

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26**

OUTOKUMPU COPPER FRANKLIN, INC.¹

Employer

and

Case 26-RC-8236

**UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC**

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,² the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is 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 Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:⁴

INCLUDED: all full-time production and maintenance employees of the Employer employed at the Franklin, Kentucky facility.

EXCLUDED: all office clerical employees, professional employees, employees of other employers, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

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 this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. 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 the United Steelworkers of America, AFL-CIO-CLC.⁵

LIST OF VOTERS

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to

communicate with them. **Excelsior Underwear**, 156 NLRB 1236 (1966); **NLRB v. Wyman-Gordon Co.**, 394 U. S. 759 (1969). Accordingly, it is directed that an eligibility list containing the **full** names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days of the date of this Decision. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. **North Macon Health Care Facility**, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Memphis Regional Office (Region 26), 1407 Union Avenue, Suite 800, Memphis, TN 38104, on or before **February 28, 2001**.

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 20570-0001. This request must be received by the Board in Washington by **March 7, 2001**.

DATED February 21, 2001, at Memphis, TN.

/s/

Ronald K. Hooks, Director, Region 26
National Labor Relations Board
1407 Union Avenue, Suite 800
Memphis, TN 38104-3627
tel: 901-544-0018

1. The name of the Employer was amended at the hearing.
2. The Employer and Petitioner have each filed briefs which have been duly considered.
3. The parties stipulated that Outokumpu Copper Franklin, Inc. (herein "Employer" or "OCF"), a Delaware corporation, has a production facility in

Franklin, Kentucky where it is in the business of wholesale manufacturing of copper tubing. During the last 12 months, a representative time period, the Employer purchased goods valued in excess of \$50,000 from vendors located outside the Commonwealth of Kentucky, such goods being directly shipped to the Employer's Franklin, Kentucky plant. Also during the last 12 months, a representative time period, the Employer sold and shipped goods valued in excess of \$50,000 directly to customers located outside the Commonwealth of Kentucky.

4. The Petitioner seeks to represent all full-time production and maintenance employees of the Employer employed at the Franklin, Kentucky facility, excluding all office clerical employees, professional employees, employees of other employers, guards and supervisors as defined in the Act.

The Employer takes the position that it is a joint employer with the three staffing agencies (Quality Personnel, Staffmark Temporary and Hamilton-Ryker and herein collectively referred to as "suppliers" or "staffing agencies") that supply the Employer with temporary workers (herein referred to as "temporary workers"). Thus, the Employer asserts that the temporary workers supplied by the listed agencies should be included in any unit found appropriate herein. Although provided with notice of the hearing, none of the listed suppliers made an appearance at the hearing. The Petitioner takes the position that temporary workers should be excluded from the unit. However, the Petitioner expressed a willingness to proceed to an election in any unit found appropriate herein.

There are 34 temporary workers assigned to the Employer's production and maintenance departments. The parties stipulated that two other temporary workers (the part-time storeroom assistant and the temporary worker assigned to the accounting department) should be excluded from any unit found appropriate herein.

The parties stipulated, and the record reflects, that the following 18 team leaders (16 in production and two in maintenance) are not supervisors within the meaning of Section 2(11) of the Act and possess no authority to hire, fire or discipline employees, nor can they effectively recommend such actions: Ricky L.

Dinkens, Donald J. White, Wanda Tuck, Robert Johnson, Eric Spears, John Hammers, Herman Poole, Tim Burnett, Terrance Baldry, Danny Hayes, Harold Blair, Carol Lee, Patrick Ford, Dave Becker, Neal Walton, Randy Bailey, David Neagle and Micky Muttines. Therefore, in agreement with the parties, I shall include them in the unit found appropriate herein.

The parties stipulated, and the record reflects, that the following shift production coordinators and the shipping/receiving supervisor possess the authority to hire, fire, discipline employees and/or assign work or they can effectively recommend such action in a manner requiring the use of independent judgment and are supervisors within the meaning of Section 2(11) of the Act: Joe Austin, Jim Dinkins, Doug Griffin, Matt Wakefield and Ray Chaffin. Accordingly, I shall exclude them from the unit. The parties also stipulated and I find that the maintenance supervisor (an unfilled position) possesses Section 2(11) indicia of supervisory authority and, therefore, is excluded from the unit.

THE EMPLOYER'S OPERATIONS

The Employer manufactures light wall copper tubing for air conditioning and refrigeration systems at its facility in Franklin, Kentucky. The Employer's facility consists of approximately 165,000 square feet under one roof with four main production "areas" consisting of: ten internally grooved ("IG") weld lines; smooth tubing lines and five draw blocks; level winder; and furnace. In addition, there are separate shipping and receiving areas. The record does not reveal any history of collective bargaining in the petitioned-for unit.

The Employer's "Handbook for Production/Maintenance Employees" identifies three "employment categories" including regular full-time employees, introductory employees and temporary employees. Regular full-time employees are "those employees who are not in a temporary or introductory status" and are regularly scheduled to work a full-time schedule. They are eligible for the Employer's full benefit package and are scheduled to work an average of 30 hours each week. According to the handbook, introductory employees are those employees whose performance is being evaluated to determine whether further employment in a specific position is appropriate. Employees serve in an

“introductory” capacity for 60 days. Temporary workers are supplied by staffing agencies and are described as,

“those who are hired as interim replacements, to temporarily supplement the work force, or to assist in the completion of a specific project. Employment as a Temporary Employee is of a limited duration. Employment beyond any initially stated period does not in any way imply a change in employment status. Temporary employees retain that status unless and until notified of a change. Temporary employees are ineligible for all of [the Employer’s] benefit programs.”

The Employer conducts a full-day safety and training program for all newly-assigned temporary workers. The staffing agency may have a representative present for a portion of the training program, but otherwise they do not have any on-site supervisors at the Employer’s facility. Additional training, if any, is provided to the temporary workers exclusively by personnel of the Employer. Except for maintenance electricians, all regular full-time employees are hired from the Employer’s current pool of temporary workers. Maintenance electricians are recruited from outside the pool of temporary workers because such workers do not possess the necessary technical expertise and qualifications to perform skilled maintenance work.

The number of temporary workers assigned to the Employer’s facility (typically between 30 and 50) corresponds to production demands of the Employer’s business cycle. The staffing agencies hire, issue paychecks, withhold taxes and pay workers compensation insurance for temporary workers. Currently, 28 temporary workers are supplied by Quality Personnel, five by Staffmark Temporary and one by Hamilton-Ryker. The number of temporary workers hired by the Employer into regular full-time positions has varied as follows over the last five years: 24 temporary workers were hired in 2000; 18 temporary workers were hired in 1999; 15 temporary workers were hired in 1998; 0 temporary workers were hired in 1997; and 37 temporary workers were hired in 1996. Temporary workers are assigned to the Employer’s facility for a maximum of 15 months. If, by that time they have not been hired into a regular full-time

position, they must serve a three-month hiatus period before they can return to the facility as a temporary worker.

The Employer, not the supplier, determines and controls the following working conditions for temporary workers: when and where they initially report to work, shift assignment and schedule, beginning date and time, break and meal period (in accordance with the Employer's established schedule), hours of work, availability of overtime, department assignment and supervisor. Among other things, temporary workers are required to comply with the Employer's appearance requirements as outlined in the employee handbook. Temporary workers must notify a supervisor of any absence.

The Employer's handbook includes an attendance policy based on a point system for its employees. There is no such attendance policy for temporary workers. Rather, each coordinator handles attendance matters as they deem appropriate. If a temporary worker's attendance is unsatisfactory, the coordinator may advise the temporary worker not to return.

The Employer's coordinators retain full authority to discipline and/or remove a temporary worker from the workplace without prior consultation with the supplier. Temporary workers are evaluated by the Employer's production coordinators (with input from team leaders) after three, six, nine, 12 and 15 months. These evaluations are used by the Employer in determining whether to offer a regular full-time position to the temporary worker.

The Employer contends that temporary workers do not have different working conditions from the Employer's regular employees. In this regard, the record reveals that temporary workers report to, and take direction from, the same supervisors, report to the same work "areas", work the same shift and otherwise work alongside employees of the Employer. The record reveals no distinction between the work performed by employees of the Employer and that performed by temporary workers. Temporary workers also attend the same plant meetings, attend the same social functions and receive the same holiday gift as employees of the Employer. There is no distinction between temporary workers and employees of the Employer with respect to break period and lunch schedule.

Temporary workers are offered full use of the Employer's vending machines, locker rooms and parking lot facilities. Contrary to employees of the Employer, however, temporary workers are not eligible for paid vacations, holiday pay, jury duty pay or bereavement pay. Full benefits do not accrue for employees of the Employer until after they have completed their introductory period of employment. Thus, neither introductory employees nor temporary workers are eligible for the Employer's group health insurance, pension plan or 401(k) plan. Contrary to the Employer's regular full-time employees and introductory employees, the Employer does not provide an allowance for safety shoes or work clothing for temporary workers. Temporary workers do not accrue plant or company seniority. Thus, temporary workers are ineligible for jobs open for bidding (e.g., team lead or the IG area). Overtime is based on plant seniority and, consequently, temporary workers are subordinate to employees of the Employer with respect to such opportunities.

Temporary workers receive paychecks each Friday; employees of the Employer are paid on Wednesday. As of March 2000, after consulting with the staffing agencies with respect to prevailing wage rates for similar workers in the area, the Employer increased the starting hourly rate for temporary workers to \$8.00. After six months of service, temporary workers receive \$8.50 per hour; after 12 months, they receive \$9.00 per hour. Introductory employees of the Employer earn \$9.22 per hour and full-time regular employees start at \$13.00 to \$14.00 per hour. One employee testified that he began earning \$14.08 when he first became a regular full-time employee about November or December 2000.

The Employer introduced correspondence and other documents by and between it and the staffing agencies with respect to the obligations of each. The Employer pays a premium to the suppliers based upon the hours worked by the temporary worker. None of the foregoing arrangements have been reduced to a contract and the Employer has reserved the right to obtain its workers from other sources.

JOINT EMPLOYER ISSUE

The Petitioner seeks to represent a bargaining unit consisting only of the employees solely employed by the Employer and has declined to amend its petition to add the staffing agencies that supply the Employer with temporary workers. Notwithstanding the Employer's assertion that it is a joint employer with the staffing agencies, the Board has held that the absence of one of the alleged joint employers at the bargaining table does not destroy the ability of the user employer to engage in collective bargaining with respect to its employees to the extent it controls their terms and conditions of employment. **Professional Facilities Management, Inc.**, 332 NLRB No. 40 (2000), citing **M.B. Sturgis**, 331 NLRB No. 173 (2000). Thus, the Board has declined to rule on joint employer issues where the Petitioner "seeks to represent employees of a statutory employer in an appropriate unit." *Id.* slip op. at 1-2. Where, as here, the petition includes only the employees of a single user employer, the Board does not require "the naming of all potential joint employers and the litigation of their potential relationship with the user employer." *Ibid.* Thus, I shall decline to make any findings with regard to whether the Employer and the staffing agencies are joint employers.

SCOPE OF THE UNIT

With respect to the Employer's contention that temporary workers must be included in the unit, I am guided by the recent ruling in **M.B. Sturgis, Inc.**, *supra*, where the Board addressed the question of whether and under what circumstances employees who are jointly employed by a "user" employer and a "supplier" employer can be included for representational purposes in a bargaining unit with employees who are solely employed by the "user" employer. Although the Board found that jointly employed and solely employed employees of a single user employer could be included in the same unit, it specifically noted that it did not intend to suggest that every unit combining both groups of employees would be found appropriate. The Board concluded that its traditional community of interest factors must be applied in determining the appropriateness of a unit in

which a party seeks to include both jointly employed employees and the solely employed employees of a user employer. 331 NLRB No. 173, slip op. at 8-9.

The Employer takes the position that temporary workers must be included in any unit found appropriate herein because of their close community of interest with employees of the Employer. In support of this position, the Employer notes that temporary workers are assigned to the same work “areas” and perform the identical work under the same supervision and working conditions as the Employer’s employees. The Employer also notes that temporary workers are assigned to the same shifts as regular full-time employees and that temporary workers and regular full-time employees alike follow the Employer’s established schedules for break and lunch period. Moreover, the Employer, not the supplier, determines and controls when and where temporary workers initially report to work, their shift assignment and schedule, beginning date and time, break and meal period, hours of work, overtime, department assignment and supervision. The Employer provides training for temporary workers and retains the absolute right to evaluate temporary workers and issue discipline to them. Temporary workers are required to comply with the Employer’s appearance policy and must report any absence to the Employer’s coordinators. The Employer also monitors the time worked by temporary workers and reports such hours to the respective staffing agencies. Moreover, the Employer suggests that its reliance on the pool of current temporary workers as its sole source of regular full-time employees supports their inclusion in the unit.

On the other hand, the staffing agencies hire, issue paychecks, withhold taxes and pay workers compensation insurance for the temporary workers. Additionally, temporary workers are paid a lower hourly wage than employees of the Employer (\$8.00 to \$9.00 per hour for temporary workers versus \$9.22 per hour for introductory employees and \$13.00 and higher for regular full-time employees) and do not accrue company seniority. Although temporary workers receive an annual holiday gift from the Employer and attend plant meetings and social events with the Employer’s employees, they are ineligible for such fringe benefits as a safety shoe allowance, work clothing, paid vacation, jury duty pay,

bereavement pay and paid holidays. Thus, although it is clear that temporary workers share some working conditions with the solely employed employees of the Employer, other working conditions are significantly dissimilar.

In applying the community of interest test to determine the scope and composition of bargaining units, the Board has consistently held that Section 9(a) of the Act requires only that a unit sought by a petitioning labor organization be an appropriate unit for purposes of collective bargaining. 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. The Act requires only that the unit be “appropriate”. That is, the unit must be appropriate to ensure employees in each case the fullest freedom in exercising the rights guaranteed by the Act. **Morand Bros. Beverage Co.**, 91 NLRB 409 (1950). See, **Dezcon, Inc.**, 295 NLRB 109, 111 (1989) (the Board need only select an appropriate unit, not the most appropriate unit). It is similarly well-settled that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. See, for example, **General Instruments Corp. v. NLRB**, 319 F.2d 420 (4th Cir. 1963); **Mountain Telephone Co. v. NLRB**, 310 F.2d 468 (10th Cir. 1962). Moreover, the Board has recently held that, “[i]n agreeing with the Regional Director’s finding that the unit is appropriate even if it excludes the joint employed employees, we stress the fact that the Petition is seeking to represent employees solely employed by the Employer, and thus is seeking to bargain only with the Employer, and not the supplier employers.” **Holiday Inn City Center**, 332 NLRB No. 128 (2000).

Based on the above, I find that the common working conditions of the temporary workers and employees of the Employer are not sufficient to require inclusion of temporary workers in the petitioned-for unit. In reaching this conclusion, I rely on the fact that the staffing agencies hire, issue paychecks, withhold taxes and pay workers compensation insurance for the temporary workers. Moreover, as noted above, temporary workers are paid a lower hourly wage than employees of the Employer, ineligible for certain fringe benefits, subject to a different attendance policy and do not accrue company seniority.

Thus, I find that a unit limited to the full-time production and maintenance employees of the Employer and excluding temporary workers supplied by the staffing agencies is an appropriate unit for the purposes of collective bargaining.

There are approximately **238** employees in the unit found appropriate herein.

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.

CLASSIFICATION INDEX

280-3620

393-6081-2075

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