UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

AMICUS CURIE BRIEF IN SUPPORT OF ELECTION IN PETITIONED-FOR UNIT SHEET METAL WORKERS EMPLOYED BY MILLER & ANDERSON, INC. AND TRADESMEN, INC., AS JOINT EMPLOYERS

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STATEMENT OF INTEREST OF *AMICUS CURIE*

The University of Wisconsin-Extension, Labor Education Department, the School for Workers, is the nation's oldest labor education program, founded in 1926 to serve the needs of working people. "The faculty at the School for Workers are personally and professional committed to help workers solve problems and realize opportunities in the workplace. We support efforts to raise living standards, increase employment security, improve health care and retirement security, secure safe and healthy workplaces, achieve due process, respect and democracy in the workplace, and revitalize our economic and political institutions. We support unions and the collective bargaining process as essential means for the pursuit of these goals."[2]

One of the current areas of focus of the faculty member and author, are the development of policies and standards to assist improvements in the workplace, and in working conditions. Over the years, there has been a dramatic decline in coverage of the NLRA. Ensuring Section 7 rights of temporary and contracted workers and providing them the ability to engage in meaningful bargaining, potentially improved by the Board's decision in this matter, is accordingly of interest to the faculty at the School for Workers and its students.

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[2] School for Workers' Mission Statement, found at www.schoolforworkers.uwex.edu.

STATEMENT OF THE CASE

The Petitioner, Sheet Metal Workers International Association, Local No. 19, AFL-CIO ("Petitioner" or "Union"), filed a Petition to represent "all sheet metal workers employed by [Miller& Anderson, Inc. and/or Tradesmen International] as either single or joint employers on all job sites in Franklin County, Pennsylvania." (Petitioner's Request for Review). On April 26, 2012, the NLRB Region 5 Regional Director dismissed the petition, claiming that Petitioner sought to represent employees of three employers: those employed by user Employer Miller & Anderson, those employed by employment agency Tradesmen International, and those jointly employed by the two employers. The Regional Director determined that since multiemployers did not consent to multiemployer bargaining, pursuant to the Board's decision in *Oakwood Care Center,* 343 NLRB 659 (2004), the unit is inappropriate and dismissed the petition. On May 10, 2012, the Petitioner filed its Request for Review.

On May 18, 2015, the Board granted the Petitioner's Request for Review, and on July 6, 2015, issued a Notice and Invitation to file briefs, including from interested *amici*. On July 16, 2015, the Board extended the deadlines for the filing of *amicus* briefs to September 4, 2015, and later again until September 18, 2015.

INTRODUCTION

As stated more than once in its recent *Browning Ferris* ruling, the Board's role is to serve the federal policy of "encouraging the practice and procedure of collective bargaining." *Browning – Ferris d/b/a BFI*, 362 NLRB No. 196, at *2, 12 (2015). Yet over the years, there has been a steady decline of coverage of employees under the Act, thereby decreasing the numbers of employees actually possessing and having the right to exercise NLRA Section 7 rights. [3] Board rulings that certain employees are not covered by the Act, such as temporary employees, disabled individuals, actors' models and newspaper carrier haulers, and employees not previously considered supervisors, have provided less protections to a greater number of workers in an ever-demanding economy[4]. In a recent decision, the Board has revisited the standard used for finding that employers are joint employers under the NLRA, returning to the standard previously upheld by the Third Circuit Court of Appeals. *BFI,* 362 NLRB No. 186, *citing NLRB v. Browning-Ferris Industries of Pa., Inc.*, 691 F.2d 1117 (3rd Cir. 1982). In this recent decision, the Board has reaffirmed its commitment to adapting the Act to the "changing patterns of industrial life" and serving the federal policy of promoting collective bargaining. *Id.*

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[3] *See* Bill Luyre, *On the Legitimacy of Mathematical Evaluation of NLRB Decision Making,* 26 ABA Journal of Labor and Employment Law, 427 (2011), Wilma Liebman, *Decline and Disenchanted Reflections of the Aging of the NLRB*, 28 Berkley J. Employment and Labor Law 569 (2007), *NLRB v. Kentucky River Community Care, Inc.,* 532 U.S. 706 (2001).
[4] *Id.*

The instant case considers whether, when it has been determined that a joint employer relationship exists, the employees solely employed by the "user" employer and those jointly employed by the "user" employer and the "supplier" employer can be included in a single bargaining unit without the consent of the employers for multi-employer bargaining. Stated another way, once the Joint Employer relationship has been established, should the employees be considered to have one "employer" for purposes of bargaining, and therefore be included in a single bargaining unit? These questions require the Board to reexamine the standards and opinions previously set forth in *Oakwood*, 343 NLRB 659, and *M.B. Sturgis,* 331 NLRB 1298 (2000). The Board should overrule the holding of *Oakwood Care Center* to recognize the appropriateness of a single bargaining unit where a joint employer relationship between a temporary or employment agency, contractor or other "supplier" employer, and the "user" employer has been established. The Board should return to the distinction made and rationale articulated in *M.B. Sturgis* between the situation involving a single user employer and supplier employers, and that involving multiple employer users. 334 NLRB No. 173 (2000).

BRIEF RECITATION OF FACTS

A. Facts of the Case.[5]

On April 13, 2012, amended April 20, 2012, Petitioner filed a petition for election in a bargaining unit consisting of "[a]ll sheet metal workers employed by [Miller & Anderson, Inc. and/or Tradesmen International] as either single or joint employers on all job sites in Franklin County, Pennsylvania." On April 26, 2012, the Regional Director dismissed the Petition, because the petitioned for unit included employees employed by Miller & Anderson, Inc., employees employed by Tradesmen International, Inc., and employees jointly employed by these entities. Because these "employers" did not consent to multi employer bargaining, pursuant to the Board's holding in *Oakwood Care Center*, the Region dismissed the petition.[6]

B. The Increased Use of Temporary/Employment Agencies and the Economic Realities Involved.

The Board has previously recognized the situation where a "user" employer contracts with a "supplier" employer such as a temporary agency, a subcontractor, a recruiting agency, and/or placement agency, to provide the necessary labor for a project or longer term employment. *See, e.g., M.B. Sturgis, Inc.*, 331 NLRB 1298, *overruled by Oakwood Care*

[5] This brief describes the case in brief, but relies upon the facts as related by Petitioner in this matter.
[6] 343 NLRB 659.

Center, 343 NLRB 659.[7] Indeed, in its recent decision in *Browning-Ferris,* the Board again recognized the dramatic increase in the use of temporary or contracted employees. *BFI*, 362 NLRB 196 at *2, 12.

Staffing companies in the U.S. employ an average of over three million people per week in 2015, approximately 2 % of U.S. employment.[8] The Association of Staffing Enterprises report that each year one-tenth of U.S. workers find a job through staffing agencies.[9] Contingent employees, which includes temporary employees as well as subcontracted employees, make up at least 4.1 % of all employment, and in recent years, temporary employment has expanded into a much wider range of occupations. *BFI,* 362 NLRB No. 196.

C. Working Conditions of Temporary and Contracted Employees Generally.

Temporary and contracted workers are a growing sector of the workforce, but lack key benefits and protections: they can usually be

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[7] This terminology, "user employer" and "supplier employer" shall be used throughout this brief in reference to this described employer relationship.

[8] *First Quarter Staffing Employment Increases 5.5% Despite GDP Contraction,* American Staffing Association (June 18, 2005), *available at* https://americanstaffing.net/staffing-research-data/asa-staffing-industry-data/staffing-employment-sales-survey/; Tian Luo, Amar Mann & Richard Holden, *The Expanding Role of Temporary Help Services From 1990-2008,* 133(8), Monthly Lab. Rev. 3, 4 (Aug. 2010); Catherine K. Ruckelshaus, *et al., Who's the Boss: Restoring Accountability for Labor Standards in Outsourcing Work,* (NELP, 2014), *htpp://www.NELP.org.*

[9] Michael Grabell, *The Expendables: How the Temps Who Power the Corporate Giants and Getting Crushed,* Propublica (June 27, 2014), http://www.propublica.org/article/the-expendables-how-the-temps-who-power-corpoate-giants-are-getting-crushed.

dismissed at will with no appeal rights or protection.[10] Temporary workers generally have lower wages, benefits, and job security than regular non-union employees, let alone the unionized workforce. [11] Sent to job sites at low wages, temporary workers face erratic scheduling, favoritism, and lax safety practices.[12] Often, temporary workers must check in with their agency, not knowing on a given day whether they will receive a work assignment, and after perhaps waiting hours for company required transportation to a job, not receiving compensation for any time until working at a job site.[13] Temporary workers have far less job security, lower wages, less promotional opportunity, less or no paid time off, and less chance to receive health and pension retirement benefits from an employer than a standard, "traditional" employee.[14] As discussed in greater detail below, temporary employees also face high

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[10] *See* Joy Vaccaro, Note: Temporary Workers Allowed to Join the Unions: A Critical Analysis of the Impact of *M.B. Sturgis* Decision, 16 J. St. John's J.L. Comm. 489, 507 (2002).
[11] *Contingent Workers, Incomes and Benefits Lag Behind Those of Rest of Workforce,* General Accounting Office Health Education and Human Services Division, 00-76, June 2000 p. 16; Erin Halton, *Temporary Weapons: Employers' Use of Temps Against Organized Labor,* 67 Ind. & Lab. Rel. Rev. 86, 87 (2014).
[12] *How Live Nation exploits low-wage workers to stage its rock concerts, The Washington Post* (Feb. 11, 2015), htpp://www.washingtonpost.com/news/wonkblog/wp/2015/02/11/how-live-nation-exploits-low-wage-workers-to-stage-its-rock-concerts/.
[13] Graebal, *supra,* n.9.
[14] *From the Ranks of Microsoft's Permatemps, The Washington Post* (March 28, 2015), htpp://www.washingtonpost.com/local/from-the-ranks-of-microsoft's –permatemps; *Contingent Workers, Incomes and Benefits Lag Behind Those of Rest of Workforce,* General Accounting Office Health Education and Human Services Division, 00-76, June 2000 p. 16.

turnover rates, making union organizing an even greater challenge than otherwise.[15]

ARGUMENT

I. Employees' Section 7 rights have been compromised by the Board's decision in *Oakwood Care Center*.

The prohibition against combining contracted or temporary employees in a single bargaining unit with user employees has severely compromised the Section 7 rights of these supplier employees. It is common in the case of a user employer utilizing contracted out or agency employees for the user employer to keep control of certain aspects of the work performed. Thus, as the Board recently found, the working conditions of the employees are a "byproduct of two layers of control" – that of the user employer as well as that of the supplier employer. *BFI,* 362 NLRB No. 196, at *14. *See also Sturgis*, 331 NLRB at 1302.[16] For instance, user employers may dictate certain wage rates and hours, may set work rules, may establish the number of workers involved, and the nature and frequency of the work to be performed.[17] Since the user employer often maintains significant control, limiting bargaining to the

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[15] *See* n. 11; *Calculating Temporary Staffing Turnover Rates – It's Complicated,* Barton Staffing (Sept. 25, 2013), htpp://www.bartonstaffing.com/calculating-temporary-staffing-rates-turover-complicated.

[16] The Board's reasoning in *Oakwood Care Center* ignores the economic reality that user employers maintain control and that contrary to causing bargaining difficulties, having both parties with a role in setting working conditions will ensure more effective bargaining at the table. *Contra,* 343 NLRB 659.

[17] Craig Becker, *Symposium: The Changing Workplace: Labor Law Outside the Employment Relation*, 74 Tex. L. Rev. 1527 (1996).

supplier employer, who may lack authority for meaningful bargaining, necessarily limits the Section 7 rights of the contracted employees.[18] For example, temporary employees supplied to Microsoft Inc., were only able to gain the paid leave they sought, not by agreement with their immediate employer, but by inducing Microsoft to provide the funding for such benefits.[19]

Contractors often bid for the work performed, and have every incentive to keep wages and other benefits low, to obtain the contract with the user employer. [20] Indeed, Labor Ready cofounder Genn Welstad encouraged purposefully keeping wages low, claiming that "[w]e don't encourage [workers] to stay here," and "[i]f we paid them more money or if we provided them with benefits, they would have a tendency to stick around."[21] Next, use of a contractor, or supplier employer, in the first place, may be a tactic to avoid unionization or bargaining.[22] Indeed, temporary staffing agencies such as Westaff sell themselves with the

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[18] David Gelles, *At We Work, an Idealist Start-Up Clashes with its Cleaners, New York Times* (Sept. 10, 2015); Becker, *supra* n.17, Jonathan P. Hiatt & Lynn Rhinehard, *The Growing Contingent Work Force: A Challenge for the Future,* 10 Lab. Law, 143 (1994).
[19] *From the Ranks of Microsoft's Permatemps, The Washington Post* (Mar. 28, 2015), htpp://www.washingtonpost.com/local/from-the-ranks-of-microsofts-permatemps/2015/03/27/64f5c922-cb5d-11e4-8c54-ffb5a6f2f69_story.html.
[20] *Id., supra* Becker, n.17, Hiatt, n.18.
[21] *Everyone Only Wants Temps,* Mother Jones (July 16, 2012). http://www.motherjones.com/politics/2012/07/labor-ready-jobs-temp-workers-investigation.
[22] Michael J. Hely, *The Impact of Sturgis on Bargaining Power for Contingent Workers in the U.S. Labor Market*, Vol. 11, Washington University Journal of Law & Policy (Jan. 2003).

assurance that "its team was specially trained to spot early warning signs of union activity."[23] In such instances, having the supplier employer, or even the user and supplier at the table without inclusion of the user's employees in the unit will make achievement of any improvements unlikely. A supplier employer will have no ability to improve benefits under the terms of its contract with its user, and the user employer can simply refuse to make any improvements. User employers use the contingent work force to decrease the bargaining power of its core work force, pitting the groups against one another.[24] Permitting the jointly employed employees in the bargaining unit with the user's employees will ensure that the user will have to make some movement toward working conditions that all employees can accept. Permitting either employer to refuse such alleged multi employer bargaining permits avoidance of real bargaining with the players with the true control.

In contrast, in the approximately four years between the *Sturgis* and *Oakwood* decision, supplier employees were more likely to have their Section 7 rights respected. In these cases, employees gained the ability to organize for the purpose of bargaining with both their immediate employer and the user employer, who typically holds the control and power over the workforce. *See, e.g., In re Wesbasto Sunroofs, Inc.*,

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[23] *See* Graebel, n.9.
[24] *Supra,* Hely, n.22.

342 NLRB 1222 (2004), *Outokumpu Copper Franklin, Inc.*, 334 NLRB 263 (2001), *Gourmet Award Foods,* 336 NLRB 872 (2001); *Interstate Warehouse of Ohio, LLC,* 333 NRLB No. 83 (2001).

Last, recognizing the rampant problem with employee misclassification to avoid certain labor costs and compliance with labor laws, the United States Department of Labor recently issued guidance defining an employee. U.S. DOL, Administrator's Interpretation No. 2015-1 (2015). The DOL broadly defines employment under the FLSA "to suffer or permit to work," which can include employees misclassified as independent contractors, subcontractors, company owners or partners, or other employment relationship, when economically dependent on the employer. *Id.* Similarly, the NLRB should continue to construe its definition of "employee" broadly, construe the Act broadly to allow for increased coverage, and recognize the economic control of the user employer in determining an appropriate bargaining unit.

II. The Board should Overrule *Oakwood Care Center.*

A. Background to the *Oakwood Care Center* case.

The Board's decision in *Oakwood* ignores economic reality, as well as failing to apply adequately the joint employer analysis, as discussed below. Accordingly, the Board should indeed overturn *Oakwood.* The question of whether employees solely employed by a user employer in a joint employer scenario, along with employees jointly employed by a user

and supplier employer began with the cursory statement by the Board in *Lee Hospital.* 300 NLRB 947 (1990).

Prior to the ruling of *Lee Hospital*, the Board on several occasions acknowledged the appropriateness of units consisting of employees employed by user employers, and those jointly employed by users and suppliers, with no requirement of additional consent by the employers. *See, e.g., S.S. Kresge Co.*, 416 F.2d 1225 (6th Cir. 1969), *Frostco Super Save Stores*, 138 NLRB 125 (1962), *Thriftown, Inc.,* 161 NLRB 603 (1966), *Jewel Tea Co.,* 162 NLRB 508 (1966).[25] *See also Western Temporary Services v. NLRB*, 821 F.2d 1258 (7th Cir. 1987). In fact, prior to *Lee Hospital,* 300 NRLB 947 (1990), there was no suggestion that this practice constituted multiemployer bargaining for which consent is required.

Separate and apart from these units of employees in the joint employer context, in 1973, the Board decided *Greenhoot, Inc.,* 205 NLRB 250 (1973). That case did *not* involve joint employers. Rather, *Greenhoot* involved 14 separate building owners and employers who had no relationship with one another except that they hired the same management company to manage their buildings. *Id.* The Board concluded that each building owner and the management company were

[25] As argued *infra* in Section IV, in a Joint Employer scenario, the parties have chosen to structure their relationship so that both have a role in determining conditions of employment and labor relations decisions. They should not have the further choice, then, to consent to collectively bargain together over those terms and conditions of employment.

joint employers governing the terms of employment at each individual building, yet that did not mean the building owners had any control over labor relations at a competitor's building. Thus, the case involved completely separate employers with no relationship to one another. Accordingly, the Board found that multi-employer bargaining with the unrelated employers' consent to be inappropriate. *Id.*

As explained in the *Sturgis* decision, the Board then extended the *Greenhoot* holding without rationale or explanation in *Lee Hospital*, finding that employees of "different employers" do not belong in the same unit without consent. *Sturgis*, 331 NLRB at 1304, *citing Lee Hospital*, 300 NLRB at 948. Unlike *Greenhoot,* however, *Lee Hospital* did not involve multi-employers in the traditional sense of being wholly unrelated entities without involvement in one another's business activities. 300 NLRB at 948. In fact, since the Board in *Lee Hospital* did not find the nurses in that case to be jointly employed by the hospital and third party Anesthesiology Associates, Inc., the Board's comment on employer consent does not constitute a ruling and was wholly irrelevant to the Board's determination. *Id.* More importantly, as the Board found in *Sturgis*, this case did not involve multi-employer bargaining and thus did not require employer consent. 331 NLRB at 1304.

In *Sturgis,* the Board considered two cases of alleged joint employer relationships and the appropriate bargaining units.[26] The *Sturgis* Board provided a detailed review of cases involving a bargaining unit comprised of employees of a user employer and those jointly employed by user and supplier decided prior to *Lee Hospital.* After consideration of this precedent, and the policy implications, the Board determined that a unit of employees, all of whom are ultimately doing work for the user employer, including user employed and user/supplier employed employees, does not constitute multiemployer units requiring consent. *Sturgis,* 331 NLRB at 1304. Indeed, unlike the traditional multiemployer relationship, the Board considered that all work is being performed for the user employer, and it follows that a unit of all such employees is appropriate. *Id.*

B. The Board should Reverse *Oakwood* and return to the holding of *Sturgis.*

In *Oakwood*, the Board reversed *Sturgis,* finding that even in light of a joint employer relationship, the employers must consent to a unit that includes both employees directly employed by the user employer and those jointly employed by the user / supplier. 343 NLRB 659[27]. In doing so, the Board commits three significant errors: (1) First, the *Oakwood*

[26] *M.B. Sturgis, Inc. and Jeffboat Division*, 331 NLRB 1298 (2000).
[27] It is not entirely clear whether consent is thus required by both the user employer and the supplier employer, or the true employer is this scenario: the user employers and the joint entity comprised of the user and the supplier. In any case, where there is a joint employer relationship, the user employer yields control over the bargaining unit of its employees. *See Sturgis*, 331 NRLB at 1305 (citations omitted).

Board ignores the historical context of multi-employer bargaining, and fails to appreciate the distinction between multiemployer bargaining among solely distinct, non integrated employers and a joint employer relationship. (2) Second, the Board misinterprets Section 9(b) of the Act to improperly narrow its scope; and (3) its policy arguments do not have a factual or logical basis.

First, multiemployer bargaining has long been in existence, even prior to the passage of the NLRA, and is distinct from the consensual joint employer relationship. Multiemployer bargaining is collective bargaining in which more than one unrelated employer or an association of employers engage as a group with a union or groups of unions. *See, e.g., H&D, Inc. v. NLRB,* 665 F.2d 257 (9th Cir. 1980). Multiemployer bargaining involves competitor employers bargaining together to protect against differentials in labor costs and to increase power at the bargaining table.[28] Multiemployer bargaining had been common and accepted in certain industries, such as the garment industry, where a number of smaller employers joined together to bargain with the union to gain bargaining strength. *NLRB v. Truck Drivers Local Union No. 449,* 353 U.S. 97, 94 (1957). Similarly, multiemployer bargaining was often utilized in industries such as long shoring or construction, where employees may be employed for shorter period, moving from one

[28] *See, e.g.,* Jan Vetter, *Symposium on the Law and Economics of Bargaining,* Comment, *Multi-Employer Bargaining Rules,* 75 Va. La. Rev. 283 (1990).

employer to another. *Id.* In this instance, multiemployer bargaining permits general contractors to estimate labor costs on a specific job. *Id.* In more recent times, such bargaining is seen in heavily subcontracted industries, such as in construction, *See, e.g., Construction Labor Unlimited*, 312 NLRB 364 (1993), and commercial cleaning.[29] Where there is a history of bargaining by employers jointly, the employers and union establish a multiemployer bargaining unit.[30] In these cases, the employers involved are wholly distinct entities, with no control over one another's employees. *See H&D, Inc.,* 554 F.2d 257[31]. Other than negotiating a master collective bargaining agreement, the employers are not involved in day-to-day operations of their competitors, in discipline of another's employees, or the finances of a competitor employer.

Employers in a joint employer relationship are in a far different situation than traditional multiemployers. The user employer may have control to set wage rates of contracted employees, which employees remain at the job site, hours, and performance of work. *Ref-Chem Co.,* 169 NLRB 376, 379 (1968), *Jewel Tea Co.,* 162 NLRB at 510. In fact, the user employer can often simply cancel its contract with the supplier employer. *Value Village, 161 NLRB 603, 607 (1966), Mobil Oil,* 219 NLRB 511, 516 (1975), and can even do so *because* the contracted employees

[29] *See supra,* Becker, n.17, Hiatt, n.18.
[30] Basic Guide to the NLRA, 24, Office of the General Counsel of the National Labor Relations Board (1997).
[31] *See also* n.29.

have unionized. *Local Union No. 447, United Ass'n of Journeymen and Apprentices (Malbaff Landscape),* 172 NLRB 128 (1968). The user employer and the supplier employer are thus jointly engaged in setting and enforcing terms and conditions of employment, or "two layers" of supervision.[32] If the two employers are not codetermining conditions of employment, and different supervision exists, the Board will likely not find a joint employer relationship or community of interest among employees. Without a finding of a joint employer relationship, the user and supplier would be distinct entities, and the rule requiring consent for multi-employer bargaining would likely apply. *See Greenhoot, Inc.*, 205 NLRB 250.

Second, the Board in *Oakwood* quotes Section 9 (b) of the Act regarding permissible units, focusing on "employer unit" to suggest that consent for multi-employer bargaining is necessary, even where the parties have been found to be joint employers. 343 NLRB at 661, *citing* 29 U.S.C. ¶ 158(b), *Greenhoot*, 205 NLRB 250, *Lee Hospital*, 300 NLRB 947. Yet, by making a finding that parties are Joint Employers, the Board is finding that they are acting as co-employers, co-determining conditions of employment. *See Browning-Ferris,* 691 F.2d 1117. As discussed, *infra, at* Section IV, the intention of the joint employer

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[32] *BFI,* 362 NLRB No. 196, *Browning-Ferris,* 691 F.2d 1117. *See also* Bita Rahebi, Comment: *Rethinking the National Labor Relations Board's Treatment of Temporary Workers: Granting Greater Access to Unionization, 47 UCLA L. Rev. 1105* (2000), *supra,* Becker, n.17.

doctrine is treat all parties involved in affecting working conditions of a group of employees as jointly managing the terms, and thus responsible for those decisions. *BFI*, 362 NLRB No. 186, *Browning-Ferris*, 691 F.2d at 1123. That being said, the placement of the term "employer unit" in Section 9(b) of the Act certainly can be read to include a "joint employer unit." There is simply no statutory basis for finding otherwise.

Last, the *Oakwood* Board claims in a perfunctory manner that policy implications of *Sturgis* are problematic in that there may be bargaining conflict among employers. In making its policy argument, the *Oakwood* Board, with no citation, presumes that a supplier employer has great control over wages and working conditions of the employees it supplies to the user employer. *Oakwood*, 343 NLRB at 663. In reality, in most circumstances, the user employer, or the client of the supplier, has a great deal of control over what it is willing to pay in wages, and to dictate other terms of employment. *See, e.g., S.S. Kresge Co. v. NLRB,* 416 F.2d at 1230-32. *See also Airborne Freight Co.,* 338 NLRB 597 (2002), *overruled in part by BFI*, 362 NLRB No. 186; *American Air Filters Co.*, 258 NLRB 49 (1981).[33]

While is common for businesses to now subcontract certain services, it is the "firms higher up that really control what these wages

[33] *See also supra,* Gelles, n.18; *See also* Catherine K. Ruckelshaus, *et al., Who's the boss: Restoring Accountability for Labor Standards in Outsourcing Work,* (NELP, 2014), at NELP.org.; *supra,* Becker, n.17.

will be."[34] The user employer is the one in the position to pay its contractor more, and require better wages and conditions for the supplied employees. *Id.*[35] Indeed, the entity contracting for services has effective control and a contractor or agency simply does not have the resources or ability to enhance employee benefits without agreement of the user employer. This is true in any numbers of industries today, such as contracted nursing, trucking, commercial office cleaning, and numerous others.[36] Moreover, a user employer can simply cancel its contract with the supplier if it wishes, if wages were to rise, or even because the supplier's employees choose to unionize.[37] In fact, user employers use contingent workers to drive down the bargaining power of the user employed employees.[38] Where a user employer does not retain such control, a joint employer relationship would not exist, and the employees are less likely to share a community of interest.

Moreover, if a user employer wishes to not be involved in joint bargaining over terms and conditions of jointly employed employees, it need only permit the supplier employer to have independent control over labor relations. *See S.S. Kresge Co.,* 416 F.2d at 1231-32, *Airborne*

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[34] *See supra,* Gelles, n. 18, quoting Fordham University School of Law Professor of Employment.
[35] *See* Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining,* 39 B.C. L. Rev. 329, 346-356 (1998).
[36] *Id.*
[37] *Id.* at 345-46.
[38] Michael J. Hely, *The Impact of Sturgis on Bargaining Power for Contingent Workers in the U.S. Labor Market,* Vol. 11, Washington University Journal of Law and Policy (January 2003).

Express, 338 NLRB at 597-98 (concurring decision explaining the high level of control that transportation carriers exert over their contractors), *American Air Filters* 258 NLRB 49 (user employer controls compensation, choice of employees, supervision and direction of work), *O'Sullivan Muckle, Krom Mortuary*, 246 NRLB 164 (1979). As discussed in greater detail below, the user and supplier employers in the joint employer relationship choose to structure their relationship as they did, and if they did not wish to collectively bargain as a joint employer, they simply had to structure their relationship in a different manner. *See International Paper Co.*, 96 NLRB 296, 298 n.7 (1951) (how the employer structures the workplace has direct bearing on the appropriate bargaining unit).

The NLRB has returned to the traditional test for determining whether entities constitute a joint employer. *See BFI,* 362 NLRB No. 186. In any case, the user employer and the joint user/supplier operation will only bargain over the terms for employees of a single combined bargaining unit if they share a community of interest, discussed *infra,* at III. Regardless of the joint employer standard applied, once the relationship has been established, the Board should allow the employees of the user employer and supplier employer employees determine for themselves the appropriate unit, thus preventing employers from gaming the system by using subcontracting, or agency arrangements. *See Western Temporary Services, Inc.*, 821 F.2d 1258.

III. The Board Should Apply the Community of Interest Standard to Determine Whether Employees Solely Employed by the User Employer and those Jointly Employed by the User and Supplier Employees Should be Included in the Same Bargaining Unit.

A return to the interpretation set forth in *Sturgis* does not mean that a unit of user employees and jointly employed employees is always appropriate. The Board will still, of course, determine whether a community of interest exists among employees of the petitioned-for unit. "[T] touchstone of an appropriate bargaining unit" is whether the workers are in an community of interest together. *Uyeda v. Brooks,* 365 F.2d 326, 329 (6th Cir. 1996). In considering appropriate bargaining units, the Board, with approval of the courts, has long considered whether the employees share a community of interest. *See, e.g., NLRB v. Action Automotive, Inc.,* 469 U.S. 490, 494 (1985), *NLRB v. Contemporary Cars, Inc.,* 667 F.3d 1364 (11th Cir. 2012), *Agri Processor Co. v. NLRB,* 514 F.3d 1 (D.C. Cir. 2008), *NLRB v. Campbell Cons' Corp.,* 407 F.2d 969 (4th Cir. 1969). *Grace Indus.,* LLC, 358 NLRB No. 62 (2012), *United Operations, Inc.,* 338 NLRB 123 (2002), *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962). The Board has also recognized that "the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination." *International Paper Co.,* 96 NLRB at 298, n.7.

The community of interest test includes, of course, whether workers have similar wages and benefits, similar working conditions, shared supervision, similar skills and duties, and interchange and integration with other employees. *Agri Processor Co.,* 514 F.3d at 9, *Speedtrack Prods. Group Ltd. v. NLRB,* 114 F.3d 1276, 1280 (D.C. Cir. 1997). *See also Baumer Foods, Inc.,* 190 NLRB 690 (1971) (seasonal and non seasonal employees share community of interest), *Berea Publishing Co.,* 140 NLRB 516, 518-10 (1963) (part time and full time employees share community of interest because both have substantial interest in the unit's wages, hours, and conditions of employment). The Board's discretion in determining community of interest is broad, "reflecting Congress' recognition of the need for flexibility in shaping the bargaining unit to the particular case. *Action Automotive*, 469 U.S. at 494, *citing NLRB v. Hearst Publications, Inc.,* 322 U.S. 111 (1944).

Thus, while this brief argues for the allowance of a combined unit of user employer employees with employees jointly employed by the user and the supplier employer without consent to multiemployer bargaining, the Board would retain the ability to deny a combined unit if the employees do not share a community of interest. *See, e.g., Trumbull Memorial Hospital*, 338 NLRB 132 (2003) (employees did not share a community of interest); *Lanco Construction Systems, Inc.*, 339 NLRB 1048 (2003) (significant differences in working conditions such as criteria for hiring/firing, wages and benefits, and pay dates preclude a

community of interest and thus a combined unit). In general, it may often be the case that the day-to-day work and job duties of user employees and supplier employees do not differ, and they therefore share a community of interest. *See Gourmet Award Foods; Interstate Warehouse of Ohio, LLC,* 333 NLRB No. 83 (2001). *Western Temporary Services, Inc.,* 821 F.2d 1258 (temporary part time workers and full time regular workers share a community of interest because temporary employees integrated fully into overall work of all employees), *Globe Discount City*, 209 NLRB 2113 (1974). Yet it may at times be the case that these workers' job functions, supervision, and benefits differ and that they lack a community of interest.

Indeed, between the *Sturgis* and *Oakwood* decisions, the Board at times applied the community of interest test to find that in fact temporary employees shared a community of interest with an employer's "regular" employees, and thus a bargaining unit of user employees and jointly employed employees was appropriate. *See, e.g., Huck Store Co. v. NLRB*, 327 F.3d 528 (7th Cir. 2003); *Outokumpu Copper,* 334 NLRB No. 39. Similarly, the Board in this time period applied the community of interest test to find that the user and jointly employed employees did not share a community of interest and denied the requested combined unit. *See, e.g., Lanco Cont. Sys. , Inc.,* 339 NLRB 1048; *Trumbull Mem'l Hospital,* 338 NLRB 900; *Engineered Storage Products Co.,* 334 NLRB 1063 (2001). As the Board in Sturgis recognized, permitting a unit of

user employees and jointly employed employees does not mean such as unit will be necessarily be found appropriate. *Sturgis,* 331 NLRB at 1306. Continuing to deny such units will, however, deny employees who share a close community of interest to join together to bargain for workplace protections.

IV. In the Joint Employer Context, There Need Not Be "Employer Consent" to Multiemployer Bargaining, Since by Definition, the Employers are Both Involved in Labor Relations Decisions, Co-Determining Working Conditions of the Employees Involved.[39]

The Board asks whether to return to the holding of *Sturgis,* which permits bargaining units that include both solely employed employees and jointly employed employees without the consent of the employers to multiemployer bargaining. 331 NLRB 1298. Based upon the legal rationale behind the joint employer doctrine, as well as the reality dictated by the very nature of the joint employer relationship, *amicus* in fact urges the Board to return to the well reasoned holding of *Sturgis.*[40]

The intention behind the joint employer doctrine is to hold both or all parties with a role in making labor relations decisions responsible for

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[39] Since the Regional Director dismissed the petition, the Board should remand the case back to the Region to determine whether employees at issue are jointly employed by Anderson & Miller, Inc., and Tradesmen International. If they are not, the Region must consider the alternative bargaining units proposed by the Petitioner, including separate bargaining units. The Board should consider arguments made by Petitioner in this regard.

[40] *Sturgis* also holds, of course, that employees of two or more separate user employers of a supplier employer cannot be included in a single bargaining unit without the employer's consent. This brief does not challenge or address this portion of the *Sturgis* decision. 331 NLRB 1298, *relying on Greenhoot, Inc.*, 205 NLRB 250.

those decisions. *Greyhound Corp.,* 153 NLRB 1488 (1965), *enf'd* 368 F.2d 778 (5th Cir. 1966); *Browning-Ferris,* 691 F.2d 1117. As observed by the Third Circuit Court of Appeals, this relationship comes about when "one employer, while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer." *Browning-Ferris*, 691 F.2d at 1123. In other words, the two employers at issue "have *chosen"* to handle jointly certain aspects of the employer – employee relationship. *Id., citing NLRB v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966) (emphasis added). Under any standard, then, the Board only finds a joint employer relationship where the joint employers, or at least the employer with more power decides, to co-determine essential terms and conditions of employment, and exert sufficient control over the work of employee. *Boire v. Greyhound*, 376 U.S. at 481, *Browning-Ferris*, 691 F.2d at 1124, *Greyhound Corp.*, 153 NLRB 1488 (1965), *aff'd* 368 F.2d 778 (3rd Cir. 1966).

Historically, in considering whether two entities constituted a joint employer, the Board determined whether the entities shared or co-determined matters affecting the terms and conditions of employment. *Browning Ferris,* 691 F.2d 1117; *Greyhound Corp.* 153 NLRB 1488; *NLRB v. New Madrid Mfg. Co.*, 215 F.2d 908, 910 (8th Cir. 1954) (anyone possessing power of control over its labor relations treated as an

employer). The Board required that to assert responsibility on an entity involved, it must possess sufficient control over the work of employees to qualify as a joint employer. *See Greyhound*, 376 U.S. at 481.

Accordingly, once a joint employer relationship has been found, both parties are necessarily involved in labor relations and setting of working conditions, and additional consent to bargain together is unnecessary and non-sensical. As found by the Sixth Circuit decades ago, if a user employer wishes to not be involved in joint bargaining over terms and conditions of jointly employed employees, it need only permit the supplier employer to have independent control over labor relations. *See S.S. Kresge Co.,* 416 F.2d at 1231-32. Indeed, it has been long recognized that if the user supplier wishes to avoid a finding of a joint employer relationship, that it can do so in how it structures the relationship.[41] Indeed, there are a myriad of cases in which the Board has not found a joint employer relationship between a user and supplier employer. *See, e.g., Villa Maria Nursing & Rehab Center,* 335 NLRB 1345 (2001).

The question before the Board does not involve an arrangement in which user employer relinquishes authority over labor relations and a joint employer relationship does not exist. The only matter before the Board is that when the parties *choose* to structure a relationship in which both user and supplier retain control over terms and conditions of

[41] *See supra,* n.17, 18, 34, 35, 38. *See also International Paper,* 96 NLRB at 298 n.7.

employment, whether a unit of user employer solely employed employees and those jointly employed by user and supplier is appropriate, without further consent. The parties choose the nature of their relationship: to allow employers to retain control, and then have the ability to veto an appropriate bargaining unit, as permitted by *Oakwood Care Center,* is for lack of a better analogy, allowing employers to have their cake and eat it too. Instead, the Board should recognize that the parties had control over the nature of contract and/or relationship and should be held to that choice. Once the joint employer relationship is established, a single unit comprised of employees employed solely by the user employer and those jointly employed by the user employer and supplier may appropriate without consent if a community of interest exists.

The fact that the instant case involves not just employees of the joint employer, but also employees solely employed by the user does not change the analysis. Ultimately, all employees are performing work for the user employer, and thus in determining the appropriate bargaining unit, the Board should employ its traditional community of interest analysis. *See Sturgis,* 331 NLRB 1298; *see also Action Automotive, Inc.,* 469 U.S. 490(community of interest test excluded family members from bargaining unit); *Kalamazoo Paper Box,* 136 NLRB at 137. As discussed in Section III above, if employees share a community of interest, they should be included in one unit. To separate the user employer's employees from those of the joint employer weakens the bargaining

power of all the employees, allows the user employer to divide and conquer the employees, playing the groups off one another to consistently keep standards low.[42] The *Oakwood* holding thus diminishes the bargaining power of employees, the very power the Act was intended to provide.

CONCLUSION

For all of the reasons set forth above, *amicus* strongly recommends that the Board return to its ruling in *Sturgis,* permitting the inclusion of user employed employees with employees jointly employed by the user and supplier in one bargaining unit. The community of interest test should be used to determine whether in any individual case, these employees should be combined in one unit for purposes of bargaining work benefits and protections.

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Respectfully submitted,

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[42] *See* Hely, n. 37.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served by electronic mail on this 18th day of September, 2015:

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