UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

WASTE MANAGEMENT, INC. d/b/a
PALMDALE DISPOSAL, AND
ARKLIN BROS. d/b/a WASTE
MANAGEMENT OF PALMDALE [1]/

Joint Employer

and

Case No. 31-RC-7798

OUTSOURCE INTERNATIONAL, INC.
d/b/a TANDEM STAFFING [2]/

Joint Employer

and

PACKAGE & GENERAL UTILITY DRIVERS
LOCAL 396, INTERNATIONAL BROTHER-
HOOD OF TEAMSTERS

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

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

2. The Employers are engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. [3]/

3. The labor organization involved claims to represent certain employees of the Employers.

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

5. The following employees of the Employers constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: [4]/

INCLUDED: All helpers/swampers employed by Waste Management, Inc. d/b/a Palmdale Disposal, and Arklin Bros. d/b/a Waste Management of Palmdale and by Outsource International, Inc., d/b/a Tandem Staffing, as joint employers, at the Waste Management facility at 1200 W. City Ranch Road, Palmdale, California.

EXCLUDED: Office clerical employees, professional employees, managerial employees, all other employees, guards and supervisors, as defined in the Act.

DIRECTION OF ELECTION [5]/

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision in this matter, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.[6]/ Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated

payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Package & General Utility Drivers Local Union 396, affiliated with International Brotherhood of Teamsters, AFL-CIO.**

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *National Labor Relations Board v. Wyman-Gordon Company*, 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of an election eligibility list, containing the **FULL** names and addresses of all the eligible voters shall be filed by the Employers with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the office of Region 31, 7th Floor, 11150 West Olympic Boulevard, Los Angeles, California 90064-1824, on or before **December 9, 1999**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board,

addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by **December 16, 1999**.

DATED at Los Angeles, California this 2nd day of December, 1999.

/s/ Byron B. Kohn

Byron B. Kohn, Acting Regional Director
National Labor Relations Board
Region 31
11150 West Olympic Blvd., Suite 12100
Los Angeles, CA 90064-1824

FOOTNOTES

1/ The name of this Employer appears as corrected at the Hearing.

2/ The name of this Employer appears as corrected at the Hearing.

3/ I take administrative notice of the Post-Hearing Stipulation concerning jurisdiction. Based upon that stipulation, and the record of the hearing in this matter, I find as follows:

Waste Management, a Delaware Corporation, with an office and principal place of business in Palmdale California, is engaged in the business of solid waste collection. Waste Management annually purchases and receives goods and services within the State of California valued in excess of $50,000 directly from entities located outside the State of California.

Outsource International, d/b/a Tandem Staffing, a Florida corporation, with offices and principal places of business in various locations in California and at other locations nationwide, is engaged in the business of providing temporary staffing services. Outsource International, d/b/a Tandem Staffing annually provides goods and services valued in excess of $50,000 directly to entities within the State of California from outside the State of California.

Based on the foregoing, I find that each employer satisfies the statutory and the Board's discretionary standard for asserting jurisdiction over non-retail enterprises. ***Siemons Mailing Service,*** 122 NLRB 81 (1959). For the reasons discussed below in footnote 4, I find that the employers are joint employers.

4/ The Petitioner seeks to represent all helpers/swampers employed by Waste Management, Inc., d/b/a Palmdale Disposal and Arklin Brothers Enterprises, d/b/a Waste Management of Palmdale (hereinafter referred to as "Waste Management") and by Outsource International, Inc., d/b/a Tandem Staffing (hereinafter referred to as "Tandem"), at the Waste Management facility located at 1200 W. City Ranch Road, Palmdale California. (The facility at issue herein will hereinafter be referred to as "the Palmdale disposal facility.")

In May of 1999, Waste Management Inc. made a stock purchase of Arklin Brothers Enterprises, thereby becoming the owner/operator of the hauling and landfill operation at the Palmdale disposal facility, which previously had been owned and operated by Arklin Brothers Enterprises. At that point, Waste Management became the employer of the employees at that Palmdale disposal facility. At the time of the stock purchase, there were approximately 120 employees working in the hauling operation at the Palmdale facility, including about 35 employees who worked as "helpers/swampers."

On September 27, 1999, the Petitioner filed a Petition in Case 31-RC-7792, seeking to represent employees of Waste Management at the Palmdale disposal facility, including the helpers/swampers. After a joint employer issue was raised with respect to the helpers/swampers, the Petitioner and Waste Management entered into a stipulation for an election in a bargaining unit which excludes the category of helpers/swampers. Thereafter, Petitioner filed the instant petition seeking to represent a unit consisting of the helpers/swampers. The helpers/swampers assist drivers on commercial and residential routes. They perform tasks such as opening and closing gates, rolling out containers, and picking up overflow trash near containers.

After Waste Management purchased Arklin Brothers, it embarked upon an effort to make cost-saving changes in the Palmdale disposal operation. As part of this effort, Waste Management made changes to the drivers' routes, redesigned the format of the route sheets, and made changes in its equipment. These changes resulted in a reduction in the number of helpers/swampers needed by Waste Management. The number of helpers/swampers desired by Waste management began to fluctuate. On July 2, 1999,

Waste Management terminated the 27 to 30 employees classified as helpers/swampers, who previously had been employed by Arklin Brothers, and entered into an arrangement with a temporary agency, called either Sage Temporary Employment or Sage Employment Service ("Sage"), to provide the helper/swamper labor. The Waste Management operations manager informed the helpers/swampers that Waste Management was severing their relationship, but there still was work for them so if they wanted to continue working, they could work for Sage, who was present to sign them up as employees. Actually, it was the Waste Management operations manager who distributed the employment papers for the temporary employment agency to the helpers/swampers and directed them to fill them out. About two weeks later, Sage determined that it was not really equipped to provide labor services to this type of enterprise and it ceased providing the labor services of the helpers/swampers to Waste Management.

At that point in time, Waste Management arranged for Tandem, an employment agency with whom Waste Management has an ongoing relationship at other Waste Management locations, to take over the provision of the helper/swamper labor services at the Palmdale disposal facility. Waste Management informed the helpers/swampers that Tandem was now providing the temporary services previously provided by Sage and that they should meet with the Tandem representative, who was present, and complete the employment applications and other necessary employment papers. The helpers/swampers continued to perform the same work, using Waste Management trucks, wearing Waste Management uniforms, and reporting to the same supervisor after Sage, and then Tandem, became the provider of their services.

The Petitioner asserts that Tandem and Waste Management are joint employers. The Board finds separate entities to be joint employers when "one entity shares or codetermines those matters governing the terms and conditions of employment of the other entity's employees, such as hiring, firing, discipline, supervision, and direction." *G. Wes Limited Company,* 309 NLRB 225 (1992), citing *Laerco Transportation & Warehouse,* 269 NLRB 324, 325 (1984). The Board will find an employer to be a joint employer when the employer "meaningfully affects matters relating to the employment

relationship such as hiring, firing, discipline, supervision, and direction." *Southern California Gas Co.,* 302 NLRB 456, 461 (1991). As the Board noted in *Sun-Maid Growers,* 239 NLRB 346, 351 (1978), it need only conclude that an employer exercises effective control over the working conditions to find that the employer is a joint employer. The Board determines the issue of joint employer upon the totality of the facts of each case. *Cabot Corporation,* 223 NLRB 1388 (1976).

In the instant case, the record reveals that Tandem has the authority to determine the wage rates and benefits of the helpers/swampers. Tandem issues the paychecks for the helpers/swampers based upon the hours reported by Waste Management. Tandem withholds taxes from the paychecks and makes the appropriate contributions for workers' compensation and unemployment insurance. The paychecks are distributed to employees by Waste Management.

The only employee who testified, testified that he started to work at the Palmdale disposal facility in 1989. In June 1999, he became confused about the name of the employer. Although the name on the paystub changed, to him, it seemed that he continued to be employed at all times by Palmdale Disposal. He continued to work at the same location, with the same co-workers, the same equipment and the same supervisor.

While directly employed by Waste Management, the helpers/swampers were supervised by a Waste Management supervisor. There is no evidence that the employees were ever told that the Waste Management supervisor would no longer be their supervisor after Waste Management arranged for Sage and then Tandem to provide their labor services. Indeed, the record reveals that after Tandem became the provider of the helper/swamper personnel, the Waste Management supervisor continued to direct which helper/swamper would go with which driver. The only employee who testified, testified that he has never been given directions about the job by any representative of Tandem and that, in fact, the only time he ever saw any representative of Tandem was when he was required to complete the employment documents for Tandem in mid-July and on those occasions when he would observe a Tandem representative bring the paychecks to the facility.

The record contains evidence of only one disciplinary action during the relevant period of time. According to the Waste Management District Manager, an employee was "surly" to the Waste Management operations manager in front of others and, therefore, the Waste Management operations manager told the employee that he would inform the temporary employment agency that Waste Management no longer wanted his services because of his surliness. At the time his employment was terminated, the employee was employed through Sage. Thereafter, the Waste Management district manager asked the Waste Management operations manager to re-assess the situation. According to the employee, he did return to work after reaching an understanding with the Waste Management operations manager. The employee testified that he was first told by the Waste Management operations manager that he would be terminated and that he had no conversation with any representative of Tandem about returning to work.

This employee was later laid off in August 1999. At that time, the Waste Management operations manager told him not to worry because he would be recalled in two weeks. The employee has not had any contact with any representative from Tandem about reassignment to any other work location. In fact, he testified that he has been unable to contact Tandem to seek other work since he does not even have their telephone number. Tandem's director of sales, operations and personnel for the district which includes the Palmdale disposal facility testified that although he is aware that helpers/swampers have been terminated from the Palmdale Disposal facility within the last month or so, he has no knowledge of any involvement by Tandem in the decision or effectuation of that action. There is no evidence that Tandem has had any involvement in the determination of which helpers/swampers would be laid off as their numbers have been reduced.

Although there are factors which would tend to negate the status of Waste Management as a joint employer (such as the fact Tandem Services maintains the right to set the wages and benefits for employees, and withholds Federal and state payroll deductions), the record reveals that Waste Management retains and exercises significant authority to control working conditions of the helpers/swampers. Thus, it is Waste Management that arranged for the helpers/swampers to be hired by Tandem Services. It is Waste Management, not Tandem Services, that assigns helpers/swampers to assist drivers on

particular routes or assigns them to clean up in the yard. I also especially note the absence of any direct supervision by Tandem Services and the perception by the only employee witness that he continued to be supervised by a supervisor of Waste Management. There is no evidence that Tandem Services possesses or exercises any authority to schedule, assign or direct the work of the helpers/swampers. Indeed, it appears that it is Waste Management that determines the hours of work and whether employees will work overtime. In this regard, the district director for Tandem testified that Tandem makes payments based upon the time sheets provided by Waste Management and if there is overtime reflected on those sheets, they pay for overtime.

I also note that Tandem does not have anybody assigned to be physically present at the Palmdale disposal facility. Although Tandem had a representative ("vendor on premises," or "VOP") assigned to the Waste Management location in Burbank, who had some responsibilities with respect to the Palmdale disposal facility, the individual who replaced that VOP in late August or early September 1999 does not have any responsibility with respect to the Palmdale disposal facility.

As noted above, Waste Management has exercised the right to terminate or at least to effectively recommend the disciplinary removal of a particular employee from its premises and that employee thereafter has had no further relationship with Tandem. There is no evidence that any helper/swamper formerly employed by Waste Management continued to be employed by Tandem Services at other locations after their services were no longer needed at the Palmdale disposal facility. Also, there is no evidence that Tandem determines or even has participates in the selection of which helpers/swampers will be laid off as the need for such employees diminishes.

By controlling the day-to-day work performance of the helpers/swampers, Waste Management exercises authority over significant aspects of their employment. See, *Sun Maid,* supra at 351. Also, since Waste Management determines the hours of work and assigns the helpers/swampers to work with different types of equipment and provides the appropriate safety equipment, like gloves, it is evident that Waste Management exercises authority over employment conditions which are within the area of mandatory collective

bargaining. *Sun Maid Growers of California v. NLRB,* 618 F.2d 56, 59 (9th Cir. 1980). Therefore, based on the foregoing and the record as a whole, I conclude that Tandem Services and Waste Management exercise sufficient power over the helpers/swampers at the Palmdale disposal to be considered joint employers. *Holyoke Visiting Nurses Association,* 310 NLRB 684 (1993).

My conclusion that Tandem and Waste Management are joint employers is complicated by the fact that there is evidence that Waste Management has been dissatisfied with the services of Tandem and has notified Tandem that it intends to use a different temporary labor provider at two of its locations, including the Palmdale disposal facility. According to the District Manager for Waste Management, they are in the process of talking with other temporary employment providers and believe that they probably will switch providers in the first week of December. The Tandem district director of sales, operations and personnel testified that Tandem has attempted to identify and correct the matters that concerned Waste Management (primarily a lack of communication and a high turnover of Tandem representatives with whom Waste Management interacts) and that, to the extent that Tandem is able to continue to do business with Waste Management, it will improve these areas. In fact, he testified that Tandem has not given up trying to maintain the relationship with Waste Management.

At the time of the hearing in this matter, Tandem was a joint employer of the helpers/ swampers at the Palmdale Disposal facility. It is not evident from the record that Waste Management will actually cease using the services of Tandem. The Waste Management district manager testified that Waste Management has contemplated using another temporary employment service to provide labor to the Palmdale disposal facility. When asked whether or not they had yet made a decision whether or not they will utilize a different company he testified that "[w]ell, at this point, I believe, you know, we have put Tandem on notice that we are going to move to another supplier and I believe that will probably happen the first week in December." At the time of the hearing, Waste Management had not yet selected any other particular company. Therefore, the fact that Waste Management has seriously contemplated changing the identity of the employment agency it uses for the provision of the helpers/swampers, does not alter my decision to

direct an election in a unit of helpers/swampers employed by Waste Management and Tandem as joint employers based on the evidence in the record at the time of the hearing.

The Employers also assert that it would be inappropriate to direct an election herein since the proposed unit of helpers/swampers is contracting or vanishing. The Board will not direct an election at a time when "permanent layoff is imminent and certain." *Larson Playwood Co*., 223 NLRB 1161 (1976).

The record reveals that Waste Management is in the process of making significant changes in its equipment which diminishes the need for helpers/swampers. Waste Management has ordered and is receiving new trucks which are more automated and is in the process of having some of the older equipment retrofitted. Although the district manager for Waste Management testified that he expected that by December 1, 1999, there would be no need for helpers/swampers, the record reveals uncertainty as to whether the delivery of the new equipment and the retrofitting of the old equipment will be completed by this target date. For example, the Waste Management district manager testified that he expects modifications to certain trucks to be completed by the end of November, if he can provide the trucks to the supplier on a timely basis and if there are no major problems caused by the difference in the styles of truck bodies needing modifications. In its post-hearing brief, Waste Management asserts that it expects additional new equipment "to begin arriving by the end of December through the first quarter of next year, <u>eliminating any potential future need for swampers in the hauling operation.</u>" Thus, it appears that notwithstanding its assertion that it expects to have all modified equipment in place before December 1, 1999, completely eliminating any need for swampers, Waste Management anticipates having some continued need for helpers/swampers through the first quarter of 2000.

Furthermore, the record reveals that Waste Management will have a continued need for helpers/swampers in connection with the county fair, which lasts from one to two weeks a year, and possibly in connection with the city's "clean-up days," which occur four times each year. In fact, the record reflects that at least one helper/swamper who

previously had been laid off from the Palmdale disposal facility was recalled just prior to the hearing to assist in connection with city "clean-up days."

At the time of the hearing, there were six helpers/swampers employed at the Palmdale disposal facility. Although the need for persons to perform helper/swamper duties has generally decreased, the record reveals that the need for persons to perform swamper duties does fluctuate. There have been occasions when helpers/swampers were laid off due to the elimination of the need for that position on particular routes, yet shortly thereafter Waste Mangement asked Tandem to provide additional helpers/swampers to work cleaning up the yard. Presumably the need for this type of assistance will continue.

I particularly note that Waste Management is looking for another temporary employment agency to provide helpers/swampers at the Palmdale disposal facility as a replacement for Tandem. It is difficult to understand why Waste Management would be actively seeking a replacement temporary employment agency to provide helpers/swampers if it definitely is not going to continue to use those employees. I conclude that this action is inconsistent with the assertion that Waste Management will no longer need the services of helpers/swampers. Compare, *Larson Playwood Co*., supra at 1161 (1976), in which the Board noted that the Employer had taken no action inconsistent with its assertion that the corporation would be liquidated imminently. As the Petitioner notes, mere expectation or speculation as to future operations cannot deprive employees of their rights to an election. I conclude that the Employers have not established that the total cessation of the need for helpers/swampers is definite and imminent or that it would be permanent. In these circumstances, Waste Management's stated intention to cease using helpers/swampers at the Palmdale disposal facility is too speculative a basis to bar an election. See, *Canterbury of Puerto Rico,* 225 NLRB 309 (1976).

Both employers argue that this case is governed by the *Greenhoot, Inc.*, 205 NLRB 250 (1973) line of cases which hold that the Board will not certify a multi-employer bargaining unit without the employers' consent. This argument is misplaced. In *Greenhoot*, the petitioner therein sought to represent employees in a unit comprised of engineers and maintenance employees employed in 14 separate office buildings, each

owned by a separate owner. Since the Board found that each of the building owners was a joint employer with Greenhoot, which was engaged in property management, the petitioned-for unit would be a multi-employer unit. The Board declined to establish a multiemployer unit absent a showing that there was a consensual basis for the unit. In subsequent cases, the Board relied on *Greenhoot* in finding that it would not include employees of a joint employer in a unit with employees of a single employer. *Brookdale Hospital Medical Center,* 313 NLRB 592, 593 (1993). In their post-hearing briefs, Waste Management and Tandom cite cases, such as *Lee Hospital,* 300 NLRB 947, 948 (1990) and *Hexacomb Corp.,* 313 NLRB 983 (1994), holding that the Board does not include employees in the same unit if they do not have the same employer, absent employer consent. Those cases are entirely inapplicable to the situation herein. In the instant case, the Petitioner does not seek to include the helpers/swampers, who are employees of joint employers, in a unit of employees employed solely by Waste Management. The Petitioner does not seek to include groups of employees who have different employers in the same unit. Rather, the Petitioner seeks a unit comprised solely of the helpers/swampers, all of whom are employees of the same joint employers. Therefore, I reject the argument that *Greenhoot* precludes the direction of an election in this case.

The Employers also assert that the petition should be dismissed because the helpers/ swampers are temporary employees. In support of this argument, Tandem argues that Waste Management has informed Tandem that it will be terminating its services and that there is no reasonable expectation that any Tandem employees will continue their assignments at Waste Management.

Generally, as the Board noted in *Ameritech Communications*, 297 NLRB 654, 655 (1990), citing *Personal Products Corp*., 114 NLRB 959, 960 (1955), "temporary employees, who are employed on the eligibility date, and whose tenure of employment remains uncertain are eligible to vote." However, temporary employees who are hired for a definite limited period and who are then discharged or laid off without a reasonable expectation of recall are not eligible to vote. *Meier & Frank Co.*, 272 NLRB 464 (1984).

Since the helpers/swampers were not hired for a definite limited period I do not find that they should be ineligible to vote as temporary employees. Moreover, since the record reveals that helpers/swampers who have been laid off have subsequently been recalled, it cannot be said that they do not have a reasonable expectation of recall. In this regard, I also note that an employee testified that when he was laid off in August, the Waste Management manager told him that he would be recalled. The identity of the helpers/ swampers has remained the same as Waste Management made transitions from being the sole employer, to using first Sage and then Tandem as an employment agency. Therefore, even if Waste Management were to substitute a different employment agency for Tandem, the helpers/swampers would have a reasonable expectation of continued employment. For the foregoing reasons, I reject the contention that the petition should be dismissed because the helpers/swampers are temporary employees.

Tandem asserts that an election should not be directed in the petitioned-for unit because the helpers/swampers do not share a sufficient community of interest with other Waste Management employees. Thus, Tandem argues that the skill level and job functions of the helpers/swampers are different than the skill level and job functions of the drivers employed by Waste Management. Since the petitioned-for unit does not include helpers/swampers in a unit which includes other Waste Management employees, this argument has no merit.

There are approximately six (6) employees in the unit found appropriate.

5/ In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

6/ The Petitioner argues that since the petition it initially filed in Case 31-RC-7792 included the classification of helpers/swampers, the eligibility date should be determined based upon that original petition. I find no merit to that argument.

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