American Staffing Association

The Sturgis Case—The Making of A Quagmire

By Edward A. Lenz

Almost two years have passed since the National Labor Relations Board issued its long-awaited decision in the *M.B. Sturgis* case dealing with how temporary workers can be organized—enough time to begin taking a serious look at the implications of the course that decision has set us on.

The central holding in *Sturgis* was that temporary workers supplied by staffing firms can be included in a single bargaining unit with the regular employees of a user firm if all the workers in the unit are employed either solely or jointly by the user firm, and the workers share a "community of interest." Overruling prior Board precedent, the ruling held that such a combination is not a "multi-employer" unit requiring the consent of all the employers.

Initial reviews of the decision were mixed. The media described it as a victory for labor. But labor advocates, while hailing the ruling in principle, foresaw no dramatic impact on union organizing. I worried publicly about the chilling effect the ruling might have on the overall use of temporary workers employed in the United States.

It now seems apparent that only a small percentage of temporary workers are likely ever to be affected by the *Sturgis* decision. While no study has been conducted to determine how many temporary employees employed by staffing firms actually belong to a union, the number is probably small. So is the pool of temporary employees who would even potentially be eligible for union membership. Anecdotal evidence suggests that as little as 5 percent of temporary employees employed by staffing firms work at union worksites—most of them on very short assignments.

Nonetheless, the impact on those temporary workers who are affected, and on the bargaining obligations of the multiple employers involved in such cases, is likely to be substantial—and adverse.

In his dissent in *Sturgis*, Board member Brame called the decision "both bad law and bad policy." Criticizing the majority's "abrupt departure from the longstanding requirement of consent to multi-employer bargaining," he predicted that the result would be "controversy and confusion as the employers strive to protect their differing interests." Private commentators voiced similar concerns. Subsequent Board decisions suggest that these concerns were not unfounded.

* © 2002 American Staffing Association, Alexandria, VA. Mr. Lenz is ASA Senior Vice President for Public Affairs and General Counsel. This article will be published in the Spring 2002 issue of the College of Labor & Employment Lawyers Newsletter.
The Board's most recent decision in the "Tree of Life" case illustrates the complex problems that lie ahead. Involving multiple staffing suppliers, the case illustrates two of the most contentious issues that are likely to be recurrent themes.

One is the "community of interest" standard that should be applied in determining whether different groups of temporary workers can be combined into a single unit. The other is how to sort out the diverse bargaining interests and obligations of the parties involved in staffing arrangements, especially when there are multiple staffing suppliers—which is more often than not the case.

How much of a "community of interest" must exist between diverse groups of workers before they can be combined into a common bargaining unit depends on when the issue arises. If it arises in the context of an initial representation proceeding, in which all of the employees the union seeks to include in the unit have the opportunity to vote, an ordinary community of interest standard applies. But if the union seeks to "accrete" a previously excluded class of employees into an existing unit without a vote, an "overwhelming" community of interest must be shown.

In Tree of Life, the Board promptly split on which standard to apply. Members Truesdale and Liebman asserted that the temporary workers were placed in positions that plainly fit the unit description (drivers and warehousemen) set forth in the union bargaining contract. Hence, in their view, the ordinary community of interest standard applied and the workers could be included. Chairman Hurtgen dissented, arguing that since temporary employees historically were not part of the bargaining unit, and since the workers in question never voted in a representation proceeding, they could not be included absent an overwhelming community of interest. That higher standard was not met, he said, because the "'bread-and-butter' conditions [of their employment] are set by different sets of employers, and these conditions are different." Indeed, in determining joint employer status, all three Board members accepted the general finding of the administrative law judge that the staffing firms controlled the workers' pay and other economic conditions and that Tree of Life controlled non-economic conditions, such as work assignments, hours of work, and work schedules. But there was anything but clarity as to the employers' respective obligations to apply the terms of the union contract to the temporary employees.

Chairman Hurtgen, of course, found it unnecessary to decide whether Tree of Life had an obligation to apply the union contract to the temporary workers since, in his view, they were not properly included in the bargaining unit. Member Truesdale, having decided that they were properly included, said Tree of Life would only be obligated to apply the provisions of the contract to the temporary workers "as to the working conditions it controlled." Member Liebman, in dissent, argued not only that the temporary employees should be included in the unit, but that Tree of Life should be required to apply all of the terms of the contract to them.

The view that Tree of Life, at most, had an obligation to apply only those provisions of the union contract dealing with matters it controlled—coupled with the law judge's finding that the staffing firms controlled the temporary employee's pay—appeared to relieve Tree of Life of any duty to apply the contract's wage terms to them. But the Board held that since the issues of control had been litigated "only in general terms," it remanded the case for further proceedings to determine
Tree of Life's control over “specific working conditions governed by particular contract provisions.”

Four months later, with no additional fact-finding, an NLRB compliance officer notified Tree of Life that, "inasmuch as Respondent has ultimate control over all of their terms and conditions of employment," it would be required to apply all of the terms of the union contract to the temporary employees. But the Regional Director subsequently recommended to the General Counsel of the Board that any enforcement proceedings be withdrawn “until such time as a thorough compliance investigation can be completed.” Hence, at this writing, it appears that there will be further fact-finding to determine the issues of control. In the meantime, Tree of Life may ask the Board to reconsider and/or clarify its decision and has filed a petition for review with the U.S. Court of Appeals for the District of Columbia Circuit.

Thus, in its fourth year of administrative litigation, Board review, remands, more fact-finding, and likely court appeals—the end of the case is nowhere in sight.

Tree of Life, along with the other cases decided to date, clearly illustrate the confusion the Sturgis decision has created for suppliers and users of temporary help. Unless the Board reconsiders its decision in Sturgis, or the courts overturn it, employers, unions, and temporary workers alike will likely find themselves mired in an ever-deepening legal quagmire.

..............

1 M.B. Sturgis, et al and Jeffboat et al., 331 NLRB 173 (Aug. 25, 2000)
3 Id.
4 Note 1, supra, slip op.at 12
5 Former NLRB general counsel, John Irving, warned that bargaining in situations involving temporary employees supplied by a staffing firm would become "a real nightmare." BNA Daily Labor Report, Sep. 6, 2000, p. AA-1.
7 Tree of Life, Inc. d/b/a Gourmet Award Foods, Northeast, 336 NLRB 77 (Oct. 1, 2001).
8 The two tests were discussed by member Hurtgen in J. E. Higgins Lumber Company. See, note 5, supra, slip op. at 2. While seeing "no necessary impediment" to the basic premise in Sturgis, he cautioned that temporary employees should not be forced into combined units without having had the chance to vote.
9 See note 7 supra, slip op. at 6.
10 Id. at 4.