

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

PAPERWORKS INDUSTRIES, INC.¹
Employer

and

Case 14-RC-108193

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 41
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on July 10, 2013, before a hearing officer of the National Labor Relations Board (Board), to determine whether temporary employees supplied to PaperWorks Industries, Inc. (Employer) by Encore Staffing Services (Encore Staffing), a temporary labor provider, should be included in the petitioned for bargaining unit.² No other issues were raised in this matter. At the close of the hearing, the parties were afforded the opportunity to file briefs addressing the issues raised during the hearing.

¹ The Employer's name appears as amended by the parties' stipulation at the hearing.

² Upon review of the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

b. 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. Commerce facts: PaperWorks Industries, Inc. is a State of Delaware corporation engaged in the business of manufacturing paperboard and packaging products at its facility located at 9650 Alden Street, Lenexa, Kansas, the only facility involved herein. During the past year, a representative period, the Employer in the course and conduct of its business operations purchased and received goods and services valued in excess of \$50,000 directly from sources located outside the State of Kansas. During this same period, the Employer sold and shipped goods and services valued in excess of \$50,000 directly to customers located outside the State of Kansas. The Employer has annual gross revenues in excess of \$1,000,000.

c. The labor organization involved claims to represent certain employees of the Employer.

d. 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.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Based on a thorough review of the record, I make the following findings:

For the reasons detailed below, I conclude that the temporary employees supplied to the Employer by Encore Staffing should be excluded from the unit because consent for such a multi-employer bargaining unit has not been attained from all parties involved.

Accordingly, 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 regular part-time employees employed by PaperWorks Industries, Inc., at its facility located at 9650 Alden Street, Lenexa, Kansas, but EXCLUDING office clerical employees, professional employees, managerial employees, guards and supervisors, as defined in the Act.

Thus there are approximately 19 employees employed by the Employer in the unit found appropriate herein. Two additional individuals, Maintenance Technician Joseph Carey and Second Shift Technical Mentor Gary Henson, will be permitted to vote subject to challenge, as the parties disagree on whether these two individuals are supervisors within the meaning of Section 2(11) of the Act and have agreed to have these two individuals vote subject to challenge rather than determining their supervisory status in the instant proceeding.

I. ISSUE

The parties differ as to the eligibility of temporary employees supplied to the Employer by Encore Staffing, but otherwise agree that the bargaining unit described above is appropriate. In its brief and through a written offer of proof, the Employer

asserts that the jointly-employed temporary employees should be included in the unit because they share a community of interest with other employees in the unit sought by the Petitioner. The Employer has also presented its legal argument as to why it disagrees with the Board's ruling in *Oakwood Care Center*, 343 NLRB 659 (2004), and believes the Board should apply the standard set forth in *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000). The Petitioner does not consent to the inclusion of the jointly-employed employees in the petitioned for bargaining unit and argues that *Oakwood* precludes the inclusion of temporary employees in the petitioned for bargaining unit without the consent of all parties.³

II. STATEMENT OF FACTS

A. Overview of Operations

The Employer is a Delaware corporation engaged in the business of manufacturing paperboard and packaging products at its facility located in Lenexa, Kansas. The Employer operates two shifts, from 5:00 a.m. until 3:30 p.m., and from 3:30 p.m. until 2:00 a.m. Employees are paid weekly with payroll periods starting on Sunday and ending on Saturday. Approximately 29 individuals work at the facility: the three supervisors or managers discussed below; 19 employees employed directly by the Employer; two additional individuals employed directly by the Employer whose supervisory status is the subject of dispute between the parties and who the parties stipulated would vote subject to challenge; and five "temporary" employees who are employed by Encore Staffing.

B. Supervisory Stipulation

³ A representative of Encore Staffing was present at the July 10, 2013 hearing but chose not to participate in the hearing or to take a position on the issues presented at the hearing.

C. At the hearing, the parties stipulated that the individuals named below hold the following positions: General Manager Heather Stevens, Production Supervisor Ed Jones, and Supervisor Joyce Britt. The parties further stipulated that these individuals are supervisors as defined within Section 2(11) of the Act and, based on the parties' stipulation that these individuals have the authority to hire, fire, or discipline employees or effectively to recommend such action, I will exclude them from the unit found appropriate. Temporary Employees/Joint Employer Stipulation

At the hearing, the parties stipulated that the temporary employees named below are jointly employed by the Employer and Encore Staffing at the Employer's Lenexa facility: Aron Boykin, Donald Brown, Robert Elbert, Anthony Goodman and Corey McDonald.

III. ANALYSIS

In *Oakwood Care Center*, 343 NLRB 659 (2004), the Board reversed *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), and returned to its prior precedent, holding that bargaining units consisting of solely and jointly employed employees are multi-employer units and are statutorily permissible only with the consent of all parties involved. The consent by all parties "must be clear and unequivocal, as manifested by express agreement or by actually entering into bargaining on a multiemployer basis." *Id.* at 663 fn. 25.

In this case, the Employer is seeking such a multi-employer unit. The parties stipulated to the joint-employer relationship that exists in relation to the employment of the temporary employees provided by Encore Staffing to the Employer. The unit sought

by the Employer would consist of both regular employees employed only by the Employer and temporary employees who are jointly employed by the Employer and by Encore Staffing. The combination of solely- and jointly-employed employees in a single bargaining unit sought by the Employer clearly falls within the parameters of *Oakwood*. Beyond the role of an observer, Encore Staffing did not participate in the hearing and has not provided clear and unequivocal consent to the inclusion of the temporary employees in the unit. Furthermore, even if Encore Staffing gave its consent, the Petitioner has clearly communicated its opposition to the inclusion of temporary employees in the bargaining unit. The Board will not approve the creation of a multi-employer bargaining unit over the objection of any party, whether it is an employer or a union. *Artcraft Displays*, 262 NLRB 1233 (1982), clarified in 263 NLRB 804 (1982); *United Fryer & Stillman*, 139 NLRB 704 (1962). Therefore, under current Board law, the inclusion of the temporary employees into the unit is not permissible because all parties have failed to give their consent to the multi-employer bargaining unit.

Although the Employer argues that the Board should overrule *Oakwood* and return to *M.B. Sturgis*, the decision to overrule Board law is exclusively left to the Board itself or the Supreme Court. *Insurance Agents' International Union*, 119 NLRB 768, 772-773 (1957), enf. denied, 260 F.2d (D.C. Cir. 1958), aff'd., 361 U.S. 477 (1960); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984), citing *Iowa Beef Packers*, 144 NLRB 615, 616 (1963).

In light of my decision that temporary employees should be excluded from the unit, it is not necessary for me to determine whether the temporary employees possess a

sufficient community of interest with the Employer's regular employees to be included in a single 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 all employees employed in the bargaining unit during the payroll period ending immediately preceding the date of this Decision (payroll cutoff date), 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 who 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 who are employed in the unit 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 **INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 41.**

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Subregional Office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

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); *NLRB. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that **two** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The list must be of sufficiently large type to be clearly legible. The undersigned shall make this list available to all parties to the election.

In order to be timely filed, such list must be received in Subregion 17's Office, Suite 100, 8600 Farley, Overland Park, Kansas 66212, on or before **July 25, 2013**. 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. 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. Since the list is to be made available to all parties to the election, please furnish a total of two copies, unless the list is to be submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall by department, etc.) If you have questions, please contact the Subregional Office.

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 5:00 p.m. (ET) on **August 1, 2013**.

This request may be filed electronically through E-Gov on the Agency's website, www.nlr.gov, but may not be filed by facsimile. Refer to the Attachment supplied with the Subregional Office's initial correspondence for guidance in filing electronically. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlr.gov. On the home page of the website, select the E-Gov tab and click E-Filing. Then select the NLRB office for which you wish to E-File your documents.

Detailed E-filing instructions explaining how to file documents electronically will be displayed.

SIGNED at Overland Park, Kansas, this 18th day of July 2013.

/s/ Naomi L. Stuart

Naomi L. Stuart, Officer in Charge
National Labor Relations Board
Subregion 17
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