UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MILLER & ANDERSON, INC.
Employer

and

Case 05-RC-079249

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

AMICUS BRIEF OF THE GENERAL COUNSEL

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On May 18, 2015, the Board granted the Petitioner's Request for Review of the Regional Director's administrative dismissal of the petition and thereafter, on July 6, 2015, issued a Notice and Invitation to File Briefs, which invited the parties and interested *amici* to address one or more of the following questions:

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

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

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

We address Questions 1 and 2 in Section B of our argument. We address Question 3 in Section C.

I. Summary of Argument

The Board should overturn *Oakwood Care Center* because its holding has unnecessarily constricted employees' statutory right to self-organization, and return to the approach articulated in *M.B. Sturgis.* That approach—which permitted jointly employed employees to organize in bargaining units with their solely employed coworkers—would advance the Section 9(b) mandate to assure employees the fullest freedom to exercise their statutory rights. By requiring employer consent to such a bargaining unit, *Oakwood* has upended the Section 9(b) mandate and allowed employers to shape their ideal bargaining unit. This diminishes employee bargaining power and frustrates effective collective bargaining.

Moreover, a mixed bargaining unit of jointly and solely employed employees ("a *Sturgis* unit") is fully consistent with Section 9(b) because it does not constitute a multiemployer unit. User and supplier employers elect to codetermine the terms and conditions of employment for certain employees and thereby choose to enter into a joint employer relationship with regard to those employees. Adding solely employed "user" employees to a bargaining unit with the jointly employed "supplier" employees does not alter this relationship between the employers. And the two groups of employees will still need to demonstrate that they share a community of interest in order to constitute an appropriate bargaining unit.

Trends in the employment landscape also support overruling *Oakwood*. Employers have increased their reliance on contingent work arrangements steadily over several decades, and contingent workers now comprise a significant share of the workforce. The

Board should recognize the reality of such changes and once again allow employees to bargain in mixed *Sturgis* units.

Collective bargaining in a mixed unit imposes no additional burdens or obligations on employers. Both user and supplier employers are already obligated to bargain with their own employees, whether solely or jointly employed; this will not change regardless of the makeup of the bargaining unit. And Section 9(a) representatives regularly navigate potential conflicts between competing employee interests. Further, the economic relationship between user and supplier employers is a mandatory subject of bargaining to the extent that it vitally affects employees' wages and working conditions, regardless of the composition of the bargaining unit.

Accordingly, the Board should permit jointly and solely employed employees to organize and collectively bargain in appropriate mixed bargaining units. The employers' consent, or lack thereof, should not be a consideration. Rather, when a union files a representation petition that names both the user and supplier employers and seeks an election in a mixed unit, the only relevant inquiries are whether the employers are joint employers under the Act and, if so, whether the solely and jointly employed employees share a community of interest.

II. Argument

A. The General Counsel Maintains an Interest in this Proceeding, But Expresses No View on the Merits of this Case.

The General Counsel does not take a position on the merits in representation cases, which are non-adversarial in nature. He therefore expresses no view on the resolution of this case.

But, while not a formal party to representation proceedings, the General Counsel maintains an interest in this proceeding for several reasons. First, the General Counsel shares the Board's concerns that "questions preliminary to the establishment of the bargaining relationship be expeditiously resolved,"[1] and that representation proceedings must also serve the goals of resolving questions of representation accurately and fairly.[2] Second, the General Counsel has a direct involvement and substantial interest in the processing of representation cases because of his supervisory authority over the activities of the Regional Directors and their staffs, to whom the Board has delegated the authority to process representation cases. Finally, the General Counsel maintains an interest in this proceeding because he is responsible for prosecuting unfair labor practice charges, including cases involving refusals to bargain by alleged joint employers in an appropriate unit. Accordingly, the General Counsel maintains that his views, set forth below, on the appropriateness of *Sturgis* bargaining units may be of assistance to the Board in resolving issues raised by this case.

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[1] *NLRB v. O.K. Van Storage*, 297 F.2d 74, 76 (5th Cir. 1961).

[2] *See, e.g.*, *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330–31 (1946).

B. The Board Should Overturn *Oakwood Care Center*, 343 NLRB 659 (2004), Because Its Holding Has Needlessly Constrained the Statutory Rights of Employees in Alternative Work Arrangements as Well as the "Solely Employed" Employees Who Work Alongside Them.

1. The *Sturgis* approach furthers the statutory mandate of Section 9(b) of assuring to employees the fullest freedom to exercise their statutory rights.

Section 9(b) directs the Board to identify an appropriate bargaining unit while affording employees the fullest freedom to exercise their statutory rights.[3] The Board "has historically honored this statutory command by holding that the petitioner's desire concerning the unit 'is always a relevant consideration.'"[4] In protecting the fundamental Section 7 right to self-organization, the Board has recognized that, "[a] key aspect" of that right "is the right to draw the boundaries of that organization—to choose whom to include and whom to exclude."[5]

The *Oakwood* decision undermines the Board's statutory directive to protect employee preference. It allows employers to "shape the unit at will" by withholding consent to bargaining with the employees' desired unit.[6] Requiring employer consent to an otherwise appropriate unit turns the Section 9(b) mandate on its head. In the period following the *Oakwood* decision, there were numerous instances where its doctrine interfered with employees' rights of self-organization.

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[3] 29 U.S.C. 159(b).

[4] *Specialty Healthcare and Rehab. Center*, 357 NLRB No. 83, slip op. at 8 (Aug. 26, 2011).

[5] *Id.,* slip op. at 8, n.18.

[6] *Oakwood Care Ctr.*, 343 NLRB at 669 (Members Liebman and Walsh, dissenting), quoting *Waterfront Emp'r Ass'n*, 71 NLRB 80, 111 (1946).

One such example can be found in *Grandview Foods*, Case 19-RC-14560, a representation case from 2004. Pre-*Oakwood*, a Teamsters local petitioned to represent a wall-to-wall bargaining unit of employees who worked in a frozen food processing plant. Some of the employees were solely employed year-round by the Employer, Grandview Foods, but the majority were seasonal employees provided and jointly employed by an employee leasing company, BBSI. The petition named both employers. During peak processing season, the jointly and solely employed employees worked side-by-side and shared a strong community of interest. In September 2004, the Regional Director issued a Decision and Direction of Election for the petitioned-for bargaining unit of solely and jointly employed employees, and the Region conducted an election on October 21, 2004. The employees overwhelmingly opted for union representation with a 97–3 vote. But before the Region certified the results of the election, the Board issued its decision in *Oakwood Care Center* on November 19, 2004. Shortly thereafter, supplier Employer BBSI petitioned the Regional Director to reconsider his previous decision in light of the Board's new rule regarding mixed units. In a new decision and order dated December 14, 2004, the Regional Director explained that he was bound by *Oakwood* to vacate the election and dismiss the petition. The 97 percent of employees who had selected union representation saw their Section 9 rights eviscerated.

The *Oakwood Care Center* approach dilutes the bargaining rights of both employee groups—the user employer's employees and the jointly employed employees—and

"defeats the collectiveness of collective bargaining[.]"[7] By requiring two groups of employees to engage in parallel bargaining relationships, despite their shared community of interest and desire to bargain in a single unit, the *Oakwood* approach diminishes employee bargaining power and allows employers to whipsaw the competing employee groups.[8]

2. A mixed unit comprised of jointly and solely employed employees is consistent with Section 9(b).

A mixed unit of jointly and solely employed employees (a "*Sturgis* unit") can be an appropriate "employer unit" within the meaning of Section 9(b). As recognized by the *Oakwood* dissent, Section 9(b) outlines the scope of a bargaining unit rather than the source of bargaining-unit members.[9] "The scope of a bargaining unit is delineated by the work being performed for a particular employer."[10] In the case of a *Sturgis* unit, "*all* of the employees at the site work for the user employer. … Hence the unit scope is

[7] Nancy Schiffer, *Whither vs. Wither: How the NLRA Has Failed Contingent Workers*, ABA Annual Meeting, Section on Labor and Employment Law (Aug. 2005) at 9, available at http://apps.americanbar.org/labor/lel-aba-annual/papers/2005/018.pdf.

[8] *See, e.g.*, *Oakwood Care Ctr.*, 343 NLRB at 666 (Members Liebman and Walsh, dissenting) ("Surely employees who are working side by side, for employers who have voluntarily created that arrangement, should be able to join together in the same bargaining unit, if they choose to. They are part of a common enterprise and, absent a common union representative, they are potential competitors with each other with respect to the terms and conditions of their work").

[9] *Oakwood Care Ctr.*, 343 NLRB at 666 (Members Liebman and Walsh, dissenting).

[10] *M.B. Sturgis*, 331 NLRB at 1304–05.

*employer*wide."[11] And an employer-wide unit is one of the examples of an appropriate bargaining unit enumerated in Section 9(b).[12]

The *Oakwood* Board majority concluded that Section 9(b) prohibited a *Sturgis* unit because it erroneously labeled this as a multiemployer unit.[13] The majority then reasoned that "the text of the Act reflects that Congress has not authorized the Board to direct elections in units encompassing the employees of more than one employer."[14] Because the employer unit is the broadest bargaining unit delineated by Section 9(b), the *Oakwood* majority concluded that the plain text of the Act forecloses any unit comprising the employees of more than one employer.[15] But the relationship between joint employers is fundamentally distinct from the relationship between employers who engage in multiemployer bargaining.

a. A *Sturgis* unit is not a multiemployer unit.

Multiemployer bargaining occurs when competing employers who separately employ their own employees at different worksites elect to bargain together through a joint representative for a master agreement. These employers are generally in the same industry, are often organized in a trade association, and employ workers who are

[11] *Oakwood Care Ctr.*, 343 NLRB at 666 (Members Liebman and Walsh, dissenting) (emphasis in original).

[12] 29 U.S.C. §159(b) ("[T]he unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof").

[13] 343 NLRB at 659.

[14] *Id*. at 661.

[15] *Id*. at 661–62.

represented by a union.[16] While employers engaged in multiemployer arrangements cede some of their bargaining authority to the group's bargaining representative, each employer retains the right to direct and control the day-to-day activities of its respective employees.[17] Because both employers and unions have a right to select their own bargaining representatives, the Board may not find multiemployer units appropriate without the consent of all parties.[18]

Joint employers, by contrast, are two or more employers who function as co-employers despite an absence of common ownership. "[A] finding that companies are joint employers assumes in the first instance that companies are what they appear to be—independent legal entities that have merely historically chosen to handle jointly . . . important aspects of their employer-employee relationship."[19] Under the Board's recently-articulated joint-employer test, the key inquiry is whether one employer (under the

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[16] *See* Douglas A. Leslie, *Multiemployer Bargaining Rules*, 75 VA. L. REV. 241, 241, 241 n.5 (1989).

[17] *See, e.g. F.E. Booth & Co.*, 10 NLRB 1491, 1497 (1939) (declining to direct an election in a multiemployer bargaining unit because "each of the Companies has retained to itself and has exercised control over its essential employer functions"). *See also* Robert W. Tollen, *When Is a Multiemployer Bargaining Unit a "Multiemployer Bargaining Unit"?*, 17 THE LABOR LAWYER 183, 191 (2001) ("A distinguishing feature of a multiemployer bargaining unit . . . is that each member controls its own employees and does not share control over them with other employers. . . . Compare joint employers: They 'exert significant control over the *same* employees,'" quoting *Lutheran Welfare Servs.* 607 F.2d 777, 778 (7th Cir. 1979) (emphasis added)).

[18] *See Greenhoot, Inc.*, 205 NLRB 250, 251 (1973) (the Board may not direct an election in a multiemployer unit absent explicit employer consent to representation in such a unit); *accord NLRB v. ILGWU*, 274 F.2d 376, 378 (3d Circuit 1960) ("Each party to the collective bargaining process has a right to choose its representative . . .").

[19] *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1122 (3d Cir. 1982) (omitting internal citations).

common law definition) "'possesses sufficient control over the work of the employees to qualify as a joint employer with' another employer."[20] Where employers are found to be joint employers of a group of employees, the Board may direct an election in a unit of those employees without the employers' consent because the employers have chosen to "share or co-determine those matters governing the essential terms and conditions of employment."[21]

Under contingent staffing agreements, the supplier employer and user employer often elect to codetermine various terms and conditions of employment and thereby voluntarily enter into an archetypal joint employment relationship.[22] It is undisputed that such employers do not engage in multiemployer bargaining when *all* of the bargaining-unit employees are jointly employed; the *Oakwood* majority recognized that a joint employer unit is not a multiemployer unit.[23]

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[20] *Browning-Ferris Indus.*, 362 NLRB No. 186, slip op. at 2 (Aug. 27, 2015), quoting *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

[21] *Browning-Ferris Indus.,* 362 NLRB No. 186, slip op. at 2 *, quoting NLRB v. Browning-Ferris*, 691 F.2d at 1123. *Cf.* Tollen, *supra* n.17 at 191 ("The facts that permit two separate employers to be treated as joint employers demonstrate a voluntary alliance. Consent to the alliance is implicit.").

[22] *See, e.g., Brookdale Hosp. Med. Ctr.,* 313 NLRB 592, 593 (1993) (hospital and agencies referring respiratory therapists to the hospital were joint employers of the referred therapists); *Cont'l Winding Co.,* 305 NLRB 122, 123 n.4 (1991) (Continental Winding and Kelly Services, a temporary personnel service, were joint employers of strike replacement employees supplied by Kelly); *AMP, Inc.,* 218 NLRB 33, 34-35 (1975) (factory operator and company that referred unskilled and semiskilled female personnel to work for factory operator on long-term and short-term bases were joint employers of referred employees); *see also, e.g.*, Tollen*, supra* n.17 at 190–192 (joint employers have voluntarily elected to share aspects of the employment relationship).

[23] *Oakwood Care Ctr.*, 343 NLRB at 662. *Accord* Tollen, *supra* n.17 at 190–191.

The addition of the user employer's solely employed employees to this bargaining unit does not alter the relationship between the user and supplier employers. Bargaining in a *Sturgis* unit would still involve all of the same parties, and the parties would stand in precisely the same stead with regard to one another. True, in a *Sturgis* unit, the supplier employer would only control the terms and conditions for some of the employees. But the user employer is an employer of all of the employees in a *Sturgis* unit.[24] And even 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.[25] 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.

b. A *Sturgis* unit will still need to satisfy traditional community of interest standards to be deemed "appropriate."

As in any representation proceeding, the employees in a petitioned-for unit that combines jointly employed employees with a user employer's solely employed employees should be found appropriate only if those employees share a sufficient community of interest. The Board's community of interest test examines several different factors to

[24] *See M.B. Sturgis, Inc.*, 331 NLRB at 1305. *Accord* Tollen, *supra* n.17 at 191 (noting that in a *Sturgis* unit, all employees share a common employer in the user employer).

[25] *See Browning-Ferris Indus.,* 362 NLRB No. 186, slip op. at 15, n.80 (noting that in some cases or as to certain issues, joint employers may engage in genuinely shared decision-making, and in others, they may exercise comprehensive authority over different terms and conditions of employment or even affect different components of the same term); *Oakwood Care Ctr.*, 343 NLRB at 662 (remarking that, for a jointly employed group, the employers may codetermine all terms and conditions of employment or they may divide control over the various terms).

determine whether the employees involved share a mutuality of interests in their terms and conditions of employment.[26]

The *Sturgis* majority acknowledged that application of the community of interest test could lead to jointly employed employees being excluded from a bargaining unit of the user employer's solely employed employees.[27] In fact, the *Sturgis* majority remanded the cases underlying that decision for the Regional Directors to make community of interest determinations.[28] In other words, if the Board elects to return to the *Sturgis* model, a union seeking to represent a *Sturgis* unit will still need to demonstrate that a user employer's jointly employed and solely employed employees share a community of interest. Accordingly, a *Sturgis* bargaining unit is fully compatible with the parameters of Section 9(b).

3. Changes in the nature of employment support a change in the law.

The Supreme Court has made it clear that federal administrative agencies must demonstrate flexibility in adapting their rules to evolving economic and legal realities.[29] "Regulatory agencies do not establish rules of conduct to last forever; they are supposed . . .

[26] *See, e.g.*, *Kalamazoo Paper Box*, 136 NLRB 134 (1962) (relevant factors include wages, hours of work, employment benefits, supervision, qualifications and skills, time spent at worksite, frequency of contact or interchange with other employees, and bargaining history).

[27] *M.B. Sturgis*, 331 NLRB at 1305–06. *See also Id*. at 1307 ("While we find no statutory impediments to these units, the employees still must share a community of interest").

[28] *Id*. at 1306.

[29] *See Am. Trucking Ass'n v. Atchison,* 387 U.S. 397, 416 (1967).

to adapt their rules and practices to the Nation's needs in a volatile, changing economy."[30] As the Board recognized in its recent *Browning-Ferris* decision, "the diversity of workplace arrangements in today's economy has significantly expanded," including a steady growth in the use of contingent workers.[31] "The fissured workplace requires new approaches to enforcing existing workplace statutes … in a way that once again protects workers."[32]

The contingent workforce comprises "a diverse group of non-core workers who provide work other than on a long-term, full-time basis."[33] The term "contingent worker" encompasses numerous employment arrangements, including leased workers, agency temporary workers, on-call workers, and direct-hire temps.[34]

The past few decades have seen a steady growth in the number of contingent workers.[35] Particularly during the 1980s and 1990s, the "temporary help supply industry" grew significantly, with such jobs rising 577% from 1982 to 1998, a period in which the

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[30] *Id*. *See also NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 266 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

[31] 362 NLRB No. 186, slip op. at 11 (Aug. 27, 2015).

[32] DAVID WEIL, THE FISSURED WORKPLACE 214 (Harvard University Press 2014).

[33] Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 158 (2003).

[34] Nancy Schiffer, *Organizing Contingent Workers: Community of Interest vs. Consent*, 17 THE LABOR LAWYER 167, 167 (2001).

[35] *See* The Associated Press, *Temporary Jobs on Rise in Shifting U.S. Economy*, USA TODAY (May 24, 2014), *available at* http://www.usatoday.com/story/money/business/2014/05/24/temporary-jobs-on-rise-in-shifting-us-economy/9273921/. *See also, e.g.,* Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C.L.R. 351, 366-71 (2002) (describing significant growth in contingent workforce).

total number of jobs in the workforce grew only 41%.[36] In 2005, the United States Department of Labor, Bureau of Labor Statistics (BLS) estimated that contingent workers accounted for up to 4.1% of total employment in the United States, including 1.2 million temporary help agency employees and 813,000 workers provided by contract firms providing employers with temporary labor.[37]

Since then, the contingent workforce has continued to grow. Because of the churning and high turnover in the temporary labor force, 11.5 million individual workers cycled through temporary staffing agencies in 2012.[38] The trade association for the staffing industry claims that 10 percent of U.S. workers find work through a staffing agency annually.[39] The average number of temporary and contract workers employed each week by temporary staffing agencies was 2.9 million in 2012, 3.0 million in 2013, and 3.2 million

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[36] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-00-76, CONTINGENT WORKERS: INCOMES AND BENEFITS LAG BEHIND THOSE OF REST OF WORKFORCE 16 (June 2000), *available at* http://www.gao.gov/assets/240/230443.pdf. The GAO report also noted that "certain industries and communities have begun to rely heavily on agency temps." *Id.*

[37] *See* BUREAU OF LABOR STATISTICS, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS, FEBRUARY 2005 1, 5 (July 27, 2005) *available at* http://www.bls.gov/news.release/pdf/conemp.pdf.

[38] Ronald A. Wirtz, *Matchmaker, Matchmaker*, FEDGAZETTE: NEWSPAPER OF FEDERAL RESERVE BANK OF MINNESOTA (Jan. 2014), https://www.minneapolisfed.org/publications/fedgazette/temporary-employment-sector-matchmaker-matchmaker.

[39] *See* Michael Grabell, *The Expendables: How the Temps Who Power the Corporate Giants Are Getting Crushed*, ProPublica (June 27, 2013), http://www.propublica.org/article/the-expendables-how-the-temps-who-power-corporate-giants-are-getting-crushe.

in 2014.[40] And the number of temporary workers placed through staffing agencies is expected to be even higher in 2015.[41]

Employers have strong legal and financial incentives to increase their use of contingent work arrangements. In addition to increasing flexibility, firms can cut their payroll costs significantly by employing contingent workers.[42] Temporary workers earn an average 25 percent less than their permanent counterparts.[43] They are far less likely to receive employer-paid benefits or training.[44] Moreover, the increased use of temporary workers creates tremendous downward pressure on the wages and benefits of the permanent, non-contingent workforce.

Given these significant changes in today's workplaces, resulting in the increasing occurrence of joint-employment arrangements, there are compelling reasons for the Board

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[40] *See* American Staffing Ass'n, *Staffing Employment Grew 5.4% in 2014: New Data From Quarterly ASA Staffing Employment and Sales Survey* (March 19, 2015), *available at* https://americanstaffing.net/posts/2015/03/19/staffing-employment-grew-5-4-in-2014/; *Staffing Employment Grew 4% in 2013: New Data From Quarterly ASA Staffing Employment and Sales Survey* (March 6, 2014), *available at* https://americanstaffing.net/posts/2014/03/06/staffing-employment-grew-4-2013/; *Staffing Employment Grew 4.1% in 2012: New Data From Quarterly ASA Staffing Employment and Sales Survey* (February 28, 2013), *available at* https://americanstaffing.net/posts/2013/02/28/staffing-employment-grew-4-1-2012/.

[41] *See* American Staffing Ass'n, *BLS: Staffing Employment Growth Continued in June—Staffing Firms Added 19,800 Jobs* (July 2, 2015), *available at* https://americanstaffing.net/posts/2015/07/02/staffing-employment-growth-continued-in-june/.

[42] *See, e.g.*, Befort, *supra* n.33 at 163; Danielle D. van Jaarsveld, *Overcoming Obstacles to Worker Representation: Insights from the Temporary Agency Workforce*, 50 N.Y.L. SCH. L. REV. 355, 355 (2006).

[43] *See* Grabell, *supra* n.39.

[44] *See, e.g.*, Befort, *supra* n.33 at 164.

to return to an approach in certifying bargaining units that fulfills the statutory mandate of Section 9(b) and affords employees the fullest freedom to exercise their statutory rights.[45]

C. The Board Should Return to the *Sturgis* Model.

As we argued in Part B, *supra*, there are compelling legal and policy arguments for rejecting the *Oakwood* model and allowing jointly employed employees to engage in collective bargaining alongside their solely employed counterparts. In this section, we address the alleged impracticalities of collective bargaining between a mixed *Sturgis* unit and the user and supplier employers. The *Sturgis* dissent and *Oakwood* majority claimed these alleged impracticalities would render good-faith bargaining unworkable.[46] But bargaining in the context of a *Sturgis* unit is no more complicated than separate bargaining with the user and supplier employees. The same good-faith bargaining rules that apply to an individual employer, as well as to joint employers bargaining in a unit restricted to their jointly employed employees, also apply to joint employers bargaining with a mixed unit of jointly and solely employed employees. Further, the economic relationship between the user and supplier employers is a mandatory subject of bargaining to the extent that it

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[45] *See* WEIL, *supra* n.32 at 180 ("[F]ederal and state policies are based on a model of employment with a single, well-defined employer with direct responsibility in hiring and firing, managing, training, compensation, and development of its workforce. But that does not conform to the way the workplace is currently organized").

[46] *See, e.g.*, *Oakwood Care Ctr.*, 343 NLRB at 662 ("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"); *M.B. Sturgis*, 331 NLRB at 1310 (Member Brame, dissenting in part) ("this forced multiemployer bargaining would produce controversy and confusion as the employers strive to protect their differing interests even as they negotiate jointly with the union"); *id*. at 1320 ("[b]argaining in a unit that combines solely employed permanent employees and jointly employed temporary employees would cause precisely the conflicts of interest and submerging of minority group concerns that the community-of-interest test . . . is designed to avoid").

vitally affects employee terms and conditions of employment, regardless of the composition of the unit.

1. Collective bargaining involving a *Sturgis* unit is no more complicated than if the jointly and solely employed employees were in separate bargaining units.

The Act provides employees with the right "to bargain collectively through representatives of their own choosing,"[47] and obligates all parties to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . "[48] When bargaining-unit members are jointly employed, each employer is bound by this obligation to engage in good-faith bargaining as to the terms and conditions it controls.[49] Since joint employers share and co-determine terms and conditions of employment, both employers—user and supplier—must be at the table in order to engage in effective bargaining for a unit including jointly employed employees, regardless of whether solely employed employees are also included in the unit.

Allowing these jointly employed employees to join a bargaining unit with their solely employed coworkers imposes no additional burden on the supplier; its bargaining obligation only extends to its employees. And the user employer has an irrefutable obligation to bargain both with its solely employed employees and the jointly employed employees, regardless of whether they are joined in a single bargaining unit. Accordingly,

[47] 29 U.S.C. §157.

[48] 29 U.S.C. §158(d).

[49] *Browning-Ferris Indus.,* 362 NLRB No. 186, slip op. at 16; *accord W. Temp. Serv. v. NLRB*, 821 F.2d 1258, 1265 (7th Cir. 1987) (observing that each employer in a joint employment relationship need only bargain over the terms and conditions it controls).

the bargaining obligation on each employer is identical whether the solely and jointly employed employees are in a combined bargaining unit or separate units.

The *Oakwood* majority also expressed concern about purported conflicts of interest for any union bargaining on behalf of both jointly and solely employed employees in a *Sturgis* unit.[50] But Section 9(a) representatives are regularly required to resolve competing interests between employee sub-groups, consistent with their duty of fair representation.[51] There are always potential conflicts between, for example: more and less senior employees; employees in different job classifications; employees on different shifts; or part-time and full-time employees. As the Sixth Circuit observed, rejecting a similar argument against permitting S.S. Kresge's solely employed employees and employees jointly employed by Kresge and its licensees to form a single bargaining unit, this potential for intra-unit conflict is not unique to mixed units.

> 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 that the unit is inappropriate, particularly when, as in the present case, there is a

[50] *See Oakwood Care Ctr.*, 343 NLRB at 662 ("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"); *M.B. Sturgis*, 331 NLRB at 1320 (Member Brame, dissenting in part) ("[b]argaining in a unit that combines solely employed permanent employees and jointly employed temporary employees would cause precisely the conflicts of interest and submerging of minority group concerns that the community-of-interest test . . . is designed to avoid").

[51] *See, e.g.*, *ALPA v. O'Neill,* 499 U.S. 65, 77 (1991) (holding that duty of fair representation standard applies to a union in its negotiating capacity).

sufficient community of interest among the employees in the unit to suggest the problem will not be serious if it does occur.[52]

The mere potential for competing interests between the jointly and solely employed employees does not justify thwarting their desire to join a *Sturgis* bargaining unit. And ultimately, user or supplier employees whose interests are so divergent as to make reconciling them difficult are unlikely to share a sufficient community of interest.

2. Mixed unit bargaining will not be inimical to collective bargaining or improperly interfere with the economic relationship between the "user" and "supplier" employers.

The *Sturgis* dissent and *Oakwood* majority expressed great concern over the injury that would be done to employer interests if employers were forced to collectively bargain with employees in a *Sturgis* unit.[53] They anticipated that the user and supplier employers would be forced to "negotiate[e] with one another as well as with the union."[54] This concern, of course, ignores the reality that the employers have elected to enter into an economic relationship with one another, one that presumably requires some amount of give-and-take to navigate even in the absence of a unionized workforce.[55] And user and

[52] *S.S. Kresge Co. v. NLRB*, 416 F.2d 1225, 1232 (6th Cir. 1969) (enforcing Board order finding violations of Section 8(a)(5) where Kresge and its licensees refused to bargain with the union representing their employees).

[53] *See, e.g.*, *Oakwood Care Ctr.*, 343 NLRB at 662 (finding that, as a matter of labor policy, "the bargaining structure contemplated in [*Sturgis*] gives rise to significant conflicts among the various employers and groups of employees participating in the process").

[54] *Id*. at 663.

[55] *See* Tollen, *supra* n.17 at 191 ("The facts that permit two separate employers to be treated as joint employers demonstrate a voluntary alliance. Consent to the alliance is implicit.").

supplier employers already have to negotiate together with the collective-bargaining representative of their jointly employed employees.

Moreover, to the extent that the economic relationship between the co-employers will be implicated in bargaining, the Supreme Court has long held that an employer's relationship with a third party is a mandatory subject of bargaining if it "vitally affects the 'terms and conditions' of [the employees'] employment."[56] For example, in *Teamsters Local 24 v. Oliver*, the Court held that a collective-bargaining agreement provision fixing a minimum rental rate for vehicles driven by owner-operators rather than the employer's own employees was a mandatory subject of bargaining.[57] The Court reasoned that the parties intended the provision to preserve the union's basic wage structure and to prevent independent drivers from undermining union wages.[58] The Court later held, in *Fibreboard Paper Products Corp. v. NLRB,* that an employer's decision to subcontract resulting in the replacement of bargaining unit employees with those of an independent contractor to do the same work under similar circumstances was a mandatory subject.[59] The Court noted the parallels between that case and *Oliver*, stating "[t]he only difference . . . is that the work of the employees in the bargaining unit was let out piecemeal in *Oliver*, whereas here the

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[56] *Allied Chem. Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179 (1971).

[57] 358 U.S. 283 (1959) (holding that Ohio antitrust law could not be applied to prevent the parties from carrying out the agreement).

[58] *Id*. at 294–95. *See also Am. Fed'n of Musicians v. Carroll,* 391 U.S. 99 (1968) (holding that union's minimum price floors for orchestra leaders in the club-date industry did not violate federal antitrust statute because they protected the hours, wages, job security, and working conditions of union members).

[59] 379 U.S. 203 (1964).

work of the entire unit has been contracted out."[60] In these cases, the Court deemed some aspect of an employer's dealings with a third party to be a mandatory subject of bargaining because it vitally affected employee terms and conditions of employment.[61]

It is also well established that a union may compel an employer to bargain over a mandatory subject of bargaining even if that term or condition is set by a third-party contractor.[62] When an employer contracts with a third-party, it often wields leverage over the terms of that contract.[63] "[A]n employer can always affect prices by initiating or altering a subsidy to the third-party supplier . . . and will typically have the right to change suppliers at some point in the future."[64]

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[60] *Id*. at 213.

[61] This does not mean, as the dissent in *Browning-Ferris* suggests, that union representatives will become "an equal partner in the running of the business enterprise…." 362 NLRB No. 186, slip op. at 23 (Members Miscimarra and Johnson, dissenting), quoting *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 676 (1981). Instead, only those aspects of the co-employers' relationship that *vitally affect* terms and conditions of employment are mandatory subjects. Indeed, as Justice Steward noted in his concurrence in *Fibreboard,* in a passage highlighted by the *Browning-Ferris* dissent, even though some entrepreneurial decisions, such as decisions concerning advertising, product design, the manner of financing, and sales, may affect job security, "it is hardly conceivable that such decisions so involve 'conditions of employment' that they must be negotiated with the employees' bargaining representative." *Fibreboard*, 379 U.S. at 223 (Stewart, J. concurring).

[62] *See Ford Motor Co. v. NLRB*, 441 U.S. 488, 503 (1979) (upholding Board decision that in-plant food services and prices set by third-party contractor were mandatory subjects of bargaining).

[63] *Id*. *See also* WEIL, *supra* n.32 at 258, 288–89 (arguing that just as companies that rely on contracting or franchise agreements (i.e. "user employers") maintain substantial control over the third-party entities (i.e. "supplier employers") to ensure that production targets and quality standards are met, they can also ensure compliance with workplace standards and collective-bargaining agreements).

[64] *Ford Motor Co.*, 441 U.S. at 503.

Assembling these threads, it is evident that the contract between a user and supplier employer "vitally impacts" employee terms and conditions. Wages and working conditions for jointly employed supplier employees are often directly enumerated in the employers' agreement, and even where such terms are not directly enumerated, the economic terms of the parties' agreement vitally affect the wages and working conditions of those employees. And as recognized in *Oliver,* the remuneration of the "third party" (jointly employed) employees directly affects the wages and other terms and conditions of the solely employed user employees. Moreover, unlike the scenarios presented in *Oliver*, *Fibreboard*, and *Ford*, the "third party" in this relationship—the supplier—is a statutory employer of some of the bargaining-unit employees with its own bargaining obligation. Thus, requiring bargaining in *Sturgis* units will not inappropriately burden employers' economic relationships with third parties.

In sum, where user employers and staffing firms have voluntarily chosen to enter into relationships they consider mutually advantageous, they have a duty to bargain with their employees' collective-bargaining representative. The composition of the unit does not affect that duty.

III. Conclusion

For all of the reasons articulated above, the General Counsel respectfully urges the Board to overrule *Oakwood Care Center* and restore the approach articulated in *M.B. Sturgis*. To the extent that employees wish to collectively bargain in a mixed *Sturgis* unit, the Board should permit them to do so, provided their employers are joint employers and the employees in the proposed unit share a community of interest. The holding in *Oakwood*

Care Center unnecessarily restricts employees' statutory rights to self-organization, and a return to the *Sturgis* model is consistent with Section 9(b) and will impose no additional burdens or obligations on employers.

Respectfully submitted,

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