COMMENTS

M.B. STURGIS AND THE NLRB’S REEVALUATION
OF THE CONTINGENT EMPLOYEE’S ABILITY
TO UNIONIZE: RAMIFICATIONS AND
RECOMMENDATIONS FOR THE USER EMPLOYER

ABSTRACT

In M.B. Sturgis, the National Labor Relations Board (NLRB or Board) addressed the question of whether, and under what circumstances, employees who are jointly employed by a "user" employer and a "supplier" employer may be included for representational purposes in a bargaining unit with employees who are solely employed by the user employer. As the nation's workforce has changed over recent decades due to an increase in "temporary" and "contract" workers, the NLRB reversed a ten-year-old ruling that had effectively denied "contingent workers" the right to join unions. The M.B. Sturgis decision permits union membership for contingent workers where there is a joint employee relationship, coupled with a finding of a "community of interest."

This comment explains that, while the decision is an important achievement for the contingent employee, it has significant ramifications for the employers who utilize this labor force. For example, the cost advantages of using the contingent employee may no longer exist. The user employer does, however, have several means available to limit the Board's decision.

Included within this comment is an examination of the background of the contingent workforce, as well as a summary of the Board's treatment of the contingent worker's ability to unionize. Following this examination is an analysis of the M.B. Sturgis decision and the rationale for overruling and clarifying precedent found in Greenhoot and Lee Hospital. Furthermore, this comment will examine the deficiencies in the Board's reasoning and will evaluate its effects on law and business.

After examining the Board's decision, this comment will suggest several remedies that the user employer may utilize to limit the Board's decision in M.B. Sturgis. By successfully preventing the joint employer status necessary, or by eliminating or minimizing evidence of a "community of interest," a user employer may increase its chances of preventing its contingent workers from unionizing and as a result increasing its costs. Other potential remedies, such as arguing a violation of section
158(b)(4)(A) of the NLRA and terminating the contract with the supplier employer, are explored as well.

I. INTRODUCTION

Recent decades have seen a transformation in the nation's work force due to an increase in the number of employees in temporary, part-time, or subcontracted positions.\(^1\) Previously, temporary workers could unionize with full-time employees with whom they worked only if the company that directly employed the temporary workers and the company where they worked agreed that they could form one group.\(^2\) Typically, the dual employers denied such requests.\(^3\) The ruling in *M.B. Sturgis*\(^4\) addresses the issue of the contingent worker's right to unionize as the nation's employers increasingly rely on temporary staff to trim costs and gain flexibility.

As a result of the National Labor Relations Board's (Board) attempt to address this escalating group of employees, the Board in *M.B. Sturgis*\(^5\) reversed a ten-year-old ruling that had effectively denied "contingent workers" the right to join unions. The Board's decision to permit contingent employees to unionize when a joint employer relationship exists could have significant ramifications for businesses that have become dependant upon this form of labor. This comment will address this issue, and will provide some suggestions for employers who wish to limit the Board's decision.

Beginning in Part II, this comment will explain the background of the contingent workforce. The background will include an explanation of the origin and characteristics of the contingent employee;\(^6\) an analysis of percentages indicating an increase in this form of labor;\(^7\) suggested reasons for the increase in this labor force;\(^8\) and finally, a summary of the Board's

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\(^1\) See Parts II.A & B (discussing characteristics and percentages of the contingent labor force).


\(^3\) See Sixel, supra note 2, at Bus. 1.


\(^5\) Id. at E-1.

\(^6\) See infra Part II.A.

\(^7\) See infra Part II.B.

\(^8\) See infra Part II.C.
treatment of contingent worker's ability to unionize,\(^9\) including an analysis of two key decisions, *Greenhoot*\(^10\) and *Lee Hospital*.\(^11\)

Part III will provide the background of the *M.B. Sturgis* case as well as the *Jeffboat Division*\(^12\) case included in the Board's decision. Furthermore, there will be an analysis of the Board's decision and the rational for overruling and clarifying precedent found in *Lee Hospital* and *Greenhoot*, respectively. Part IV will discuss and analyze the Board's reasoning in *M.B. Sturgis*, which sets precedent for the next generation of labor organization suits involving the contingent worker. In addition, this part will evaluate the deficiencies in the Board's reasoning and the practical effects of the decision on the law and business. In an attempt to address the issue, this comment will provide some suggestions for employers who utilize contingent workers and who wish to limit the Board's decision. Finally, Part V will summarize the discussion made in this comment.

II. BACKGROUND

A. *Name and Characteristics of the Contingent Workforce*

Generally, the work force of a corporation can be divided into two groups. The first group is comprised of the "core workers" who have a strong affiliation with the employer and are part of the "corporate family."\(^13\) Core workers "show [a] long-term attachment to the company and have a real measure of job stability,"\(^14\) including an implicit contract with their employers and often significant fringe or employee benefits.\(^15\) The second group, the "contingent workers," are characterized by possessing a weak affiliation with the specific employer and not maintaining a significant stake in a company.\(^16\) "Contingent workers are not considered part of the corporate family"\(^17\) and do not possess the same attachment and job-

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\(^9\)See infra Part II.D.


\(^12\)331 N.L.R.B. No. 173 (2000).


\(^14\)Id.

\(^15\)See *id.* at 864-65 (describing characteristics of core workers).

\(^16\)See *id.* at 865 (describing the contingent work force).

\(^17\)See Belous, *supra* note 13, at 865.
stability as core employees. Generally, employers "do not make implicit contracts with contingent workers."19

The term used to describe the contingent employee labor force "is an umbrella phrase [used] for different categories of nonpermanent employees including temporary workers."20 Although part-time and temporary work are the most prevalent forms of contingent work, "the term generally is understood . . . to encompass independent contractors, leased employees, seasonal or casual employees, and contract employees."21 "While temporary work is generally thought to be short-term, 'it may extend into months or even years."22 As a result, contingent work has made the U.S. labor market more flexible in terms of the number of work hours that employees supply and employers purchase.

Contingent employment has a variety of characteristics, "including low[er] wages and [reduced] benefits," the employer's ability to acquire or release in accordance with "fluctuations in the labor market, and low[er] investment in human capital."23 Furthermore, temporary workers tend "to forego health insurance, unemployment compensation eligibility, and hourly wage rates commensurate with full-time hourly rates."24

While the most common type of temporary jobs are currently secretarial and clerical positions, there has been an emergence of temporary

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18 Id.

19 See id. at 864 (contrasting the contingent work force with the core workers).

20 See Bita Rahebi, Rethinking the National Labor Relations Board's Treatment of Temporary Workers: Granting Greater Access to Unionization, 47 UCLA L. REV. 1105, 1108 n.3 (2000) (Audrey Freedman, executive director of the Human Resources Program Group "coined the term 'contingent employee' during a 1985 conference on employment security, saying, 'It is a term that connotes conditionality.'") (citations omitted).


22 See Rahebi, supra note 20, at 1108 (quoting Clyde W. Summers, Contingent Employment in the United States, 18 COMP. LAB. L.J. 503, 509 (1997)).

23 See Kenneth G. Dau-Schmidt, The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Work Force, 52 WASH. & LEE L. REV. 879, 882 (1995) (explaining that these criteria were incentives for employers to employ more contingent workers than they otherwise would employ).

24 See Hiatt, supra note 21, at 741 (explaining that whether workers chose part-time or temporary work voluntarily or involuntarily, arguably few opted to forego these benefits).
workers within higher skilled professions. These professions include "doctors, lawyers, managers, and even chief executive officers."  

Despite the ability to hire temporary workers directly, a large number of employers rely on staffing agencies to supply their temporary workforce. Staffing agencies secure jobs for workers and in turn charge user employers a fee for the employees' services. In general, the supplier-agency often handles the payroll and other administrative matters of the employees. "This reliance creates an interesting triangular relationship in which there exists a supplier employer (the agency) and a user employer."  

The contingent workers have traditionally relied upon collective bargaining to advocate their views and to secure rights. As discussed below, they have also traditionally had limited access to unions to provide them with their needed representation.

B. Percentage Increase in the Contingent Workforce

Statistics show that the number of U.S. temporary workers is rapidly increasing. A study conducted by the General Accounting Office (GAO) "reports a tremendous growth in the 'temporary help supply industry' during the past two decades." According to data from the Bureau of Labor Statistics (BLS), the GAO reports that "from 1982 to 1998 the number of jobs in the temporary help supply industry rose 577 percent, while the total number of jobs in the work force grew only 41 percent." The report further noted that "certain industries and communities have begun to rely heavily on agency temps."
According to the NLRB, "In February 1999, nearly one percent of the U.S. work force, or 1.2 million employees, worked for 'temporary help agencies,' and another 0.6 percent worked for 'contract firms.'"[34] "BLS's most recent surveys indicate that . . . 'contingent' and 'alternative employment arrangements' accounted for as much as 4.3 percent of all employment in February 1999, or 5.6 million employees."[35] Furthermore, in 1999 the BLS "predicted that the number of temporary employees would increase [by] more than 50 percent between 1996 and 2006."[36]

C. Reasons for Increase

The rise of the contingent workforce can be explained either as a result of supply-led or demand-led growth.[37] Supply-led growth posits that "temporary employment is increasing because of changes in demographics."[38] Demand-led growth, however, "suggests that the increase is a result of employers' desires to cut labor costs."[39] Under demand-led growth, the temporary workforce permits employers to "reduce their administrative burdens by hiring employees who do not need extensive training or recruiting and can quickly be laid off."[40]

There are three significant benefits to employers who utilize contingent human resource systems to reduce labor costs. First, . . . contingent workers are often paid far less than core workers. Second, . . . contingent workers often do not receive the same fringe benefits as core

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[37]See Rahebi, supra note 20, at 1110 (citing François J. Cárre, Temporary Employment in the Eighties, in NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE 45, 70 (Virginie L. duRivage ed., 1992)). This comment suggests that, while both admittedly may be contributing factors, the growth has primarily been a result of employers attempting to cut labor costs.

[38]See id.


[41]See Belous, supra note 13, at 873 (examining the benefits and costs of contingent strategies).
workers. Third, contingent systems are much more flexible... [B]y using contingent workers an employer... [can] only pay... [for] the labor that [it]... needs." This third category presumably offers the largest benefit.\textsuperscript{43}

Many employers recently altered their basic human resource systems by reducing the size of their core work force and increasing their use of external labor markets and contingent workers.\textsuperscript{44} According to labor analysts, in an attempt to avoid dealing with labor unions and costly contracts, many firms have been hiring more temporary workers and sending jobs to contractors.\textsuperscript{45} Businesses are not just sending out "special projects but everyday functions like office cleaning, payroll processing, human resources departments and entire clerical and assembly-line units."\textsuperscript{46}

D. Board Treatment

By the end of the 1960s, there was neither a court nor a Board decision "barring... units combining solely employed employees and jointly employed employees on the basis that they constituted multiemployer units," absent employer consent.\textsuperscript{47} Jointly employed employees were granted inclusion subject only to the Board's traditional community of interest standards.\textsuperscript{48}

Until recently, two Board decisions guided the Board in its determinations regarding the permissibility of jointly employed and solely employed employees comprising a single unit. These two decisions, \textit{Greenhoot}\textsuperscript{49} and \textit{Lee Hospital}\textsuperscript{50} established precedent for statutory interpretation and Board policy requiring employer consent for these units.

\textsuperscript{42}See id.
\textsuperscript{43}See id. (providing as an example that the reduction in core corporate economists in many Fortune 500 companies may be considered proof of this claim).
\textsuperscript{44}See id. at 866 (describing the change in the internal labor market and the increased use of external labor markets).
\textsuperscript{45}See \textit{U.S. unions win in ruling on temporary workers}, supra note 34 (explaining the importance in the NLRB's decision in \textit{M.B. Sturgis, Inc.}).
\textsuperscript{46}See Christopher D. Cook, \textit{Temps Demand a New Deal}, \textit{The Nation}, Mar. 27, 2000, at 13, 15 (describing the scope and role of contingent labor in today's economy).
\textsuperscript{48}See id.; see also NLRB v. Zayre Corp., 424 F.2d 1159, 1165 (5th Cir. 1970) (finding that "the Board ha[d] often found... appropriate... unit[s]" of the user's employees and licensees' employees, "especially... when [the user] employer exercised... substantial control over the employment practices of the licensees and was in practical effect a joint-employer").
\textsuperscript{49}205 N.L.R.B. 250 (1973).
\textsuperscript{50}300 N.L.R.B. 947 (1990).
1. *Greenhoot*

In *Greenhoot*, the petitioner sought to establish a unit consisting of employees in fourteen separate office buildings. In its argument, Greenhoot contended that the Regional Director was incorrect in its finding that Greenhoot was the sole employer of the employees. Rather, Greenhoot contended, the respective building owners were the sole employers of the petitioned-for employees. Alternatively, Greenhoot argued that a combined unit was not appropriate because it was a joint employer with each of the building owners. The Board agreed with Greenhoot's alternative contention, and concluded that "Greenhoot and each of the Building owners [were] . . . joint employers at each of the respective buildings."

The Board reasoned that "separate units at each location" was appropriate because consent for a multiemployer unit was absent. Consequently, the Board held that a unit comprised of employees who are employed by one user employer as well as separate employers constitute a multiemployer unit.

2. Treatment After *Greenhoot* but Prior to *Lee Hospital*

Following *Greenhoot*, the Board continued to find that units combining solely employed employees and jointly employed employees was permitted and did not "implicate[] any multiemployer bargaining concern." Furthermore, in several unfair labor practice cases where solely employed employees and jointly employed employees were included in contractual units, the Board imposed a bargaining obligation on the joint

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32See id.; see also M.B. Sturgis, Inc., 331 N.L.R.B. No. 173, 170 Daily Lab. Rep. (BNA), at E-6 (discussing the arguments in Greenhoot, Inc.).
34Id.
35See id. at 251 (finding that the facts "sufficiently demonstrate that Greenhoot and the building owners at each building share or codetermine matters governing the essential terms and conditions of employment of the employees").
36See id. (finding that, absent multiemployer status, separate units are appropriate). See also M.B. Sturgis, Inc., 331 N.L.R.B. No. 173, 170 Daily Lab. Rep. (BNA), at E-6 (discussing the Greenhoot holding).
employers. Moreover, the U.S. Court of Appeals for the Seventh Circuit permitted bargaining of units comprised of solely employed employees and jointly employed employees absent employer consent.

3. The Lee Hospital Extension of Greenhoot

Seventeen years after Greenhoot, the Board in 1990 decided differently in Lee Hospital.61 In Lee Hospital, the petitioner sought a unit of certified registered nurse anesthetists (CRNAs), which the Regional Director found did not constitute an appropriate unit separate from the other hospital professionals.62 Upon seeking review of the decision, Lee Hospital argued that the CRNAs were jointly employed by itself and Anesthesiology Associates, Inc. (AAI).63 Moreover, Lee Hospital argued that as a result of this joint employer relationship a conflict of interest existed between the CRNAs and the other professionals employed by the hospital.64

The Board affirmed the Regional Director's dismissal of the petition; it recognized that the combined unit would conflict with its holding in Greenhoot,65 but "did not explain or reconcile the factual or legal differences between Greenhoot and Lee Hospital."66 Upon concluding that Lee Hospital and AAI were not joint employers of the CRNAs, the Board in Lee Hospital ultimately did not apply the rule from Greenhoot.67

In subsequent cases, the board continued to apply the rule from Lee Hospital. This rule has since been used "to prohibit any unit that would combine jointly employed employees with solely employed employees of..."
one of the joint employers, absent consent of both employers.\(^6\)

As noted by the Board in *M.B. Sturgis,* "No case since *Lee Hospital* has discussed, explained, or rationalized this new rule.\(^7\)

III. ANALYSIS

A. M.B. Sturgis

1. Introduction

The Board addressed the issue presented in *Greenhoot* and *Lee Hospital* due to the "ongoing changes in the American work force and workplace and the growth of joint employer arrangements."\(^8\) This includes "the increased use of companies that specialize in supplying 'temporary' and 'contract workers' to augment the work forces of traditional employers."\(^9\) Specifically, the Board deemed it necessary to address this issue because prior Board decisions in this area "were decided before the growth of these types of alternative employment arrangements.\(^10\)

The Board in *M.B. Sturgis* addressed "the question of whether[,] and under what circumstances[,] employees who are jointly employed by a 'user' employer and a 'supplier' employer can be included for representational purposes in a bargaining unit with employees who are solely employed by the user employer."\(^11\) In doing so, the Board's decision in *M.B. Sturgis* reexamined two key Board decisions: *Greenhoot, Inc.*\(^12\) and *Lee Hospital.\(^13\)

The Board in *M.B. Sturgis* reaffirmed the decision in *Greenhoot* such that it "requires employer consent for the creation of true multiemployer units involving separate user employers."\(^14\) The court, however, overruled


\(^{70}\)See *M.B. Sturgis, Inc.*, 331 N.L.R.B. No. 173, 170 Daily Lab. Rep. (BNA), at E-7 (reviewing Board treatment subsequent to *Lee Hospital*).

\(^{71}\)See id. at E-1.

\(^{72}\)See id.

\(^{73}\)Id.


\(^{75}\)205 N.L.R.B. 250 (1973).


Lee Hospital in order to assist the growing number of contingent workers who have been denied representational rights.\(^78\)

2. The Factual History (M.B. Sturgis)

The petitioner, Local 108, filed a petition to represent a unit of all employees at a plant operated by M.B. Sturgis located in Maryland Heights, Missouri.\(^79\) At this plant, Sturgis employed 34-35 employees in addition to 10-15 "temporary" employees who were supplied by Interim, a national provider of temporary help personnel.\(^80\) The temporary employees were employed under practically identical working conditions: they "work[ed] side-by-side with Sturgis' employees, perform[ed] the same work, and [were] . . . subject to the same supervision."\(^81\)

Interim's responsibilities, beyond hiring the temporaries, also included determining the wages and benefits received and paying the temporary employees.\(^82\) Both the full-time and temporary employees worked the same hours; however, temporary employees at Sturgis were not permitted to work more than forty hours per week.\(^83\) Neither Sturgis nor Interim disputed that they were joint employers of the temporary employees.\(^84\)

"[T]he Regional Director for Region 14 issued a Decision and Direction of Election in M.B. Sturgis, Inc."\(^85\) In the decision, the Regional Director held that under Lee Hospital, the temporary employees could not be included in the same unit with Sturgis's solely employed employees, absent the consent of both Sturgis, who did consent, and Interim, who did not.\(^86\) The Regional Director's decision was based primarily on Interim's

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\(^{78}\)See id.

\(^{79}\)See id. at E-2.

\(^{80}\)See id.


\(^{82}\)See id.

\(^{83}\)See id.

\(^{84}\)See id.


\(^{86}\)See id. at E-2. Interim had stated in oral arguments that it did not consent to the inclusion of the temporary employees in the unit. Id. at E-3. Furthermore, Interim contended that Greenhoot and Lee Hospital controlled the case. Id. Under these cases, Interim argued that the Board could not include the temporary employees "without violating the principles of multiemployer bargaining, i.e., that the employers must have expressly consented to joint negotiations or have unequivocally manifested through a course of conduct an intent to be bound by group collective bargaining." See id. (relying on Hughes Aircraft Co., 308 N.L.R.B. 82
failure to participate in the election and a lack of evidence to demonstrate that Interim had consented to the inclusion of the temporary employees.87 The Regional Director subsequently directed an election among the solely employed employees only, excluding the temporary employees.88 Further, the Regional Director denied a motion made by Sturgis to reopen the hearing to determine whether Interim would in fact consent to the temporary employees being included in the unit.89

Thereafter, Sturgis requested, and was granted, Board review as to the exclusion of the temporary employees and as to the Regional Director's denial of its motion to reopen the hearing to ascertain whether Interim would consent to the inclusion of the temporary employees in the unit.90

3. Parties' Contentions (M.B. Sturgis)

The petitioner, Local 108, contended that the temporary employees should not have been included in the unit "because of the short-term nature of their employment."91 In addition, Local 108 contended that "the employees are jointly employed and, under the Greenhoot doctrine as applied in Lee Hospital, . . . [may not] be included in the same unit [as] the . . . permanent employees solely employed by Sturgis."92

Sturgis argued that consent by Interim should not have been required93 and "that the Board should look only to whether the employees share a community of interest with its regular employees."94 Sturgis further argued that the decision in Greenhoot "does not stand for the principle that everyone has cited it for, and that [Greenhoot's] progeny has improperly expanded its underlying meaning."95 Sturgis additionally argued that the unit would not be appropriate if the temporary employees were not included, and that the Regional Director was mistaken in refusing to reopen the record to permit Interim to be a party to the case.96

(1992) (citing Greenhoot and Lee Hospital)).

87See id. at E-2.
88See id. at E-1 to E-2.
90See id. (citing § 102.67 of the Board's Rules).
91See id. at E-3.
92See id.
94See id.
95See id.
96Id.
B. Jeffboat Division

1. The Factual History (Jeffboat Division)

Jeffboat operated as an inland river shipbuilder on the Ohio River in Jefferson, Indiana, and utilized employees provided by T.T. & O. Enterprises (TT&O), a "temporary supplier firm." Petitioner, Teamster Local 89, filed a unit clarification petition with the Acting Regional Director for Region 9 to clarify that the bargaining unit would include the employees supplied by TT&O for use by Jeffboat. Petitioner, Local 89, sought "to accrete these employees to a unit ... covered by a collective-bargaining agreement between Jeffboat and Local 89." The Acting Regional Director dismissed the unit clarification petition because it found that the user and supplier employers were joint employers of the supplied employees. Without addressing other issues presented in the petition, the Acting Regional Director found that the jointly employed employees could not be included in the existing unit.

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98 See id. at E-2.
99 See id. at E-3.
100 See id. at E-2 (citing Jeffboat, 331 N.L.R.B. No. 173 (2000)). The Acting Regional Director concluded that "Jeffboat and TT&O are joint employers of the TT&O-supplied employees," and that Jeffboat control[ed] practically all aspects of the daily environment of the TT&O-supplied employees. Jeffboat's supervisors assign[ed], direct[ed], and overs[aw] the daily work of the TT&O-supplied employees. The Acting Regional Director also found that Jeffboat supervisors had authority to discipline the TT&O-supplied employees for unsatisfactory performance or any infraction of Jeffboat's rules and regulations, and are responsible for monitoring the time that TT&O-supplied employees spen[t] on different Jeffboat assignments.

See id. at E-3. Despite a finding by the Acting Regional Director that "the jointly employed employees 'share a strong community of interest' with the bargaining unit employees, he dismissed the petition because Jeffboat and TT&O do not consent to joint bargaining." Id.

101 See M.B. Sturgis, Inc., 331 N.L.R.B. No. 173, 170 Daily Lab. Rep. (BNA), at E-3 (relying on Greenhoot and Lee Hospital). Because of this finding, the Acting Regional Director "found it unnecessary to reach Jeffboat's several alternative grounds for dismissing the petition." Id.

Jeffboat made the following alternative arguments: (1) the jointly employed employees are temporary employees who lack a sufficient community of interest to be included in the unit; (2) the petition is untimely because Local 89 unsuccessfully sought to limit the subcontracting of work during the parties' most recent contract negotiations; and (3) the grievance-arbitration procedure is the only appropriate means for resolving this dispute.

See id. at E-3 n.8.
because, under *Greenhoot* and *Lee Hospital*, neither Jeffboat nor TT&O consented to joint bargaining.\(^{102}\)

Subsequently, "Local 89 filed a request for review of the Acting Regional Director's dismissal of the petition, contending that a substantial issue is raised by the Acting Regional Director's reliance on *Greenhoot* and *Lee Hospital*.\(^{103}\) In addition, Jeffboat filed a conditional request for review, asserting that the Regional Director was mistaken in finding that it was a joint employer of the TT&O-supplied employees.\(^{104}\) Alternatively, Jeffboat contended "that the Acting Regional Director erred by failing to reach the Employer's other asserted grounds for dismissing the petition."\(^{105}\)

Subsequently, the Board granted Local 89's request for review as well as Jeffboat's conditional request for review.\(^{106}\) The Board, however, suspended Jeffboat's alternative arguments.\(^{107}\)

2. Parties' Contentions (Jeffboat Division)

Petitioner, "Local 89[,] contend[ed] that the Board should cease adhering to the *Greenhoot* 'doctrine' as a bar to including the jointly employed employees in the contractual unit."\(^{108}\) Local 89 further argued that no basis existed for a requirement of consent because the unit was not a "true" multiemployer unit.\(^{109}\) Furthermore, Local 89 urged that the joint employer finding be affirmed.\(^{110}\)

In contrast, both Jeffboat and TT&O contended "that the Board should adhere to *Greenhoot*.\(^{111}\) They contended that *Greenhoot* provided "the underlying policy reasons for prohibiting any change in this established bargaining unit, absent mutual consent."\(^{112}\) In addition, they argued that TT&O was the sole employer of the supplied employees and that the Acting Regional Director's joint employer finding was not supported by sufficient evidence.\(^{113}\) TT&O further contended that it was

\(^{102}\)See id. at E-3.

\(^{103}\)See id.

\(^{104}\)See id.


\(^{106}\)Id.

\(^{107}\)See id.

\(^{108}\)See id. at E-3.


\(^{110}\)See id.

\(^{111}\)See id.

\(^{112}\)See id.

appropriate to require employer consent to include the thirty employees in the unit; "otherwise, TT&O would become bound by a collective-bargaining agreement without ever having the opportunity to bargain over the terms and conditions therein."\(^{114}\)

### C. The National Labor Relations Board Decision

The Board began its analysis by examining whether joint employer status existed between Jeffboat and TT&O.\(^{115}\) The Board concluded that the Regional Director was correct in finding that Jeffboat and TT&O were joint employers under current Board precedent.\(^{116}\) "[T]he 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment."\(^{117}\) The basis of a finding of joint employer status "is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer."\(^{118}\)

The Board concluded that in order to determine whether two or more employers are joint employers under current precedent "the entities must share or codetermine matters governing essential terms and conditions of employment."\(^{119}\) To achieve this, it must be shown that the employers "meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."\(^{120}\)

Upon examination, the Board found the record to fully support the finding that Jeffboat's supervisors "assign, direct, and oversee the daily work of the TT&O-supplied employees; that Jeffboat supervisors have authority to discipline TT&O-supplied employees; and that Jeffboat's supervisors are responsible for monitoring the time spent by TT&O-

\(^{114}\)See id.

\(^{115}\)Id. at E-4. In M.B. Sturgis, the joint employer status was undisputed. See id. at E-4 n.9.

\(^{116}\)See id. at E-4.

\(^{117}\)See NLRB v. Browning-Ferris Indus., 691 F.2d 1117, 1123 (3d Cir. 1982) (determining the appropriate standard for joint employer status) (citations omitted) (emphasis added).

\(^{118}\)See id. (citing Walter B. Cooke, 262 N.L.R.B. No. 74, slip op. at 31 (1982)).


\(^{120}\)See id. (citing Riverdale, 317 N.L.R.B. at 882 (citing TLI, Inc., 271 N.L.R.B. 798 (1984))).
supplied employees on different Jeffboat assignments.\textsuperscript{121} In addition TT&O granted Jeffboat the authority to direct and assign the supplied employees work, hours and overtime.\textsuperscript{122}

After finding that joint employer relationships existed in both \textit{M.B. Sturgis} and \textit{Jeffboat}, the Board addressed "whether, under the statute and Board policy, employer consent is required in order for the Board to combine in one unit employees who are jointly employed by a supplier employer and a user employer, with employees solely employed by the user employer.\textsuperscript{123}

Upon consideration, the Board found that \textit{Lee Hospital} was incorrectly decided because it did not involve multiemployer bargaining, and therefore, consent was not required.\textsuperscript{124} The Board concluded "that a unit composed of employees who are jointly employed by a user employer and a supplier employer, and employees who are solely employed by the user employer, is permissible under the statute without the consent of the employers.\textsuperscript{125}

The Board began by examining section 9(b) of the National Labor Relations Act (NLRA or Act).\textsuperscript{126} The Board concluded that "consent" of the employer is not required "for employees to be represented for collective bargaining in an employer-wide unit"\textsuperscript{127} and found that "the traditional community of interest test" is the appropriate method to use for determining whether employees may be represented in collective bargaining.\textsuperscript{128}

The Board, however, has consistently held that units that are multiemployer in scope are "not appropriate absent the consent of all parties.\textsuperscript{129} The Board noted that:

\begin{itemize}
\item \textsuperscript{121}See id.
\item \textsuperscript{122}See id.
\item \textsuperscript{123}See \textit{M.B. Sturgis, Inc.}, 331 N.L.R.B. No. 173, 170 Daily Lab. Rep. (BNA), at E-4 to E-5.
\item \textsuperscript{124}See id. at E-7.
\item \textsuperscript{125}Id.
\item \textsuperscript{126}See id. ("Section 9(b) provides [that 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, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.").
\item \textsuperscript{127}See \textit{M.B. Sturgis, Inc.}, 331 N.L.R.B. No. 173, 170 Daily Lab. Rep. (BNA), at E-7.
\item \textsuperscript{128}See id. (citing NLRB v. Action Automotive, 469 U.S. 490, 494 (1985); Kalamazoo Paper Box, 136 N.L.R.B. 134, 137 (1962); Globe Discount Cty, 209 N.L.R.B. 213 (1974)).
\item \textsuperscript{129}See id. (citing Rayonier Inc., 52 N.L.R.B. 1269 (1943); Pacific Metals Co., 91 N.L.R.B. 696, 699 (1950); Chicago Metro. Home Builders Ass'n, 119 N.L.R.B. 1184, 1186 (1957); Bennett Stone Co., 139 N.L.R.B. 1422, 1424 (1962)).
\end{itemize}
cases like *Greenhoot* involve multiple user employers whose only relationship to each other is that they obtain employees from a common supplier employer. In such cases, the union seeks to represent a unit that includes employees of all of the users. Thus, it is clear that the unit is a multiemployer unit and therefore consent of the separate user employers would be required before the Board could direct an election.130

Where all employees are performing work on behalf of the user employer, however, the Board will not find these units to constitute a multiemployer unit requiring consent.131 The Board found that "a unit of all of the user's employees, both those solely employed by the user and those jointly employed by the user and the supplier, is an 'employer unit' within the meaning of Section 9(b)."132 They found this decision to be consistent with precedent because "[t]he scope of a bargaining unit is delineated by the work being performed for a particular employer."133 According to the Board, "in a unit combining the user employer's solely employed employees with those jointly employed by it and a supplier employer, all of the work is being performed for the user employer."134 In addition, both solely and jointly employed employees within the unit are employed by the user employer.135

Furthermore, the Board noted that "[s]eparating 'regular' employees—i.e., the solely employed—from the 'temporaries' who may... share the same classifications, skills, duties, and supervision, creates an artificial division that is not required by the statute."136 The Board consequently overruled *Lee Hospital* and found "no statutory requirement of employer consent to a unit combining solely and jointly employed employees of a single use employer."137 The Board returned to the community of interest test, as applied prior to *Lee Hospital*, to decide whether to include jointly employed employees in units with solely employed employees.138

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130See id.
132See id.
133See id.
134See id.
136See id.
137See id. at E-7 to E-8.
138See id. at E-8 (citation omitted).
1. Community of Interest Analysis Applies

The Board next expounded upon the application of the community of interest test. This "test examines a variety of factors to determine whether a mutuality of interests in wages, hours, and working conditions exists among the employees involved." The Board concluded that the appropriateness of the unit will be decided on a case-by-case analysis of the particular circumstances.

The Board found that "[u]nder Section 9(b) of [the] statute, a group of an employer's employees working side by side at the same facility, under the same supervision, and under common working conditions, is likely to share a sufficient community of interest to constitute an appropriate unit."

2. Rejection of Arguments Opposing the Overruling of Lee Hospital

Upon overruling Lee Hospital and clarifying Greenhoot, the Board addressed various arguments presented by the dissent. First, the Board rejected the contention that the decision would impede bargaining because employers would be compelled "to bargain . . . over employees with whom they have no employment relationship." To the contrary, the Board determined that the employer is only obligated to bargain with units of employees "with whom it has an employment relationship and only to the extent it controls or affects their terms and conditions of employment."

Second, the Board rejected "the contention that an employer that controls only some aspects of the employment relationship cannot engage in meaningful bargaining." The Board found that the supplier employer was able to bargain with the solely employed employees of the user.


140 See id.

141 See id. at E-8(citing Swift & Co., 129 N.L.R.B. 1391 (1961); Kalamazoo Paper Box, 136 N.L.R.B. 134 (1962)) (emphasis added). Consequently, the Board noted that since the Regional Director in M.B. Sturgis did not decide whether the employees shared a community of interest, and in Jeffboat, the Acting Regional Director did not reach the issue whether the accretion of the jointly employed employees to the existing unit is warranted, the Board did not determine the appropriate units, but instead remanded the proceedings to the Regional Directors to decide. See id.

142 See id.


144 See id.
employer to the extent that it controls the terms and conditions of employment of the jointly employed employees.\textsuperscript{145} Therefore, the joint employers and the sole employers must only "bargain over the terms and conditions of employment of their [own respective] employees."\textsuperscript{146}

Third, the Board rejected the dissent's argument that by "requiring the joint employers to engage in 'involuntary' bargaining together 'injects into their relationship duties and limitations beyond those established and allocated in their agreement, creating severe conflicts in the underlying business relationship and rendering impossible the productive collective bargaining the majority envisions."\textsuperscript{147} The Board, relying on precedent, felt "confident that bargaining in these units is feasible."\textsuperscript{148}

3. Clarification of \textit{Greenhoot}

Upon overruling \textit{Lee Hospital}, the Board proceeded to clarify the application of \textit{Greenhoot}.\textsuperscript{149} The Board held that:

if a petitioner seeks to bargain only with the supplier employer, a petitioned-for unit of all the employees of a single supplier is not a multiemployer unit because the petition is seeking to represent the employees \textit{vis a vis} a single employer. If the petitioner names only the supplier employer in its petition, there is no statutory impediment to a supplier-wide unit under the Act.\textsuperscript{150}

Therefore, "\textit{Greenhoot}'s requirement of employer consent to the creation of a multiemployer unit has no application when the bargaining relationship sought is only with the supplier employer."\textsuperscript{151}

\textsuperscript{145}\textit{See id.}
\textsuperscript{146}\textit{See id.}
\textsuperscript{148}\textit{See \textit{id.} (relying on S.S. Kresge v. NLRB, 416 F.2d 1225, 1231 (6th Cir. 1969); Gallencamp Stores v. NLRB, 402 F.2d 525, 531 (9th Cir. 1968)).}
\textsuperscript{149}\textit{See \textit{id.} at E-10.}
\textsuperscript{150}\textit{M.B. Sturgis, Inc., 331 N.L.R.B. No. 173, 170 Daily Lab. Rep. (BNA), at E-10 (footnote omitted).}
\textsuperscript{151}\textit{id.} (footnote omitted).
IV. EVALUATION

The Board's decision in *M.B. Sturgis*⁵² ostensibly makes it easier for unions to organize the contingent work force. Prior to this ruling, employees were prevented from organizing because employers used their joint employer status as a means to refuse consent.⁵³ But as "the dual-consent requirement is abandoned, joint employer status [is] essential in allowing temporary workers to organize in the user's unit."⁵⁴

While the Board did not overtly state the effects of its decision, for the reasons outlined below, this decision has significant ramifications for corporations.

As previously discussed, "temporary workers are attractive to employers because of their flexibility and low-maintenance nature."⁵⁵ Employers, however, may become reluctant to utilize this work force now that the employees have the ability to unionize without employer consent.⁵⁶ Consequently, "employers may regard temporary employment as a less attractive option, which [could] translate into a decrease in . . . [the use of contingent] employment."⁵⁷

This Part will examine the Board's decision and the consequences that this decision may have on the utilization and recent dependency of contingent workers. Furthermore, this comment will briefly discuss the effect that the Board's decision may have on supplier companies. In an attempt to assist companies affected by this decision, this comment will suggest some possible remedies for user employers who wish to limit the *M.B. Sturgis* decision.

A. The Elimination of Employer Consent May Remove the Desirability of Utilizing Contingent Employees

The *M.B. Sturgis* decision could complicate the way that employers deal with employees and eliminate some of the cost advantages of using

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⁵²See id.

⁵³See supra Part II.D; see also Rahebi, supra note 20, at 1115 (discussing the use of joint employer status as a means of refusing consent).

⁵⁴See Rahebi, supra note 20, at 1115 (discussing incentives and disincentives in seeking a joint employer determination).

⁵⁵See supra Part II.C; see also Rahebi, supra note 20, at 1131 (discussing possible changes in temporary employment status).

⁵⁶See Rahebi, supra note 20, at 1131.

⁵⁷See id. (discussing the implications of allowing temporary workers to unionize with non-temporary workers).
temporary employees. The low wages and benefits that make contingent workers so appealing to companies may disappear should contingent workers be able to readily unionize with the user's employees.

For example, because contingent workers require less training, this decision may lead to increased costs for companies who utilize contingent workers should unions require more extensive training. Additionally, once these employees are included in units with full-time employees who receive higher wages, benefits and training, user employers and supplier employers are bound to be thrust into negotiations to alleviate the discrepancy.

Employers may now be forced to deal with temporary workers in the same manner as they deal with their regular employees. Should the contingent workers decide to unionize with the user employer's full-time employees, employers will no longer be able to "artificially separate the two groups of workers." While user employers have traditionally been able to limit the pay and benefits of the temporary workers, for example, this may not be such an achievable result once the workers accrete into the user employer's full-time employee union.

By increasing the bargaining power of the temporary employees, employers will be forced to pay more in private benefits, which has normally been provided to core employees only. Examples of these are health and pension benefits, sick leave, vacation days, and disability benefits. Employers may be discouraged from employing those workers if they are required to provide proportionate benefits because it "would be akin to increasing the minimum wage."

Another by-product of the M.B. Sturgis decision may be increased costs to companies in legal fees resulting from challenges that this decision is likely to bring. Companies are unlikely to allow temporary workers to

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158 See Hiatt, supra note 21, at 751.
161 See Dau-Schmidt, supra note 23, at 886-87 (citation omitted).
162 See id. (suggesting that the issue of disproportionate benefits of contingent workers and core workers needs to be addressed).
163 See id. (citing David Card, Using Regional Variation in Wages to Measure the Effects of the Federal Minimum Wage, INDUS. & LAB. REL. REV., Oct. 1992, at 22 (finding that recent empirical work on the employment effects of the minimum wage calls this conclusion into doubt)).
be represented by their unions uncontested. Consequently, a greater number of representation hearings will likely be held to determine whether a joint employer relationship exists and if so, whether there is a "community of interest." The ability to release the contingent worker, either when the labor market fluctuates or when the company enters into a slow period, is yet another appealing aspect of using contingent workers that may be compromised by the *M.B. Sturgis* decision. As discussed above, one of the main reasons employers utilize this form of labor is because of the flexibility it affords them to acquire and dismiss employees as the labor market fluctuates. Once the contingent work force is included in the same bargaining unit as the full-time employees, employers will not be able to release the contingent workers without creating a substantial risk of exposing themselves to unfair labor practice charges.

Consequently, the Board's decision may reduce or potentially eliminate the use of contingent workers by employers wishing to avoid three-party bargaining. Alternatively, user employers may opt to eliminate their existing regular employee workforce, replacing those employees with all contract employees.

**B. Effect on Supplier-Companies**

Besides the impact the Board's decision in *M.B. Sturgis* will have on employers' reliance on and utilization of contingent workers, supplier employers will also feel the effects of this decision as various questions and issues are resolved over time.

Temporary agencies may feel the most immediate impact by the *M.B. Sturgis* decision. "Although the[] employees are hired by the temporary agency, the board ruled that for the purposes of labor law they are considered employees of the client company if they work side by side with full-time employees, doing the same work under the same

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164 See *U.S. unions win in ruling on temporary workers*, supra note 34 (paraphrasing labor analyst Dr. Gary Chaison).


166 See Dau-Schmidt, supra note 23, at 882.

167 See Prepared Testimony of G. Roger King, supra note 165.

168 See id. (suggesting potential implications of the Board's decision in *M.B. Sturgis, Inc.*).

169 See Swoboda, supra note 160, at A01.
Consequently, "unless jointly employed and solely employed employees are represented in separate bargaining units, suppliers of temporary labor will be enmeshed in labor disputes over which they have no control, contrary to the policy of the secondary boycott laws."171

C. Recommendations for Employers Who Want to Limit the Decision

1. Prevent Joint Employer Status

Corporations that utilize contingent workers have several means available to them to limit the Board's decision in M.B. Sturgis. One recommended remedy is for user-employers to prevent the joint employer status necessary for contingent workers to be able to unionize with the full-time employees employed by the user employer. By eliminating the joint employer status required by the M.B. Sturgis decision, the old multi-employer consent requirements will apply.

The joint employer relationship is found where one entity affirmatively and actively participates in the control of labor relations and working conditions for employees of another entity, despite the absence of common ownership.172 Therefore, a user employer may be able to avoid joint employer status by preventing unions from showing the right to control.

The right to control test is a factual inquiry "based on direct control and whether employers have 'possessed sufficient control over the work of the employees to qualify as a joint employer.'"173 Since the right to control test is one factor used to determine joint employer status, employers may be able to avoid liability by "circumvent[ing] the test by demanding that the [supplier] 'maintain a thin level of supervisory oversight.'"174 In other words, a user employer can require the supplier employer to employ specific procedures at work which would allow the user employer to avoid joint employer status "by saying that it does not directly impact the workplace."175

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170Id.
173See Rahebi, supra note 20, at 1116 (quoting Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964); Browning-Ferris Indus., 691 F.2d at 1121).
174See Rahebi, supra note 20, at 1117 (quoting Hiatt, supra note 21, at 747).
175See Rahebi, supra note 20, at 1117-18 (describing the use of the right to control test in determining joint employer status) (emphasis added).
By requiring the supplier to implement these precautions, "the staffing agency becomes a middleman, or screen, that shields the user [employer] from liability."\textsuperscript{176} For example, a user employer wishing to avoid obligations can ask the staffing agency to supervise the employees. Additionally, the user employer can direct the staffing agency to set "particular wages, terms, and conditions of employment,"\textsuperscript{177} factors typically used to establish that the staffing agency is the sole employer. These precautions would permit the user employer to "indirectly control the [supplied] employees by relying on the staffing agency."\textsuperscript{178}

Because meaningful day-to-day supervision of the contingent employee and exercise of the authority to discipline and discharge the employee, or to effectively recommend such actions, are generally required to establish a joint employer relationship, employers may be able to avoid the relationship by simply maintaining minimal or routine supervision or direction of employees.

2. Elimination of Community of Interest

An alternative remedy available for user employers desiring to limit the \textit{M.B. Sturgis} decision is to eliminate the community of interest that is required before contingent workers are able to unionize with full-time employees employed by the user employer. As explained above, the community of interest test "requires an examination of whether there is a substantial similarity in wages, hours, and working conditions among the employees."\textsuperscript{179}

As with the precautions suggested for preventing a joint employer relationship, employers can make distinctions between the permanent and temporary employees to ensure that there is no community of interest. A user employer can establish different working conditions for the temporary and regular employees based on standards examined in the community of interest test.\textsuperscript{180} By establishing "different wages, different benefits, different supervision, and different hours of work," the user employer may "diminish" a union's ability to argue that "the two groups of employees have common interests."\textsuperscript{181} Thus, the less common denominators that

\textsuperscript{176}See id. at 1118.
\textsuperscript{177}See id. at 1119.
\textsuperscript{178}See id.
\textsuperscript{180}See id.
\textsuperscript{181}See id.
contingent employees share with regular employees, the less likely they will be included in a proposed bargaining unit. The user employer may take to prevent a community of interest. First, an employer should not "keep the same temporaries for an indefinite period of time." The user employer should instead "establish a fixed time when [the temporaries] either become [a] regular employee[] or are replaced." To accomplish this, the employer should "notify [the] temporary employees that their employment will end on a fixed date . . . [and] [r]equire them to sign statements in which they unequivocally acknowledge that their employment is of a temporary nature and will expire at no later than a certain [predetermined] date" and that they are not "entitled to the same benefits as [the] regular workforce." Second, the user and supplier employers should agree in writing that the supplier has the responsibility of disciplining the temporary employees. Under the M.B. Sturgis decision, temporary workers can join an existing union with the full-time employees if the user-employer supervises the employee, either by assigning projects or providing discipline. One way the user employer can prevent a community of interest is to "establish a separate system of disciplining their employees and rely on temporary agenc[ies] to handle problems that crop up among its own employees." Third, the user employer should communicate to the temporary employees that any mistreatment or harassment by regular employees should be reported to the supplier employer. Fourth, temporary employees should not be given any handbooks or be included in meetings and functions involving regular employees. Fifth, the user employer should not "conduct performance reviews [of the] temporary employees." Finally, the user employer should reduce their degree of control over the temporary employees.

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183 See id.
184 See id.
186 See Temps eligible for union representation at job assignments, supra note 182.
187 See Sixel, supra note 2.
188 See Temps may be included in regular employees' bargaining unit, supra note 185.
189 Id.
190 See id.
Another possible way for a user employer to limit the *M.B. Sturgis* decision is to claim a violation of section 158(b)(4)(A) of the NLRA.191 By permitting bargaining units without employer consent, employers can argue they will be forced into multiemployer bargaining in violation of section 158(b)(4)(A) of the Act.193

A user employer can argue that as a result of the contingent worker's ability to unionize without having first obtaining permission, they will not be protected from boycotts.194 The statute specifically prohibits a union from placing economic pressures on a neutral employer. In essence, this provision ensures that economic pressures are only placed on employers who have the power to change work conditions.195

Should a sufficient degree of control over the workforce be found, unions may be able to apply economic pressures on employers.196 These once "neutral employers" would no longer be immune from secondary

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191See *M.B. Sturgis, Inc.*, 331 N.L.R.B. No. 173, 170 Daily Lab. Rep. (BNA), at E-3 to E-4 (amic present representing the employers). Section 158 reads:

(b) Unfair labor practices by labor organization.

It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section.


193See id.

194See Rahebi, supra note 20, at 1131 (describing the implications of utilizing a hybrid test to determine joint employer status).

195See id. at 1115-16 (explaining why employers may want to avoid joint employer status).

196See id. at 1131.
boycotts. Therefore, employers could no longer avoid responsibility by shielding themselves through the use of a screen.

Employers may choose to avoid joint employer status to gain protection from secondary boycotts under section 158(b)(4) of the NLRA. By following the precautions outlined above and remaining a "neutral employer," the user employer can significantly limit action that employees may take.

4. Termination of Contract with Supplier-Employer

As mentioned above, the M.B. Sturgis decision could significantly affect the use of contingent workers in an effort to avoid union problems. Therefore, a final recommendation to user employers wishing to limit the M.B. Sturgis decision is termination of the contract with the supplier employer.

If contingent employees win a union election, the user employer can effectively nullify the election by canceling the contract. User employers have the option of terminating their contract with the supplier employer based solely on the unionization of its employees. The NLRB has held that a user employer who fires a supplier employer does not violate section 158(a)(3) of the NLRA merely because its employees engaged in union

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197See id. "At oral arguments for these cases, 'the NLRB's general counsel conceded that more picketing could result from the new standard.'" Id. at 1131 n.123 (quoting Harold P. Coxson, NLRB to Rule on Unionizing Temporary Workers, NAT'L J., Feb. 24, 1997, at C4).

198See Rahebi, supra note 20, at 1131 (discussing the effects on employers of using a hybrid test in determining joint employer status).

199See id. at 1115 (discussing incentives and disincentives for employers in seeking joint employer status).

200See id. at 1116.

201See U.S. unions win in ruling on temporary workers, supra note 34.

202See Hiatt, supra note 21, at 745.

203See Rahebi, supra note 20, at 1114 (explaining why current options available to temporary employees are not practical).

204Section 158 reads:
Unfair labor practices
(a) Unfair labor practices by employer.
   It shall be an unfair labor practice for an employer--
   (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day
activity. 205 "The user employer is only limited in that it cannot threaten to terminate the employees or explain its antiunion motive to the supplier employer." 206 In addition, the user employer is restricted by sections 158(a)(3) and 158(a)(1) which state that it would be a violation of these sections if the user employer instructed the supplier employer to lay off specific employees due to their union affiliations. 207 

Moreover, the Board's decision in M.B. Sturgis mentions approvingly the holding of Ford Motor Co. v. NLRB . . . that an "employer's right to change suppliers," not of temporary employees but of vending machine food and beverages provided to employees, "gives it leverage over such services and prices" . . . and therefore such third-party supplier's services and prices are within the scope of mandatory bargaining. 208 

User employers can usually find alternative, cheaper supplier companies. Unless the supplier company implements one of the suggested stipulations to prevent joint employer status or a community of interest, the user employer has the option of terminating the contract with that supplier.

following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.


205 See Rahebi, supra note 20, at 1114 (citing Local No. 447, United Ass'n of Journeymen & Apprentices (Malbaff Landscape), 172 N.L.R.B. 128, 129 (1968)).

206 See Rahebi, supra note 20, at 1114 (citing Craig Becker, Labor Law Outside the Employment Relation, 74 Tex. L. Rev. 1527, 1550-51 (1996)).

207 See Rahebi, supra note 20, at 1114 (citing Dews Constr. Corp., 231 N.L.R.B. 182, 182 n.4 (1977)).

208 See Eric Rosenfeld, NLRB Restores Representation Rights to Temps, N.Y.L.J., Outside Counsel, Sept. 25, 2000, at 6 (citing Ford Motor Co. v. NLRB, 441 U.S. 488 (1999)).
Because the direct employer of the employees is the only one obligated to bargain, even if the contract is not terminated, "the system of competitive bidding effectively bars the newly unionized contractor from making any economic concessions." Consequently, the user employer "lack[s] the effective capacity to improve their employees' wages unless their clients are willing to bear the increased labor costs."

V. CONCLUSION

The makeup of the American work force has changed drastically in the last few years. The NLRB recognized this issue and addressed it in M.B. Sturgis, whereupon it decided to overrule its 1990 Lee Hospital ruling because of the "ongoing changes in the American work force . . . including the increased use of companies that specialize in supplying 'temporary' and 'contract' workers to augment the work forces of traditional employers." The decision permits union membership of contingent workers when there is a joint employer relationship coupled with a finding of a "community of interest."

While the decision is an important achievement for the contingent employee, it has significant ramifications for employers who utilize this labor force. No longer will the cost advantages of using contingent employees from a single supplier exist. These user employers do, however, have several means available to limit the Board's decision.

If user employers prevent the joint employer status necessary for contingent workers to unionize with the user employer's full-time employees, contingent workers will arguably not be successful in implementing the Board's decision in M.B. Sturgis. Furthermore, by eliminating or minimizing any trace of evidence suggesting a "community of interest," a user employer may increase its chances of preventing its contingent workers from unionizing and increasing its costs. Arguing a violation of section 158(b)(4)(A) is another remedy available to prevent the unionization of this valued labor source. Should all else fail, the user employer retains the option of terminating the contract with the supplier employer.

Mark D. Olivere

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209 See Hiatt, supra note 21, at 745 (providing a remedy for the frustrated collective bargaining that may result from contract employees winning a union election).

210 See id. (providing that, if contract employees won a union election, contracting arrangements would be frustrated because contractors would be unable to afford the increased costs).

211 See Swoboda, supra note 160, at A23 (citing M.B. Sturgis).