

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

MICROFLECT COMPANY, INC.
d/b/a VALMONT MICROFLECT

Employer

and

Case 36-RC-6056

MICROFLECT COMPANY, INC.
d/b/a VALMONT MICROFLECT and
ADDECO NORTH AMERICA, LLC¹

Joint Employers

and

MICROFLECT COMPANY, INC.
d/b/a VALMONT MICROFLECT and
EXPRESS SERVICES, INC.²

Joint Employers

and

MICROFLECT COMPANY, INC. d/b/a
VALMONT MICROFLECT and SELECTEMP
CORP.

Joint Employers³

and

PLUMBERS, STEAMFITTERS AND
MARINE FITTERS LOCAL 290, UNITED
ASSOCIATION OF JOURNEYMEN &
APPRENTICES OF THE PLUMBING &
PIPEFITTING INDUSTRY OF THE U.S.
AND CANADA, AFL-CIO

Petitioner

¹ The name of Employer Adecco North America, LLC, appears as corrected at hearing.

² The name of Employer Express Services, Inc. appears as corrected at hearing.

³ This party to the proceeding will be deleted hereafter from the caption, since, it is being dismissed as a party, *infra*.

DECISION AND DIRECTION OF ELECTION; DECISION AND ORDER

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 record⁴ 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.⁵
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. 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:

All full-time and part-time employees employed at the 3575 - 25th St. SE, Salem, Oregon facility ["the Facility"] of Microflect Company, Inc., d/b/a Valmont Microflect ["Microflect"], who are employed by Microflect, OR jointly by Microflect and Adecco North America, LLC, OR jointly by Microflect and Express Services, Inc., including Steel Department employees, Custom Manufacturing Department employees, component warehouse employees, yard employees, maintenance employees, truck drivers, and lead men; but excluding all office clerical employees, sales employees, professional employees, drafting employees, tower workers, production schedulers, guards and supervisors as defined in the National Labor Relations Act, and all other employees.

Microflect is engaged in manufacturing steel towers and poles and components thereof for wireless communications. In addition to its own regular employees, Microflect employs temporary employees provided by supplier employers, including Adecco North America ("Adecco") and Express Services, Inc. ("Express"). Petitioner seeks an election among a unit of Microflect's employees, including temporary employees jointly employed by Microflect and the respective supplier employers. It thus seeks to bargain, in one unit, with Microflect concerning Microflect's "sole" employees *and* with Adecco and Microflect concerning their jointly employed employees *and* with Express and Microflect concerning their jointly employed employees. Microflect and Adecco contend that Petitioner is seeking a non-consensual multi-employer bargaining unit, and further that employees employed solely by Microflect do not share a

⁴ The parties filed briefs, which have been considered.

⁵ The hearing officer's receipt of stipulations regarding unit inclusions and exclusions is affirmed only to the extent set forth herein.

community of interest with employees supplied by Adecco and Express. Adecco states that it does not consent to multi-employer bargaining.

Terminology.

Consistent with the Board's recent decision in *M.B. Sturgis, Inc., and Jeffboat Division, American Commercial Marine Service Company*, 331 NLRB No. 173 (Aug. 2000), herein the companies that supply employees (i.e., Adecco and Express) are at times referred to as "supplier" employers, and the company that uses those employees (i.e., Microflect) as the "user" employer. In addition, herein, employees provided by the supplier employers are referred to as "temps," and employees employed solely by Microflect are referred to as "regular" employees.

Procedural Issues.

At hearing, Microflect and Petitioner agreed to stipulations proposed by the hearing officer that:

Any unit found appropriate by the Regional Director would include the following employees: All full-time and regular part-time employees of [Microflect] employed at The Facility, including Steel Department employees, Custom Manufacturing Department employees, component warehouse employees, yard employees, maintenance employees, truck drivers, and lead men, in that those classifications share sufficient community of interest in regards to their wages, hours, and working conditions.

and,

any unit found appropriate by the Regional Director would exclude the following classification of employees employed at [The Facility].... office clerical employees, sales employees, professional employees, drafting employees, tower workers, production schedulers, guards and supervisors as defined in the Act in that they do not share a sufficient community of interest in regards to wages, hours and working conditions with those employees previously stipulated into any appropriate unit.

The above stipulations were received by the hearing officer, even though Adecco refused to join in them. Adecco made no contention at hearing or on brief contrary to the stipulations with respect to employees employed solely by Microflect, nor did it propose any alternative unit.⁶ I therefore accept the stipulations as evidence of agreement between the Union and Microflect that the employee described therein, insofar as they are employed solely by Microflect, should be included or excluded respectively in any unit found appropriate herein. I note this stipulation, the record as a whole and the lack of anything contrary presented by Adecco or Express, as grounds for making findings consistent with the stipulations. I further note that the Adecco and Express employees generally perform the same basic kinds of work as do the sales employees of Microflect.

⁶ On brief, Adecco contended that it is unclear whether the agreed-upon unit includes aluminum fabricators, receptionists, and welders. In fact, it is clear from the record that aluminum fabricators and welders are among the employees that Microflect and Petitioner would include in the unit, and that the receptionist is among those they would exclude. Adecco would exclude welders because it does not employ welders, although Microflect does.

The second amended petition herein names Microflect, Adecco, Express, and SelecTemp Corporation ("SelecTemp") as employers and requests the following unit:

Included:

All full-time and regular part-time employees of Microflect Company, Inc., d/b/a Valmont Microflect employed at its Salem, Oregon facility except as excluded below; all full-time and regular part-time employees jointly employed by Microflect Company, Inc., d/b/a Valmont Microflect and Adecco Employment Services, Inc., at Microflect Company, Inc.'s Salem, Oregon facility except as excluded below; all full-time and regular part-time employees jointly employed by Microflect Company, Inc., d/b/a Valmont Microflect and SelecTemp Corp at Microflect Company, Inc.'s Salem, Oregon facility except as excluded below; and all full-time and/regular part-time employees jointly employed by Microflect Company, Inc., d/b/a Valmont Microflect and Express Personnel Services at Microflect Company, Inc.'s Salem, Oregon facility except as excluded below.

Excluded:

All office clerical employees, sales employees, guards, professional employees and supervisors as defined in the National Labor Relations Act.

Adecco contends that supplier employers Express and SelecTemp were not afforded due process, in that they were not named as parties in earlier versions of the petition, and the second amended petition was not filed until the afternoon prior to the opening of the hearing.

However, both Express and SelecTemp responded to the Subregion by letter prior to the opening of the hearing, and such letters were received without objection into the record as Board Exhibits 2 and 3, respectively. In the letters, both Express and SelecTemp concede they meet the Board's discretionary jurisdictional standards, and I find that each is engaged in interstate commerce within the meaning of the Act. Further, Express stated simply that it "does not intend to appear at the hearing in this matter." SelecTemp similarly stated that it did not intend to appear. There is no evidence that either Express or SelecTemp requested any postponement of the hearing.

There is no evidence that either Express or SelecTemp had designated Adecco or Adecco's attorney to represent them in the instant matter. There is no evidence that either Express or SelecTemp themselves are raising any issues in this matter with respect to due process. I therefore find that Adecco lacks standing to raise these issues, and reject its gratuitous contentions.

Evidence in the record establishes that at the time of the hearing, Microflect did not employ any employees jointly with SelecTemp, although it has frequently done so in the past. The record does not reflect that SelecTemp was only in a temporary hiatus in operations at Microflect at the time of the hearing or that there were any firm plans by Microflect to use them again in the future. Therefore, SelecTemp is not a party to this matter, and I shall dismiss the petition as to it.

Other Issues.

Microflect has approximately 128 regular employees engaged in welding, steel fabricating, aluminum fabricating, inspecting, painting, warehousing, material handling, truck driving, and maintenance. In addition, at the time of the hearing, it had 25 temps supplied to it by Adecco, including 16 shipping employees, two material handlers, three steel fabricators, one aluminum fabricator, one maintenance helper, one receiving inspector, and one inventory controller. It also had two steel fabricators supplied by Express.

All employees, including temps, are supervised exclusively by Microflect's personnel while they are working on Microflect's premises. Temps work side-by-side with Microflect's regular employees, have the same qualifications, perform the same job duties, share in the amenities of Microflect's facility (including lunchroom, restrooms, and parking lot), and must observe the same rules of conduct. Microflect's Director of Human Resources testified that temps working alongside regular employees generally, but not always, perform the same work. She did not elaborate on this point.

Microflect sets the wage rate for the temps by contractually specifying a wage rate to be paid by the respective suppliers to their respective employees. Microflect's regular employees receive fringe benefits provided by Microflect. Adecco's employees receive fringe benefits provided by Adecco. There is no evidence regarding any fringe benefits provided to employees of Express. Microflect establishes the hours of work for temps in its facility, and assigns their job duties.

There is no exclusivity contract between Microflect and Adecco; the former may access applicants via any source. When Microflect has need for an employee in a specific position on a specific shift, it notifies a supplier employer such as Adecco and provide job descriptions. Adecco then conducts interviews, performs basic screening and sends one or more candidates to Microflect. Microflect's supervisor in the relevant department decides whether to accept a candidate or not. Adecco arranges a drug test for successful applicants. The employee then reports to Microflect. After 90 days, a temp may be offered a position as a regular employee of Microflect; in the past two years 31 individuals who began working for Microflect as temps became regular employees. If Microflect offers the temp a position prior to the end of the 90 days, and the temp accepts, Microflect is charged a fee of \$250 by Adecco. Microflect pays Adecco 1.5 times an employee's hourly rate for each hour the employee works for Microflect.⁷ Microflect evaluates its Adecco employees every four weeks, as it does with its own regular employees during their first 90 days. The evaluations are not shared with Adecco. Adecco employees working at Microflect are required to inform Adecco if they are going to be late for work or miss a day of work. Temps commencing their employment with Microflect receive the same orientation as Microflect's regular employees, except that they are not told about Microflect's fringe benefits.

Temps receive their paychecks from their supplier employer. There is a difference in how the time records of Microflect's regular employees and those of temps are kept, inasmuch as the information is sent to separate payroll systems. Microflect has no common ownership with either of the supplier employers, nor any common management or any shared facilities.

There is evidence that Microflect can discipline temps for minor infractions such as tardiness, but that Adecco is responsible for any serious discipline of its employees. However,

⁷ Express charges 1.67 times the employee's hourly rate.

Microflect can advise Adecco that it no longer wishes to have a particular temp working on its premises; the employee is not necessarily terminated from employment with Adecco, although he is removed from the Facility.⁸

Analysis.

In *Sturgis*, supra, the Board said, “a unit composed of employees who are jointly employed by a user employer and a supplier employer, and employees who are solely employed by the user employer, is permissible under the statute without the consent of the employers.” *Sturgis*, at Slip. Op. P. 7. In *Sturgis*, the Board distinguished cases such as *Greenhoot, Inc.*, 205 NLRB 250 (1973), involving “multiple *user* employers whose only relationship to each other is that they obtain employees from a common supplier employer. In such cases, the union seeks to represent a unit that includes employees of all of the users. Thus, it is clear that the unit is a multi-employer unit and therefore consent of the separate user employers would be required before the Board could direct an election.” *Sturgis*, at Slip. op. P. 8 [Emphasis added.] The Board also said in *Sturgis* that, “a petition that names as the employers unrelated employers will be treated as seeking an inappropriate multi-employer unit absent the consent of all the employers; a petition that seeks a unit only of the employees supplied to a single user, or seeks a unit of all the employees of a supplier employer and names only the supplier employer, does not involve a multi-employer unit.” *Sturgis*, at Slip. op. P. 11

Adecco and Microflect contend that Petitioner is seeking a multiemployer unit. The petition, in its second amended version, names Microflect, Adecco, SelecTemp, and Express. Petitioner has never stated that it wishes to bargain only with Microflect; a reading of the petition demonstrates that it wishes to bargain with both Microflect and the supplier employers regarding the full panoply of terms and conditions of employment of a unit including both the solely employed employees of Microflect and the jointly employed employees of Microflect and the respective supplier employers.

In *Sturgis*, at Slip. op. P. 8 the Board said, “We decline to accept the faulty logic of *Lee Hospital* [300 NLRB 947 (1990)]. . . that a user employer and a supplier employer—both of which employ employees who perform work on behalf of the user employer—are equivalent to the completely independent employers in a multi-employer bargaining units.” Further in that case, the Board said, “We reject the contention that finding these units appropriate presents impediments to meaningful bargaining because employers are compelled to bargain at the table over employees with whom they have no employment relationship. To the contrary, in these units each employer is obligated to bargain only over the employees with whom it has an employment relationship and only to the extent it controls or affects their terms and conditions of employment.” *Sturgis*, at Slip op. P. 9

Clearly, the Board in *Sturgis* contemplated situations in which a union would seek to bargain with both the user employer and the supplier employer. The Board has not, to my knowledge, yet decided any post-*Sturgis* case involving a user employer and multiple supplier employers, such as occurs herein. However a careful reading of *Sturgis* demonstrates that an appropriate unit can be formed that includes the jointly employed employees of *multiple* suppliers to a single user along with the users own employees.

⁸ There is no indication that the facts set forth requiring Adecco/Microflect in the proceeding three paragraphs vary in any significant way vis a vis Express/Microflect.

“The joint employers must bargain over the terms and conditions of employment of their employees, and the sole employers are obligated to bargain over the terms and conditions of employment of their employees. See also *Western Temporary Services v. NLRB*, 821 F.2d, 1258, 1265 (1987), in which the court found that a user employer, Classic, and its supplier Western, each needed only to negotiate with the union over their jointly employed employees to the extent that they each control their conditions of employment. We impose no greater requirement here.” *Sturgis*, at Slip. op. P. 9. Nothing in *Sturgis* says or even hints that this circumstance does not apply where there are multiple supplier employers each with a joint employer relationship to the single user employer.

But, there is stronger evidence that the "user/supplier combination" principle extends to situations, as here, involving a single user and multiple suppliers. In *Sturgis*, the Board held that a user's directly employed employees [*Sturgis or Jeffboat*] could be combined with their respective supplier's employees that were jointly employed by the user and the supplier. These "do not constitute multi-employers and requiring consent." Slip. op. P. 8. "The scope of a bargaining unit is delineated by the work *being performed for a particular employer*. In a unit combining the user employer's sole employees with those jointly employed by it and a supplier employer, all of the work is being performed for *the user employer*. Further, all of the employees in the unit are employed, either solely or jointly, by the user employer". Id. [Emphasis added.]

A unit consisting of the employees jointly employed by two separate employers was considered "multi-employer" under *Lee Hospital*, but the Board reversed *Lee* in *Sturgis*. Combining employees of multiple *users* remains multi-employer, under *Greenhoot*. From this we can see that a unit combining the solely employed employees of a single user (Microflect) and multiple suppliers (Adecco, Express) can be appropriate. It is a combination of relationships but not multi-employer. All of the work is still being performed for a single employer (Microflect). All of the employees are still employed, either jointly or solely, by the single user (Microflect). "We hold today that consent requirements for multi-employer bargaining among separate and independent employers do not apply to units that *combine jointly employed and solely employed employees of a single user employer*." *Sturgis*, at Slip. op. P. 12.⁹

"Our view is consistent with well-settled precedent that both precedes and post dates *Greenhoot*. We adhere to these cases with the knowledge that, until *Lee Hospital*, neither the Board nor the courts ever found the inclusion, in a unit of user's employees, of employees supplied by other *employers* and jointly employed by the user to involve multi-employer bargaining. *Sturgis*, at Slip. op. P. 8. ([Emphasis added]. Given that *Lee Hospital* was reversed in *Sturgis*, the Board reverted to pre-*Lee* case law permitting multiple suppliers' employees in a unit with a single user.

Adecco contended at hearing that it is not a joint employer with Microflect, but did not advance that argument on brief. There it contended that Adecco and Express are not joint employers with each other. As the Board stated in *Sturgis*, "under current Board precedent, to establish that two or more employers are joint employers, the entities must share or codetermine matters governing essential terms and conditions of employment. *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1123 (3d Cir. 1982); *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995). The employers must meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." *Riverdale*, 317 NLRB at 882, citing *TLI, Inc.*, 271 NLRB 798 (1984).

⁹ Note that the Board does not here distinguish between single or multiple suppliers.

Here, Adecco and Microflect each “meaningfully affect matters relating to the employment relationship” in that Adecco hires, fires, and disciplines employees who are performing work for Microflect at Microflect’s Facility, and provides their fringe benefits, while Microflect co-determines who will work at the Facility, supervises supplier employees on a day-to-day basis, determines their wage rates, and assigns and directs their work. Thus I find Adecco and Microflect to be joint employers. On a similar basis, I also find Express and Microflect to be joint employers.

As noted, Adecco argues that it is not a joint employer with other supplier employers; and I agree. However, Adecco is a joint employer with the user employer, Microflect and Express is likewise a joint employer with Microflect. Thus, employees of each of the supplier employers have a common user employer. As demonstrated above, a combination of one or more supplier employees jointly employed with a single user, plus the solely-employed employees of the same user, does not preclude the appropriateness of a single user, multiple supplier unit.

In *Sturgis* the Board said, “consent requirements for multi-employer bargaining among separate and independent employers do not apply to units that combine jointly employed and solely employed employees of a single user employer. We will apply traditional community of interest factors to decide if such units are appropriate.” *Sturgis* at Slip op. P. 12. Thus, the unit sought by Petitioner is an appropriate unit, if there exists a community of interest among the employees solely employed by Microflect and those jointly employed by Microflect and Adecco, and by Microflect and Express.

In assessing community of interest, the Board considers such factors as the method of wages or compensation, hours of work, benefits, qualifications, training and skills, job functions, frequency of contact with other employees, integration of work functions, interchange with other employees, and history of bargaining. *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962).

Here, the temps have the same wage rates as the regular employees, work the same hours, have the same qualifications and skills, generally perform the same job duties side-by-side with the regular employees under the same supervision in the same facility, and share all the amenities of that facility with the regular employees. Further, the record as a whole establishes that the work of the temps is functionally integrated with that of the regular employees. A substantial number of temps have become employed as regular employees -- an average of more than one per month. These significant areas of commonality substantially outweigh differences such as different fringe benefits, different timekeeping methods, and separate payrolls. I find that the temps jointly employed by Adecco and Microflect, and those jointly employed by Express and Microflect share a community of interest with employees employed solely by Microflect sufficient to warrant their inclusion in the unit.

There are approximately 155 employees in the Unit.

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 be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit 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 PLUMBERS, STEAMFITTERS AND MARINE FITTERS LOCAL 290, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE U.S. AND CANADA, AFL-CIO.

ORDER

IT IS HEREBY ORDERED that the petition, insofar as it pertains to SelecTemp be, and it hereby is, dismissed.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of 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 hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Officer-in-Charge for Subregion 36 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Subregional Office, 601 SW Second Avenue, Suite 1910, Portland, Oregon 97204, on or before April 25th, 2001. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (503) 326-5387. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

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. This request must be received by the Board in Washington by May 2nd, 2001.

DATED this 18th day of April, 2001

Paul Eggert, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

420-7330