

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

In the Matter of

EMPIRE PACKING CO., L.P.,  
D/B/A CINCINNATI PROCESSING

Employer

and

Case 9-RC-16855

UNITED FOOD AND COMMERCIAL  
WORKERS UNION LOCAL 1099, AFL-CIO

Petitioner

**SUPPLEMENTAL DECISION AND ORDER**

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board, in which the Petitioner, contrary to the Employer, maintained that employees supplied to the Employer by temporary employment agencies should be excluded from the appropriate unit. Thereafter, on March 26, 1997, the undersigned issued a Decision and Direction of Election, herein called the Decision, excluding employees supplied by temporary employment agencies from the unit. On April 4, 1997, the Employer filed with the Board a Request for Review of the Decision which was granted by the Board's Order dated April 22, 1997. On the same date, an election was conducted pursuant to the Decision and the ballots were impounded. The ballots of the employees supplied by temporary agencies were challenged. By Order dated September 14, 2000, the Board remanded this proceeding to the undersigned for further consideration consistent with its decision in *M.B. Sturgis, Inc.*, 331 NLRB No. 173 (2000).

On October 24, 2000, the parties filed a joint motion to reopen the record to receive a supplemental stipulation of fact. The parties' joint motion is hereby granted and their supplemental stipulation is hereby received. In accordance with the supplemental stipulation, I find that for approximately the past 2 years, the Employer has not used any temporary agency employees at its Fairfield, Ohio facility and has no plans to use any in the near future.

Upon the entire record in this proceeding, <sup>1/</sup> the undersigned finds:

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<sup>1/</sup> On October 24, 2000, the Petitioner timely filed a supplemental brief. The Employer did not avail itself of the opportunity to file a supplemental brief. In arriving at my decision herein, I have carefully considered all of the briefs submitted by the parties in this matter including their initial post-hearing briefs, their briefs on review and their supplemental briefs.

The Employer is engaged in processing pork chops at a facility in Fairfield, Ohio. On March 17, 1997, the date of the hearing in this matter, the Employer employed approximately 35 employees in the unit found appropriate. There is no history of collective bargaining affecting any of the employees involved in this proceeding.

The Petitioner seeks to represent a unit of production and maintenance employees employed exclusively by the Employer at its Fairfield, Ohio facility. Because the Employer does not contend that a production and maintenance unit is inappropriate, I find that it is an appropriate unit for purposes of collective bargaining. However, the Employer maintains that the production and maintenance unit, in addition to the employees sought by the Petitioner, must also include production employees furnished by supplier employers (temporary employment agencies). At the time of the hearing, the Employer exclusively employed approximately 23 production and maintenance employees and about 12 supplied production employees.<sup>2/</sup> The supplier employers did not consent to the inclusion of the supplied employees in a unit with employees exclusively employed by the Employer.

At its Fairfield facility, the Employer received pork loins which were processed into pork chops and packaged for retail sale by its customers. The loins were sawed into chops and the chops were trimmed, fed through a scraping machine, placed on a styrofoam backing, wrapped with plastic film and boxed for shipment to the Employer's customers. Five or six exclusively employed employees operated the saws but the supplied employees did not perform that function. Exclusively employed employees and the supplied employees performed all other production tasks.

The supplied employees were hired by and carried on the payroll of the supplier employers who were responsible for their payroll taxes and workers compensation. The Employer determined the wage rate for the supplied employees and paid the supplier employers a percentage (in excess of 100 percent) of that wage rate as compensation for the services of the supplied employees. The wage rates for the supplied employees were the same as those for the exclusively employed employees. The supplied employees' work at the Employer's facility was supervised and directed by the Employer because the supplier employers did not furnish supervision for them. The supplied employees worked in the same job classifications, during the same hours, under the same work rules and supervision as the exclusively employed employees. The Employer provided paid holidays and vacations to its exclusively employed employees but did not furnish any fringe benefits to its supplied employees. Some of the supplied employees received vacation, retirement benefits and health insurance from their supplier employers.

The exclusively employed employees were subject to a 60 day probationary period. The supplied employees worked for the employer for a period of 90 days after which they were converted to employees exclusively employed by the Employer. No supplied employees worked more than 90 days without such a conversion. Following their conversion, the employees were

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<sup>2/</sup> My factual findings are based on the Employer's operations at the time of the March 17, 1997 hearing and this Decision is drafted using the past tense. Because the Employer no longer uses supplied employees, these factual findings do not necessarily reflect its current operations.

not required to serve a 60 day probationary period. About six or seven of the employees exclusively employed at the time of the hearing had been converted from supplied employee status. Although the Employer could terminate the services of supplied employees, it never did so. The record discloses that about one in eight supplied employees converted to an exclusively employed employee as a result of a high turnover rate among supplied employees.

#### ANALYSIS:

In *M.B. Sturgis*, supra, the Board held that employees jointly employed by a user employer and a supplier employer may be appropriately included in a unit with employees exclusively employed by the user employer even in the absence of the consent of both the user and supplier employers provided that the supplied employees share a sufficient community of interest with the exclusively employed employees. The *Sturgis* Board overruled *Lee Hospital*, 300 NLRB 947 (1990), which previously held that the consent of the supplier and user employers was required in order to combine the two groups of employees in a single unit.

Initially, I must determine whether the Employer and the supplier employers were joint employers of the supplied employees. *M.B. Sturgis*, supra, slip. op. p. 4, Section III(A)(1). There the Board noted that to establish that two or more employers are joint employers, they must share or codetermine matters governing essential terms and conditions of employment by meaningfully affecting matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction. Here the Employer assigned, directed and supervised the work of the supplied employees, determined their wage rates and working hours and could terminate their services. On the other hand, the supplier employers were responsible for hiring the supplied employees, paying their wages, deducting their taxes and paying for their workers compensation. Under such circumstances, I conclude that the Employer and the supplier employers affected and codetermined essential terms and conditions of employment of the supplied employees. Accordingly, I find that they were joint employers of the supplied employees. *TLI, Inc.*, 271 NLRB 798 (1984). See also, *N.K. Parker Transport Inc. and M.K. Parker Transport, Inc.*, 332 NLRB No. 54 (Sept. 29, 2000) (Board found joint employer relationship where user and supplier employer, like here, codetermined supplied employees' working conditions.)

Having found that the supplied employees were jointly employed by the Employer and the supplier employers, it is necessary to determine whether the employees sought by the Petitioner constitute an appropriate unit based on community of interest principles. *Sturgis*, supra, Section III(B)(4)(b), slip. op. p. 8-9. I note that Section 9(a) of the Act only requires that a unit sought by a petitioning labor organization be an appropriate unit for purposes of collective bargaining, and there is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit or even the most appropriate unit. *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950). Moreover, the unit sought by the petitioning labor organization, while not dispositive, is always a relevant consideration and a union is not required to seek representation in the most comprehensive grouping of employees unless an appropriate unit compatible to that requested does not exist. *Overnite Transportation Company*, 322 NLRB 723 (1996); *Purity Food Stores*, 160 NLRB 651 (1966). Indeed, the Board has held that more than one unit may be appropriate among employees of a particular enterprise. See, *Overnite Transportation Company*, 322 NLRB at 726. In *Overnite*, the Board found the petitioned-for

unit of drivers and dock workers excluding mechanics to be appropriate on the basis that the mechanics had a sufficiently distinct community of interest to enable them to be represented in a separate unit. Thus, their inclusion in the petitioned-for unit of drivers and dock workers was not required.

Although the broader unit combining the jointly and exclusively employed employees urged by the Employer in the instant matter may be appropriate, under the rationale of *Overnite*, it does not *ispo facto* render the unit sought by the Petitioner inappropriate. This approach is consistent with the Board's community of interest analysis at Section III(B)(4)(b) of the decision in *Sturgis* where the Board noted that employees working side by side at the same facility, under the same supervision with common working conditions are likely to share a sufficient community of interest to constitute an appropriate unit despite the fact that some of those employees might have some differing terms and conditions of employment which could enable them to be appropriately represented in a separate unit. Thus, in order to determine whether the petitioned-for unit limited to the exclusively employed production and maintenance employees is appropriate, it is necessary to examine community of interest factors to ascertain whether the jointly employed employees which the Petitioner would exclude could constitute a separate appropriate unit. *Overnite*, supra.

In analyzing community of interest among employee groups, the Board considers bargaining history; functional integration; employee interchange and contact; similarity of skills, qualifications and work performed; common supervision, and similarity in wages, hours, benefits and other terms and conditions of employment. *Armco, Inc.*, 271 NLRB 350, 351 (1984); *Atlanta Hilton & Towers*, 273 NLRB 87, 90 (1984); *J.C. Penney Co.*, 328 NLRB No. 105 (1999). Here, there is no history of collective bargaining affecting the employees at issue.

The jointly and exclusively employed employees worked side by side sharing the same job functions (except maintenance and saw operation), hours of work, supervision and wage rates. Such circumstances demonstrated a very high degree of functional integration, interchangeability and work related contact between the two groups of employees and indicated that they shared similar skills and qualifications. However, the benefits for each group were different and they were carried on different payrolls. The employment tenure varied between the two groups to the extent that they were hired by separate entities and the fact that a jointly employed employee would continue to be employed by the supplier employer following separation from the Employer where an exclusively employed employee would become unemployed.

The evidence shows that the Employer did not terminate the services of any of the jointly employed employees and that all of them who were willing to work at the Employer's facility for 90 days were converted to employees exclusively employed by the Employer. Such conversion created an overwhelming community of interest between the exclusively employed employees and the jointly employed employees who had every expectation of the opportunity to join the exclusively employed group. This community of interest was strengthened by the fact that the two groups shared common job functions, work hours, supervision and wage rates.

The lynchpin of the Board's analysis in *Sturgis*, supra, is the notion that jointly and exclusively employed employees are employed by the same employer. Inasmuch as all of the jointly employed employees who completed 90 days of employment with the Employer were converted to exclusively employed status, their status as jointly employed employees was analogous to the status of trainees or probationary employees with a reasonable expectation of permanent employment in a bargaining unit. In *Johnson's Auto Spring Service*, 221 NLRB 809 (1975) and *National Torch Tip Company*, 107 NLRB 1271 (1954), the Board held that the exclusion of such employees from a bargaining unit in which they enjoy a reasonable expectation of permanent employment is unwarranted and they should be eligible to vote in representation elections conducted in such units. See, *Hicks Oil & Hicksgas*, 293 NLRB 84, 87 (1989); *Rhode Island Hospital*, 313 NLRB 343, fn. 3 (1993), where the Board included employees designated as temporary in bargaining units on the basis that their status was analogous to that of probationary employees. In *Johnson's Auto*, the Board included the trainees in a bargaining unit despite the fact that they were subject to a 90 day probationary period during which they received a wage rate substantially less than unit employees, did not receive the fringe benefits enjoyed by unit employees and only 1 of 13 trainees converted to permanent status upon completion of the 90 day probationary period. In *Johnson's Auto* and *National Torch Tip*, the Board held that probationary employees' expectation of permanent employment in a bargaining unit should not turn on the proportion of them completing their probationary period. Because the jointly employed employees here earned the same wage rates as the exclusively employed employees, their community of interest with the exclusively employed employees in terms of wages, hours, supervision and work functions was greater than the community of interest the trainees in *Johnson's Auto* shared with the permanent employees. The supplied employees here enjoyed a similar expectation of conversion to permanent employment as exclusively employed employees.

Although the difference between the Employer's jointly and exclusively employed employees in terms of benefits, payroll and job tenure might militate in favor of their separate representation, I conclude that these factors are overshadowed by the overwhelming community of interest shared between the two groups as demonstrated by the similarities in their wages, hours, supervision and work functions and particularly the jointly employees' expectation of permanent employment as exclusively employed employees. Under such circumstances, the jointly employed employees could not constitute a separate appropriate unit. Thus, their inclusion in the production and maintenance unit with the Employer's exclusively employed employees is required.

In its briefs, the Petitioner correctly relies on *Pen Mar Packaging Corp.*, 261 NLRB 874 (1982); *Caribbean Communications Corp.*, 309 NLRB 712 (1992) and *NLRB v. New England Lithographic Company*, 589 F.2d 29, 100 LRRM 2001 (1<sup>st</sup> Cir. 1978) for the proposition that temporary employees whose employment tenure in a bargaining unit is of finite duration are not eligible to vote in representation elections. The Petitioner argues that because the jointly employed employees in the instant matter retained their jointly employed status for only 90 days, a finite period of time, their status was that of temporary employees within the meaning of these precedents and they should not be eligible to vote. The Petitioner analogizes the status of the jointly employed employees to that of applicants for employment with the Employer and reasons

that because only one in eight of them were converted to exclusively employed employees, they do not have a reasonable expectation of employment with the Employer.

The Petitioner's analysis concerning the status of the jointly employed employees is premised on the notion that they were employed by a different employer than the exclusively employed employees. However, as noted above, the Board in *Sturgis*, supra, made clear that jointly and exclusively employed employees are employed by the same employer. Under these circumstances, the status of the jointly employed employees here was more properly analogized to the probationary employees in *Johnson's Auto*, supra, and *National Torch Tip*, supra, than to temporary employees as urged by the Petitioner.

The Petitioner also argues that the differences in the jointly employed employees' retirement benefits, insurance, vacation, holidays and relative permanency of job assignments permit them to be excluded from the unit on community of interest grounds. Although these differences might be probative as to whether that the jointly employed employees could appropriately enjoy separate representation, I have concluded such differences are insufficient to overcome the strong community of interest between the two groups created by the similarities in wages, hours, supervision and work functions as well as the jointly employed employees' expectation of permanent employment as exclusively employed employees. The Petitioner did not cite any precedents, nor am I aware of any, which would support a finding, in view of the otherwise strong community of interest between the two groups, that such differences would be sufficient to enable the jointly employed employees to be separately represented.

Based on the foregoing, the record as a whole and careful consideration of the arguments of the parties at the hearing and in their briefs, I find that the following employees of the Employer constituted a unit appropriate for purposes of collective bargaining:

**All production and maintenance employees employed by the Employer at its Fairfield, Ohio facility, including employees supplied by temporary employment agencies, but excluding all office clerical employees and all professional employees, guards and supervisors as defined in the Act.**

Accordingly, as I have found that the employees supplied to the Employer by temporary agencies are properly in the unit, I shall order that the impounded ballots, including the challenged ballots of the employees supplied by temporary agencies, cast in the election on April 22, 1997 be opened and counted.

#### ORDER

IT IS HEREBY ORDERED that on a date, time and place to be subsequently determined by the undersigned, the impounded ballots, including the challenged ballots of employees furnished by temporary agencies, cast in the election on April 22, 1997 be opened and counted and a tally of ballots issue.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14<sup>th</sup> Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by November 17, 2000.

Dated at Cincinnati, Ohio this 3rd day of November 2000.

*/s/ Richard L. Ahearn*

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