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# NLRB Overrules Controversial Clinton-Era Decision That Facilitated Unionization of Contingent Workforces

The NLRB has done it again, overturning yet another controversial Clinton Board decision that had overruled long-standing precedent. In *Oakwood Care Center*, 343 N.L.R.B. No. 76 (Nov. 19, 2004 decision released Nov. 26, 2004), the NLRB held, by a 3-2 margin, that in the absence of employer agreement the Board is not authorized to include in a single bargaining unit workers who are jointly employed by a personnel staffing agency and a user employer, together with workers employed solely by the user employer. The Board concluded that such units are multiemployer in scope and consensual in nature, overruling *M.B. Sturgis, Inc.*, 331 N.L.R.B. No. 1298 (2000).

Four years ago in the *Sturgis* case, the Clinton Board, then comprised of three Democrats and two Republicans, dismissed decades of precedent (*e.g.*, *Greenhoot, Inc.*, 205 N.L.R.B. 250 (1973) and *Lee Hospital*, 300 N.L.R.B. 947 (1990)), by including jointly employed temporary agency employees in the user employer's bargaining unit, without the consent of both. Contrary to a long line of cases, *Sturgis* held that the combined unit may be appropriate, even where there is no consent, if the user and supplier employers qualify as "joint employers" of the contingent workforce, and all employees share a "community of interest" in terms and conditions of employment. In *Tree of Life, Inc.*, 336 N.L.R.B. No. 77 (2001), the Clinton Board extended *Sturgis* even further, ruling that the employer committed an unfair labor practice by refusing to apply its collective bargaining agreement to temporary agency employees working for it in bargaining unit positions.

All that has now changed. The Bush Board, with party affiliations reversed, has returned to the pre-*Sturgis* precedent, explaining that "*Sturgis* was wrongly decided" and "misguided both as a matter of statutory interpretation and sound national labor policy," however "well intentioned" it may have been. "[C]ombined units of solely and jointly employed employees," the Board held, "are statutorily permissible only with the parties' consent."

Section 9(b) of the National Labor Relations Act provides: "The Board shall decide in each case whether, in order to assure 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. . . ." The NLRB in *Oakwood* noted that the employer unit is the broadest of those categories, and that "[b]y ignoring the bright line between employer and multi-employer units, *Sturgis* departed from the statutory directive of Section 9(b) as well as decades of Board precedent."

The NLRB emphasized that employees of the single employer (the "user") and employees of the joint employer (the "user/supplier") have different employers. A unit combining the two is multiemployer in scope, notwithstanding the overlap; therefore, the employers must consent to its formation. Overruling *Sturgis*, the Board reasoned that "the nonconsensual mixing of employees of different employers" violated a basic principle of the Act, *i.e.*, "that employees be grouped together by common interests *and* by a common employer." Accordingly, the NLRB dismissed a petition filed by SEIU/1199 seeking to represent employees at the Oakwood Care Center, a Long Island nursing home, some of whom were employed directly by the home and some of whom were supplied by a personnel

staffing agency and jointly employed by the home and the agency.

In support of *Sturgis*, the dissenting members of the NLRB wrote that "[t]he key finding in *Sturgis* was that joint employers are fundamentally distinct from groups of independent employers who bargain in a traditional multi-employer setting." They argued that the critical difference between the joint employer and multi-employer situation "is that where one or more supplier employers provides employees to a single user employer at a common worksite, *all* of the employees at the site work for the user employer. . . Hence the unit scope is *employer*wide," as contemplated under Section 9(b).

Although the *Oakwood* decision continues the Bush Board's recent pattern of overturning Clinton-era decisions, we note that the terms of two of the five current members of the Board expire very soon. Democrat Dennis Walsh's term expires on December 16, 2004, and Republican Ronald Meisburg's term will expire when the 108th Congress adjourns for the year. Historically, the Board will not overrule precedent unless three members vote to do so. Thus, with a 2-1 split in the offing, and likely delays in appointing new members, it is probable that we will not see such significant rulings from the Board for some time to come.



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