

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 32**

(Visalia, CA)

IVEX PACKAGING CORPORATION

Employer

and

Case 32-RC-4855

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, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/
2. The Employer is engaged in commerce within the meaning of the Act and will effectuate the purposes of the Act to assert jurisdiction herein. 2/
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 the Section 9(c)(1) and Section 2(6) and (7) of the Act. 3/
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 and regular part-time production, maintenance and distribution employees, including all QA technicians, lead employees and sample employees, employed by the Employer at its Visalia, California facilities, including all full time and regular part-time production, maintenance and distribution employees, QA technicians, lead employees and sample employees performing work duties at the Employer's facilities who are provided to the Employer by temporary placement or employment agencies.

EXCLUDED: All managerial and administrative employees, foremen, data entry employees, shipping lead, sales persons, office clerical employees, receptionists, customer service representatives, administrative assistants, human relations administrator, management information systems coordinator, all other employees, 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 5/ 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, 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 UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in 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); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969); North Macon Health Care Facility, 315 NLRB 359, 361, fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer 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 NLRB Region 32 Regional Office, 1301 Clay Street, Suite 300 N, Oakland, California 94612-5211, on or before March 14, 2001. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

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 March 21, 2001.

DATED at Oakland, California, this 7th day of March 2001.

/s/ James S. Scott
James S. Scott, Regional Director
NLRB Region 32
32-1220

1/ The Employer moved to strike certain testimony concerning an advertisement for employees in a local newspaper as hearsay since a copy of it was not placed in evidence. Based on the record as a whole, permitting such testimony was not prejudicial and the motion to strike is therefore denied.

2/ The parties stipulated, and I find, that the Employer, a Delaware corporation with facilities and an office located in Visalia, California, is engaged in the manufacturing of plastic and paper packaging products. During the past twelve months, the Employer, in the course and conduct of its business operations, sold and shipped goods valued in excess of \$50,000 directly to customers located outside the State of California.

3/ Although notified of the filing of the petition and the hearing in this matter, H. R. Connect, a temporary employment agency, did not appear or otherwise participate in this proceeding. The Board has held that a petitioner is not required to name a joint employer or to litigate their potential relationship with the user employer. *Professional Facilities Management, Inc.*, 332 NLRB No. 40 (2000).

4/ Except for those individuals whom the Employer obtains from temporary employment agencies (herein, agency workers), the parties are in agreement as to the appropriate unit. The Employer takes the position that it is not the employer of the agency workers and they do not share a community of interest with the regular employees. Even if the agency workers shared a community of interest, they would not be properly included, according to the Employer, because neither the Employer nor the temporary employment agencies have consented to representation of the agency employees in the same unit as the user employer's employees. Petitioner argues that the agency workers are properly included because of their strong community of interest with the regular employees and, under current Board law, there is no need for the user employer and the supplier employers to consent to be in the same unit.

The bargaining unit is composed of four departments: plastic, distribution, maintenance and paper. The parties stipulated and the record supports a finding that the following individuals are supervisors and properly excluded from the unit: plastic department supervisors John Stuhaan, Angela Mull, Thurl Johnson and Russell Young; paper department supervisor Lanny Morton; maintenance supervisor Joe Evaro; distribution supervisor Ray McClure; shipping lead Roger Babb; manufacturing manager

John Noell; scheduling supervisor Gary Chancellor; QA manger Doug Booker and plant manager Lou Warren.

Currently, there are approximately 306 regular employees in the unit. The distribution employees work out of the Employer's warehouse, which is located about 1 to 1-1/2 miles from the main plant. The regular employees are paid on an hourly basis and the Employer provides them with a benefits package which includes medical, dental and life insurance, 401k, employee stock plan, tuition reimbursement, hand tool purchase program and computer based training. The Employer does from time to time use agency workers in all unit classifications and currently employs them in most classifications (57 in the plastic department; 3 in distribution and one in the paper department). The overwhelming majority of agency workers are supplied by H.R. Connect (herein HR) but the Employer uses other unnamed supplier agencies when HR is unable to supply employees. The Employer does not directly compensate the agency workers for anything, including wages. Rather, the Employer pays HR a fee and HR determines the hourly rate of pay and the markup as well as any benefits for each agency worker. Agency workers receive their paychecks and benefits directly from the supplier agency.

The parties entered into a number of stipulations regarding the regular and agency workers as follows: regular and agency workers are paid on a weekly basis; agency workers work side by side with regular employees; agency workers are supervised by the Employer's supervisors regarding job performance and day to day duties; agency workers generally work the same schedule and number of hours per week and use the same time clocks, lunchroom, lockers and other facilities as regular

employees; when the Employer is unhappy with the performance of an agency worker, the supplier is asked to remove the worker and has done so; and agency workers are required to attend plant wide and departmental meetings except for meetings concerning benefits to which they are not entitled.

Agency workers receive their day to day job assignments from the Employer's supervisors and are invited to, and attend, gatherings and parties both at and away from the plant. Agency workers do not wear any uniforms, nametags or other identification, which would show them to be non-regular employees. Their work is inspected by the same QA employees in the same manner as regular employees. Any required re-work is also handled in the same manner. HR has no on site representative at the Employer's facility.

Generally, after about 90 days, the Employer evaluates the agency workers based on job performance and absenteeism. If favorable, the Employer may perform a formal evaluation and directly hire the agency worker. In some cases, the Employer will request that the supplier reassign the agency worker to another employer. However, there are agency workers who have worked for the Employer for over one year without becoming regular employees. There is usually a pay increase when an agency worker becomes a regular employee. However, there is no evidence in the record concerning any differences in wages between regular employees and agency workers in the same job classification.

In order to show that two entities are joint employers, they must codetermine essential terms and conditions of employment such as hiring, firing, discipline, supervision and direction. *M. B. Sturgis, Inc.*, 331 NLRB No. 173 (2000); *Riverdale*

Nursing Home, 317 NLRB 881, 882 (1995). Here, the Employer is responsible for the day to day direction, scheduling, supervision and assignment of work to the agency workers. In fact, there are no representatives from the supplier on site. The Employer also has ultimate authority as to whether an agency worker remains employed or is referred to the supplier for reassignment. The Employer uses the same procedures for re-doing inferior work for both groups of employees. Thus, the record evidence in this case is sufficient to support a joint employer finding.

In *M. B. Sturgis*, the Board held that “consent requirements for multiemployer bargaining among separate and independent employers do not apply to units that combine jointly employed and solely employed employees of a single user employer.” Thus, a unit of employees jointly employed by a user and a supplier, and employees solely employed by the user, is permissible without the consent of the employers. Rather, the Board will apply traditional community of interest factors to determine if the units are appropriate. The Board also pointed out in *Sturgis* that “Under Section 9(b) of our statute, a group of an employer’s employees working side by side at the same facility, under the same supervision, and under common working conditions, is likely to share a sufficient community of interest to constitute *an* appropriate unit.”

In the instant case, the regular employees and agency workers are supervised by the same individuals for purposes of job performance, scheduling and day to day work assignments. Both groups of employees perform the same work, requiring the same skills and functions. Indeed, there is no way to determine whether an individual is a regular employee or an agency worker by appearance, type of work performed or day to day functioning. Agency workers perform the same work in all classifications,

departments and shifts as regular employees and, thus, have the same interaction and contact. Working conditions, such as number of hours, punching a time clock, hours of work, shifts and access to lockers, lunchroom and parking areas are identical. The only difference appears to be how the agency workers are compensated in terms of wages and benefits. Some differences, however, do not mean employees cannot be included in the same unit. On this basis, particularly the common supervision, nature of skills and functions, and type of work performed, I find that the agency workers and regular employees share a community of interest sufficient to constitute an appropriate collective bargaining unit. Therefore, the agency workers shall be included in the unit and eligible to vote in the election.

There are approximately 367 employees in the petitioned-for unit.

5/ please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

177-1650
420-7330