

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SUBREGION THIRTY-THREE

ENGINEERED STORAGE PRODUCTS CO.,  
A DIVISION OF CST INDUSTRIES, INC.1/

Employer

and

TEAMSTERS LOCAL 330, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, AFL-CIO1/

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Case 33-RC-4605

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter 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(s) involved claim(s) to represent certain employees of the Employer.4/

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:5/

All full-time and regular part-time employees, including all production, maintenance, material handling, shipping and receiving, quality, and plant clerical employees employed by the Employer, but excluding office clerical employees, confidential employees, sales order coordinators, guards, professional employees, temporary employees, lead persons 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(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.<sup>6/</sup> Eligible to vote are those in the unit(s) who were 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 their status as such during the eligibility period and their replacements. Those in the military services of the United States 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 TEAMSTERS LOCAL 330, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO.

## LIST OF VOTERS

In order to insure 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 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); **N.L.R.B. v. Wyman-Gordon Company**, 394 U.S. 759 (1969).<sup>7/</sup> Accordingly, it is hereby directed that within 7 days of the date of this Decision *two* copies of an election eligibility list, containing the 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 *33rd Subregion, Hamilton Square, 300 Hamilton Boulevard, Suite 200, Peoria, Illinois, 61602*, on or before July 19, 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 provisions 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, D.C. 20570-0001. This request must be received by the Board in Washington by July 26, 2001.

Dated July 12, 2001  
at: Peoria, Illinois

/s/ Ralph R. Tremain  
Ralph R. Tremain, RD – Region 14

1/ The parties stipulated to their correct names and that all documents should be amended to reflect the proper names. The names of the Employer and of the Petitioner appear as amended.

2/ I have carefully considered the record evidence, and the parties' briefs, and the brief of Oursource International, Inc., d/b/a Tandem Staffing for Industry, hereinafter referred as Tandem, which entered an appearance in this matter.

3/ The parties stipulated that the Employer is engaged in commerce within the meaning of the National Labor Relations Act and is subject to the jurisdiction of the National Labor Relations Board. The Employer, a Delaware corporation, is engaged in the business of producing storage products and agricultural unloaders at its facility at 345 Harvestore Drive, Dekalb, Illinois. During the past 12 months, a representative period of time, the Employer purchased and received goods and materials in excess of \$50,000 directly from vendors located outside the State of Illinois. Based upon the foregoing facts, I find the Employer herein is engaged in commerce within the meaning of the Act. The approximate number of employees in the unit found appropriate herein is 68.

4/ The parties stipulated that the Petitioner is a labor organization within the meaning of the Act, and I so find. There is no collective bargaining agreement covering any of the employees in the unit sought in the Petition herein, and the parties are in agreement that there is no contract bar. Furthermore, there is no history of collective bargaining affecting these employees.

5/ The parties stipulated that an appropriate unit would include all full-time and regular part-time employees, including all production, maintenance, material handling, shipping and receiving, quality, and plant clerical employees, but excluding office clerical employees, confidential employees, sales order coordinators, guards, professional employees and supervisors as defined in the Act. Accordingly, I find that the above-described unit constitutes an appropriate unit for collective bargaining. The only issues raised herein are

whether or not leadman Brian Eglund, Dan Kelm, Paul Mathis, Tim Parker, Dave Martinson, Bob Pagliaro, and Ed Danielson, are supervisors within the meaning of Section 2(11) of the Act and, consequently, should be excluded from any appropriate bargaining unit and whether or not four temporary employees, namely, Mike Shady, Miguel Mireles, Fernando Rico and Lorenzo Kent, should be included in the unit found appropriate herein. With respect to the supervisory issues, the Employer contends that the leadmen possess a sufficient indicia of authority as defined in Section 2(11) to be deemed to be supervisors. Contrary to the Employer, the Petitioner maintains that the leadmen do not have any supervisory indicia under the Act and should be included in the unit found appropriate herein. Regarding the temporary employees, the Employer contends that the four temporary employees are jointly employed by the Employer and Tandem for an indefinite period of time, share a community of interest with the Employer's regular employees and, therefore, should be included in the bargaining unit found appropriate herein. The Petitioner and Tandem maintain that the temporary employees are not jointly employed by the Employer and Tandem, do not share a community of interest with other employees of the Employer included in the bargaining unit and should not be included in the bargaining unit found appropriate herein.

With respect to the leadmen, the record establishes that the leadmen possess supervisory indicia required by Section 2(11) of the Act. Accordingly, and as discussed below, I find that Brian Eglund, Dan Kelm, Paul Mathis, Tim Parker, Dave Martinson, Bob Pagliaro and Ed Danielson are supervisors within the meaning of the Act, and I shall exclude them from the unit.

The record establishes that the employees solely employed by the Employer, whom the Petitioner seeks to represent, excluding the four temporary employees supplied by Tandem, constitute an appropriate unit for collective bargaining. Accordingly, and as discussed below, I find that the temporary employees are jointly employed by the Employer and Tandem but do not share a community of interest with the other employees included in

the bargaining unit, and should be excluded from the bargaining unit found appropriate herein.

### BACKGROUND

As indicated above, the Employer is engaged in the business of producing storage products and agricultural unloaders at its Dekalb, Illinois facility. On approximately January 10, 2001, the Employer bought the Dekalb facility from the A. O. Smith Engineered Storage Products Company. Albert Mark Harper has been the Plant Manager at the facility for the last two and one-half years. Harper reports to John Farris, the Employer's President. Although the parties did not stipulate that Harper and Farris possess supervisory authority, it is apparent from the record that Harper and Farris possess at least one of the supervisory indicia of authority within the meaning of Section 2(11) of the Act and that the parties do not dispute that they are supervisors to be excluded from the unit. Accordingly, I find that Farris and Harper are supervisors within the meaning of Section 2(11) of the Act and are to be excluded from the unit found appropriate herein.

In the Production Department, Dave Bubik is the supervisor of coatings, machine shop, and assembly, and Duane Daugherty is supervisor of fabrication and welding. Don Hays is supervisor of Production and Inventory Control. Phil Heyer is supervisor of Purchasing. Jacque Burlison is supervisor of the Quality Department. Roy Kelm is supervisor of the Maintenance Department. Mark Kennedy is supervisor of the Shipping and Receiving Department and the Customer Service Department. Bubik, Burlison, Daugherty, Hays, Heyer, Kelm, and Kennedy all report directly to Plant Manager Harper. It is apparent from the record that Dave Bubik, Jacque Burlison, Duane Daugherty, Don Hayes, Phil Heyer, Roy Kelm, and Mark Kennedy possess at least one of the supervisory indicia of authority within the meaning of Section 2(11) of the Act and that the parties do not dispute that they are supervisors to be excluded from the unit. Accordingly, I find that Dave Bubik, Jacque Burlison, Duane Daugherty, Don Hayes, Phil Heyer, Roy Kelm, and Mark Kennedy are

supervisors within the meaning of Section 2(11) of the Act and are to be excluded from the unit found appropriate herein.

The Employer manufactures bolted storage tanks. These tanks are factory coated with porcelain enamel. The product is used in both potable and waste water applications. The Employer also manufactures a storage tank which handles animal waste and animal feed for the agricultural industry. In addition, the Employer manufactures an unloader and parts to service that unloader.

The Employer's plant is comprised of several different departments. The Production Department consists of fabrication, welding, paint line, glass line, machine shop, assembly and inventory control. The Employer also has a Maintenance Department, a Customer Service Department, a Shipping and Receiving Department, and a Quality Department. Employees in fabrication bring the raw material, that is, steel, into the facility, fabricate it, and make it into parts in preparation for coating. The fabrication area is located on the east end of the plant and covers an area approximately 120,000 square feet. Employees in welding weld parts for the agricultural unloader. They also weld manways and parts for the storage tanks. The welding area is located on the north side of the building and covers an area of approximately 10,000 to 12,000 square feet. Employees who work on the glass line apply glass on a coating line. The coating line, approximately 1,200 feet long, is made up of 8 different coating booths in which different types of glass are applied to sheets of steel. After the coating line, the steel is transferred to a firing line, which is also approximately 1,200 feet long. The steel then goes into a pre-heat and then into a furnace where the glass is actually fused to the steel. The materials then come off the glass line and go through a cooling tunnel. The materials go to the end of the line where they are taken off the line and stacked and skidded. The glass line is located in the south central part of the plant and covers at least 60,000 square feet. The glass line has a facility on the first floor and also has an area called the pit in which the glass is stored. The paint line coats angles used in tanks and parts used in the agricultural unloader. The paint line is located in the central part of the plant and covers

approximately 4,000 to 6,000 square feet. The machine shop machines castings and forgings. These are mostly parts that go into the agricultural unloaders and also parts to supply the after-market. The machine shop is located in the south central part of the plant and covers an area of about 12,000 square feet. Employees in the assembly area put together the agricultural unloaders. They assemble sub-assemblies. Those sub-assemblies are then assembled to complete the unloader. The assembly area is located in the south part of the plant and covers an area of about 8,000 or 10,000 square feet. Employees in production inventory control insure that the Employer is receiving the correct inventory as materials pass through the plant. Production inventory control is in charge of scheduling the product through the plant and in charge of making sure that the production schedule is meeting with what it is going out the door of the facility.

The Maintenance Department repairs equipment and does preventive maintenance on machines throughout the facility. The Maintenance Department is centrally located on the east side of the facility.

The Quality Department performs inspections of incoming raw material and parts. This department also does some in-process inspections of parts in the machine shop area and various places throughout the facility.

The Customer Service Department is in charge of making sure that customer orders make it through the process. Employees in this department talk to customers and do order inventory. They confirm the status of materials throughout the floor and make sure that the materials are going to be ready to reach customers on a timely basis.

The Shipping and Receiving Department is charged with unloading trucks and raw materials coming to the plant and loading goods on to trucks that are outgoing.

The working hours for most employees in the plant is 6:00 a.m. to 4:30 p.m., Monday through Thursday. Supervisors leave between 4:30 p.m. and 5:30 p.m. There is currently a second shift which operates from 4:20 p.m. to 2:50 a.m., Monday through Thursday.

## THE DUTIES AND WORKING CONDITIONS OF THE LEAD PEOPLE

The seven lead persons in dispute herein are Brian Eglund, Dan Kelm, Paul Mathis, Tim Parker, Dave Martinson, Bob Pagliaro, and Ed Danielson. They report to the Employer's supervisors who are in charge of production, that is, supervisors Dave Bubik, Duane Daugherty, Mark Kennedy and Roy Kelm. The record indicates that the functions, duties, and responsibilities of the seven lead persons are very similar.

Lead Brian Eglund has responsibilities over fabrication. Lead Dan Kelm is over welding, and Lead David Martinson is over shipping and receiving. Paul Mathis is lead on the glass line and Bob Pagliaro is lead in machine shop assembly. Tim Parker is lead in maintenance on days, and Ed Danielson is lead in maintenance on nights. There are no supervisors on the second shift. Only leads work on second shift. The leads who work on the second shift are Danielson and Mathis. Mathis is responsible for the glass line on second shift on which the temporary employees work beside the Employer's solely-employed employees.

The lead person position was created in approximately January 2000, as a way to improve communications and provide more supervisory help in areas that were far removed from where the supervisors' offices were located. The Employer has a facility that is approximately 500,000 square feet, makes a large product and has employees dispersed throughout the facility. Before the lead person position was created, the four supervisors over production had a large physical areas which they supervised as well as a large number of employees reporting to them.

The lead positions are not bid jobs. The lead applicants are interviewed by a panel of supervisors and then selected by the supervisors after the interviews. The functions of the lead are explained to them at the time that they are interviewed for the position. In November, 2000, there was a review of the disciplinary process that the leads could use according to the Employer's handbook in administering discipline. The scenario discussed with the leads was one in which an employee refused to do a job that the lead person asked

them to do. The leads were instructed that they would report the incident to the supervisor who would then write up the employee. The record does not reflect the effectiveness of such recommendations or the degree to which such recommendations involve more than application of clear employees policies. The employees chosen for lead positions have been, in general, the more senior employees of the Employer.

The leads are responsible for their specific areas. The leads have employees who report to them. However, the number of persons reporting to each lead varies by department. Specifically, the leads are responsible for prioritizing work, for moving people from area to area, for communications, for insuring that their employees get their jobs done, for making sure that the material flow is there, for enforcing plant rules, and for disciplinary actions. According to Plant Manager Harper, the leads have general supervisory responsibility for their areas.

In addition to handling employee problems, the leads keep track of employee time. They approve time sheet on a daily basis which, after approval by the lead, are forwarded to the Employer's accounting department where the time sheets are used as a basis for pay. Overtime hours on the time sheets are also approved by the leads.

The leads are authorized to transfer employees from one department to another. If an employees is transferred to a department with a higher pay rate, the lead authorizes the higher pay rate through a form called a labor upgrade. The leads, in deciding to transfer an employee to another department, consider the skills that are required for the transfer. They also consider production demand throughout the plant in order that they can meet production schedules. The leads communicate with one another and decide what employee goes where in order to meet production schedules.

The leads prioritize work in the plant by considering the skills of the employees, looking at the production schedules, and talking with the production schedulers. The leads will then make decision on their own concerning the material flow through each of their responsible areas. The leads assign the work in their areas based on their knowledge of the

job skills of their employees and their requirements for completing the job. They use their judgment in assigning people in their areas to meet production requirements. At least a half dozen times a day, a lead person is involved in changing production schedules or transferring workers from one line to another. Each instance of prioritizing work or transferring workers takes anywhere from 20 to 45 minutes.

The leads spend approximately 50% of their time in supervisory functions.

In the fall of 2000, the Employer's leads and supervisors received training by the Business and Industrial Development Center at Kishwaukee College. They received training on the fundamentals of managing and conflict resolution and received certificates upon completion of the course.

Leads have the authority to approve time off if an employee gets sick during the day or requests other time off during the day. The lead also approves vacation requests. They have the final say on vacation requests and do not need approval from a supervisor. The leads have the authority to recommend overtime, and their recommendations are generally, but not always, followed and approved. The leads also have the authority to approve overtime without checking with a supervisor even if a supervisor is present.

While the supervisors are paid a salary, the leadmen, as well as the employees who report to them, are paid on an hourly basis. The leads are paid \$1.03 per hour more than the employees who report to them. The leadmen and hourly workers all get paid for overtime worked. At least some supervisors also get paid for overtime worked. Senior management determines how much the annual pay raise will be, and all employees receive the same annual raise.

In the event of a workplace accident or injury, the leads have the authority to act. The normal procedure is that the lead will contact the human resource assistant or administrator who then contacts the corporate medical office. The lead has the responsibility to arrange for transportation for any injured employee and for time off.

In order to negotiate with suppliers, an individual has to be an authorized representative of the Employer. In this regard, leads are considered authorized representatives of the company in negotiations and have the authority to negotiate with suppliers on behalf of the Employer. The employees who report to the leads are not considered authorized representatives. Recently, the Employer entered into negotiations for compressed gases used in welding and in the fabrication area. Dan Kelm, the lead person in welding, was key in working with two different suppliers in negotiations for pricing of the compressed gases and was the primary person responsible for these negotiations. Based on the negotiations with the suppliers, the Employer signed a contract.

The leads attend daily productions scheduling meetings with the supervisors, including the customer service supervisor. Plant manager Harper and the Employer's logistics officer also attend these meetings. The function of the meetings is to coordinate with all of the department and the schedulers for the flow of materials throughout the plant. Also considered in these meetings are the manpower requirements of the different departments and overtime requirements.

Since the lead position was created, the company has hired no permanent hourly employees. At such time as the Employer does hire permanent hourly employees in the future, the leads will be involved in the hiring process in some unspecified manner. With respect to the temporary employees supplied to the Employer by Tandem, the leads did their orientation and supervise them. The leads have also made recommendations as to the temporaries whom the Employer should and should not continue to utilize.

While one lead has an office, all leads have access to an office. Approximately 10 to 15 percent of a lead's time is spent in the office. The leads also have access to the computers.

## DISCUSSION OF THE SUPERVISORY ISSUE

Supervisory status under the Act depends on rather an individual possesses authority to act in the interest of the Employer in the matters and in the manner specified in Section 2(11) of the Act, which defines the term “supervisor” as:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires use of independent judgment.

It is clear that in interpreting the definition of supervisor under Section 2(11) of the Act, it is to be viewed in the disjunctive and that “the possession of any one of the authorities listed in (that Section) places the employees invested with this authority in the supervisor class”. Ohio Power Company v. NLRB, 176 F.2d 385 (C.A. 6 1949), cert. denied 338 U.S. 899 (1949).

While the record does not show that the leadmen in dispute possess the authority to hire or fire employees, the record clearly shows that they exercise independent judgment in directing other employees and assigning work to the employees within the unit found appropriate herein, approve requests for vacations and other time off, transfer employees to other departments which may result in a pay increase, and grant or effectively recommend overtime.

In reaching the conclusion that the leadmen exercise independent judgment within the meaning of Section 2(11) of the Act in assigning tasks to other employees, I find that the leadmen are responsible for the work of the areas to which they are assigned, to the employees in those areas and the daily operation and production of those areas. The leadmen are in charge of the areas to which they are assigned and, as such, exercise responsibilities that other employees do not have. The record clearly shows that they schedule and assign

work and, in doing so, make judgments regarding schedules and priorities, employees skills and specialties and workload. The leadmen give employees their orders and instructions and make certain that the work is completed and done properly. Custom Bronze & Aluminum Corp., 197 NLRB 397 (1972). See also Hecks, Inc., 277 NLRB 916, 919 (1985); Illini Steel Fabricators, Inc., 197 NLRB 303 (1972); Wolverine World Wide, Inc., 196 NLRB 410 (1972); Birmingham Fabricating Co., 140 NLRB 640, 642 (1963).

The leadmen also attend daily production meetings with other supervisors which other employees in the bargaining unit found appropriate herein do not attend. Furthermore, if the leadmen are not found to be supervisors, then that would leave the Employer with supervisors Bubik, Daugherty, Kennedy, and Kelm as first-line supervisors over the approximately 75 regular unit employees and up to 20 temporary employees who are scattered over a large area of its plant. Pennsylvania Truck Lines, 199 NLRB 641, 642 (1972). In addition, if the lead people are not supervisors, then there would be no supervision on second shift See Dale Service Corp., 269 NLRB 924 (1984).

In sum, I find that the lead people possess supervisory indicia under Section 2(11) of the Act. Accordingly, I find the lead people to be supervisors and exclude them from the unit found appropriate.

#### TEMPORARY EMPLOYEES

Since early May 2001, Tandem has supplied temporary general labor to the Employer. Until June 29, 2001, there were 20 temporary employees. From June 29 until July 16, 2001, when the second shift is scheduled to start up again, Tandem will supply on an indefinite basis four temporary employees to the Employer. The Employer takes the position that these four temporary employees, Miguel Mireles, Fernando Rico, Lorenzo Kent and Mike Shady, should be included in the bargaining unit

The temporaries supplied by Tandem perform the same jobs as the Employer's regular employees. The temporaries have done glass line utility, assisted in press operations, assisted

in the machine shop and assisted in the assembly area. The supervisors and leads employed by the Employer supervise the temporary employees. Tandem has no supervisors on site at the Employer's plant. The temporaries goes through the same orientation program as the Employer's other employees. They have the same hours, breaks and lunch time and use the same restrooms and break rooms as the Employer's other employees.

Although the solely employed employees of the Employer are paid on Thursdays, the temporaries are paid by Tandem on Fridays. The Employer does not sign the checks of the temporary employees. Their checks are signed by Tandem. The temporaries do not use the time clock which the Employer's employees use. Although initially the Employer records their time on the same time sheets on which it records the times of its regular employees, the Employer sends the times to Tandem on Tandem stationery.

Employees of the Employer receive medical and dental insurance and life and disability insurance and are eligible for a 401(k)plan. They also receives paid holidays and paid vacation. The temporary employees receive none of these benefits. The temporaries are also not entitled to the Employer's Workmen's Compensation and Unemployment Insurance. Whereas the Employer's employees are paid \$15 to \$16 per hour, the temporary employees are paid a base rate of approximately \$8 per hour and an attendance incentive of \$1.50 per hour. The pay rates of temporary employees are set by Tandem. Tandem recruits, interviews, selects and tests the employees. The parties stipulated that Tandem handles all payroll and benefits for the temporary employees assigned to the Employer, and I so find. Although the Employer can request Tandem not to assign a particular temporary to work for it, Tandem is responsible for the discharge the temporary employees whom it furnishes to the Employer. Under Tandem's confirmation agreement with the Employer, Tandem is designated as the employer of the temporary employees. If the temporary employees have grievances on a job or concerns about a job, they are instructed to contact their service coordinator at Tandem.

Tandem provides safety glasses to the temporary employees and deducts from their paychecks the cost of those glasses. If the temporary does not have their own steel toe work

shoes, Tandem provides them with toe caps. Upon request, Tandem will also supply them with safety back belts.

On a daily basis, the temporary employees report to a supervisor at Tandem's office to let Tandem know that they are there and ready to go to work at the Employer's facility. They are then assigned to the Employer's account for that day.

Although it appears that the Employer has, in the past, hired as regular employees temporaries supplied by employers other than Tandem, no Tandem employees have ever been hired for full-time employment with the Employer. Inasmuch as the Employer has not hired any new employees for at least two and one-half years, any temporaries whom it hired for full-time employment appear to have been hired prior to that time. The agreement between Tandem and the Employer provides that the client shall not hire a Tandem service employee "for the first 90 days of such employee's assignment to the client". An additional agreement provides that the Employer will not hire an employee supplied by Tandem for 30 days after that employee last performs work for the Employer.

#### DISCUSSION OF THE TEMPORARY EMPLOYEES

Section 9(a) of the National Labor Relations Act provides "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment...." 29 U.S.C. Section 159 (a). In making a determination as to whether a petitioned for unit is appropriate, the Board has held that Section 9(a) of the Act only requires that the unit sought by the petitioning union be an appropriate unit for purposes of collective bargaining. Nothing in the stature requires that the unit be the only appropriate unit or the most appropriate unit. See Morand Brothers Beverage Co., 91 NLRB 409, 418 (1950). The Act only requires that the unit sought be an

appropriate unit for the purposes of collective bargaining. See National Cash Register Co., 166 NLRB 173, 174 (1966).

Although the unit sought by a petitioning labor organization is a relevant consideration in determining the scope of a bargaining unit, a union is not required to seek representation in the most comprehensive grouping of employees unless an appropriate unit compatible to the unit that is requested does not exist. See Overnite Transportation Company, 322 NLRB 723 (1996); Dezcon, Inc., 295 NLRB 109, 111 (1989). Although an Employer may seek a broader unit and that unit may be appropriate, it does not necessarily render the petitioner's unit inappropriate. See Overnite Transportation Co., *supra*.

Whether or not the temporary employees supplied by Tandem to the Employer should be included in the petitioned for voting unit is governed by the Board's decision in M. B. Sturgis, Inc., 331 NLRB No. 173 (August 25, 2000). Under Sturgis, temporary employees can only be included in a unit with employees who are solely employed by the user employer if the user employer and supplier employer are joint employers and the employees share a community of interest. See M. B. Sturgis, Inc., 331 NLRB No.173, slip op. at 8.

In order to establish that two or more employers are joint employers, the entities must share or codetermine matters governing essential terms and conditions of employment. See M. B. Sturgis, Inc., 331 NLRB No. 173, slip op. at 4, citing NLRB v. Browning Ferris Industries, 691 F.2d 1117, 1123 (3<sup>d</sup> Cir. 1982); Riverdale Nursing Home, 317 NLRB 881, 882 (1995). There can be no finding of joint employer status unless the two employers jointly and meaningfully affect matters that relate to the employment relationship of the jointly employed employees, such as hiring, firing, disciplining, supervising and directing." See Riverdale Nursing Home, 317 NLRB at 882.

The record evidence shows that Tandem is responsible for interviewing, selecting and hiring all employees supplied to the Employer and establishes that Tandem is solely responsible for discharging the temporary employees.

The record establishes that the Employer assigns, directs and oversees the daily work of the employees supplied by Tandem. In addition, the employees supplied by Tandem perform the same duties and share the same employee facilities as the employees exclusively employed by the Employer. While the Employer may not be able to discharge a Tandem temporary employee, it clearly can have the employee removed from its service. The Employer also monitors the time worked by the temporary employees in its service.

Based upon the above, it is apparent that the Employer and Tandem affect and codetermine essential terms and conditions of employment of the temporary employees supplied by Tandem to the Employer. Accordingly, I find that the Employer and Tandem are joint employers regarding the employees supplied by Tandem to the Employer. See Riverdale Nursing Home, 317 NLRB at 882.

Having found that the Employer is a joint employer with Tandem, I must determine whether or not the jointly employed employees of Tandem and the Employer and the solely employed employees of the Employer share a community of interest. In determining whether a unit is appropriate, a major determinate is the community of interest and duties of the employees involved. In applying a community of interest test, the Board analyzes bargaining history, functional integration, employee interchange, employee skills, work performed, common supervision and similarity in wages, hours, benefits and other terms and conditions of employment. See J.C. Penney Co., 328 NLRB No. 105 (June 18, 1999); Armco, Inc., 271 NLRB 350, 351 (1984).

The record clearly discloses that the jointly employed employees share some interest with the solely employed employees of the Employer whom the Union seeks to represent. The two employee groups work side-by-side, perform identical work under the same supervision and working conditions, work essentially the same hours and are scheduled in the same manner by common supervision. The Employer monitors the time of temporary employees furnished by Tandem which it forwards to Tandem for payroll purposes. Although the above establishes that the jointly and solely employed employees of the Employer have

many common interests, there are also some major differences in their terms and conditions of employment. The jointly employed employees are hired by Tandem without any input by the Employer. Tandem establishes and controls the wages received by the temporary employees, and these temporary employees are carried on the payroll of Tandem. Tandem is also responsible for taxes and Workmen's Compensation for the employees whom it supplies the Employer. The jointly employed employees are not entitled to benefits furnished by the Employer for its solely employed employees, and fringe benefits, if any, enjoyed by the temporary employees are provided by Tandem. Although it appears that the Employer can have a jointly employed employee removed from service, Tandem has the sole responsibility to discharge the employees whom it supplies the Employer. The employees supplied by Tandem do not automatically become regular employees of the Employer. The Employer has not hired any temporary employees for over two and one-half years, has never hired a Tandem supplied employee, has not informed any Tandem employees that it has plans to hire them in the future and appears to have no intent on hiring Tandem employees at this time. Indeed, the Employer is specifically prohibited by its contract with Tandem from hiring any of the temporary employees for the first 90 days of such employee's assignment to the Employer. Thus, it appears, that no employees could be hired at this time by the Employer even if there was a need for employees.

The Employer's reliance upon Outokumpu Copper Franklin, Inc., 334 NLRB No. 39 (June 6, 2001) to support its position that the jointly employed employees share a community of interest with the Employer's regular employees and should be included in the unit with the regular employees is misplaced. In Outokumpu, the Board held that the temporary employees supplied to Outokumpu from three staffing agencies shared a community of interest and should be included in the voting unit because the temporary employees worked side-by-side with the employer's production and maintenance employees in all areas of the plant, the employer's supervisors had full authority to discipline, discharge and send home the temporaries, the employer's supervisors evaluated temporaries for future employment, the

temporaries were the sole source for the employer's regular production and maintenance employees, and the employer exclusively determined the wage rates the temporary employees would receive. See Outokumpu, 334 NLRB No. 39, slip op. at 1-2. Many of the facts present in that case are not present in the instant case. For instance, here, temporaries are not the sole source for the Employer's regular work force, and Tandem's hiring of the temporaries whom it supplies to the Employer is not based on criteria determined by the Employer. In Outokumpu, the Board found that "dissimilar terms and conditions of employment are substantially outweighed by the many common terms and conditions of employment shared by the regular and temporary employees." Outokumpu, 334 NLRB No. 39, slip op. at 2. In the instant matter, the dissimilar terms and conditions of employment of the temporary employees supplied by Tandem and the Employer's solely employed employees are not outweighed by the common terms and conditions of employment.

The facts in Interstate Warehousing of Ohio, LLC, 333 NLRB No. 83 (March 27, 2001), also relied upon by the Employer, are distinguishable from the facts of the instant case. In that case, the employer obtained all of its permanent employees by hiring from its temporary employees. In the instant case, the Employer has never hired from Tandem's supplied employees and, in fact, has hired no new employees for two and one-half years. As the Regional Director found in Interstate Warehousing of Ohio, LLC, 333 NLRB No. 83, slip op. at 6, "a significant number of temporary employees are converted to permanent employees of the Employer after completing a probationary period". Here, the jointly employed employees of Tandem and the Employer share a common work function, hours and supervision with the Employer's permanent employees while working side-by-side with them, and these factors, as they did in Interstate Warehousing of Ohio, demonstrate a high degree of functional integration and interchangeability and work related contact between the temporary and permanent employees. Unlike that case, though, these community of interest factors cannot be considered in conjunction with the temporary employees' expectations of conversion to permanent employees of the Employer. While in Interstate Warehousing of

Ohio the status of temporary employees was analogous to the status of a probationary employee with a reasonable expectation of permanent employment in the bargaining unit, in the instant case, the jointly employed employees of Tandem and the Employer do not have an expectation that they will be offered permanent status, and they are not akin to probationary employees.

In view of the above and the record as a whole and having carefully considered the traditional community of interest factors relied on by the Board, I find that the temporary employees supplied by Tandem to the Employer do not share a community of interest with the Employer's regular hourly employees, and I conclude that the employees solely employed by the Employer whom the petitioner seeks to represent, excluding the employees supplied by Tandem, constitute an appropriate unit for collective bargaining. There are sufficient dissimilarities between the two groups of employees to warrant a finding that the employees employed solely by the Employer constitute an appropriate unit. For all of these reasons, I will exclude from the bargaining unit the temporary employees furnished by Tandem to the Employer. See Overnite Transportation Co., 322 NLRB at 724-25; M. B. Sturgis, Inc., 331 NLRB No. 173, slip op. at 11.

6/ Your attention is directed to Part 103, Subpart B, Section 103.20 of the Board's Rules and Regulations, Series 8, as amended, which provides, inter alia, that employers shall post copies of the Board's official Notice of Election in conspicuous places at least three full working days prior to 12:01 a.m. of the day of the election, that failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed, and that an employer shall be estopped from objecting to nonposting or late posting of Notices unless it notifies the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received the Notices. You may wish to review the above rule in its entirety so that you are fully aware of its complete contents and the obligations imposed by it. 7/ The full first and last names and addresses of all eligible voters must be filed by the employer. North Macon Health Care Facility, 315 NLRB 359 (1994).

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