UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

In the matter of:	:	
	:	
MILLER & ANDERSON, INC.	:	
	:	
and	:	Case No. 05-RC-079249
	:	
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 19, AFL-CIO	:	

BRIEF OF TRADESMEN INTERNATIONAL IN RESPONSE TO BRIEFS FILED AT THE INVITATION OF THE BOARD

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ARGUMENT

Tradesmen has previously moved to dismiss this case as moot, and it remains undisputed that neither employer has employed any employees in the petitioned-for unit for more than three years, and that neither employer has any future expectation of doing so. *See* Tradesmen International Motion to Dismiss, NLRB Case No. 05-RC-079249, at 1 (July 20, 2015). Nevertheless, the Board has inexplicably proceeded to entertain *amicus* briefs arguing that the Board should overrule its precedent in *Oakwood Care* so as to allow the Petitioner to proceed with its petition to represent employees of both Tradesmen and Miller & Anderson in a single bargaining unit. None of the briefs offer any means by which such a new standard could possibly be applied to the facts of this case, where there are no employees in the petitioned-for unit at all. Tradesmen is filing this responsive brief pursuant to the Board's Order inviting briefs, in order to make clear that if the Board somehow fails to dismiss this case as moot, it should deny the petition on the merits.[1]

[1] In order to avoid repeating arguments advanced by the *amici* briefs that oppose any overruling of *Oakwood Care*, Tradesmen hereby incorporates those briefs by reference. As the *amici* briefs make clear, the answers to the three questions posed by the Board are: (1) There has been no adverse impact on employees from the *Oakwood Care* decision; (2) The Board should continue to adhere to the *Oakwood Care* holding, which was correctly decided; and (3) The Board should not revert to the unlawful and arbitrary *Sturgis* doctrine, or anything like it.

I. THIS CASE IS AN IMPROPER VEHICLE FOR CHANGING THE STANDARD FOR JOINT EMPLOYER BARGAINING

Petitioner and the *amici* who filed briefs in support of the petition on September 18, 2015, have altogether ignored the undisputed facts of this case, referenced above and in Tradesmen's motion. The Union filed its request for review of the Regional Director's decision on March 10, 2012, approximately three and a half years ago. In the three and a half years it has taken this case to reach the Board, the relationship between Miller and Tradesmen has long since ended, there are no employees in the requested unit, joint or otherwise, and there is no indication that these entities would ever have a relationship in the future.

Because there are no employees in the petitioned-for unit, any attempt to change the *Oakwood Care* standard in this case would constitute an impermissible advisory opinion, even if the case were not moot (which it plainly is). The Board has long held that it will not issue advisory opinions in the absence of facts in the case before it to which the opinion could apply.[2] *Albert Einstein Coll. of Med.*, 226 NLRB 1141 (1976) ("With one exception, the Board does not render advisory opinions. The single exception is embodied in Section 102.98 of the Board's Rules ….''). The Board should apply its longstanding precedent here to reject calls for

[2] Advisory opinions of the Board are supposed to be restricted to the limited jurisdictional provisions of Section 102.98 of the Board's Rules which have no bearing on the present case.

what will in effect be an advisory opinion on joint/multi- employer bargaining units.

II. ANY GROWTH IN THE TEMPORARY OR CONTINGENT WORKFORCE HAS NO BEARING ON THE CASE AT ISSUE

The primary argument advanced by the Petitioner and the *amici* supporting the petition is that the growth of the temporary and contingent workforce in the American economy somehow requires a change in established labor policy. *See, e.g.*, Brief of Petitioner, pp. 4-7; Brief of the General Counsel, pp. 12-16. Tradesmen is the construction industry's premier skilled workforce recruiter, which provides construction contractors and industrial companies with North America's best skilled craftsmen. But the skilled employees supplied by Tradesmen to Miller &Anderson on the long completed project at issue in this case are not the source of the legal challenge to the *Oakwood Care* doctrine.

Rather, the focus of the union amici's and General Counsel's briefs is squarely on non-contingent employees, *i.e.*, the core employees (more than three years ago) of Miller & Anderson. It is undisputed that the petition seeks to combine employees of Tradesmen who were supposedly jointly employed by Miller & Anderson in a unit that includes employees who were *solely* employed by the latter employer. There is no claim that the Miller & Anderson employees had any employment relationship whatsoever with Tradesmen; they had only one employment relationship, with Miller & Anderson. Thus, the question facing the

Board is whether these non-contingent employees are properly included in a bargaining unit with alleged Joint Employees.[3] In short, they are not. The Act does not provide for such a bargaining unit without the consent of all of the employers involved.

III. THE STANDARD SET IN *GREENHOOT* AND *OAKWOOD CARE CENTER* IS MANDATED BY THE ACT AND SOUND LABOR POLICIES

As explained in several of the *amici* briefs opposing the petition in this case, the plain language of the Act and the national labor policy both support the conclusion that separate employers must consent before a multiemployer bargaining unit can be established. As the Board held in *Greenhoot,* 205 NLRB at 250*,* where there are multiple different employers, merely an overlap in one employer is not sufficient to require multiemployer bargaining without the employers' consent. *Greenhoot*, 205 NLRB at 251. Indeed, the Board clearly stated:

> there 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

[3] There is no actual evidence in the record that the putative joint employment relationship alleged in this matter ever actually existed. The alleged joint employer relationship between Miller and Tradesmen was not actually litigated before the Regional Director. This is yet another reason why it is improper to proceed with any change to the *Oakwood Care* standard in the present case.

> a desire to be bound in future collective bargaining by group rather than individual action.

Id. Nothing in this holding supports Petitioner's contention that *Greenhoot* "speaks only of the relationship *between* joint employers …, not of the relationship *among* the parties to a joint endeavor." *See* Brief of Petitioner, p. 10. Rather, *Greenhoot* clearly applies to any group of "several employers," not "several joint employers." *See, e.g., Lee Hosp.*, 300 NLRB 947, 950 (1990).

Petitioner conflates *Greenhoot*'s holding with the application of that holding to its facts. In doing so, Petitioner overemphasizes a three-word phrase "in each location" to argue, in essence, that it is appropriate that User Employees and Joint Employees in one location be combined into a unit without their multiple employers' consent. *See* Brief of Petitioner, pp. 9-10, *citing Greenhoot*, 205 NLRB 250. In doing so, Petitioner attempts to artificially limit the holding of *Greenhoot* into something far narrower than that intended by the Board.

What's more, the policies underlying the Act do not support the Petitioner's reading of *Greenhoot* or the overturning of *Oakwood Care Center*. The Act makes clear that federal labor policy is designed to encourage "the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. Section 9(a) of

the Act further states: "Representatives designated or selected for the purposes of collective bargaining … shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." *See* 29 U.S.C. § 159(a).

Yet, the practice of collective bargaining would not be furthered by placing Joint Employees in a bargaining unit with employees exclusively employed by a User Employer without their employers' consent. Joint Employees and User Employees have entirely different circumstances to confront when engaging in bargaining. For instance, User Employees and Joint Employees bargain with different entities; consider economic factors specific to their different employers; address different business, contractual or relationship issues with their employers; and, perhaps most importantly, bargain over different terms and conditions of employment (such as, policies on placement, termination, pay rates, and employee benefits). Given these stark differences, combining these employees into a unit without consent would hinder, not further, the collective bargaining process.

Indeed, the General Counsel's brief tacitly admits that the differences between joint employers and a single user employer can affect bargaining. "[E]ven in units where all employees are jointly employed, the employers may divide control such that the user employer sets some terms and the supplier others.

Likewise, the employers in a *Sturgis* unit might share control over some of the terms and conditions of employment and divide control of the remaining terms and conditions and could bargain accordingly—just as in any joint-employer bargaining scenario." *See* Brief of the General Counsel, at p. 11 (emphasis added). The General Counsel ignores, or fails to appreciate, that with respect to User Employees the user employer has no reason to "share control over some of the terms and conditions of employment" with a third-party. Yet, user employers would lose this control when Joint Employees and User Employees are combined in a unit without their consent. As a result, the General Counsel is simply wrong when he asserts "[b]argaining in a *Sturgis* unit would still involve all of the same parties, and the parties would stand in precisely the same stead …." *Id.*

The interests of the employees themselves are not served by placing Joint Employees in a bargaining unit with User Employees without their employers' consent. Both sets of employees would have less power "to negotiat[e] the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. This is because Joint Employees and User Employees face different, and sometime competing, bargaining goals and strategies. In fact, Joint Employees and User Employees could be pitted against each other in negotiations because of their divergent interests. Allowing such tension is antithetical to the Act's purpose of providing "mutual aid and protection" for employees.

Moreover, employees' rights in choosing a representative under the Act are not unfettered. The Act prohibits forcing an employer to join a multi-employer bargaining unit. Specifically, the Act provides that it is an unfair labor practice "to threaten, coerce, or restrain any person … where … an object thereof is- - (A) forcing or requiring any employer or self-employed person to join any labor or employer organization …." 29 U.S.C. § 158(b)(4); *see also*, 29 U.S.C. § 158(b)(1).

Again, the Act and the national labor policy both support the conclusion that separate employers must consent before a multiemployer bargaining unit can be established and that *Greenhoot* and *Oakwood Care Center* should not be overturned.

IV. CONCLUSION

For the foregoing reasons, the Board should deny the Union's petition as moot. If it does not deny the petition as moot, the Board should reaffirm the well-established and appropriate precedent in *Greenhoot* and *Oakwood Care Center* on the merits of this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing *Brief Of Tradesmen International In Response To The Briefs Filed At The Invitation Of The Board* was electronically filed on September 30, 2015, through the Board's website, is available for viewing and downloading from the Board's website, and will be sent by means allowed under the Board's Rules and Regulations to the following parties:

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