UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MILLER & ANDERSON, INC.,	)	
	)	
Employer	)	
	)	
v.	)	Case No. 05-RC-079249
	)	
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 19, AFL-CIO,	)	
	)	
Petitioner.	)	
	)	

BRIEF OF *AMICUS CURIAE* COUNCIL ON LABOR LAW EQUALITY

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Date Submitted: September 18, 2015

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INTRODUCTION

The Council on Labor Law Equality ("COLLE") submits this *amicus curiae* brief in response to the Board's Notice and Invitation to File Briefs, which invited the parties and *amici* to address one or more of the following questions:

1. How, if at all, have the Section 7 rights of employees in alternative work arrangements, including temporary employees, part-time employees and other contingent workers, been affected by the Board's decision in *Oakwood Care Ctr.*, 343 NLRB 659 (2004), overruling *M.B. Sturgis*, 331 NLRB 1298 (2000)?

2. Should the Board continue to adhere to the holding of *Oakwood Care Center*, which disallows inclusion of solely employed employees and jointly employed employees in the same unit absent the consent of the employers?

3. If the Board decides not to adhere to *Oakwood Care Center*, should the Board return to the holding of *Sturgis*, which permits units including both solely employed employees and jointly employed employees without the consent of the employers? Alternatively, what principles, apart from those set forth in *Oakwood* and *Sturgis*, should govern this area?

COLLE urges the Board to adhere to its decision in *Oakwood Care Center* and continue to hold that solely employed employees and jointly-employed employees cannot be combined in the same bargaining unit without the consent of both employers. *Oakwood Care Center* is consistent with longstanding Board precedent and it properly implements Congress's judgment, reflected in Section 9(b) of the National Labor Relations Act ("Act" or "NLRA"), that the maximum scope of a bargaining unit is normally limited to a single employer absent the employers' consent to the contrary. The *Sturgis* decision was contrary to the Act and its legislative history, as well as decades of Board and court precedent regarding the establishment of multi-employer bargaining units. A return to the short-lived, and erroneous, *Sturgis* rule would provide little benefit to employees while imposing a substantial burden on employers and the collective bargaining process. This is particularly true given the Board's recent decision in

Browning-Ferris Industries, 362 NLRB No. 186 (2015), which greatly expands the ability of employees and unions to establish a joint employer bargaining unit. Reversing *Oakwood Care Center* would compound the burdens imposed by the Board's new joint employer standard and could lead to impractical and unstable bargaining relationships over the objection of the employers involved. This would be contrary to the Act's goal of promoting industrial peace through stable and effective collective bargaining.

For the foregoing reasons, which are set forth below in greater detail, COLLE submits that the Board should adhere to the rule set forth in *Oakwood Care Center* and continue to require that the involved employers must give their consent prior to the establishment of a bargaining unit comprised of solely- and jointly-employed employees.

STATEMENT OF COLLE'S MEMBERSHIP AND INTEREST

COLLE is a national association of employers that was formed to comment on, and assist in, the interpretation of the law under the Act. COLLE's purpose is to follow the activities of the Board and the courts as they relate to the Act. Through the filing of *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach in the formulation and interpretation of national labor policy regarding issues that affect a broad cross-section of industry. COLLE has participated as *amicus curiae* in numerous cases before the Board.

With respect to this case, COLLE's members are large, national employers, many of whom rely on third-party suppliers and contractors in order to operate their businesses. The potential that the Board would deviate from decades of settled precedent on the issue of whether employers can be compelled to engage in multi-employer bargaining without their consent is therefore of special importance and significance to COLLE's members.

SUMMARY OF THE CASE

This case involves an election petition filed by Sheet Metal Workers International Association, Local Union No. 19 ("Petitioner" or "Union") to represent a unit of all sheet metal workers who are jointly or solely employed by Miller & Anderson, a mechanical and electrical contractor, and Tradesmen International, a temporary staffing company. The petition originally sought a unit of employees working solely at the Chambersburg Hospital jobsite in Chambersburg, Pennsylvania. *See* Tradesmen International's Motion to Dismiss, *Miller & Anderson, Inc.*, Case No. 05-RC-079249, at *2 (filed July 20, 2015) ("Motion to Dismiss"). However, the petition was later amended to include all workers employed by Miller & Anderson and/or Tradesmen International "as either single or joint employers on all job sites in Franklin County, Pennsylvania." *See id.*; *see also* Request for Review of Administrative Dismissal, *Miller & Anderson, Inc.*, Case No. 05-RC-079249, at *1-2 (filed May 10, 2012) ("RFR").

On April 26, 2012, the Regional Director rejected the petition on the ground that the union had not obtained both employers' consent to a multi-employer bargaining unit and therefore, under the Board's decision in *Greenhoot, Inc.*, 205 NLRB 250 (1973), and *Oakwood Care Ctr.*, 343 NLRB 659 (2004), the petition did "not raise a question concerning representation" rendering further proceedings on the matter "unwarranted." *See* RFR, at *1-2.

Petitioner filed a Request for Review ("RFR") of the Regional Director's decision on May 10, 2012. In the RFR, the Union claimed that the Board's decision in *Greenhoot* was inapposite and its decision in *Oakwood Care Center* was "mistake[n]" and "misguided." *See* RFR, at *4. The Union argued that *Oakwood Care Center* "effectively prevents the representation of temporary workers" and does not "reflect the reality of modern employment practices," and that the previously-overruled *Sturgis* decision should guide this case instead.

RFR at *2-4. In its description of the facts, the Union represented to the Board that Miller & Anderson was "currently performing projects in Franklin County, Pennsylvania," and that it "believed" that these projects were staffed with sheet metal workers from Tradesmen International.

After it lay dormant for over three years, the Board decided to grant the RFR on May 18, 2015. On July 6, 2015, the Board invited the parties and interested *amici* to file briefs discussing the various issues raised by the case.

On July 20, 2015, Tradesmen International moved to dismiss the RFR as moot. *See* Motion to Dismiss. In its motion, Tradesmen informed the Board that it "has not performed any sheet metal work for Miller & Anderson, Inc., or any other sheet metal work in Franklin County, Pennsylvania, since July 2012," and "has no expectation of performing such work in the foreseeable future." Motion to Dismiss, at *1. The Motion also noted that Miller & Anderson also are no longer performing sheet metal work in Franklin County, and have no expectation of doing so in the foreseeable future. *Id.* at *3. Because the petitioned-for unit no longer exists and there are no employees who would be affected by any Board ruling, Tradesmen explained, the Union's RFR is completely moot. *See id.* In support, Tradesmen filed a declaration from one of its executive employees. *See* Attachment to the Motion to Dismiss, Affidavit of Scott Hilligoss, *Miller & Anderson, Inc.*, Case No. 05-RC-079249 (filed July 20, 2015).

The Union filed an opposition on July 23, 2015, arguing that there was "no factual record" on whether the work in question "regularly was or will be performed," that this issue would be addressed by the parties when and if the Board decided that the Regional Director's decision should be reversed, and that denying the petition on mootness grounds would "effectively negate" construction trade unions' ability to appeal an administrative dismissal

given the short term nature of construction projects. *See* Petitioner's Opposition to the Motion to Dismiss, *Miller & Anderson, Inc.*, Case No. 05-RC-079249 (filed July 23, 2015). Tradesmen filed its reply on July 27, 2015. *See* Tradesmen International's Reply, *Miller & Anderson, Inc.*, Case No. 05-RC-079249 (filed July 27, 2015).

ARGUMENT

I. The Board Should Adhere to Its Decision in *Oakwood Care Center* and Its Prior, Longstanding Precedent.

The Board's decision in *Oakwood Care Center*, as well as its decades of pre-*Sturgis* precedent, was supported by the plain language of the Act and its legislative history, and should be adhered to in this case.

A. The Board's Decision in *Oakwood Care Center* Is Consistent with the Act and Its Legislative History.

The Board should adhere to its decision in *Oakwood Care Center* because that decision is consistent with Section 9(b) of the Act. Section 9(b) does not authorize the Board to certify a multi-employer bargaining unit, absent the employers' consent to such a unit:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

29 U.S.C. § 159(b). As the Board recognized in *Oakwood Care Center*, the phrase "employer unit" clearly refers to only a single employer, and does not contemplate multiple employer bargaining units. *See Oakwood Care Ctr.*, 343 NLRB at 661-62.

In addition, the *Oakwood Care Center* Board correctly recognized that the term "subdivision thereof" was intended to refer to bargaining units encompassing something "less than" a single employer unit:

> The legislative history supports this interpretation of the plain language of the Act. Specifically, Congress included the phrase "or subdivision thereof" to authorize other units "not as broad as 'employer unit,' yet not necessarily coincident with the phrases 'craft unit' or 'plant unit.'

Oakwood Care Ctr., 343 NLRB at 661 (quoting H.R. Statement on Conf. Rep. S. 1958, 79 Cong. Rec. 10297, 10299 (1935), reprinted in 1 Leg. Hist. 3260, 3263 (NLRA 1935)).

Congress's use of the term "employer" in the singular was intentional. As Member Brame pointed out in his dissenting opinion in *Sturgis*, Congress expressly considered whether Section 9(b) of the Act should include multi-employer associations as well. In rejecting a Senate Amendment that would have specifically prohibited multi-employer associations absent voluntary association, Congress reasoned that the provision would be an unnecessary confirmation of the Board's existing practice. *See Sturgis*, 331 NLRB at 1315 (dissent) (citing House Conf. Rep. No. 510 on H.R. 3020, 2 Leg. Hist. 535-536 (LMRA 1947)); *see also NLRB v. Truck Drivers Local 449 (Buffalo Linen Supply Co.)*, 353 U.S. 87, 96 (1957).

Since that time, the Board has consistently mandated that multi-employer bargaining only take place with the consent of all employers. Such consent, the Board has affirmed and reaffirmed, must be clear and unequivocal, and will not be inferred lightly. *See, e.g., Artcraft Displays, Inc.*, 262 NLRB 1233, 1236 (1982) (a multi-employer unit exists "only where employers indicate an unequivocal intent to be bound as a group for collective-bargaining purposes"); *United Fryer & Stillman, Inc.*, 139 NLRB 704, 708 (1962) ("the inclusion of a particular employer in a multiemployer unit is based upon [] mutual consent . . . as evidenced either by a bargaining history for such group of employers in a single unit, or by the express agreement of the parties to the inclusion of the individual employers") (internal quotations omitted); *Chi. Metro. Home Builders Ass'n*, 119 NLRB 1184, 1186 (1957) ("an essential basis

for any finding that a multiemployer unit is appropriate is that the individual employers unequivocally manifest a desire to be bound in future collective bargaining by group rather than individual action").

In short, and contrary to the Petitioner's claim in its Request for Review, decades of precedent demonstrate that by disallowing multi-employer bargaining absent clear and unequivocal consent from the parties, the Act is *very much* "concern[ed]" with not "forc[ing] an additional negotiation" between two different employers without their express consent. *See* RFR, at *2 (arguing that a "complication in the relationship between [the temp agency and the user employer] is not the concern of the Act").

With the exception of *Sturgis*, the Board's prior precedent regarding the combination of user and supplier employers' employees into a single unit abided by these longstanding statutory principles. For example, in *Greenhoot*, the Board found that 14 groups of engineers and maintenance employees, each of which was jointly employed by a building manager and one of 14 building owners, could not be combined in a single unit absent the consent of the building manager and all the building owners. Despite that the 14 groups of employees "shared" a common employer in the building manager, the Board in *Greenhoot* found that combining the groups of employees would result in a multiemployer unit, and reaffirmed that there is "no legal basis" to establish a multi-employer unit absent the express consent of the employers involved or an established course of conduct indicating such consent. *Greenhoot, Inc.*, 205 NLRB at 251.

In *Lee Hospital*, 300 NLRB 947 (1990), the Board applied these principles to a two-party scenario, and similarly found that a group of jointly-employed employees could not be combined in a unit with singly-employed employees without both employers' consent. The proposed combination was a group of certified registered nurse anesthetists employed in a department that

was operated by a hospital contractor, and a group of other hospital professional employees who were employed only by the hospital. *Id.* at 947. The Board found it necessary to decide whether the hospital contractor constituted a joint employer (along with the hospital) of the nurse anesthetists because, if so, the nurse anesthetists could not be included in a unit with the other hospital professionals without the consent of the hospital. *Id.* at 948 ("the Board does not include employees in the same unit if they do not have the same employer, absent employer consent").

The Board's decision in *Sturgis* uprooted the decades of precedent described above. It did so by identifying an artificial distinction between "true" and "false" multi-employer units in the context of a user/supplier employer scenario. 331 NLRB at 1298. The Board's reasoning in *Sturgis* was as follows:

- In a user/supplier scenario, all the employees (jointly-employed temporaries and singly-employed regulars) are "performing work" for the user employer. *Sturgis*, 331 NLRB at 1304-05.
- Therefore, the user employer and the supplier employer both employ employees who perform work for the user employer. *Id.* at 1305.
- By virtue of this voluntary association, the user employer and supplier employer are not "equivalent to . . . completely independent employers." *Id.* at 1305; *see also Oakwood Care Ctr.*, at 666 (dissent).
- Therefore, a unit composed of the user employer's singly-employed employees and the user and supplier employers' jointly-employed employees does not constitute a "true" multiemployer bargaining unit. *Id.*

In so finding, the Board in *Sturgis* rejected as "faulty" the *Lee Hospital* Board's conclusion that the "joint employer" entity constitutes a distinct employer from either the user or the supplier employer. *See id.* at 1305. Thus, the *Sturgis* Board concluded the singly-

employed employees and jointly-employed employees make up a single employer unit, not a multi-employer unit.[1]

Just four years later, the Board in *Oakwood Care Center* correctly concluded that the reasoning of *Sturgis* was palpably wrong and "departed from the statutory directive of Section 9(b) as well as decades of Board precedent." *Oakwood Care Ctr.*, 343 NLRB at 662. The *Sturgis* Board erroneously conflated the answers to the following two questions: "Who do the employees perform work for?" and "Who is the employer?" Because the singly-employed and jointly-employed employees both perform work for the benefit of the user employer, the *Sturgis* Board reasoned, "all of the employees . . . work for the user employer." *See Oakwood Care Ctr.*, 343 NLRB at 666 (dissent).

This conclusion is incorrect and is framed in a misleading way. That the jointly-employed employees perform work that benefits both employers is a natural consequence of a joint employer relationship. But this does not mean that the user employer's employees and the jointly-employed employees share the same employer, or that a unit combining them both does not constitute a multi-employer bargaining unit. While the jointly employed employees have a relationship with both employers, the user employer's employees are only employed by the user employer; they have no employment relationship with the joint employer. In holding to the contrary, the *Sturgis* Board incorrectly expanded the definition of a bargaining unit beyond the clear and unequivocal terms of Section 9(b) of the Act – *i.e.*, the "employer unit, craft unit, plant unit, or subdivision thereof."

[1] The Board in *Sturgis* expressly reaffirmed, however, that under *Greenhoot* a petition that names multiple user employers "whose only relationship to each other is that they obtain employees from a common supplier employer" will be treated as seeking a multiemployer bargaining unit requiring the consent of all the employers. *Id.* at 1305, 1308. COLLE does not understand the Board's Notice and Invitation to address whether the Board should continue to adhere to this rule. *See also* RFR, at *2 (arguing that *Greenhoot* is inapplicable to this case).

B. The *Oakwood Care Center* Decision Has Not Diminished the Section 7 Rights of Employees in Alternative Work Arrangements.

The Request for Review, like the *Sturgis* majority, insists that eliminating the employer consent requirement for jointly- and singly-employed bargaining units is necessary because otherwise it will be "virtually impossible" for employees of staffing agencies to organize. This is hyperbole, and even more so in light of the Board's decision in *Browning-Ferris*.

In *Browning-Ferris*, the Board acknowledged that it was changing "the legal landscape" under the Act by expanding the definition of joint employer status. *Browning-Ferris*, 362 NLRB No. 186, slip op. at 20. And the Board did so out of concern that "employees covered by the Act may be deprived of their statutory right to bargain effectively over wages, hours, and working conditions" if they are employed in a joint employer relationship. *Id.*, slip op. at 15. The Board cited statistics regarding the growth of staffing and subcontracting arrangements and the millions of contingent workers who would be encompassed by the Board's expanded definition of joint employer status. *Id.*, slip op. at 11. Thus, a linchpin of the *Browning-Ferris* decision was the proposition that an expanded definition of joint employer status – by itself, and without any change in *Oakwood Care Center* – would enable millions of contingent workers to exercise their right to organize and engage in meaningful collective bargaining.

Indeed, there are many instances of successful organizing campaigns involving temporary workers. Examples have included the Washington Alliance of Technology Workers (affiliated with the Communications Workers of America), which successfully organized contract workers at Microsoft Corporation in the Seattle area; the United Workers Association, which helped Oriole Park's temporary cleaning staff in Baltimore, Maryland organize in support of higher wages; and SEIU Local 925, which represents temporary employees at the University of Washington. *See generally* "Oriole Park Workers to Protest Pay," Wash. Post, Sept. 1, 2007,

http://www.washingtonpost.com/wp-dyn/content/article/2007/08/31/AR2007083102078.html); Danielle Dorice Van Jaarsveld, *Collective Representation Among High-Tech Workers at Microsoft and Beyond: Lessons from WashTech/CWA*, 43 INDUSTRIAL RELATIONS No. 2 (May 2004)); *see also Bergman Brothers Staffing*, Case No. 05-RC-105509 (petition filed May 21, 2013) (certifying unit of asbestos abatement employees of staffing company); *Spartan Staffing, LLC*, Case No. 03-RC-109178 (petition filed Jul. 16, 2013) (certifying turn-on/shutoff personnel, security riders, and gas field support personnel employed by Spartan staffing and assigned to Rochester Gas & Electric's 400 West Avenue facility); *The Expo Group, LP*, Decision and Direction of Election, Case No. 15-RC-094712 (Jan. 11, 2013) (directing an election for employees of trade show services employer, for unit consisting of "all employees employed by the employer on a p[a]rt-time, per diem or casual basis" performing work for exhibitors in the New Orleans metropolitan area); *Subject: Employco Usa & Blue Point, LLC*, Case 28-CA-23328, 2011 WL 2960966, at *4 (N.L.R.B.G.C. June 17, 2011) (noting that nationwide staffing company Employco had recognized the Teamsters as the representative of its temporary employees performing convention work in Las Vegas).

In short, the claim that *Oakwood Care Center* "effectively bars yet another group of employees . . . from organizing labor unions" (*see Oakwood Care Ctr.*, 343 NLRB at 663 (dissent)) is simply untrue, and even more so now that the Board has changed the legal landscape in *Browning-Ferris*.

C. No Changed Circumstances Compel the Board to Reverse Precedent Again.

Federal agencies should only reverse precedent when there is a substantial justification for doing so. *See SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 442 (2d Cir. 2011) (noting that "[w]here the Board 'departs from prior interpretation of the Act without explaining why that

departure is necessary or appropriate,' the Board will have exceeded the bounds of its discretion") (internal quotations omitted); *Consol. Edison Co. of New York, Inc. v. F.E.R.C.*, 315 F.3d 316, 323 (D.D.C. 2003) (stating that a federal agency "must adhere to its precedents in adjudicating cases before it").

No such justification exists here. Over the past several decades – in *Lee Hospital*, *Sturgis*, and *Oakwood Care Center* – the Board has thoroughly and repeatedly considered the issues raised in this case. The Petitioner's Request for Review raises absolutely no new facts or legal issues that have not already been exhaustively considered by the Board in all of these cases.

COLLE anticipates that the Petitioner and interested *amici* will argue that the same statistics the Board cited in support of its decision in *Browning-Ferris* justify a reversal of *Oakwood Care Center* as well. But contingent or temporary employment arrangements were also increasing at the time that *Oakwood Care Center* was decided in 2004, as well as when *Sturgis* was decided in 2000. Indeed, both the *Sturgis* majority and the *Oakwood Care Center* dissent openly acknowledged the American economy's increasing reliance on temporary staffing arrangements, and used this as their main justification for arguing that the definition of "employer" should be reconfigured to encompass a unit comprised of jointly and singly-employed employees. *Oakwood Care Ctr.*, 343 NLRB at 663-64, 668 (dissent) (noting the increase in alternative work arrangements); *Sturgis*, 331 NLRB at 1298, 1308 (detailing the "tremendous growth" in the temporary employment industry, and concluding that the Board needed to "alter" its policy to afford statutory rights to "a growing segment of the workforce"). The Board in *Oakwood Care Center* did not reject the *Sturgis* rule because there was insufficient evidence that alternative or contingent employment relationships were on the rise. The Board

did so because *Sturgis* was contrary to the Act, its legislative history, and the Board's longstanding interpretation of the scope of its statutory authority.

This conclusion is no less true today than it was in 2004. *See generally* Harold Datz, *When One Board Reverses Another: A Chief Counsel's Perspective*, 1 AM. U. LAB. & EMPL. L.F. 67, 71 (Winter, 2011) (noting that "[w]here precedent changes simply because a different political group is in power, the public becomes cynical about our ideals and disrespectful of the law"). To the extent that the Petitioner or like-minded *amici* disagree with the holding of *Oakwood Care Center*, *Lee Hospital*, and *Greenhoot*, the proper method to seek a change in the law is through Congress, rather than seeking yet another reversal of Board precedent in a case that is now moot. *See generally* Employer's Motion to Dismiss. Reversing precedent on this issue for the third time in fifteen years would circumvent not only the terms of the Act and its legislative history, it would violate one of the central purposes of the Wagner Act: achieving consistency in the law pertaining to labor relations. 79 Cong. Rec. 2371-72 (daily ed. Feb. 21, 1935) (statement of Sen. Wagner) ("Everybody needs a law that is precise and certain.").

II. The Board Should Not Return to the Rule of *Sturgis*.

As explained above, a return to the *Sturgis* rule would be contrary to the plain language of the Act, its legislative history, and longstanding Board precedent. In addition, it would give rise to a multiplicity of unstable and unworkable bargaining relationships.

A. A Return to *Sturgis*, Coupled with *Browning-Ferris*, Would Not Promote Industrial Stability.

There is inherent conflict and instability in creating a bargaining unit composed of jointly employed employees and employees who are solely employed by the user employer. This is because the user employer and the supplier employer are not similarly situated. Most multi-employer bargaining units involve competitors who are similarly situated with respect to their

employees and the union. Each employer is an independent actor in the marketplace and each has the authority to determine the terms and conditions of employment of its employees.

A user employer and a supplier employer do not share equivalent authority or bargaining power. The relationship is one of dependence, rather than independence. The user employer is the customer of the supplier employer. While the supplier may want to serve the interests of the user employer in order to continue the business relationship, the two companies have competing interests when it comes to sharing in the costs of the employees whom they jointly employ. Their relationship is, therefore, "complementary in some respects and clearly conflicting in others." *Sturgis*, 331 NLRB at 1320-21 (dissent).

Further, many user employers regularly utilize not just one, but multiple suppliers simultaneously for their temporary labor, with whom they may have established different contractual relationships on different terms. *See id.* at 1314 (dissent); *see also Oakwood Care Ctr.*, 343 NLRB at 662-63 & n.22 (noting these conflicts and that the "difficulties that arise from the *Sturgis* holding are necessarily magnified in situations involving multiple supplier employers"). Injecting involuntary multi-employer bargaining into these relationships necessarily creates "duties and limitations beyond those established and allocated in their agreement," and thereby creates "severe conflicts in the underlying business relationship" that undermine the potential for successful bargaining. *Sturgis*, 331 NLRB at 1321 (dissent).

The Board's recent decision in *Browning-Ferris* further expands the types of business relationships that may be encompassed by the new joint employer standard. Because the *Browning-Ferris* standard is so broad, it is difficult to even predict all of the types of business relationships that could be affected by the new standard, and the Board declined to set forth any clear limits on it.

Even without a return to the *Sturgis* standard, *Browning-Ferris* will reach a greater number of business relationships and produce increasingly complex and fragmented bargaining relationships. *Browning-Ferris* holds that a joint employer who retains indirect or potential control over some but not all terms and conditions of employment will bargain only over the terms and conditions that it has the authority to control. 362 NLRB No. 186, slip op. at 16. This amorphous standard will inevitably lead to disputes about who has the authority to control, and the responsibility to bargain over, each discrete term or condition of employment for the jointly employed employees. On some subjects, the supplier employer may exercise direct control, but the user employer may be deemed to have "indirect" or "potential" control over those same subjects – even if the user employer has never actually exercised control over those subjects. The user employer and the supplier employer – not to mention the union – may disagree about who has the authority and responsibility to bargain over those terms and conditions of employment for the jointly employed employees. And even when the parties agree that the user employer does not have the authority or responsibility to bargain over certain subjects, the resolution of those issues may well affect bargaining on subjects that the user employer does have authority to control. *See id.*, slip op. at 42 (dissent) ("the Board has traditionally denounced this type of segmented issue-by-issue negotiating, when unilaterally undertaken by a party, as unlawful 'fragmented bargaining'").

This fragmented bargaining process will be made even more difficult if the Board decides that the user employer's employees must be included in the same bargaining unit with the jointly employed employees, even over the employers' objections. The user employer will be required to bargain on all subjects that relate to its employees, but on those same issues the user employer may not have the authority or responsibility to bargain as to the jointly employed employees (if

the user employer does not exert any direct, indirect, or potential control over those subjects for the supplier's employees). Thus, if the *Browning-Ferris* standard is combined with a return to the *Sturgis* rule, bargaining will be fragmented in multiple ways:

- Subjects that pertain only to the user employer's employees (only the user employer will bargain on those subjects);
- Subjects that pertain to the jointly employed employees and are co-determined by user and supplier employer (both employers will be required to bargain on those subjects);
- Subjects that pertain to the jointly employed employees and are determined solely by the supplier employer (only the supplier employer will bargain on those subjects); and
- Subjects that pertain to the jointly-employed employees and that are determined solely by user employer (only the user employer will bargain on those subjects).

A collective bargaining relationship that is fragmented in these multiple ways will be inherently unstable, contentious, and susceptible to failure. If the user employer and supplier employer are forced into such a bargaining relationship without their consent, there will likely be disputes on the employers' side of the table (over who has the responsibility to bargain, and ultimately pay for, certain terms and conditions of employment) as well as with the union. And there will likely be divisions on the union's side of the table if the terms and conditions of employment for the user employer's employees are different (*i.e.*, more or less favorable to the employees) than for the jointly employed employees. And there will be no agreement unless the parties can reach agreement on all terms and conditions of employment for both groups of employees (the user employer's employees and the jointly employed employees). The Board should not mandate bargaining relationships that are so fraught with the potential for failure.

B. The "Community of Interests" Standard Does Not Alleviate These Concerns.

The *Sturgis* majority dismissed many of these concerns by reasoning that removing the consent requirement for a hybrid user employer/joint employer bargaining unit did not alter the requirement that the employees in the petitioned-for unit must share a "community of interests." This requirement, the *Sturgis* majority claimed, would be sufficient to ensure that the Board would not certify user/supplier units that possess inherent conflicts. *See Sturgis*, 331 NLRB at 1305-06.

As the dissent in *Sturgis* correctly recognized, however, the community of interests standard does not take into account the unique considerations presented by combining employees of two different employers. To the contrary, the very applicability of that test *presumes* that the employees in question share the same employer:

> That some of the employees in a proposed unit are employed by joint employers, *i.e.*, a different employing entity from the sole employer of the remaining employees, goes beyond "some differing terms and conditions of employment from their colleagues." In fact, as discussed previously, it is not a community of interest factor at all. Having the same employer (not merely one employer in common, as the majority would have it) is a statutory condition precedent that must be satisfied before the Board may consider a possible community of interest. . . . By presupposing a condition precedent, the majority's approach puts the cart before the horse, and the majority's desired application of the statute before the statute itself.

Sturgis, 331 NLRB at 1317, 1319-20 & n.48 (dissent) (also noting that "[i]n [ordinary] multiemployer bargaining, the voluntary action of the parties makes it unnecessary for the Board to determine whether the unit is appropriate through a community of interest analysis").

Application of the community of interests analysis would be particularly complex in the context of a hybrid user employer/supplier employer unit. User and supplier employees may have some similar job duties, but the user employer's employees may have additional job duties.

They may also have different supervisors, but the user employer's employees may play a role in directing the work of the supplier's employees. The user employer's employees may have different opportunities for advancement and may be interchanged with other employees of the user employer. The supplier employer's employees may rotate in and out of the user employer's business, sometimes working for other employers in other locations. Yet, when they are working at the user employer's site, they may share some common terms and conditions of employment with the user employer's employees. The various permutations of these community of interest factors, coupled with the breadth of the *Browning-Ferris* standard, means that the application of the community of interest analysis will be very difficult to predict. *See generally* Peter Capelli & J.R. Keller, *Classifying Work in the New Economy*, 38 ACADEMY OF MANAGEMENT REVIEW No. 4 (2013) (explaining the wide variety of contingent staffing arrangements); *see also Sturgis*, 331 NLRB at 1314 (dissent) (same).

This problem will be exacerbated by the Board's new election rules because there is very little time to investigate these factors or even identify which employees might be included in the petitioned-for unit. As one commentator pointed out in response to the Notice of Proposed Rulemaking, the new two-day deadline for employers to produce a voter list would require a significant and extensive coordination between the user employer and supplier employer to obtain the requisite employee contact information. The Board relied on the continuing validity of *Oakwood Care Center* in dismissing this concern. *See* Representation—Case Procedures, 79 Fed. Reg. 74,308-01, 74,355 (Dec. 15, 2014) ("it is by no means clear that 'temporary employees' provided by a third party will as a matter of course even be included in a bargaining unit").

Even if the supplier employer's employees are not present or appropriately accounted for in the representation case procedures, it is possible that they would be deemed to be included later without their consent or the consent of the employers. *See, e.g.*, *Gourmet Award Foods*, 336 NLRB 872 (2001) (finding that temporary employees were "hired in" to the existing bargaining unit, and rejecting the dissent's conclusion that the accretion analysis was appropriate).

Thus, the Board should not sweep the very substantial concerns presented by a potential return to the *Sturgis* rule under the rug of the community of interests standard. Application of that standard will be unpredictable and will impose significant costs and burdens on the employers involved.

C. Overruling *Oakwood Care Center* and Returning to *Sturgis* Will Be Bad for Employees As Well.

In order to avoid the costs, uncertainty, and inherent difficulties presented by the prospect of hybrid joint employer/user employer bargaining units, user employers are likely to take one of two routes: (1) decrease or discontinue the use of temporary or contingent worker arrangements; or (2) take steps to further differentiate the user employer's employees from the supplier employer's employees. Both of these options would have negative consequences for employees who currently benefit from (and may even prefer) temporary or alternative staffing arrangements.

1. *Decreased Use of Alternative Staffing Arrangements.*

Many user employers may simply decide to discontinue temporary staffing arrangements altogether in order to avoid the uncertainty, risk, and expense described above. Doing so, however, would eliminate the many benefits that these arrangements bring both to companies and employees. For employers, temporary staffing options provide a substantial benefit by

helping companies avoid the cycle of hires and layoffs that come with the inevitable ups and downs of the business's performance, and the significant costs that come with that cycle. This, in turn, improves the financial stability of companies by ensuring that they will maintain consistent production capabilities during periods of boom and downturn alike. *See* Joy Vaccaro, *Temporary Workers Allowed to Join the Unions: A Critical Analysis of the Impact of the M.B. Sturgis Decision*, 16 J. OF CIVIL RIGHTS AND ECON. DEV. 489, 508 (Spring/Summer 2002).

Opponents of temporary or alternative staffing arrangements contend that reducing employers' reliance on temporary workers will create a beneficial result for workers, because employers will replace temporary employees with permanent hires. But there is no clear evidence that this is so. Companies may instead elect to increase the workload of their regular employees when business is good and then lay them off when there is a downturn in the business cycle.

A reduction in the use of temporary or alternative staffing arrangements could have negative consequences for workers as a whole. By serving as an attractive alternative to companies that cannot securely take on additional full-time workers, the rise in the contingent employment industry has created substantial job opportunities for Americans. A December 2013 report found that the U.S. temporary employment industry is expected to add over 780,000 jobs by 2022. U.S. Dep't of Labor, Bureau of Labor Statistics, Monthly Labor Review, "Industry Employment and Output Projections to 2022" (Dec. 2013). Alternative work arrangements also help workers avoid prolonged unemployment while gaining gradual exposure to an employer that may end up bringing them on as regular employees. *See* Catherine Rampell, "Unemployed, and Likely to Stay That Way," N.Y. Times, Dec. 2, 2010, http://www.nytimes.com/2010/12/03/business/economy/03unemployed.html?_r=1&scp=1&sq=

RAMPELL%20AND%20TELEVISION%20PRODUCER&st=cse. The rise in temporary employment further has provided new opportunities for less experienced workers to gain skills and on-the-job training in their chosen fields. *See generally* Kathryn Dill, "The Fastest Growing Temp Jobs," Forbes.com (Mar. 27, 2014), http://www.forbes.com/sites/kathryndill/2014/03/27/the-fastest-growing-temp-jobs/. Finally, temporary employment can provide the increased job flexibility that workers in need of alternative arrangements, such as those with family obligations, often cannot get from permanent employment. Robert R. Trumble, Ph.D. & Theodore S. Hanson, *Effects of Temporary Staffing on the Temporary Workers*, 9 HR Advisor: Legal & Practical Guidance No. 5 (Sept./Oct. 2003).

2. *Increased Differentiation Between Temporary and Permanent Employees.*

User employers who do not forgo temporary staffing arrangements may seek to further differentiate their own employees from their supplier's employees. Indeed, after *Sturgis*, several legal commentators published guidelines on how user employers could avoid an involuntary *Sturgis* unit by creating new divisions between their temporary and permanent workers. If the Board returns to the *Sturgis* rule, it is likely that user employers will again seek counsel on how to differentiate their permanent employees from temporary employees.

This differentiation could diminish the opportunities and benefits that temporary staffing arrangements currently provide to contingent workers. *See generally* Michael J. Hely, *The Impact of Sturgis on Bargaining Power for Contingent Workers in the U.S. Labor Market*, 11 WASH. U. J.L. & POL'Y 295, 318 (2003) (noting that "[i]f implemented to its fullest extent, *Sturgis* may have the ironic effect of entrenching further insecurity and alienation for contingent workers by compelling suppliers and users to construct contingent worker arrangements even more carefully"). For example, user employers may limit "crossover" hiring from the ranks of

temporary employees. *Cf. Lawson Mardon U.S.A., Inc.*, 332 NLRB 1282, 1287 (2000) (finding that the "extremely limited number of transfers" from one employee group to another supported a lack of a community of interest). Doing so would eliminate one of the chief benefits of contingent staffing arrangements for American workers – a pathway to permanent employment.

CONCLUSION

For all of these reasons, COLLE respectfully urges the Board to adhere to its decision in *Oakwood Care Center*.

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Date Submitted: September 18, 2015

CERTIFICATE OF SERVICE

I certify that on September 18, 2015, a true and accurate copy of the foregoing Brief of *Amicus Curiae* Council on Labor Law Equality was served through the Board's electronic filing system on the Board, and by e-mail on the following:

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