Tree of Life, Inc., d/b/a Gourmet Award Foods, Northeast (the Respondent or GAF) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent failed to apply the provisions of the parties' collective-bargaining agreement to certain temporary employees who performed unit work at the

<sup>1</sup> All dates are in 1998 unless otherwise indicated.

GAF's Albany facility. Additionally, the complaint alleges that the Respondent refused to provide necessary and relevant information to the Union.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party, and the Respondent, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent is a corporation engaged in the wholesale distribution of specialty food products, with an office and place of business located in Albany, New York, where it annually purchased and received goods valued in excess of \$50,000 directly from points located outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Accustaff, Inc., J. J. Young, Enterim Personnel, and TSI are engaged in the business of providing leased or temporary employees to other employers, including the Respondent.<sup>2</sup>

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. Background

At all material times, the Union has been the designated exclusive collective-bargaining representative of the drivers and warehousemen employed by the Respondent at its Albany facility. This recognition has been embodied in a series of collective-bargaining agreements, the most recent of which is effective from May 1999 to April 2002. The parties' agreement relevant here was in effect from April 13, 1996, to April 12, 1999 (GC Exh. 2). The Respondent is a distributor of specialty and gourmet foods to various retail grocery store chains and full-service sales outlets. In September 1998, it employed approximately 100 employees comprised of 70 warehouse workers and 30 drivers. The Respondent's operation is run around the clock with three overlapping shifts.

For approximately 5 years before October 1998, the Respondent has employed leased or temporary employees to assist unit employees with warehouse duties during periods of increased business that often include the Passover holidays. The Union did not voice any objections, primarily because the parties' agreement gives the Respondent the right to schedule part-time and casual workers as needed, and the temporary workers rarely were employed more than 30 days.<sup>3</sup> Around October 1, Respondent's operations manager, Irwin Rodriguez, met with Union Business Agent Kevin Hunter. Rodriguez informed Hunter that because of increased business, GAF had contracted with Accustaff to bring approximately 30 temporary employees into the warehouse to assist unit employees in their daily work

<sup>2</sup> The General Counsel, after the opening of the hearing, made a motion to remove Accustaff, Inc., Party-in-Interest, from the caption in the subject complaint. I granted the unopposed motion, and this decision will only concern the parties noted above.

<sup>3</sup> The parties' agreement contains at art. III, a union-security clause, requiring employees to join the Union after 30 days of employment.

assignments.<sup>4</sup> Hunter apprised Rodriguez that he needed to get together with the Union to sign up these individuals as it was anticipated that a number of them would be working in excess of 30 days.<sup>5</sup> Hunter asked Rodriguez to provide the Union with a list of the temporary employees. Rodriguez faxed a current seniority list of full-time employees to Hunter but did not provide a list containing the names of the temporary employees.

On October 8, Rodriguez apprised Hunter that the Respondent could not provide a list of the temporary employees and that he should do what he had to do. By letter dated October 13, the Union requested Respondent to provide a list of the names and addresses of all individuals performing driving or warehouse work at GAF broken down by hours and weeks of work, commencing October 1. The list sought the names and addresses of all bargaining unit employees, as well as any and all additional individuals performing driving or warehouse work whether those individuals are directly employed by Respondent or by some other related or unrelated enterprise (GC Exh. 3). The Respondent did not respond to the letter or provide any information to the Union.

#### B. The 8(a)(1) and (5) Violations

##### 1. Application of the parties' agreement

The General Counsel alleges in paragraph 8 of the complaint that since October 1, Respondent has been party to agreements with Accustaff and other business entities to provide temporary employees to Respondent to perform warehouse work at the Albany facility. Since the temporary employees have performed the same work while being supervised and working side by side with unit employees, the General Counsel asserts that Respondent has been a joint employer with Accustaff and the other business entities of the temporary employees working at the Albany facility. In paragraph 9 of the complaint, the General Counsel alleges that the Respondent has failed to apply the provisions of the parties' agreement to the temporary employees of Accustaff and the other business entities that perform unit work at the Albany facility.

The evidence discloses that Accustaff and the other business entities recruit and hire the temporary employees. The Respondent and the referring agencies agree to a set fee for the use of the temporary employees, but the agencies determine the temporary employees' hourly wages. The agencies provide workers' compensation and make all relevant payroll deductions and contributions. The temporary employees sign a generic timecard, also used by GAF employees, that is then forwarded to the referring agencies who compute the hours worked before issuing a check to the temporary employees. The Respondent assigns work and directs the temporary em-

<sup>4</sup> The number of temporary employees peaked in mid-October 1998. By March 1999, the complement was substantially reduced but temporary workers still remained in all of the warehouse departments.

<sup>5</sup> The record shows that 55 Accustaff employees were referred to Respondent between September 28 and January 21, 1999. Of these employees, 17 were employed in excess of 30 days. One employee, Charles Cammon, who was a temporary employee from November 17 to February 5, 1999, became a full-time employee on that date and joined the Union. He remained a full-time employee of GAF until he resigned on November 10, 1999, to take another job (GC Exh. 4).

ployees, establishes labor relations policies, and uses its own supervisors to exercise day-to-day control over the temporary employees. Indeed, Respondent acknowledges that no referral agency supervisory personnel are involved in the daily supervision of the temporary employees. Moreover, the Respondent also determines hours and sets the work schedules including directing the temporary employees to work overtime on Saturdays. Based on the forgoing, I conclude that the Respondent and the referring agencies codetermine the temporary employees' essential terms and conditions of employment, and therefore are joint employers. *Capitol EMI Music*, 311 NLRB 997, 998 (1993).

The Board has held that employees of a joint employer will not be combined with employees of a single employer in a single unit unless both parties provide consent. See *Connecticut Yankee Atomic Power Co.*, 317 NLRB 1266 (1995); *Brookdale Hospital Medical Center*, 313 NLRB 592 (1993); *Flatbush Manor Care*, 313 NLRB 591 (1993); and *Greenhoot, Inc.*, 205 NLRB 250 (1973).

In the subject case, Accustaff and the other business entities hire the temporary employees and prepare all relevant payroll deductions and contributions. There is no evidence that Accustaff or the other referring agencies ever consented or agreed to include the temporary employees in the unit represented by the Union. Moreover, there is no evidence that the Respondent and the referring agencies discussed the issue nor is there any evidence that GAF has provided the requisite consent to include the temporary employees in the parties' collective-bargaining unit.

Under these circumstances, and following Board precedent, the temporary employees are ineligible to become part of the Respondent's bargaining unit. It follows, therefore, that the Respondent did not fail to apply the provisions of the collective-bargaining agreement to the temporary employees. Accordingly, I recommend that the 8(a)(1) and (5) allegations in paragraph 9 of the complaint be dismissed.<sup>6</sup>

## 2. The information request

The General Counsel alleges in paragraph 10 of the complaint that on October 13, the Union requested the Respondent to provide certain information to the Union (GC Exh. 3). The request was broken down into two separate parts. First, the Union requested the names and addresses of all individuals performing driving or warehouse work that were currently in the bargaining unit. The same information was requested for individuals who also performed driving or warehouse work, regardless of whether those individuals are employed directly

<sup>6</sup> The General Counsel argues, principally relying on *Sterling Nursing Home*, 316 NLRB 413 (1995), that the Respondent has violated the Act. In my opinion, the reliance on that case is misplaced for two reasons. First, the *Greenhoot* consent issue was not raised in that case. In fact, Board Member Cohen specifically noted that fact in fn. 1 of the decision. Second, the evidence in *Sterling* revealed that the respondent's bargaining representative repeatedly told the union that "he would 'take care of' or 'straighten out' the problem of coverage of the referral employees under the current bargaining agreement." Thus, the implied consent in that case is conspicuously missing in the subject case.

by GAF or by some other related or unrelated entity or enterprise. The evidence discloses that the Respondent did not respond or provide any information to the Union.

In respect to the Union's request for information regarding bargaining unit employees, it is well established that an employer has an obligation to supply requested information that is reasonably necessary to the exclusive collective-bargaining representative's responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). The information requested by the Union, as it concerns bargaining unit employees, is presumptively relevant to collective bargaining. *Harco Laboratories*, 271 NLRB 1397 (1984). The Respondent has not rebutted this presumption. Nor did they raise issues of relevance or lack of necessity in denying the Union's information request. For these reasons, I find that the Union is entitled to the information regarding bargaining unit employees and conclude in failing to respond and refusing to provide the information, Respondent violated Section 8(a)(1) and (5) of the Act.

With respect to the portion of the information request involving the temporary employees', the Union apprised the Respondent that it was necessary to administer the terms and conditions of the existing collective-bargaining agreement, including the grievance and arbitration procedures contained therein. In this regard, employees Oliver Preville and Shawn McCumber credibly testified that prior to the arrival of the temporary employees around October 1, they both were working 50 to 55 hours a week. After October 1, their work hours were cut to approximately 45 hours per week. Additionally, prior to October 1, both employees were afforded the opportunity to work Saturday overtime while after that date, their Saturday overtime hours were substantially reduced. Both employees testified that this was because the temporary employees were given the opportunity to work Saturday overtime to the exclusion of the unit employees. Indeed, Preville filed a grievance contesting the denial of his right to work Saturday overtime and asserted his seniority should give him the assignment over the temporary employees (GC Exh. 7). Lastly, both employees credibly testified that job bidding and the ability to receive preferred jobs was impacted by the presence of the temporary employees at the Albany facility after October 1.

For all of the forgoing reasons, I find that the erosion of unit work effectively made the Union's articulated need for the information necessary and relevant. Additionally, I conclude that the information was necessary to the Union's efforts to ascertain whether the Accustaff employees were or were not within the unit it represented. Accordingly, I find that when the Respondent refused to provide the information regarding the temporary employees, it violated Section 8(a)(1) and (5) of the Act. *Continental Winding Co.*, 305 NLRB 122 (1991).

## CONCLUSIONS OF LAW

1. The Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to furnish the Union with information it requested on October 13, 1998, the Respondent violated Section 8(a)(1) and (5) of the Act.

4. The Respondent did not violate Section 8(a)(1) and (5) of the Act when it failed to apply the provisions of the collective-bargaining agreement to the temporary employees of Accustaff and other referral agencies performing unit work at the Albany facility.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In this regard, I shall recommend that Respondent be ordered to promptly provide the Union with the information that it requested on October 13, 1998.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

#### ORDER

The Respondent, Tree of Life, Inc., d/b/a Gourmet Award Foods, Northeast, Albany, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Teamsters Local 294, International Brotherhood of Teamsters, AFL-CIO, by failing and refusing to furnish it with information that was requested on October 13, 1998, which information is relevant and necessary to administer the collective-bargaining agreement they have with the Respondent.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union the information it requested on October 13, 1998.

(b) Within 14 days after service by the Region, post at its facility in Albany, New York, copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided

<sup>7</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>8</sup> If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the Na-

ional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 13, 1998.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Teamsters Local 294, International Brotherhood of Teamsters, AFL-CIO, by refusing to furnish, on request, with information necessary for, and relevant to the Union's function as the exclusive bargaining representative of certain of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish the Union with the information it requested on October 13, 1998.

TREE OF LIFE, INC., D/B/A GOURMET AWARD  
FOODS, NORTHEAST