UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MILLER & ANDERSON,
Employer

and **Cases 05-RC-079249**

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

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AS AMICUS CURIAE

Respectfully submitted by:

Judith A. Scott
General Counsel
Johnda Bentley
Assistant General Counsel
LaRell Purdie
Assistant General Counsel
Service Employees International Union
1800 Massachusetts Ave, NW
Washington, DC 20036

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INTEREST OF AMICUS CURIAE

The Service Employees International Union (SEIU) submits this amicus brief in response to the notice issued on July 6, 2015, requesting briefs concerning the Board's decision in *Oakwood Care Center,* 343 NLRB 659 (2004), overruling *M.B. Sturgis,* 331 NLRB 1298 (2000).

The Board in *Oakwood* began to require the consent of employers where the petitioned-for bargaining unit combines solely employed employees with jointly employed employees, such as temporary workers, who share a user employer in common. *M.B. Sturgis* allowed such petitions to go to election without requiring employer consent.

SEIU is an international labor organization, representing employees in workforces that increasingly rely on the use of temporary agencies and subcontractors (supplier employers) to fulfill positions that were previously within bargaining units. The decision in *Oakwood* has negatively impacted our members, both those who are contingent workers, and those working directly for employers who also use contingent workers. Our members are primarily in the healthcare industry, property services (e.g. guards and janitorial services), and the public sector. Our members in the healthcare and property service industries have been most affected by the decision in *Oakwood*.

SEIU thanks the Board for the opportunity to submit this brief in support of the Petitioner and to provide its experiences with organizing workers in alternative work arrangements.

INTRODUCTION

The focus of this brief is how *Oakwood* affects the Section 7 rights of employees in alternative work arrangements, and more broadly, how alternative work arrangements impact Section 7 rights of employees. This brief will also explore the trend of alternative work arrangements. To show how alternative work arrangements impact workers' Section 7 rights and

determine what principles should govern their Section 7 rights, SEIU considered examples from its Local Union Affiliates representing healthcare and property service workers. The examples collected show that indeed workers' Section 7 rights and benefits that could be enjoyed through unionization are eroded by the *Oakwood* standard, which requires employees to obtain their employer's consent to exercise those rights.

In SEIU's experience, when jobs are moved from within a bargaining unit to outside a bargaining unit through the use of temporary agencies or contractors, the outsourced workers experience a decrease in benefits, and the employees who remain in the bargaining unit experience a decrease in benefits, because fewer members are paying into the health and welfare funds. Further, additional resources must be spent on collective bargaining to attempt to organize those outsourced workers into separate units over and over again as the agencies change hands rather than including them in the larger unit. Accordingly, SEIU urges the Board to overrule *Oakwood* and return to the holding in *M.B. Sturgis*.

This brief will use the terms "supplier employer" and "user employer" in speaking about the factual examples and cases, consistent with the Board's usual practice since *M.B. Sturgis.* This brief will also use the terms "supplier employees" to refer to employees of a supplier employer and "user employees" to refer to employees of a user employer.

I. THE DECISION IN *OAKWOOD* HAS MADE IT HARDER FOR WORKERS IN ALTERNATIVE WORK ARRANGEMENTS TO EXERCISE THEIR SECTION 7 RIGHTS.

The 2015 Government Accountability Office (GAO) report on the contingent workforce estimates that the size of the contingent workforce can range from less than five percent to more

than a third of the total employed labor force.[1] This range depends on the definition of contingent work and the data source.[2]

M.B. Sturgis recognized that American workers are increasingly in employee/employer relationships that do not fit a classic definition of employment under applicable workplace protection laws, broadly defined as alternative work arrangements.[3] One report describes the trend in changing work arrangements as workplace fissuring, in the sense that companies have transferred responsibility for supervising their workers to growing networks comprising smaller business units, each with a discrete function to perform with a select group of employees.[4] Many terms exist to capture this arrangement and the various forms of alternative work arrangements: subcontracting[5]; temporary work[6]; contingent work[7]; workplace fissuring[8]; and, outsourcing,[9] making it more difficult to quantify the trends.

The Board in *M.B. Sturgis* embraced a broad, more inclusive definition of contingent work that acknowledged "the growth of joint employer arrangements, including the increased use of companies that specialize in supplying 'temporary' and 'contract workers' to augment the workforces of traditional employers."[10]

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[1] U.S. Gov't Accountability Office, GAO-15-168R, Contingent Workforce: Size, Characteristics, Earnings, and Benefits 3 (2015).
[2] Id. at 3.
[3] Catherine Ruckelshaus et al., Nat'l Emp't Law Project, *Restoring accountability for labor standards in outsourced work* 5 (2014).
[4] David Weil, Enforcing Labour Standards in Fissured Workplaces: The US Experience, 22 Econ. & Lab. Rel. Rev. 33, 36 (2011).
[5] Catherine Ruckelshaus et al., supra note 3, at 7.
[6] *M.B. Sturgis, Inc.*, 331 NLRB 1298, 1312-13 (2000).
[7] U.S. Gov't Accountability Office, supra note 1.
[8] David Weil, supra note 4, at 34-38.
[9] Catherine Ruckelshaus et al., supra note 3, at 4.
[10] 331 NLRB at 1298.

Workers in alternative work arrangements may be called "agency temps", "contract company workers", "day laborers", "direct-hire temps", "independent contractors", "on-call workers", "self-employed workers", or "standard part-time workers."[11] In *M.B. Sturgis*, the employees at issue were called "temporary" employees. Notwithstanding the various labels assigned to employees in alternative work arrangements, under *M.B. Sturgis* the "temporary" employees were supplier employees, who worked side-by-side user employees.

A. HEALTHCARE INDUSTRY

SEIU is the largest healthcare union in North America, representing over 1.1 million members including nurses, home care workers, dietary aides, and non-clinical service workers.[12] Many SEIU healthcare members work in large hospitals—user employers—that rely on supplier employers for a variety of clinical and non–clinical functions, ranging from laundry to medical transcription services.

Hospitals that rely on supplier employers have historically focused on labor-intensive, non-clinical services such as laundry, housekeeping, and food services. One third of American hospitals rely on supplier employers for cleaning services.[13] More recently, the trend has accelerated and spread to other areas, including information technology, call centers, human resources, patient care services, emergency room management, equipment maintenance, cardiovascular perfusion, and diabetes treatment.[14] An estimated one out of eight hospitals relies

[11] U.S. Gov't Accountability Office, supra note 1, at 11.
[12] SEIU Healthcare, http://www.seiu.org/seiuhealthcare/ (last visited Sept. 18, 2015).
[13] Dan Zuberi, Cleaning Up: How Hospital Outsourcing Is Hurting Workers and Endangering Patients 37, 13 (2013).
[14] Kevin D. Lyles et al., Jones Day, *Healthcare Outsourcing Overview: Staying Focused in Uncertain Times*, 7 AM. HEALTH LAWS. ASS'N, APR. 2010, *available at* http://www.jonesday .com/files/Publication/03293b67-5563-48a6-97f4-fb157db2d369/Presentation/PublicationAttachment/c91e37d5-93de-476f-94c3-42bfcac58e92/Lyles_Helms_Lykins%20article.pdf.

on supplier employers in its sterile processing operations in surgical departments, while almost half of hospitals rely on supplier employers for part of their benefits and administration processes.[15] Hospitals also frequently use supplier employers for management in non-clinical services, with the result that user hospitals retain line (user) employees on their payroll, but rely on supplier employers for management of user and supplier employees. Research indicates that hospitals' reliance on supplier employers will continue to expand. In a 2013 survey, seventy percent of the hospital executives interviewed expected their total spending on supplier employers to remain the same or increase in the following year.[16]

While outsourcing is becoming more prevalent in the hospital industry, hospitals retain substantial direct and indirect control over the terms and conditions of employment of their supplier employers in order to ensure quality patient care, uniformity of treatment, and protection of their healthcare "brands."[17] These interests are satisfied through the implementation of guidelines and indirect methods of control, such as contracts, that govern how contractors set hours, wages, and job tasks for employees.

1. Nursing Homes

In addition to working in large hospitals that rely on supplier employers, SEIU members work in nursing homes that increasingly rely on supplier employers. SEIU 1199 United Healthcare Workers - East's ("1199") experience in the NY Downstate Region is particularly relevant.

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[15] Id. at 2.

[16] *Executive Opinions on Purchasing: Outsourcing 2013*, Modern Healthcare (Aug. 16, 2013), http://www .modernhealthcare.com/article/20130816/DATA/500030414.

[17] David Weil, supra note 4, at 12.

1199 represents approximately 350,000 healthcare employees. In its largest Region, Downstate New York, 1199 represents approximately 45,000 nursing home employees employed in approximately 40 not-for-profit homes (employing approximately 15,000) and in approximately 225 for-profit homes (employing approximately 30,000 employees) in New York City, Westchester and Long Island. In addition, 1199 represents another 33,000 nursing home workers in its Upstate NY, New Jersey, Florida and Massachusetts Regions, employed in approximately 272 homes. 1199's experience representing nursing home employees in NY Downstate Region is relevant to understanding how alternative work arrangements impact workers' Section 7 rights.

While the nursing home employees are employed in service, maintenance, clerical, technical, registered nurse and other professional classifications, the bulk of the nursing home caregivers are certified nursing attendants ("CNAs") and licensed practical nurses ("LPNs"). These two job classifications are the two primary direct patient care workers in nursing homes in all 1199 Regions, and the two most prominent classifications where homes utilize supplier employees. In fact, in the for-profit sector, in numerous instances, ten to twenty percent (or more) of bargaining unit jobs were staffed regularly over extended periods of time by supplier employees, often extending beyond one year. Supplier CNAs and LPNs work side-by-side with user CNAs and LPNs and perform the same job functions.

Supplier employees:

a. performed patient care on the same patients as the unit employees;
b. were included in the regular monthly posted schedules;
c. worked schedules and covered shifts otherwise staffed by regular unit employees;
d. were subject to the same work rules and work protocols as regular unit staff;
e. were supervised on-site at the homes by the home's supervisory staff that also supervised the unit employees;

f. had to notify the home's supervisory staff for permission for time off;
g. wore the same uniforms and identifications as the regular unit employees.

Moreover, the elected Delegates of 1199 reported many instances in which the nursing homes posted job openings, and prospective employees were interviewed at the homes by home supervisors, offered jobs by the home's supervisors only to find out that they were actually employed by a supplier employer when they received their first paycheck.

The foregoing shows that in the NY Downstate homes, supplier employees' performance of duties, in all respects, is indistinguishable from user employees that are in the bargaining unit. However, the homes' use of supplier employees, impacts the ability of the Union to negotiate and maintain collectively bargained terms. In both the not-for-profit and for-profit sectors, the members' health, pension, education, child care and job security Taft-Hartley funds are financed by employer contributions based on bargaining unit gross pay. Thus, to the extent that the Union cannot bargain for supplier employees, because of their exclusion from the homes' units, gross payroll is diminished and there is less money available to support the health, pension and other benefits.

1199 has also experienced more difficulty negotiating collective bargaining agreements with regular staffing hours and paid time off provisions with homes that use a significant amount of supplier employees that are excluded from the negotiations. Not only does the exclusion of supplier employees from negotiations adversely impact a union's ability to negotiate terms and conditions, but also its ability to advocate for better patient care.

Nursing homes rely on CNAs to help residents with their activities of daily living, implement individualized care plans and provide familiar consistent support. The relationship that CNAs build with their residents is an important factor in care quality. Patients and their families value the quality of the relationships they have with frontline caregivers more highly

than the quality of the medical care and the quality of the food, which is one of the benefits of staffing consistency (consistent assignments). Additionally, residents, "feel more comfortable and secure" when staffing is consistent.[18]

The benefits of consistent assignments are negatively impacted by high rates of turnover. Studies exploring the causes of CNA turnover have identified low pay, sparse benefits,[19] and authoritarian management styles which exclude CNAs from fully participating in the care process as creating turnover prone environments[20] – all of which are typified by the use of supplier employees.

2. Hospitals

1199 also has experience representing user employees and supplier employees, working side-by-side in the same hospital, in separate bargaining units. In 1199's experience in Florida, excluding supplier employees from the user employer's bargaining unit often results in redundant negotiations, litigation, and wrongful displacement of employees. As such, labor unions must expend significant resources to secure the benefits supplier employees would receive as members of the user employer's bargaining unit. This strain on resources, along with the burden of bargaining a new CBA with each new supplier employer, diminishes the union's ability to effectively bargain on behalf of all its members.

[18] California HealthCare Foundation, *Consistent Assignment: A Key Step to Individualized Care*. *21 Fast Facts, Dec. 2007, available at* http://www.chcf.org/~/media/MEDIA%20LIBRARY%20Files/PDF/F/PDF%20FF21ConsistentAssignment.pdf.

[19] Gail Wagnild, A descriptive study of nurse's aide turnover in long-term care facilities, 16(1) J. Long-Term Care Admins. 19-23 (1988).

[20] Howard Waxman et al., *Job Turnover and Job Satisfaction Among Nursing Home Aides, 24* The Gerontologist, Oct. 1984, at 503-509.

In Florida, 1199 represents 5,000 healthcare workers, including 1,200 at a Hospital[21] in Palm Beach County, Florida. The Hospital is owned by a large healthcare system that operates hundreds of hospitals across the United States.

At the Hospital, 1199 represents registered nurses, technical and service and maintenance bargaining units. The collective bargaining agreement between the Hospital and 1199 provides that: (1) the Hospital must provide 30 day notice that it will subcontract a department; and (2) when twenty or more employees will be displaced by the subcontracting deal, the Hospital must: (a) require the supplier employer to offer employment to affected employees and (b) maintain current rate of pay for a period not less than 90 days.

Environmental Services and Housekeeping ("EVS") employees were included in the service and maintenance bargaining unit[22] until 2006 when the Hospital outsourced its EVS department to Supplier Employer A. Pursuant to Article 30 of the collective bargaining agreement, the Hospital provided 1199 with advanced notice and required that Supplier Employer A offer employment to all EVS employees. All of the employees retained their positions and wages. EVS staff—now supplier employees—also secured severance pay through effects bargaining with the Hospital.

1199 executed a collective bargaining agreement with Supplier Employer A. The agreement's terms mirrored those of the previous agreement between the Hospital and 1199 and secured EVS staff the same benefits, conditions, and pay they had in the larger service and maintenance bargaining unit. In August 2007, the Hospital terminated its contract with Supplier Employer A and entered into a new sub-contracting agreement with Supplier Employer B. 1199

[21] The name of the hospital is omitted because the parties have an ongoing bargaining relationship.
[22] All non-professional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards. 29 CFR § 103.30(a) (2015).

negotiated another collective bargaining agreement with Supplier Employer B on June 30, 2008. A month after 1199 and Supplier Employer B executed their collective bargaining agreement, Supplier Employer A acquired Supplier Employer B as a subsidiary. Supplier Employer A resumed operation of the Hospital's EVS department and assumed the collective bargaining agreement between Supplier Employer B and 1199.

In Fall 2010, the Hospital outsourced the EVS department a third time to Supplier Employer C. Unlike Supplier Employers A and B, Supplier Employer C did not retain all EVS staff. Instead, Supplier Employer C required employees to reapply and conditioned their rehiring on drug screenings and an English proficiency test. Supplier Employer C's English proficiency test requirement displaced twenty employees, the majority of whom had been hired by the Hospital before the EVS department was outsourced. 1199 filed a grievance challenging the Hospital's failure to require that Supplier Employer C retain EVS staff as required by Article 30 of the CBA. The Hospital refused to arbitrate the grievance, arguing its duty to protect sub-contracted work expired in 2006 when it engaged in effects bargaining, although it retained its ability to decide to outsource the work. 1199 was compelled to enforce its arbitration rights in federal court.

The Hospital hired a number of the EVS staff and they were part of the service and maintenance bargaining unit before the Hospital outsourced the EVS functions. Notwithstanding the revolving door of supplier employers, EVS worker's terms and conditions (outside of the collective bargaining agreement) never changed significantly, largely because of the Hospital's continued control over EVS staff.

First, the Hospital establishes hiring standards for EVS employees. Then, the Hospital requires all EVS staff applicants to undergo a background check and nicotine test. Then, the

Hospital's human resource representative reviews background check results and has sole discretion to reject an employee on the basis of their criminal history.

EVS staff is also subject to the Hospital's rules and training requirements. The Hospital's language rules explicitly apply to EVS employees. Indeed, when Supplier Employer C became the supplier employer, it stated that the Hospital asked it to enforce the Hospital's English language policy. Additionally, the Hospital requires EVS staff to participate in annual ethics and compliance trainings facilitated by Hospital management. Finally, Hospital managers directly supervise, assign and provide cleaning instructions to the EVS staff. EVS employees are almost certainly jointly employed under the Board's recent decision in *BFI Newby Island Recyclery (Browning-Ferris)*, 362 NLRB No. 186 (2015).

EVS staff and the Hospital's service and maintenance workers work in the same facility, share the Hospital as an employer, and have similar terms and conditions of employment. EVS staff and the service and maintenance bargaining unit members continue to have similar wages, hours, and conditions. For instance, EVS staff and Hospital service and maintenance staff have the same starting rate for new hires and the same number of hours in the standard work week. EVS staff and Hospital service and maintenance staff also had nearly identical benefits from 2006-2010 bargained for by 1199. Moreover, they perform the same type of nonprofessional duties and are in the same presumptive unit pursuant to the Board's Health Care Rule. 29 CFR § 103.30(a) (2015). Overall, EVS staff are materially indistinguishable from support staff and would share a unit but for their subcontracted status. Their exclusion has made it more difficult for the union to represent them.

First, 1199 resorted to protracted litigation to enforce supplier worker's rights. 1199 spent a year in federal court to compel the Hospital to retain EVS staff after the Hospital changed

supplier employers four times in four years. Second, 1199 had to negotiate the same contract three times over the course of four years. Finally, twenty workers were displaced for four months.

Had EVS staff had the option to be included in the service and maintenance bargaining unit with the user employees without the consent of the supplier employer and user Hospital, their employment would most likely have been unaffected by the Hospital's decision to repeatedly change supplier employers. Moreover, the Hospital could not credibly shirk its responsibilities under Article 30(A) by claiming it did not employ EVS staff if they were integrated into the Hospital service and maintenance unit. Thus, because of the consent requirement established in *Oakwood*, the union had to expend unnecessary resources and member dues in order to hold the Hospital accountable for retaining EVS jobs.

At another hospital in Central Florida ("Medical Center")[23] where 1199 represents a bargaining unit of service and maintenance workers, recently the Medical Center contracted out the EVS department to Supplier Employer H. Before the Medical Center decided to contract out the EVS department to Supplier Employer H, as part of the service and maintenance bargaining unit at the Medical Center, the workers enjoyed benefits under the collective bargaining agreement such as medical coverage, disability insurance, paid time off, shift differentials, and 401k matching contributions based on years of service. After the Medical Center contracted out the department, Supplier Employer H eliminated all hospitalization coverage, and only provided minimal essential coverage plans. Additionally, Supplier Employer H eliminated all matching contributions to the workers' 401K plan and eliminated all paid time off. Now, the supplier employees are not eligible for paid time off until May 2016, and, then the amount of time

[23] The name of the hospital is omitted because the parties have an ongoing bargaining relationship.

proposed by Supplier Employer H is half to one third less than their benefits as employees of the Medical Center.

The cut in benefits that Supplier Employer H has made and continues to propose in bargaining has seriously impacted employees. Supplier Employer H and the Union have been bargaining over a first contract, and disputes have arisen over the severe cuts implemented by Supplier Employer H. Workers impacted by these severe benefit cuts wanted to engage in concerted protected activity, as guaranteed by the NLRA, but the Medical Center, because of a no-strike provision in the collective bargaining agreement that covers the user employees, attempted to prevent the supplier employees from picketing their employer on the Medical Center's premises. Had the Medical Center succeeded, it would have stripped these employees of their rights and of the limited tools they have to achieve balance at the bargaining table.

B. PROPERTY SERVICES

SEIU affiliates represent over 200,000 workers in the property services industry. One of the largest groups of these SEIU-represented property service workers are committed office cleaners, which is a labor intensive job, who are employees of cleaning contractors.[24] Contractors in this industry are the supplier employers, supplying labor to large building owners—user employers. In the past two decades, user employers' reliance on supplier employers for janitorial services has grown dramatically."[25] SEIU's experience representing

[24] Ctr. for Competitive Analysis, *The U.S. Building Maintenance and Service Industry: National Trends and Characteristics* 4 (Aug. 2000); Roger Waldinger et al., Lewis Ctr. for Reg'l Policy Studies, *Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles* 3 (Apr. 1996); Christopher L. Erickson et al., *Justice for Janitors in Los Angeles: Three Rounds of Negotiations*, 40:3 Brit. J. Indus. Rel. 543, 545 (2002).

[25] Catherine Ruckelshaus et al., supra note 3, at 9 (*citing* Arindarajit Dube & Ethan Kaplan, Does Outsourcing Reduce Wages in the Wage Service Organizations? Evidence from Janitors and Guards, 63 Indus. & Lab. Rel. Rev. 287 (2010)).

office cleaners is also helpful to understand how alternative work arrangements impact workers' Section 7 rights.

SEIU Local 32BJ is the largest union of property service workers in the U.S., with more than 145,000 members. 32BJ is concentrated in the Northeast – in Massachusetts, New Hampshire, Rhode Island, Connecticut, New Jersey, New York, Delaware, Pennsylvania, Maryland, Northern Virginia, and Washington, D.C. – but also extends to southern Florida and as far west as Montana. Members of 32BJ work primarily as cleaners, property maintenance workers, doormen, security officers, window cleaners, building engineers, and school and food service workers.

In the property service industry, it is very common for the building owners—user employers—to employ some workers directly and jointly employ others through contractors—supplier employers. *AM Property Holding Corp.*, 350 NLRB 998 (2007) illustrates this point. In *AM Property*, AM Property –the user employer--purchased a commercial office building. Prior to the purchase, the employees of the supplier employer providing the evening cleaning crew were represented by 32BJ. After purchasing the office building, the user employer decided to solely employ three engineers, two day cleaners, and an elevator operator, id. at 999, and it retained a new nonunion supplier employer, PBS, to employ the evening cleaning crew. Shortly after the sale, PBS recognized a different union, which disclaimed interest, and then PBS employees struck. AM Property terminated its contract with PBS and contracted with yet another nonunion supplier employer which hired some of the nonstrikers of the previous contractor, but none of the strikers. Id.

The Board ultimately decided that AM Property was not the joint employer of the workers who worked for the cleaning contractor (supplier employer), but that was under the

former standard for establishing a joint-employer relationship. Under the Board's joint-employer standard recently restated in *Browning-Ferris*, 362 NLRB No. 186, AM Property would have likely been considered a joint employer with the cleaning contractors. Assuming that was the case, the day cleaners and night cleaners could have bargained together with AM Property. In addition, if the Board returns to the Sturgis standard, it would address concerns frequently voiced by employer groups about fragmented bargaining units.

In 32BJ's experience, it is not unusual for the building management of commercial office buildings to directly employ the day cleaners, while contracting out the night cleaning, or even to directly employ some, but not all, property service workers on the same shift. Similarly, in apartment buildings or condominiums, it is not unusual for some of the service employees to be employed directly by the user building owners while others work for a supplier contractor. Depending upon the facts, the building owner/manager may qualify as the joint employer of the supplier employees.

In all of these circumstances, the Union might want to file a petition to represent all the service workers at the building, combining those who are solely employed by the user with those who are employed by both the user and the supplier. As a result of the consent requirement established by *Oakwood*, the bargaining power is diminished for all the affected employees. In many cases, the same economic issues and the same policies regarding conduct on the worksite will apply to both the supplier and user employees.

The above examples from the healthcare and property services industries show that workers are increasingly in alternative work arrangements. As a result of the change in their work arrangements, workers and their unions are obligated to expend resources enforcing the workers' Section 7 rights. Despite these increased expenditures, supplier employees too often

lost their previously bargained benefits in the process of the user repeatedly changing suppliers. In light of these examples, the Board should overrule *Oakwood* and return to the standard in *M.B. Sturgis*.

II. THE BOARD SHOULD OVERRULE *OAKWOOD*

In addition to the arguments raised in the *Oakwood* dissent, 343 NLRB 663-670, the plain language of the National Labor Relations Act ("the Act") and the Congressional Record from both 1935 and 1947 demonstrate that the *Oakwood* majority provided an overly narrow interpretation of Section 9(b).[26]

Section 9(b) of the Act states:

> (b) [Determination of bargaining unit by Board] 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 [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.[27]

Relying on some legislative history for support, the majority in *Oakwood* stated that Congress intended "craft unit, plant unit, or subdivision thereof" to mean subgroups of the broadest category of "employer unit." However, the complete legislative history suggests the opposite. An amendment was offered on the House floor to add the following to Section 9(b)(1): *"Provided,* That no unit shall include the employees of more than one employer." 2 Leg. Hist. 3220 (NLRA 1935). That amendment, which represented the viewpoint of the *Oakwood* majority, was squarely rejected. Id. at 3230. This rejected amendment was also raised in a debate about Section 9(b) in the Congressional Record of the Taft-Hartley Amendments, as evidence of Congress's intent to allow units with employees of more than one employer. 2 Leg. Hist. 1288-

[26] 29 U.S.C. § 159(b).
[27] 9(b) also limits the Board's authority in specific ways with respect to professional employees, craft units, and guards.

1289 (LMRDA 1947).[28] *Oakwood* is also contrary to the plain language of the statutory directive in Section 9(b) to decide appropriate bargaining units "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act."

III. THE BOARD SHOULD RETURN TO *M.B. STURGIS*

The Board should return to the standard articulated in *M.B. Sturgis*, which is consistent with the economic realities of alternative work arrangements and goals of the Act. As the dissent in *Oakwood* aptly stated, *Oakwood* effectively barred supplier employees "from organizing labor unions by making them get their employers' permission first." Id. at 663. Our examples demonstrate that supplier employees now have a second-class status under the NLRA, which negatively impacts all employees. *M.B. Sturgis* is not only well within the limits of Section 9(b), but it brings more stability to organizing and collective bargaining. Finally, *M.B. Sturgis* fulfills the Board's statutory obligation "to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act."

A. *M.B. Sturgis* is consistent with economic realities

The Board in *M.B. Sturgis* recognized "ongoing changes in the American workforce and workplace and … the increased use of companies that specialize in supplying temporary and contract workers to augment the workforces of traditional employers." 331 NLRB at 1298. As discussed above, more of the total employed labor force is in and impacted by alternative work

[28] Indeed, a Senator pointed out during the debate that the Board relied on this rejected amendment to defend challenges to the agency's authority to find such units appropriate was challenged, and the courts had sustained the Board's interpretation. 2 Leg. Hist. 1289 (LMRDA 1947).

arrangements.[29] For these reasons, the *M.B. Sturgis* standard is more urgent today than at the time *Sturgis* was decided

The Board recently reaffirmed its obligation to continue to interpret the Act in a way that allows workers to fully exercise their rights in *Browning-Ferris, 362 NLRB No. 186.* After years of placing additional requirements on finding joint-employer status, without explaining how the Act or common-law compelled those additional requirements, the Board rightly modified the joint employer standard. The Board reasoned that the joint employer standard prior to its decision in *Browning-Ferris* was "out of step with changing economic circumstances, particularly the recent growth in contingent employment relationships." 362 NLRB No. 186, slip op. at 1. Similarly, *Oakwood* places additional requirements that are not compelled by the Act and disconnected from the reality of today's workforce. For employees' rights to not be abridged by an employer's decision to outsource work, and to fully exercise their rights, the Board must continue to interpret the Act in light of these realities and return to the standard articulated in *M.B. Sturgis*.

B. Sturgis bargaining units facilitate rather than hinder collective bargaining

The Sturgis standard would foster more efficient collective bargaining contrary to arguments raised by employers. The Board in *Oakwood* incorrectly reasoned that "the bargaining structure contemplated in [*M.B. Sturgis*] gives rise to significant conflicts among the various employers and groups of employees participating in the process."[30] This argument is not novel and it was explicitly rejected by the courts. The possible differences in interests between jointly and solely employed employees with a common user employer are no greater than the

[29] U.S. Gov't Accountability Office, supra note 1, at 3, 12.
[30] Oakwood, 343 NLRB at 663.

differences that already exist among different types of job titles within units of only one employer.

In *S.S. Kresge Co. v. NLRB*, the Court stated,

> "There is a possibility that the employees in the departments operated by Kresge will dominate union policy. This, however, is a problem which is germane to all units encompassing different departments with divergent interest. Indeed, the same problem could arise if the appropriate unit consisted solely of Kresge employees, because employees in larger Kresge departments could impose their decisions on employees in smaller departments. Such a result does not mean the unit is inappropriate, particularly when, as in the present case, there is a sufficient community of interest among employees in the unit to suggest the problem will not be serious if it does occur."

416 F.2d 1225, 1232 (6th Cir. 1969), enforcing *S.S. Kresge Co.*, 169 NLRB 442 (1968).

Requiring a user employer and supplier employer to bargain together with a unit of solely and jointly employed employees without their consent is reasonable considering they have already voluntarily entered into a contract with each other. See *Gallenkamp Stores Co. v. NLRB*, 402 F.2d 525, 531 (9th Cir. 1968), enforcing *K-Mart*, 162 NLRB 498 (1966) (finding that where the joint employers "have worked out their diverse business problems" as demonstrated by their license agreements, like efforts should prove effective in bargaining with the union). There is no dispute that, under the Act, "a unit encompassing all of an employer's employees, or a subgroup of such employees, can constitute an appropriate unit. The Board does not require 'consent' of the employer in order for employees to be represented for collective bargaining in an employer-wide unit. Rather, the appropriateness of such units is governed by our traditional community of interest test." *M.B. Sturgis*, 331 NLRB at 1304 Moreover, even the *Oakwood* Board agreed that consent is not required where "[a]ll of the unit employees work for a single employer, i.e., the joint employer entity A/B[,]" finding that "a joint employer unit of A/B is not a multiemployer unit." 343 NLRB 662. As explained above, differing interests between sole and jointly employed

employees and between their employers are minimal. These potential conflicts do not justify the *Oakwood* consent requirement, especially when that consent is not required for units comprised of only jointly employed employees.

Additionally, *M.B. Sturgis* effectuates the goals of the Act and promotes labor stability by providing employees and their collective bargaining representatives more options with which they may attempt to organize and bargain with their employers. For example, in the hospital setting - a setting where the Board has already determined presumptively appropriate units for collective bargaining[31] – a union may decide to accrete supplier employees into an already existing bargaining unit of user employees, assuming the supplier employer and user employer are joint employers. This would alleviate the union's need to expend significant resources to collectively bargaining a contract for a unit of solely supplier employees that were once part of the bargaining unit of user employees, like in the above example from 1199 - Florida Region. There, the Local expended significant resources to collectively bargaining on behalf of user and supplier employees in separate bargaining units, and even more resources attempting to enforce the supplier employees' rights in federal court and through arbitration.

IV. CONCLUSION

The *Oakwood* decision placed an unprecedented burden on employees exercising Section 7 rights. Impartial studies as well as the anecdotal examples from SEIU demonstrate the continuing trend for employers to use supplier employers at the expense of workers. Since *Oakwood*, employers have increasingly divided the workforce, and this trend will continue. The NLRB should return to *M.B. Sturgis* to ensure that jointly employed workers can exercise their

[31] In addition, the *Oakwood* rationale contradicts Board's stated goal of avoiding destabilization, as set out in 29 CFR § 103.30, which lays out eight presumptively appropriate bargaining units in the healthcare industry.

full Section 7 rights.