
**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

Case No. 05-RC-079249

MILLER & ANDERSON, INC.,

EMPLOYER,

v.

**SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 19, AFL-CIO,**

PETITIONER.

ON PETITION FOR REVIEW

***AMICUS CURIAE* BRIEF ON BEHALF OF THE
AMERICAN STAFFING ASSOCIATION IN OPPOSITION
TO THE PETITION FOR REVIEW**

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**BRIEF OF *AMICUS CURIAE*
AMERICAN STAFFING ASSOCIATION IN
OPPOSITION TO THE PETITION FOR REVIEW**

The American Staffing Association (“ASA”) respectfully submits this *amicus curiae* brief in response to the request of the National Labor Relations Board (“Board” or “NLRB”) for *amici* views regarding whether the Board should continue to adhere to the holding of *Oakwood Care Center*, 343 NLRB 659 (2004). The existing legal standard, which disallows inclusion of solely employed employees in the same collective bargaining unit with jointly employed employees absent consent of all employers, is the proper standard and was correctly applied in this case; any departure from the standard would contravene the express provisions of the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.* (“NLRA” or “Act”), public policy, and well-established Board precedent.

INTRODUCTION

ASA 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 Center*, 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?

In response to the Board's inquiry, ASA urges the Board to adhere to its longstanding consent standard, reaffirmed in *Oakwood*, which permits "mixed" bargaining units only upon the co-principals (i.e., multiple employers) manifesting their consent to collectively bargain in concert with one another utilizing just a single agent (i.e., the employers' exclusive bargaining agent). Were the Board to abandon its longstanding consent precedent and find the Union's mixed-unit petition "appropriate" under Section 9(b) of the Act, 29 U.S.C. § 159(b), it would allow organized labor to compel non-consensual, multi-employer bargaining in direct contravention of the Act.

As we explain below, there is no reason for the NLRB to abandon its long-standing *Greenhoot/Oakwood* consent standard because NLRA-covered temporary employees and other contingent workers who opt to pursue non-permanent, alternative work arrangements, are

already afforded the full protection of the Act, including the right to be represented by a union in their own bargaining units.

Central issues in this case are (1) whether, in the first instance, the Union's petition is moot and should be dismissed because the petitioned-for unit no longer exists, and (2) if the case is determined not to be moot, whether the Regional Director for Region 5 properly dismissed a petition filed by the Sheet Metal Workers International Association, Local 19, AFL-CIO ("Union"), seeking to represent "all sheet metal workers employed by [Miller & Anderson, Inc. and Tradesmen International, Inc.] as either single employers or joint employers on all job sites in Franklin County, Pennsylvania," on the grounds that these two firms did not consent to multiemployer bargaining. In dismissing the petition, the Regional Director relied on long-standing precedent set forth in *Greenhoot, Inc.*, 205 NLRB 250 (1973), and reaffirmed by the Board in 2004 in *Oakwood*. The Union requested review urging the Board to resuscitate the standard announced in *Sturgis*, a standard the Board promptly revisited and overruled in *Oakwood*.

STATEMENT OF INTEREST

ASA represents over 1,700 staffing firms operating an estimated 17,000 offices in all 50 states. Nationwide, staffing firms employ three million workers each week in virtually every occupation. ASA represents and promotes its members' interests through legal and public affairs advocacy. ASA also encourages ethical business conduct; provides information regarding the laws and regulations that apply to staffing services, especially those protecting the welfare of employees; promotes better public understanding of the staffing industry and its role in the economy and society; and provides education and other services to help members stay informed about the industry and their business.

Staffing services encompass a broad range of employment and human resources services, including the best known among them – temporary help services. The advantages of temporary work to individuals are widely recognized by employees, businesses, economists, and policy-makers. From its earliest inception, and as the Dunlop Commission, established by the U.S. Department of Labor and Department of Commerce, recognized over two decades ago, the temporary and staffing service industry afforded and continues to afford significant benefits to its employees including flexibility, independence, supplemental income, skills training, “safety net” protection, and an opportunity to find work. *See generally* The Dunlop Commission on the Future of Worker-Management Relations (1994). Staffing firms providing temporary help typically recruit, train, and test their employees and assign them to clients in a wide range of job categories and skill levels, from laborers and construction workers to information technology specialists, accountants, and lawyers. Temporary work also benefits business. Temporary employees fill in during vacations and illnesses, meet temporary skill shortages, handle seasonal or other special workloads, and help staff special projects. The use of temporary staffing provides employers with the flexibility to adjust the size of their work forces to meet business and economic exigencies and seasonal fluctuations quickly and at a predictable cost.

ARGUMENT

I. THE UNION’S PETITION SHOULD BE DISMISSED ON MOOTNESS GROUNDS.

The Union filed a Request for Review (“RFR”) of the Regional Director’s decision on May 10, 2012. After three years of no action on the part of the Board with regard to the RFR, the Board belatedly granted the Union’s RFR. In the interim, the relationship between Miller & Anderson, Inc. and Tradesmen International, Inc. (“Tradesmen”) ceased to exist with no indication that it would change in the future.

On July 20, 2015, Tradesmen moved to dismiss the RFR. *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. Tradesmen argued that because the petitioned-for unit no longer exists and there are no employees who would be affected by any Board ruling, the Union’s RFR is moot. *Id.* ASA agrees with Tradesmen.

The Board has long recognized that where the petitioned-for unit no longer exists, the petition is appropriately dismissed as moot as a question of representation no longer exists. *See, e.g., Int’l Harvester Co. (Chattanooga, Tenn.)*, 73 NLRB 436 (1947) (where operations were terminated and there was no demonstration that employees would continue to be employed, the Board found “no useful purpose will be served if we proceed with a determination of representatives at the present time.”); *Davey McKee Corp.*, 308 NLRB 839 (1992) (where work was scheduled to terminate within days of the hearing, petition should be dismissed as moot); *General Motors Corp. (Brooklyn, NY)*, 88 NLRB 119 (1950); *Todd-Galveston Dry Docks, Inc.*, 54 NLRB 625 (1944); *Longerier Co.*, 277 NLRB 570 (1985); *Corrections Corp. of America*, 338 NLRB 452 (2002).

As set forth in detail in Tradesmen’s Motion to Dismiss, there are no employees in the putative bargaining unit the Union seeks to represent, there have been no employees for a period of nearly three years, and there is no expectation that any employees will be working in the petitioned-for unit in the future.¹ This case, therefore, is a particularly inappropriate vehicle upon

¹ The Union does not deny these points, but instead strains to sidestep the procedural infirmity by asserting that the NLRB must create a record before it can dismiss the petition. The argument is meritless. Requiring the parties to expend their resources to create a record prior to dismissing the petition, as the Union contends, serves “no useful purpose.” *Int’l Harvester Co.*, 73 NLRB at 438.

which to invite deliberations over the utility of resuscitating a previously-overruled substantive standard. Nor does this case fall within a narrow exception to the mootness doctrine (*i.e.*, where the facts or events can be manipulated for the purpose of evading review). Moreover, there are no doubt current representation cases in the pipeline that could present the Board with a live mixed-unit controversy.

The Board is an independent tribunal that is properly not in the business of rendering advisory opinions. Indeed, the Board previously witnessed the mootness doctrine at the time it announced the *Sturgis* standard. Twenty years ago, *Value Recycle, Inc.*, No. 33-RC-4042 (Mar. 1, 1996) was one of three cases – along with the *Jeffboat*² and *Sturgis* cases – that was to be decided after the Board heard oral argument on all three cases in December 1996. The NLRB, however, did not render a decision on Laborers Local No. 75’s petition in *Value Recycle*. Instead, that case was closed because by January 1998 it had become moot due to the employer having ceased its operations and no longer performing any work on the site. Bitá Rahebi, *Rethinking the National Labor Relations Board’s Treatment of Temporary Workers: Granting Greater Access to Unionization*, 47 UCLA L. Rev. 1105, 1118 and n.59 (2000); *Sturgis*, 331 NLRB at 1301 and n.4 (petition withdrawn a year after oral argument). Just as in *Value Recycle*, in the instant case, Sheet Metal Local 19’s petition should be withdrawn in advance of oral argument or properly dismissed after oral argument as moot.

² *Jeffboat Div., American Commercial and Marine Serv. Co.*, No. 9-UC-406 (2000) (appeal consolidated with *Sturgis*).

II. THE BOARD'S RELIANCE ON CHANGED CIRCUMSTANCES IN THE STAFFING INDUSTRY IS UNFOUNDED AS THE BASIS FOR RETURNING TO *STURGIS*.

Contrary to the Board's predicate for its decision in *Sturgis*, it bears emphasis that the staffing industry is no longer a nascent industry experiencing unbridled growth. The meteoric rise in domestic outsourcing in the 1980s and 1990s, which may have propelled the failed *Sturgis* experiment in 2000, has stabilized, if not waned in the post September 2001 period that includes a prolonged business contraction due to the Great Recession. By many accounts the current era is characterized by U.S. firms turning to foreign outsourcing outside the ambit of the NLRA. The market for domestic temporary workers has matured in the nineteen years since the *Sturgis/Jeffboat/Value Recycle* oral argument, and, in recent years it has consistently topped out at 2% of the total domestic, non-farm workforce. Against this backdrop, *Sturgis*-era citations to "577%" industry growth, an "ever-expanding army of [domestic] employees referred to as contingent," and a vulnerable temporary employee "underclass" "effectively" stripped of their Section 7 rights and any employer-sponsored health care benefits appears wholly misplaced and divorced from the marketplace realities in 2015. *See, e.g.,* Alden J. Bianchi & Edward A. Lenz, *The Final Code Section 4980H Regulations; Common Law Employees; and Offers of Coverage by Unrelated Employers*, Bloomberg BNA (2014) ("Because they are in the so-called 'people business,' most staffing firms are applicable large employers for [Internal Revenue] Code section 4980H purposes. These firms will either extend [health care] coverage [under the 2012 Affordable Care Act] or pay any applicable penalties").

In addition, unions would appear to have already adapted to the changed labor landscape in which temporary employees emerged, now decades ago, as revolving fixtures in a number of manufacturing and service industries. While encouraging a temporary employee to exercise his

or her Section 7 right to pay union dues in exchange for getting an exclusive bargaining agent may pose inherent challenges – due principally to the temporary employees’ definitional proclivity not to work for an extended duration at any particular job site – within the framework of the long-established, bright-line rules, the task is hardly insurmountable. Indeed, at least some recent NLRB rulings underscore this point.

By way of illustration, a recent NLRB Advice Memorandum, *see Employco USA and Blue Point, LLC*, No. 28-CA-23328, 2011 WL 2960966 (Jun. 17, 2011), addressed whether one of Employco’s “client companies” (*i.e.*, Blue Point) violated the NLRA by “failing to abide by the [staffing firm’s] collective bargaining agreement” with Teamsters Local 631. The Advice Memo concluded that there was no NLRA violation because Blue Point was not a party to the labor agreement that Teamsters Local 631 had negotiated with Employco.

In defending itself from the union’s unfair labor practice charge – *i.e.*, that the non-signatory Blue Point was nonetheless bound by the Teamster’s labor agreement with the staffing firm – Blue Point asserted that “it was unaware of what the actual Union wages and fringe benefit costs were as they were not broken down in [the staffing firm’s] invoices.” *Id.* at *3. Blue Point also defended itself by indicating that in addition to using Employco’s temporary employees to install and dismantle exhibitors’ booths at various trade shows, it had opted to use Carpenters Union employees to perform the same tasks due to its having “signed a contract with the Carpenters.” In view of recent fact patterns such as this, the discredited, *Sturgis*-era claim that temporary employees’ Section 7 rights are “effectively” denied unless the Board undertakes a political revision and compels staffing firms to bargain alongside their clients rings hollow. As demonstrated below, in the current era, the overruled *Sturgis* standard represents a solution in search of a problem that creates its own problems.

III. THE *GREENHOOT/OAKWOOD* CONSENT STANDARD IS MANDATED BY THE NLRA AND NATIONAL LABOR POLICY.

Assuming *arguendo* that the Board does not dismiss the petition as moot, *see supra* 4-6, the Board should alternatively dismiss the petition on the merits, finding that the *Greenhoot/Oakwood* consent standard, applied by the Regional Director, should be enforced and maintained. This longstanding Board precedent is supported by the NLRA's plain language which prohibits forced multi-employer bargaining units. By requiring employers' consent for a multi-employer bargaining unit, the *Greenhoot/Oakwood* consent standard is consistent with the Act's mandates.

A. The NLRA Prohibits Coerced Multi-Employer Bargaining Units.

The NLRA constrains unions from "threaten[ing], coerc[ing] or restrain[ing] any person" for purposes of "forcing or requiring any employer . . . to join any labor organization." 29 U.S.C. § 158(b)(4)(A). Section 8(b)(4)(A) has repeatedly been interpreted by the Board and the Judiciary to prohibit forced multi-employer bargaining units. *See, e.g., Mobile Mech. Contractors Ass'n, Inc. v. Carlough*, 664 F.2d 481 (5th Cir. Unit B 1981); *Glass Workers Local 1892 (Frank J. Rooney, Inc.)*, 141 NLRB 106 (1963); *I.L.W.U. Local 8 (General Ore, Inc.)*, 126 NLRB 172 (1960); *United Construction Workers (Kanawha Coal Operators Ass'n)*, 94 NLRB 1731 (1951).

In *Oakwood*, the Board cited to Member Brame's dissent in *Sturgis* stating that he "correctly noted . . . additional problems could arise in designating whether union activity is primary or secondary under Sec. 8(b)(4)(ii)(B)." *Oakwood*, 343 NLRB at 663 n.23. Specifically, Member Brame stated the prohibition against forced multi-employer units reflects Congress's

intent in drafting the Taft Hartley Act in 1947. *Sturgis*, 331 NLRB at 1316 (Member Brame, dissenting).

The House of Representative's proposed bill, H.R. 3020, would have prohibited all multi-employer bargaining, with or without employers' consent. *See* H. Rep. No. 245, 80th Cong. 56 (1947). The Senate's substitute, which was enacted, took a conditionally accommodating approach; it prohibited multi-employer bargaining except where undertaken voluntarily by all the employers, thereby providing those employers who desire to engage in multi-employer bargaining the ability to do so. *See* S. 1126, 80th Cong. § 2(2) (1947) (codified as 29 U.S.C. § 152(2)). Accordingly, the Legislature neither approved of nor intended to allow union-coerced multi-employer bargaining. Rather, the agreed-upon statutory language that resulted in the consensus of both chambers of Congress and the Administration purposefully prohibited non-consensual multi-employer bargaining.

Twenty-six years later, the NLRB applied this statutory imperative in the *Greenhoot* case thus establishing multi-employer consent as the operative standard governing the exercise by staffing industry temporary employees of their Section 7 right to "form, join or assist labor organizations . . . [and] to bargain collectively." 29 U.S.C. § 157.

[T]here is no legal basis for establishing a multiemployer unit absent a showing that the several employers have expressly conferred on a joint bargaining agent the power to bind them in negotiations or that they have by an established course of conduct unequivocally manifested a desire to be bound in future collective bargaining by group rather than individual action.

Greenhoot, 205 NLRB at 251. *See generally* Restatement (Third) of Agency §§ 1.01, 3.16, 6.05(2)(c) (2006) (common agent with multiple coprincipals). With the exception of the fleeting, Board-overruled experiment in *Sturgis*, the NLRB has firmly, consistently, and repeatedly

enforced the consent principle set forth in *Greenhoot*³ including in the temporary employee context. In the instant case, there is no manifestation of assent by the principals to be bound by a single bargaining agent. As such, Miller & Andersen and Tradesmen cannot be bound together forcibly for the purposes of collective bargaining; to do so would be in violation of the Act and without legal support.

Section 8(b)(1)(B) of the Act also provides, “[i]t shall be considered an unfair labor practice for a labor organization or its agents to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.” 29 U.S.C. § 158(b)(1)(B). This section has historically been recognized as a prohibition against attempts to force employers to join or resign from multi-employer bargaining. See *Florida Power & Light Co. v. Int’l Bhd. of Elec. Workers, Local 641*, 417 U.S. 790, 799 (1974) (citing *United Slate, Tile & Composition Roofers, Local 36 (Roofing Contractors Ass’n of Southern California)*, 172 NLRB 2248 (1968)); *Orange Belt District Council of Painters No. 48 (Painting & Decorating Contractors of America, Inc.)*, 152 NLRB 1136 (1965); *General Teamsters Local 324 (Cascade Employers Ass’n, Inc.)*, 127 NLRB 488 (1960); see also *Sheet*

³ See, e.g., *Tampa Bay Area Glazing Contractors Ass’n*, 228 NLRB 360, 361 (1977) (“It is well settled that the Board will find a multi-employer unit appropriate only where employers evidence [a] clear intent to participate in such a bargaining arrangement.”); *Lee Hosp.*, 300 NLRB 947, 948 (1990) (“[A]s a general rule, the Board does not include employees in the same unit if they do not have the same employer, absent employer consent.”); *Hunts Point Recycling Corp.*, 301 NLRB 751, 753 (1991) (Board “bind[s] an employer to multi-employer bargaining and by extension . . . find[s] that the employees of that employer belong to a multi-employer unit” only upon unequivocal evidence of each employer’s assent); *Hughes Aircraft Co.*, 308 NLRB 82 (1992) (“Board will not sanction [multi-employer bargaining units] without a showing that the [e]mployers have expressly consented to joint [collective bargaining] negotiations . . . ”); *Brookdale Hosp. Medical Ctr.*, 313 NLRB 592, 593 (1993) (staffing firm’s employees excluded from client’s bargaining unit where staffing firm had not consented); *Hexacomb Corp. and Western Temporary Servs., Inc.*, 313 NLRB 983 (1994) (“It is well established that the Board does not include [the] employees of joint employers in a unit with employees of a single employer, absent employer consent.”); *Connecticut Yankee Atomic Power Co.*, 317 NLRB 1266, 1268 (1995) (“[E]mployees of a joint employer will not be combined with employees of a single employer in a single unit, unless the parties consent.”); *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982) ([The Board cannot] “force[] employees into multi-employer bargaining units” absent the consent of all the employers in the unit).

Metal Workers' Int'l Ass'n, Local 104, 323 NLRB 227, 232 n.6 (1997) (noting the “the strong protections the Act affords parties wishing to retain independent bargaining status”).

Section 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B), therefore, prohibits the very thing the Union now seeks. Moreover, read in conjunction with the prohibitions set forth in Section 8(b)(4), 29 U.S.C. § 158(b)(4), it becomes even more clear that Congress intended the Act to prohibit the forced multi-employer bargaining unit sought by the Union in the instant matter.

B. Permitting Multi-Employer Units in Contravention of the Act Furthers no Purpose as Employees in Alternative Work Arrangements Enjoy the Act's Protection Under the *Greenhoot/Oakwood* Consent Standard.

That no change is necessary is evidenced by the fact that under the *Greenhoot/Oakwood* standard, employees are not deprived of their rights to organize. Under the current standard, if employees of a staffing firm working at a “customer” site desire union representation, the union can petition for representation of those employees. Prohibiting the union from adding these employees to a unit with customer employees, without the consent of both employers, does not deprive any employees of their Section 7 rights. It is well-established that employees in alternative work arrangements enjoy the protections of the Act and are free to organize; they just must do so in appropriate, lawful bargaining units.

Contrary to the Union's assertion in its RFR, it is not “virtually impossible” for employees of a temporary staffing firm to organize. In fact, there are many instances where unions have organized contingent workers and/or temporary staffing firm employees. For example, the Washington Alliance of Technology Workers successfully organized contract workers at Microsoft Corporation. See Van Jaarsveld, Danielle Dorice, *Collective Representation Among High-Tech Workers at Microsoft and Beyond: Lessons from WashTech/CWA*, Industrial Relations (April 2004); *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); *Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186, at *43 (2015) (Members Misimarra and Johnson, dissenting) (“*BFI*”) (“The majority cites no evidence, and none has been presented, showing that employees in contingent . . . employment situations have been unable to bargain with their undisputed [staffing] firm employer.”) (emphasis added).

As to Members Liebman and Walsh's dissent in *Oakwood*, employees in an alternative work arrangement are, in fact, not required to obtain their employer's consent prior to organizing. As stated, they are free to organize in an appropriate unit as any other employees under the Act. Consent is required only where the Union seeks to create a multi-employer unit. The Regional Director did not dismiss the petition in the instant case because the Union cannot represent the staffing firms. Rather, he dismissed the petition because the Union sought to unlawfully force a multi-employer bargaining unit without the employers' consent. Even the Union recognized in its RFR its ability to petition for multiple bargaining units, whether individually employed by one of the employers or jointly employed by both, provided the employees were not coerced into an unlawful multi-employer bargaining unit. RFR, at 4.

Moreover, there is no evidence that the employees' interests would be served by forcing employees of both the customer and the staffing company into the same unit. In fact, there is ample indication of potentially conflicting and divergent interests that could heighten labor unrest under such a bargaining arrangement. Based solely on the nature of their employment relationships, the two groups of employees have different interests in collective bargaining and no interests would be served by forcing these two distinct groups to negotiate together.

A non-consensual, *Sturgis*-type unit would create inherent tension in the bargaining relationship. The interests of the client's full-time employees may not align with the interests of the staffing firm's temporary employees. For example, seniority could run under two tracks – one for the client's employees and a “second class” of seniority for the jointly employed unit. The same could be true of wages, benefits, and even progressive discipline. In that regard, a union could compromise the interests of the temporary employees in exchange for greater wages (and in turn greater dues) solely for the client's employees. There are obvious tensions and potential conflicts that could arise between the employers as well. For example, “mixed units” could create issues where one employer refuses to bargain over certain issues while suggesting that the other employer is responsible for responding to the proposal. These tensions would likely be exacerbated where, as in the *Jeffboat* case, several staffing firms place their employees with a common client. That practice is not uncommon. If there is disagreement, then all of the employees lose the benefit of a bargained-for agreement, and work stoppages, strikes, and other labor unrest could occur. In short, as one advocate observed during the Board's consideration of the rejected *Sturgis* standard, “like most shotgun weddings, shotgun collective bargaining through forced non-consensus multi-employer bargaining leads to practical problems which we've heard described this morning, conflict and divorce.” Transcript of December 2, 1996 at 107, Oral Argument by Harold P. Coxson in *Jeffboat Div., American Commercial and Marine Serv. Co.*, No. 9-UC-406 (2000).

If temporary employees were combined into a multi-employer bargaining unit with employees who choose to work in a traditional work assignment, at least one set of employees' needs will not be met as they have diametrically divergent interests in their employment.

Employees' needs would be better served by requiring unions to organize each group of employees separately, where each group's separate interests can be appropriately addressed.

Unions have historically asserted that non-consensual, multi-employer bargaining units are necessary because other unquestionably NLRA-sanctioned approaches to organizing temporary employees are too difficult and temporary employees represent such a "significant" part of the workforce. These arguments are unavailing. First, even without attempting to rewrite the Act to permit otherwise unlawful forced multi-employer bargaining units, temporary employees are able to freely organize under the Act. *Supra* at 12. Second the Board's claims (and forecasts) of phenomenal growth in the number of temporary employment relationships – based on the "most recent" survey from 2005 – are unfounded and detached from reality. *See, e.g., BFI*, 362 NLRB No. 186 at *11. Temporary employees represent a small fraction of employees in the workforce. According to the Bureau of Labor Statistics, as of July 2015, temporary employees represented only 2.04% of the total non-farm workforce, hardly a "significant" number of employees. Bureau of Labor Statistics, *Current Employment Statistics Survey* (July 2015) available at, <http://www.bls.gov/ces/ceshighlightsarch.htm>. Regardless of the limited penetration of the temporary workforce, the 2.04% of the workforce comprised of temporary employees can readily organize, should it so desire. Return to the failed, forced multi-employer bargaining experiment under *Sturgis* could result in fewer job opportunities for temporary service employees while encouraging global work assignments. The Union's assertion that the nature of the temporary workforce requires a departure from the *Greenhoot/Oakwood* consent standard is a discredited, *Sturgis*-era claim that lacks merit and should be rejected.

IV. EMPLOYEES IN THE MULTI-EMPLOYER UNIT SOUGHT BY THE UNION MAY NOT SHARE A COMMUNITY OF INTEREST.

Putting aside for a moment the Board's longstanding prohibition of coerced multi-employer bargaining units, a staffing firm's employees and its client's employees may not even share basic "community of interest" factors for the Board to satisfy its statutory duty under Section 9(b) to determine "the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b). In fact, a staffing firm's employees and its client's employees may not share common terms and conditions of employment, supervision, skills, training or a history of collective bargaining. To now ignore the fact that temporary employees and client employees may not share basic community-of-interest factors, let alone the same employer, and permit the inclusion of these very distinct employees in one bargaining unit would be in contravention of established Board precedent.⁴

The Board's new election rules make the employer's burden much more difficult to investigate and in cases such as this determine whether a sufficient community of interest exists between the two separate groups of employees. Moreover, one need not be clairvoyant to predict that in the multi-employer context the new two-day deadline for employers to produce a voter list and obtain the requisite employee contact information will be difficult, to say the least.

Even former Chief Judge Harry Edwards, a staunch friend of organized labor, recognized the pitfalls of flip-flopping decisions, such as proposed here, on the stability of national labor policy. See Harry T. Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 Ohio St. L.J. 23, 24 (1985)

⁴ And beyond the pure community of interest factors, the Board has long recognized that where temporary employees are employed for one job only, for a set duration, or have no substantial expectancy of continued employment, such employees are to be excluded from any unit found to be "appropriate." See, e.g., *Indiana Bottled Gas Co.*, 128 NLRB 1441, n.4 (1960); *Owens Corning Fiberglass Corp.*, 140 NLRB 1323 (1963).

“political . . . revision [is] nothing new to the NLRB.”). *See also*, 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”). For these reasons, a departure from the established *Greenhoot/Oakwood* consent standard is not warranted.

V. RETURN TO THE FAILED EXPERIMENT OF *STURGIS* CREATES A MYRIAD OF OTHER PROBLEMS.

Sturgis was a four-year experiment. Its results were not positive. There is no reason to repeat it. Doing so would involve abandoning a long-standing, bright-line rule that provides firms and union organizers with predictability and certainty. A return to *Sturgis* would unnecessarily threaten to enmesh staffing firms in their clients’ labor disputes. In the current era, the overruled *Sturgis* standard represents a solution in search of a problem.

A. Undermining Secondary Boycott Prohibitions

Beyond the complications and complexities linked to fractionalized collective bargaining, resuscitating the overruled standard in *Sturgis* would seriously undermine the NLRA’s secondary boycott prohibitions, and thereby increase the potential for labor strife. Section 8(b)(4) is aimed at protecting neutral employers from union pressures – whether the pressure takes the form of strikes, threats or other subtler forms of union coercion. 29 U.S.C. § 158(b)(4)(B). Conduct which is deemed “secondary” is proscribed; that includes union conduct tactically directed toward a neutral employer in a labor dispute that is not its own. Conversely, if the union’s sole objective is to influence its signatory employer’s labor relationship with its unionized employees, union pressure is deemed “primary,” and therefore lawful. The Supreme Court recognized long ago, for example, that a union boycott did not violate the NLRA because it related to the working conditions of the jobsite’s union carpenters. *National Woodwork Manufacturers Ass’n v. NLRB*,

386 U.S. 612 (1967). The Court's definition of "primary dispute" focused generally on the directness of the union's grievance and the ability of the pressured/boycotted employer to control its resolution.

A return to *Sturgis* and coerced multi-employer bargaining would undoubtedly greatly diminish the application of Section 8(b)(4), 29 U.S.C. § 158(b)(4), protections that Congress deemed important for the preservation of industrial stability. Reverting to *Sturgis* would entangle staffing firms in their client's labor disputes. Under the long-standing and existing framework, staffing firms that do not consent to bargain alongside their client remain non-signatories well positioned to enjoin union picketing/pressures tactically calculated to advance union objectives elsewhere at other client locations or at other locations where the staffing firm is doing business with other clients. As a practical matter, under the overruled *Sturgis* standard, unions have taken the position that staffing firms that refer their temporary employees to a unionized client are "primary" (rather than "secondary") employers within the meaning of the Act, and thus the unions may engage in picketing activities at other sites where staffing firm employees are located. On the eve of oral argument in the *Sturgis/Jeffboat/Value Recycle* cases, for example, the AFL-CIO's associate general counsel noted as follows:

[T]emporary agencies maintain operations in a wide variety of work-sites, under *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950), and its progeny, the union may picket such employers at any locations at which they do business. Thus, a dispute with Kelly or Manpower in Dallas may justify picketing in New York, or a dispute with a national contractor in Los Angeles may lead to selected picketing at other locations where the union believes it will have maximum impact.

Larry Engelstein, *Organizing Contract Service Workers Under a Dysfunctional Law*, Address before the 29th Annual Pacific Coast Labor & Employment Conference, at 11-12 (May 9-12

(1996). This point was conceded by the NLRB as well. It was widely reported that “at oral argument for [the *Sturgis/Jeffboat/Value Recycle*] cases the NLRB General Counsel conceded more picketing could result from the new [*Sturgis*] standard.” *NLRB to Rule on Unionizing Temporary Workers*, Nat’l L. J., Feb. 24, 1997, at C4.

Accordingly, resuscitating *Sturgis* threatens to unhinge Congress’s carefully-constructed, secondary boycott prohibitions and undermine national labor policy. Congress enacted the NLRA to improve (not impair) labor relations (“eliminate the causes of certain substantial obstructions to the free flow of commerce,” 29 U.S.C. § 151), restore equality in bargaining power between employers and promote (not undermine) labor-management stability. Such national labor policies would be undermined were the Board to resuscitate the appropriately short-lived *Sturgis* standard.

B. Creating Unfair Timing Issues

In addition, from a practical standpoint the determination of whether Section 8(b)(4)(B), 29 U.S.C. § 158 (b)(4)(B) is violated “cannot be made without an inquiry into . . . all of the surrounding circumstances.” *National Woodwork*, 386 U.S. at 644. If the brief interlude during which the Board erroneously applied the *Sturgis* standard before overruling it is any indication, under a resuscitated *Sturgis* standard, it would be more difficult for staffing firms to demonstrate that they are “neutral” employers in a labor dispute involving their client’s employees. For example, in *Gourmet Awards Foods*, 336 NLRB 872 (2001), years after the case was brought, the Board remanded it in 2003 to permit a more thorough determination of who – as between the staffing firms and their common client – controlled the non-economic terms and conditions of employment. *See generally* NLRB General Counsel Arthur Rosenfeld Issues Report on Recent Case Developments, 2003 WL 21098648, 15 *18-19 (May 2, 2003). By the time the Board’s

rationale could be tested in court, the Board had properly overruled *Sturgis*. The analytical quagmire that *Gourmet Award Foods* posed both for the employers in the case and staffing firms generally was averted only through the intervening *Oakwood* ruling, which prompted the Board's 2005 stipulated dismissal of the circuit court appeal in *Gourmet Award Foods*.

VI. THE BOARD'S DECISION IN *BROWNING-FERRIS* PRESENTS ANOTHER POWERFUL REASON TO DENY THE UNION'S PETITION.

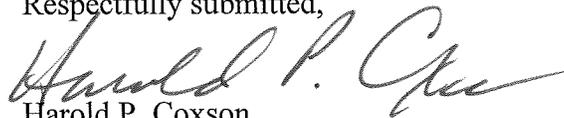
The Board's recent decision in *BFI*, provides another very practical reason for rejecting the Union's petition here. The *BFI* ruling broadens the circumstances under which the Board will find that a joint employer relationship exists. Under the *BFI* rationale, companies may be deemed joint employers where each is a common law employer and each directly or indirectly has the authority to control the terms and conditions of employment. By exploding the traditional joint employer inquiry to include an examination of *indirect* authority – for example, through a third-party intermediary such as a staffing firm – the untested *BFI* representation ruling seemingly paves the way for many multi-party relationships, such as those involving staffing firms and clients as well as franchisors and franchisees, to be deemed joint employment relationships. In *BFI*, the Board recognized that its decision would change “the legal landscape” by expanding the definition of joint employer status. *BFI*, 362 NLRB No. 186 at *24. In addition, the Board anticipated that millions of contingent workers would be encompassed by its expanded definition of joint employer status. *Id.* at *15. If that is true, a change in the *Greenhoot/Oakwood* consent standard is unnecessary and would create new problems through compelled multi-employer bargaining. Once joint employer status is more easily found under the new *BFI* standard, compelling parties to bargain with the union as a multi-employer unit will have material consequences for staffing employees.

Were the Board to resuscitate the *Sturgis* standard, there is, as noted, *supra* at 13-14, a significant prospect of greater labor unrest. Moreover, because the newly-minted *BFI* joint employer standard was not in place when *Sturgis* was decided, the complexities of multi-employer bargaining have not been tested under the Board's 2015 joint employer standard. The new *BFI* standard complicates an already complicated relationship. Were the Board to revert to the overruled *Sturgis* bargaining unit standard and apply it in tandem with the new *BFI* joint employer standard, the NLRB would, in administering the NLRA, sow uncertainty and conflict into staffing firm/client relations and the representation of employee rights under those arrangements, thus achieving exactly the opposite result intended by the Act; which was to encourage collective bargaining, create stable bargaining relationships, and reduce labor strife by protecting neutral employers from labor disputes that are not their own.

CONCLUSION

For the foregoing reasons, the Board should deny the Union's petition as procedurally moot, or, in the alternative, reaffirm the well-established precedents addressed in this brief and deny the petition on the merits.

Respectfully submitted,



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Dated: 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* American Staffing Association was served through the Board's electronic filing system on the Board, and by e-mail on the following:

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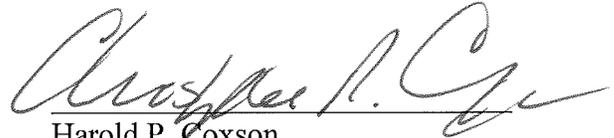
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