

J. E. Higgins Lumber Company, Employer-Petitioner, and Teamsters Local 150, International Brotherhood of Teamsters, AFL-CIO.
Case 20-UC-389

October 31, 2000

ORDER GRANTING REVIEW AND REMANDING
BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN
AND HURTGEN

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Union's Request for Review of the Regional Director's Decision and Order (pertinent portions of which are attached as an appendix). The Union's Request for Review of the Regional Director's Decision and Order is granted as it raises substantial issues solely regarding the Regional Director's reliance on *Greenhoot, Inc.*, 205 NLRB 250 (1973), in clarifying the contractual unit to exclude individuals jointly employed by the employer-petitioner and TLC Transportation Staffing, Inc. In all other respects, the Request for Review is denied.

On August 25, 2000, the Board issued its decision in *M. B. Sturgis, Inc.*, 331 NLRB No. 173, which overruled *Lee Hospital*, 300 NLRB 947 (1990), and clarified *Greenhoot, Inc.*, supra. The Board has decided to remand the issue on review to the Regional Director for further consideration consistent with *M. B. Sturgis*, including a reopening of the record, if necessary, and the issuance of a supplemental decision concerning whether the disputed employees are included in the unit described in the collective-bargaining agreement.

MEMBER HURTGEN, concurring.

In *M. B. Sturgis, Inc.*, 331 NLRB No. 173 (2000), the Board adopted new principles to deal with the "contingent work force." Prior to *M. B. Sturgis*, the Board rule was that employees, who are jointly employed by a supplier employer and a user employer, could not be placed into a bargaining unit with employees of the user, absent the consent of both the supplier and user.¹ See *Lee Hospital*, 300 NLRB 947 (1990). In *M. B. Sturgis*, the Board removed this bar, concluding that the Act does not prohibit such a unit. The Board remanded, however, the question of whether the two groups *should be* in the same unit, that is, whether such a unit is appropriate under Section 9(b) of the Act. For the reasons set forth in that

¹ The terms "supplier employer" and "user employer" are those used by the Board in *M. B. Sturgis*. A supplier employer is one that supplies employees for use by another employer, while the user employer is the employer that uses those employees.

case, I agree with the holding of *M. B. Sturgis*. However, I wish to take this opportunity to set forth my concerns in this area.²

The Board in *M. B. Sturgis* said that it was acting to protect the Section 7 rights of these "contingent" employees. I write separately here to set forth my strong view that the Board must make sure that this aim is carried out.

I begin by noting that, in one sense, these employees have always had Section 7 rights. As employees of a joint-employer, they were always free to organize (or refrain therefrom) in a unit consisting entirely of joint-employer employees. They did not need the consent of their employers to do so. The issue in *M. B. Sturgis* was whether the joint employees could be combined into a unit of employees employed solely by the user.

I agree that there is no necessary impediment to such a unit. However, in carrying out this new policy, we must be careful not to trample on Section 7 rights and not to offend "appropriate unit" principles. See *Overnite Transportation Co.*, 322 NLRB 723, 723-724 (1996) (explaining concept of "appropriate unit" and criteria for determining whether unit is appropriate).

My concern is highlighted by *Jeffboat* and by the instant case. In *Jeffboat*, the union sought to add the "contingent" employees, *by means of accretion*, to an extant unit of user employees. The same is true in the instant case. Thus, the Union seeks to add these employees to the existing unit *without their vote*. The Board's remand leaves that issue open. If the Union succeeds, I fear that the Section 7 rights of these employees would be undermined. Ironically, a policy designed to protect Section 7 rights, may wind up undermining these rights.³

Based on the above, I would not, without an employee vote, add the supplier/user employees to an extant unit of user employees, unless the test for accretion is satisfied. Under extant principles, a substantial burden is imposed on the party who seeks by accretion to include employees without their consent. "The Board has followed a restrictive policy in finding accretion because it forecloses the employees' basic right to select their bargaining representative." *Towne Ford Sales*, 270 NLRB 311 (1984); *Melbet Jewelry Co.*, 180 NLRB 107 (1969). See also *Giant Eagle Markets*, 308 NLRB 206 (1992).

This substantial burden finds expression in the test historically used by the Board. The Board has said that it

² I was recused in both *M.B. Sturgis* and *Jeffboat Division, American Commercial Marine Service Company (Jeffboat)*.

³ The irony continued in *M. B. Sturgis*. In that case, the employer wanted to allow the contingent employees to vote, i.e., to be included in the unit in which an election would be held. The union sought to exclude these employees.

will add employees to a bargaining unit without their consent “only when the additional employees have little or no separate group identity . . . and when the additional employees share an overwhelming community of interest with the pre-existing unit to which they are accreted.” *Safeway Stores*, 256 NLRB 918 (1981), cited with approval in *Compact Video Services*, 284 NLRB 117, 119–120 (1987). On the other hand, if the Board is simply determining a unit, *in which an election will be held*, the standard “community of interest” test is used.

As noted above, I join in the remand of this case. Thus, I do not decide the result that would flow from the application of the foregoing tests. However, I would note that, in many supplier/user situations, the economic emoluments of employment for the jointly-employed group are set by the supplier, while the emoluments for the user group are set only by the user. For the same reasons, the two groups are likely to have different economic emoluments. In light of these considerations, it may be difficult to show an overwhelming community of interest between these two groups. Because of this, and because of Section 7 considerations, I would generally not force the contingency group into the user unit (i.e., add them without a vote). On the other hand, if the issue is whether the two groups can be joined in one *voting* unit, the standard “community of interest” test is appropriate. However, given the aforementioned differences regarding economic emoluments of employment, I would have serious concerns about this issue as well.

APPENDIX

REGIONAL DIRECTOR’S DECISION AND ORDER

4. By the instant petition, the Employer seeks to clarify the unit covered by its collective-bargaining agreement with the Union to exclude certain individuals working for the Employer who were referred to it by a temporary agency called TLC Transportation Staffing, Inc. (herein called TLC). The Employer contends that the disputed individuals are jointly employed by the Employer and TLC and, as neither employer consents to their inclusion in the bargaining unit, under the Board’s decision in *Greenhoot, Inc.*, 205 NLRB 250, 251 (1973), they must be excluded from the unit. Contrary to the Employer, the Union asserts that the individuals at issue are employed solely by the Employer and should be included in the unit.

As discussed below, the parties also take opposite positions with regard to whether the Board should defer to an award issued by Arbitrator John B. LaRocco on May 14, 1999, pertaining to the issues presented herein. In his Opinion and Award, Arbitrator LaRocco found the Employer and TLC to be joint employers of the individuals referred by TLC and that these individuals are subject to the union security provisions of the collective-bargaining agreement between the Employer and the Union. The Employer argues that the Board should defer only to that portion of the arbitrator’s Opinion and Award finding

that the Employer and TLC are joint employers of the disputed individuals. The Union asserts that the Board should not defer to the Arbitrator’s Award insofar as it reaches a finding of joint employer status, and that the Board should find that the Employer to be the sole employer of the disputed employees.

Stipulations. The parties stipulated that the factual findings set forth in Arbitrator LaRocco’s Opinion and Award regarding the performance of work and companies at issue may be relied on by the undersigned in resolving the issues presented herein. The parties further stipulated that Cliff Meadows, an employee of the Employer and a Union shop steward, had been subpoenaed to testify at the hearing herein and, if called as a witness, would have testified that driver Scott Davis and warehouse employee Dan Geiger are employed by the Employer and are not connected with TLC in any way; that Davis and Geiger perform precisely the same type of work, under the same supervision, as the bargaining unit employees; and that Davis and Geiger are the two employees who perform work pursuant to Section 1(B) of the management-rights clause of the parties’ collective-bargaining agreement. This clause states that up to two non-bargaining unit employees may do bargaining unit work.

Background. The Employer is a non-retail supplier and distributor of lumber and related products. Its drivers and clerks (warehouse employees) are represented by the Union. The Employer and the Union have been parties to successive collective-bargaining agreements for several years. The union-security clause in the 1986–1989 agreement contained at Section 1(A) the following language: “Only bargaining unit employees shall perform work which has historically or is presently assigned to the bargaining unit.” This language does not appear in subsequent agreements beginning with the 1989–1992 agreement. In addition, the management rights clause of the parties’ 1989–1992 collective-bargaining agreement contained a new provision, section 1(B), which stated: “The Employer agrees that except during a time when Higgins seniority employees are on layoff, up to two (2) non-bargaining unit employees may do bargaining unit work.” In the 1992–1995 agreement, section 1(B) of the management rights clause was modified by placing a parenthesis around the layoff condition so that the clause read as follows: “The Employer agrees that (except during a time when Higgins seniority employees are on layoff) up to two (2) non-bargaining unit employees may do bargaining unit work.”

Negotiations over the parties’ most recent collective-bargaining agreement ended in an impasse and, on April 14, 1997, the Employer unilaterally implemented its last best offer. In November 1997, the Union’s membership ratified the new agreement, which is effective for the period April 14, 1997, until April 14, 2000. At section 15(B) of the 1997–2000 collective-bargaining agreement (hereinafter the Agreement), the managements rights clause was modified to add language giving the Employer the right “to subcontract bargaining unit work.” A new section 1(D) was also added stating that, “Non-bargaining unit personnel may occasionally perform bargaining unit work as reasonably deemed necessary by the Employer.” Further, section 1(B) of the management-rights clause was

modified to read: "The Employer agrees that up to two (2) non-bargaining unit employees may do bargaining unit work."

The record establishes that since about 1993, two non-bargaining unit employees (driver Scott Davis and warehouse employee Dan Geiger) have performed bargaining unit work pursuant to section 1(B) of the management-rights clause of the foregoing agreements. Sometime in 1997, the Employer entered into a labor services agreement with TLC pursuant to which TLC agreed to supply the Employer with up to five qualified and licensed persons. About 6 months prior to ratification of the 1997-2000 Agreement, two persons from TLC, a forklift operator and a truckdriver, began to perform bargaining unit work for the Employer on a daily basis. On July 21, 1997, the Union filed a grievance over the failure of these individuals to comply with the union security provisions of the Agreement. On February 26, 1998, the Union filed a second grievance over the failure of the TLC workers to comply with the Agreement's union-security provisions. By December 1998, five individuals supplied by TLC were working at the Employer's Sacramento facility, including three truckdrivers and two warehousemen.

The TLC Contract. The Employer's contract with TLC is for a 3-year period. The terms of this agreement provide that the Employer has final approval over all TLC supplied personnel; TLC conducts Department of Transportation (the D.O.T.) drug screening tests for the employees it supplies; and TLC is denominated as an "independent contractor." Under the terms of this contract, TLC hires and fires the personnel it supplies to the Employer; TLC is obligated to hold periodic safety meetings for its employees at the Employer's expense; the Employer provides weekly time and payroll data to TLC for TLC supplied employees; TLC sends the Employer invoices on a weekly basis for the hours worked by TLC personnel; the Employer absorbs and pays any increase in TLC's direct operating costs; TLC is responsible for paying the TLC personnel all wages and benefits; TLC is not responsible for any equipment expenses; the Employer interviews, road tests, and has final approval over the TLC personnel who are provided to the Employer; the Employer may return any unapproved TLC worker within two hours of the workday start time; the Employer must maintain commercial liability insurance covering the TLC personnel and must name TLC as an additional insured; TLC maintains workers' compensation insurance covering the TLC personnel; and the Employer must comply with all laws and maintain the necessary safety and legal records for the TLC personnel.

As indicated above, the parties have stipulated that the undersigned may rely on the factual findings of Arbitrator LaRocca regarding the performance of work and the companies at issue in the instant case. In his Opinion and Award, Arbitrator LaRocca found that the workers supplied by TLC report for work at the Employer's facility at the same time as the Employer's bargaining unit employees and that they work alongside and perform the same work as the bargaining unit employees. Bargaining unit employees train the TLC personnel. TLC truck drivers operate Employer trucks; perform deliveries; and wear an Employer uniform as do the Employer's bargaining unit truck drivers. The Employer's foreman supervises both TLC personnel and the Employer's bargaining unit employees.

Generally, if a TLC worker is ill, he or she is not replaced by another worker from TLC. Rather, the employees of the Employer and other TLC personnel working for the Employer at the time do the work of the absent employee.¹ TLC workers and the Employer's bargaining unit employees sign up for vacation on the same vacation schedule, attend the same meetings, and participate in holiday dinners held by the Employer. The record reflects that on one occasion, the Employer assigned overtime work to TLC personnel without first asking bargaining unit employees if they wanted to perform such work.

Arbitrator LaRocco further found that TLC pays the workers it furnishes the Employer; makes deductions from their salaries and pays their payroll taxes; and provides vacation pay, health insurance, workers' compensation, an employee assistance program, and a credit union for its employees. TLC workers participate in the Employer's safety program and are also required to attend TLC safety meetings. TLC tests its personnel for drugs before they are sent to work for the Employer. TLC workers are not part of the Employer's D.O.T. random drug testing pool but rather, are within the TLC pool for this purpose.

Evidence From the Record in the Instant Proceeding. The only witness to testify at the hearing in this proceeding was Randy Curtis Aubin. Aubin worked as a driver at the Employer's Sacramento facility from about October 1998 until June 1999. Before to going to work for the Employer, Aubin saw an advertisement placed by TLC in a local newspaper. He also spoke by telephone and in person to a TLC representative named Rod.² Aubin filled out a TLC employment application which asked about his driver's license and traffic violations. He gave his resume, social security card and driver's license to Rod and filled out a W-4 form. Rod sent Aubin to a local hospital for a drug test as required by D.O.T. regulations the same day as his interview. After the results of the drug test came back, and a couple of weeks after their interview, Rod sent Aubin to interview with the Employer, telling Aubin that it was a good place to work. Rod told Aubin that if he went to work for the Employer, he would be paid \$13 an hour for the first year and \$14 an hour thereafter. Aubin testified that he did not discuss fringe benefits with Rod.

At the Employer's facility, Aubin met with the Employer's general manager, Rick Warner, and Foreman/Dispatcher Bruce Watson. Warner and Watson reviewed Aubin's resume and discussed his work experience with him. They explained that Aubin's job would be to deliver lumber to the Grass Valley, Placerville, and Sacramento areas and that his work schedule would be Monday through Friday, from 7 a.m. until approximately 5 or 6 p.m. After the interview, Aubin telephoned Rod at TLC who said that the Employer had selected another candidate for the position. Aubin told Rod that he had not done well in the interview and that he really wanted to work for the Em-

¹ However, Warner testified that on one occasion, a TLC person was absent for a couple of days and at the Employer's request, TLC replaced the person.

² TLC has an office located approximately 5 miles from the Employer's facility. TLC does not have or maintain an office at the Employer's facility.

ployer. Rod responded that he would try to “smooth things over.” Rod did not refer Aubin for work with another employer.

Aubin continued to call Rod seeking employment and after about 2 weeks, Rod referred Aubin to the Employer for another interview. He again met with Watson and Warner at the Employer’s facility. At the conclusion of this interview, Watson and Warner told Aubin that they would contact TLC about hiring him. Aubin began working for the Employer about 2 days later. Although Aubin recalled receiving an employee handbook from TLC, he could not recall being given an employee handbook by the Employer.

Aubin testified that he was trained in all aspects of his driving responsibilities by an employee of the Employer. Aubin punched in for work using the same time card and the same time clock as was used by other employees of the Employer. He was paid \$13 an hour on a weekly basis by direct deposit. The pay stubs mailed to Aubin reflected that his paychecks were issued by TLC. TLC took deductions for State and Federal taxes and state disability insurance from his paychecks. According to Aubin, TLC offered fringe benefits (i.e., medical and a 401(k) plan) that were self-contributory and he did not choose to participate in them. Aubin testified that the benefits package provided by TLC was different than that provided by the Employer to its employees.

Aubin did not ask for or receive vacation time during his tenure with the Employer and he was unaware as to whether he had been paid for vacation time in his final paycheck from TLC. He was paid for five holidays by TLC. Aubin was absent 1 day of work while working for the Employer and was paid for this day by TLC. He drove an Employer truck similar to those driven by the Employer’s bargaining unit employees. Aubin’s immediate supervisor was Foreman/Dispatcher Bruce Watson who also supervised the Employer’s bargaining unit drivers and clerks. If Aubin had a problem while on his route, he contacted the Employer’s foreman/dispatcher, Watson. During the time Aubin worked at the Employer’s facility, the Employer conducted three or four safety meetings that were attended by all of the Employer’s shop employees as well as all the TLC personnel working in the shop. No TLC representatives, other than the persons that had been referred to work at the Employer’s facility, attended these safety meetings at the Employer’s facility. Aubin testified that he also attended one safety meeting at TLC’s office after receiving a letter notifying him that it was a mandatory meeting. Aubin was not disciplined during his tenure of employment with the Employer and the record does not contain any evidence of specific disciplinary matters involving TLC personnel.

The Employer provided Aubin with a uniform similar to that worn by bargaining unit employees. Employer Dispatcher Bruce Watson gave Aubin keys to the Employer’s facility, the access codes for entering different parts of the facility and a fuel card. Aubin also attended an Employer Christmas party that both Employer and TLC employees were invited to attend. Aubin testified generally that he had very little contact with TLC after he began working at the Employer’s facility.

After he had worked for the Employer about two weeks, Aubin spoke to a TLC clerical named Chris about getting a

raise and was told that it usually took a year and that she would get back to him. Aubin then went to Employer Dispatcher Watson, told him that he had a better job offer, and that he needed benefits and more money or he would be forced to leave. Watson responded that he would see what he could do. A few days later, Aubin told Watson and Employer General Manager Warner that he “needed a raise and a full-time job away from the temporary agency.” They responded that because of the pending arbitration proceeding, they could not hire him directly, but that they would get back to him. They tried to convince Aubin to stay with the Employer; that there was a future for him. They subsequently called Aubin and told him he could have a \$1 raise from TLC and start putting away money towards his retirement and pension. Shortly thereafter, Aubin quit his job at the Employer’s facility. He has not worked for the Employer or for TLC since this date.

Aubin testified that during his tenure of employment with TLC, he considered the Employer to be his employer. However, he further testified that at the time of the above-described meeting with Warner and Watson, he was not employed by the Employer and that he was asking to be hired directly by the Employer. Aubin testified that the final paycheck he received for his work at the Employer’s facility was from TLC, and that in the spring of 1999, he received a W-2 form from TLC for tax purposes. He did not receive a W-2 form from the Employer.³

The Arbitrator’s Opinion and Award. As indicated above, on July 21, 1997, and February 26, 1998, the Union filed grievances over the failure of TLC personnel working at the Employer’s facility to complete their union membership obligations pursuant to the union-security provisions of its collective-bargaining agreement with the Employer. On December 8, 1998, these grievances were heard by Arbitrator LaRocco. At the arbitration proceeding, the parties stipulated that the arbitrator would address following issues: “(1) Whether the individuals employed by TLC Transportation Staffing, Inc. are subject to the collective-bargaining agreement between Teamsters Local 150 and Higgins Lumber Company; and (2) If the answer is No, did the Company’s subcontracting otherwise violate the applicable collective-bargaining agreement? If yes, what is the remedy?” The parties further stipulated that if the Arbitrator answered in the affirmative to either of the issues, he would remand the case to the parties to mutually work out an appropriate remedy and that the Arbitrator would retain jurisdiction over the case.

³ At the hearing, the Employer’s counsel made an offer of proof that if TLC President/CEO Paul Driskell, were called as a witness, he would testify as follows: that TLC is a professional contract staffing agency; TLC is not in the business of selling lumber; it is separately incorporated and maintains offices separate from the Employer; the Employer has no financial control over TLC and TLC has no financial control over the Employer; the Employer has no equity or ownership interest in TLC and TLC has no equity or ownership interest in the Employer; TLC has many other customers in both northern and southern California; the Employer’s business represents less than 2 percent of TLC’s overall business; and that other than the individuals whose unit placement is disputed in this case (drivers and warehousemen), TLC and the Employer share no other employees or managers.

As indicated above, in his Opinion and Award, Arbitrator LaRocco found that the Employer and TLC were joint employers of the individuals TLC referred to work for the Employer. He also found that because there were already two non-bargaining unit employees performing bargaining unit work as provided for in section 1(B) of the contract, the workers TLC referred to the Employer were subject to the union security provisions of the Agreement. As the parties had agreed that the Arbitrator would remand the case back to the parties to mutually work out an appropriate remedy if he answered either of the issues presented to him in the affirmative, the Arbitrator remanded the case to the parties to work out a remedy and retained jurisdiction over the case.

TLC's Position. No representative of TLC appeared at or participated in the hearing in this proceeding. The record contains, as a joint exhibit, a letter from Paul C. Driskell, president/CEO of TLC, dated July 14, 1999, which states that notwithstanding the decision of Arbitrator LaRocco, TLC had no notice of the underlying grievances, was not represented at the arbitration proceeding and does not believe it is bound by the arbitrator's award. In his letter, Driskell further states:

Moreover, and to be very clear, TLC has never consented in any way, shape or form, and does not now consent, to the inclusion of individuals it employs and assigns to work at Higgins' Sacramento facility in the unit of employees Local 150 represents at that location.

By letter to the Regional Director of Region 20 of the Board dated July 15, 1999, TLC's attorney notified the undersigned of TLC's position in this regard and that it did not wish to become a party to the instant unit clarification proceeding.

Analysis. It is well established that questions of representation, accretion and appropriate unit do not depend upon contract interpretation but rather upon the application of statutory policy. See *Williams Transportation Co.*, 233 NLRB 837, 838 (1977); *Marion Power Shovel Co.*, 230 NLRB 576, 577-578 (1977). In the instant case, the question as to whether TLC and the Employer are joint employers of the individuals referred to TLC is the determinative issue with regard to the unit placement of such persons. In these circumstances, this is clearly an issue for the Board to decide and I decline to defer to the Arbitrator's decision on this issue. However, the parties have stipulated that I may rely on the factual findings of the Arbitrator as set forth in his Opinion and Award in reaching my decision herein. Accordingly, I have carefully reviewed the evidence in the instant proceeding as well as the factual findings of Arbitrator LaRocco in making my decision herein.⁴

⁴ No party contends that the unit clarification petition herein is untimely or that a unit clarification proceeding is an inappropriate proceeding within which to resolve the issue of the unit placement of the TLC personnel. I find that this proceeding is the appropriate means to resolve this issue. Thus, there is no evidence that the Employer, the Union and TLC have ever agreed to the inclusion of the disputed TLC personnel in the bargaining unit. Rather, the Employer began using TLC to supply personnel in 1997; in July 1997, and in February 1998, the Union filed grievances alleging that certain individuals (i.e., TLC personnel) who were allegedly employed by the Employer, failed to complete their Union membership obligations under the collective-

It is well settled that a joint employer relationship is established when otherwise independent businesses share or co-determine matters governing significant and essential terms and conditions of employment of a group of employees. *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1121-1124 (3d Cir. 1982); *Martiki Coal Corp.*, 315 NLRB 476, 477 (1994); *Windemuller Electric*, 306 NLRB 664, 666 (1992), citing *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). To establish a joint-employer relationship, there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction. *Lee Hospital*, 300 NLRB 947, 948 (1990); *TLI, Inc.*, 271 NLRB 798 (1984); *Laerco Transportation*, 269 NLRB 324 (1984).

In the instant case, the evidence establishes that TLC recruits and hires the employees it refers to the Employer. TLC confirms the immigration status and employment eligibility of these individuals, performs the mandatory D.O.T. background checks and drug screening and provides these individuals with its employee handbook and rules which are different from those of the Employer. TLC also pays these employees, makes tax and other deductions from their pay, and provides for their benefits. The pay and benefits TLC provides to its personnel and employees are different from those provided by the Employer to its employees. TLC also pays for workers' compensation insurance for the employees it supplies to the Employer. After TLC personnel are placed with the Employer, the Employer trains them, and provides their uniforms, equipment, timecards, timeclock, and their day-to-day supervision. The TLC personnel work alongside the Employer's bargaining unit employees performing the same type of work and using the same equipment as they. The Employer keeps the time records of hours worked by TLC personnel and transmits this information to TLC.

In view of the foregoing, it is plain that the Employer and TLC share or codetermine matters governing significant and essential terms and conditions of employment of the individuals at issue and meaningfully affect matters relating to their employment relationship. Thus, I find that TLC and the Employer share or codetermine the hire and the remuneration of the persons referred to the Employer by TLC and that the Employer affects their daily supervision and direction of their work. Accordingly, I find, as did Arbitrator LaRocco in his Opinion and Award, that the Employer and TLC are joint employers of the

bargaining agreement. These grievances were the subject of Arbitrator LaRocco's Opinion and Award which, if enforced, could result in the effective accretion of the TLC personnel into the bargaining unit over the objections of TLC and the Employer. However, as stated above, questions concerning representation do not depend upon contract interpretation but rather upon the application of statutory policy and are for the Board to decide rather than an arbitrator. A unit clarification proceeding is the appropriate vehicle for such decision making by the Board. See *Williams Transportation Co.*, 233 NLRB 837, 838 (1977); *Marion Power Shovel Co.*, 230 NLRB 576, 577-578 (1977); *Bethlehem Steel Corp.*, 329 NLRB 243, 244 fn 5 (1999). Moreover, the petition herein is not untimely filed given that it was precipitated by the Arbitrator's Opinion and Award which, if enforced, could result in the disputed positions being effectively accreted into the unit. Id.

employees at issue herein. See *Brookdale Hospital Medical Center*, 313 NLRB 592 (1993).⁵

The Union's reliance on *Lee Hospital*, 300 NLRB 947 (1990), to support its assertion that the Employer is the sole employer of TLC personnel, is misplaced. In *Lee Hospital*, the Board found a hospital employer to be the sole employer of certified registered nurse anesthetists (CRNAs) working in its anesthesia department which was operated by a separate corporation with whom the hospital employer had a contract. In finding that hospital and the contractor were not joint employers of the employees at issue, the Board noted that control over critical terms and conditions of employment of the employees at issue rested solely with the hospital. In this regard, the Board noted that the hospital's control extended to such matters as hiring, wages, fringe benefits, and authority to terminate the employees at issue. By contrast, in the instant case while the Employer has control over the daily supervision of workers supplied by TLC, TLC has control over their hire, termination, wages and fringe benefits. Thus, TLC retains and exercises control of the "hire and remuneration" of the employees at

⁵ No party contends that the Employer and TLC are alter egos or a single employer and the record does not support such a finding. In this regard, the record reflects that TLC and the Employer are in different types of businesses; are separately owned; have separate office locations; have separate management; and there is no common control of labor relations between them.

issue. As the Board stated in *Brookdale Medical Center*, supra, 313 NLRB at 593, "We believe that these very matters—hire and remuneration—are essential terms and conditions of employment." In these circumstances, I find that the Board's decision in *Lee Hospital*, does not support a finding that the employees at issue in the instant case are solely employed by the Employer.

It is well established that employees of joint employers may not be included in a bargaining unit with employees of a single employer, absent the consent of both employers. See *Hexacomb Corp.*, 313 NLRB 983 (1994); *Brookdale Hospital Medical Center*, supra, at 593 (1993); *Greenhoot, Inc.*, 205 NLRB 250 (1973). In the instant case, TLC has made clear its objection to having its employees included in the bargaining unit of the Employer's employees represented by the Union. Accordingly, I will grant the Employer's petition to clarify the recognized contractual unit to exclude the individuals jointly employed by the Employer and TLC.

ORDER

IT IS HEREBY ORDERED that the existing contractual bargaining unit represented by Teamsters Local 150, International Brotherhood of Teamsters, AFL-CIO, be, and it hereby is, clarified to exclude employees jointly employed by the Employer and TLC.