

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

SOLARIS PAPER, INC.

Employer

and

Case 21-RC-21067

TEAMSTERS DISTRICT COUNCIL #2, LOCAL 388-M,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CTW

Petitioner

**SUPPLEMENTAL DECISION AND
DIRECTION OF ELECTION**

On September 23, 2008, I issued a Decision and Direction of Election in this matter. Thereafter, the Employer filed a request for review of that decision. By Order dated October 23, 2008, the Board remanded this case to me for further appropriate action and the issuance of a supplemental decision.

The initial Decision concluded, among other things, that the Employer was seeking a multi-employer unit, composed of both employees solely employed by the Employer and the "temporary" employees. The Board Order remanded this case, directing that the supplemental decision determine whether the Employer solely employs the temporary agency-supplied employees; and if so, whether those employees share a sufficient community of interest to mandate their inclusion in the unit found appropriate.

I. ISSUE

The initial issue presented is whether the Employer is the sole employer of the temporary employees supplied by the two staffing agencies, or whether the temporary employees are jointly employed by the Employer and the staffing agencies. If the record discloses that the temporary employees are solely employed by the Employer, then the second issue presented would be whether the temporary employees share a community of interest with the Employer's solely employed employees sufficient to require their inclusion in the unit found appropriate.

Based on the record as a whole, and for the reasons set forth below, I conclude that the temporary employees are not solely employed by the Employer and that they are instead jointly employed by the Employer and the temporary agencies. Accordingly, I reaffirm my exclusion of the temporary employees from the unit found appropriate in my September 23, 2008 Decision and Direction of Election.

II. RECORD EVIDENCE

As detailed in the September 23, 2008, Decision and Direction of Election, in addition to the approximately 81 production, maintenance and shipping and receiving employees employed solely by the Employer, the Employer also uses about 90 employees supplied by temporary agency employers Staff-It and Cobblestone.¹ These temporary employees work in many of the same classifications and work areas, and perform the same work under the same supervision as the Employer's solely-employed employees.

¹ A third temporary agency, Personnel Options, used to provide the Employer with temporary employees. Personnel Options has not provided the Employer with any temporary employees since 2007 and the status of Personnel Options or its temporary employees is not at issue herein.

The temporary agencies recruit and interview potential employees to determine if their skills match what the Employer has requested. The temporary agencies verify their applicants' I-9 documents and pay for their drug tests to be administered. The temporary agencies also set up the temporary employees' pay and withholding deductions. While the Employer determines the temporary employees' wage rates and any increases in those wage rates, the temporary agencies actually pay the temporary employees. The temporary agencies charge the Employer a fee for their expenses, including worker's compensation premiums, beyond the temporary employees' hourly rates. While the Employer goes over its rules with new temporary employees, it also asks the temporary agencies to go through its rules with these employees.

The Employer submits weekly staffing requests to the temporary agencies and the temporary agencies schedule the temporary employees based on the Employer's needs. Staff-It and Cobblestone are responsible for scheduling their employees' shifts and days off. The temporary agencies have the right to make changes to the temporary employees' schedules, and they notify the Employer so that it knows when they make changes to the staffing schedules.

The record discloses that if a temporary employee wants to work a different shift at Employer's facility, the temporary employee asks his or her temporary agency. Also, the record reveals that the temporary agencies unilaterally undertake filling-in for absent or otherwise unavailable temporary employees assigned to work at the Employer's facility, with other temporary employees. In addition, if the Employer needs additional workers to fill an unexpected, short-term need, it may call Staff-It or Cobblestone for additional temporary employees. The record discloses that temporary

employees provided in those temporary or emergency circumstances may or may not come back to work for the Employer in the future.

The temporary agencies are also responsible for replacing temporary employees who call in sick. In these circumstances, temporary employees call their temporary agency employer if they are not going to be able to report for a scheduled shift and the temporary agency sends a replacement temporary employee to the Employer. Once the originally-assigned temporary employees is well enough to return to work, the temporary agencies determine whether or not the replacement temporary employee is then terminated. Thus, the temporary agencies determine whether or not the replacement temporary employee will return to work for the Employer. Finally, the record discloses that if a temporary employee does not report to work and did not call the temporary agency in advance, an Employer supervisor reports the absence to the temporary agency.

Temporary employees' time is kept by their respective temporary agency employers. Temporary employees do not use the same time clocks as the Employer's regular employees. A time clock for the temporary employees supplied by Staff-It is located near the productions supervisors' office area, next to one of the time clocks used by the Employer's regular employees. Staff-It also has assigned one of its own employees² to work at the Employer's main facility in order to manage the temporary employees' time on site. Annabelle has a desk and a computer in a supervisor's office at the Employer's facility. Annabelle's hours at the Employer's facility vary in an effort to cover portions of all three shifts the temporary employees from Staff-It work at that

² The record reveals that the Staff-It employee's name is Annabelle _____. The record does not disclose her last name.

facility. Staff-It employees working at the Employer's satellite facility use timecards to record their time, which are collected by Annabelle.

In addition, the record discloses that a Staff-It manager visits the Employer's facility, though the record does not disclose the frequency or nature of those visits. The record also does not disclose the specific method that Cobblestone uses to track its temporary employees' work time.

While the temporary employees provided by Staff-It may work for the Employer as operators, assistant operators and material handlers, the record reveals that they mainly perform non-skilled jobs, such as general laborers. Even if a temporary employee performs as an operator or assistant operator, the titles of operator and assistant operator positions are reserved for the non-probationary, solely-employed employees of the Employer who perform that work. The temporary employees provided by Cobblestone, estimated to be between 10 and 13 employees, perform general housekeeping work for the Employer, removing the accumulation of dust from in and around machines and production areas.

The record discloses that the temporary employees' work is supervised by the Employer's supervisors. In this regard, the Employer's supervisors decide where the temporary employees are going to work each day and they assign the work to the temporary employees. Employer supervisors evaluate the temporary employees and temporary employees may be converted to become solely-employed employees of the Employer based on these evaluations.³ Employer supervisors may also tell the temporary agencies not to send certain poor-performing temporary employees back to work for the Employer.

³ The record does not contain evidence of any written evaluations of the temporary employees.

The Employer's work and safety rules are applied to both the temporary and the Employer's solely-employed employees. The record reveals that the Employer's supervisors may discipline temporary employees for failing to follow these rules. The record does not disclose the nature or extent of such discipline, but Manufacturing Director Andre Lair testified that the Employer's supervisors may send employees, including temporary employees, home if they are not wearing proper safety shoes.

It is the temporary agencies, however, and not the Employer, that maintain any written documentation of discipline issued to temporary employees. Employer supervisors may authorize overtime and grant time off for temporary employees, and can send temporary employees home if there is a decline in the need for production on a particular line.

The Employer has converted approximately 18 temporary employees to become solely-employed employees, who were originally supplied by Cobblestone and Staff-It. When temporary employees are converted to solely-employed employee status, a new probationary period is commenced.⁴

The temporary employees generally perform the same work and functions, using the same equipment in the same locations, as the Employer's solely-employed employees. Temporary employees work alongside solely-employed employees and have regular contact with them. Temporary employees may park in the same parking areas as the solely-employed employees. The temporary employees and solely-employed employees have access to the same lunchrooms, restrooms and smoking areas, and use the same entrances and exits to the facilities.

⁴ At hearing, Manufacturing Director Lair testified that he did not know if the Employer pays the temporary agency a fee when it hires a temporary employee to work directly for the Employer.

The Employer's solely-employed production employees generally work 12-hour shifts, while the temporary employees are usually scheduled for 8-hour shifts. While the Employer may authorize overtime for temporary employees, the temporary employees do not usually work overtime. The temporary employees are generally paid less than the Employer's solely-employed employees and, like the Employer's probationary solely-employed employees, receive no benefits from the Employer.⁵

The temporary employees, like the Employer's solely-employed probationary employees, wear street clothes to work and not uniforms. The temporary employees also wear color-coded vests, paid for by the temporary agencies, that identify from which agency they have been supplied. The Employer's non-probationary solely-employed employees are provided with uniforms and reimbursement for the purchase of required safety shoes. While the Employer provides both the temporary and the solely-employed employees with necessary ear plugs and safety glasses, the temporary employees are not reimbursed for the required safety shoes.

III. ANALYSIS

While the Employer contends that its degree of control over the temporary employees makes it the sole employer of these employees, the record discloses that the temporary agencies share or codetermine certain essential terms and conditions of employment of the temporary employees and that these employees are thus jointly employed by the Employer and their respective temporary agencies.

⁵ Manufacturing Director Lair initially testified that he did not know what benefits the temporary agencies may provide the temporary employees and then later presented hearsay testimony indicating that Staff-It does not provide its temporary employees with any medical benefits.

In order to establish that two or more employer are joint employers, the evidence must disclose that the employers share or codetermine matters governing essential terms and conditions of employment. Riverdale Nursing Home, 317 NLRB 881, 882 (1995); Pitney Bowes, Inc., 312 NLRB 386, 387 (1993) In order to make such a finding, the employers at issue must meaningfully affect matters relating to the employment relationship, such as hiring, firing, discipline, supervision and direction. Riverdale Nursing Home, above, citing TLI, Inc., 271 NLRB 798 (1984); Pitney Bowes, supra.

Here, while it is apparent that the Employer assigns and supervises the temporary employees' work, determines their wage rates, and evaluates their performance in an effort to determine which temporary employees it may hire and, in some cases, which temporary employees it may request not return to work, the record discloses that Staff-It and Cobblestone share or codetermine certain essential terms and conditions of employment of the temporary employees they supply to the Employer.

In this regard, the record reveals that the temporary employers recruit, interview and hire employees to be supplied to the Employer based on the Employer's requirements. The temporary employers set their respective temporary employees' schedules with the Employer based on the Employer's stated needs, and may change the temporary employees' scheduled shifts and days off pursuant to these employees' requests. Further, the temporary employees must call their temporary employers if they are sick or otherwise unavailable for scheduled shifts, and the temporary employers are responsible for sending their replacements to work for the Employer. Finally, the record also discloses that the temporary employers separately manage the temporary employees'

timekeeping and payroll, and that one of the temporary agencies, Staff-It, has an employee on site to assist in that function.

Based on the above-noted factors, I find that the temporary employees are not solely employed by the Employer. Rather, it is concluded that the temporary agencies share or codetermine certain essential terms and conditions of employment of the temporary employees that meaningfully affect the employment relationship and that they, along with the Employer, jointly employ the temporary employees working at the Employer's facilities.

Having concluded that the Employer does not solely employ the temporary employees supplied by Staff-It and Cobblestone, and that the Employer jointly employs these employees with the respective staffing agencies, I reaffirm my conclusion that the Employer is seeking a multi-employer unit, composed of both the Employer's solely-employed employees, and the temporary employees employed jointly by the Employer and two temporary agencies.

As detailed in the September 23, 2008 Decision and Direction of Election, in Oakwood Care Center, 343 NLRB 659 (2004), the Board found that combined units of solely and jointly employed employees are multi-employer units and statutorily permissible only with the parties' consent. The Petitioner here opposes the inclusion of the temporary employees in the unit, and the temporary agencies have not given clear and unequivocal consent to their inclusion in the unit. Thus, under Oakwood Care Center, above, the inclusion of temporary employees in the unit found appropriate is impermissible because the requisite consent of all parties is absent.

In light of the conclusion that the temporary employees should be excluded from the unit, it remains unnecessary to determine whether or not the temporary employees share a sufficient community of interest sufficient to mandate their inclusion in the unit found appropriate.

IV. CONCLUSION

On the basis of the foregoing and the record as a whole, I reaffirm my finding that the temporary employees should be excluded from the unit. Accordingly, I shall direct an election in the following appropriate unit (hereinafter "Unit"):

All full-time and regular part-time production employees, maintenance employees, shipping and receiving employees, production clerk-planning, production clerk-product specialist, production clerk-purchasing, production clerk-expediter, warehouse clerk-receiving, warehouse clerk-mail, warehouse clerk-imports and warehouse clerk-shipping employees employed by the Employer at its facilities located at 13415 Carmenita Road, Santa Fe Springs and at 16220 Carmenita Road, Cerritos, California; excluding all other employees, temporary employees, office clerical employees, sales employees, guards and supervisors as defined in the Act.

There are approximately 91 employees in the Unit found appropriate.

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 are employed during the payroll period ending immediately preceding the date of this Supplemental Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an

economic strike, which commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. 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 the **Teamsters District Council #2, Local 388-M, International Brotherhood of Teamsters, CTW.**

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 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); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Supplemental Decision, two copies of an alphabetized 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. North Macon Health Care Facility, 315 NLRB 359 (1994).

In order to be timely filed, such list must be received in Region 21, 888 South Figueroa Street, 9th Floor, Los Angeles, California 90017, **on or before November 14, 2008**. No extension of time to file the list shall be granted, excepted in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. 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 (213)894-2778. 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.

NOTICE OF POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.21, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three (3) working days prior to the day of the 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 five (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.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street,

N.W., Washington, D.C. 20570. The Board in Washington must receive this request by **5 p.m., EST, on November 21, 2008**. This request may **not** be filed by facsimile.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site:**www.nlr.gov**.

DATED at Los Angeles, California, this 7th day of November 2008.

/s/James F. Small
James F. Small
Regional Director, Region 21
National Labor Relations Board