Whither vs. Wither

How the NLRA Has Failed Contingent Workers

Whither –to what end

Wither –to cause to wither;
to make incapable of action

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Rage, rage against the dying of the light

Dylan Thomas
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Introduction:

On the occasion of the 70th anniversary of the National Labor Relations Act, in May 2005, NLRB Chairman Robert Battista spoke of the ability of the statute to adapt to an “evolving workplace” and to “make adjustments to a changing industrial landscape over the years” – appropriate, achievable goals. Yet in *H.S. CARE L.L.C., d/b/a Oakwood Care Center*, 343 NLRB No. 76 (2004), the Board accomplished none of this. Rather, this decision is one among many that unmasks the majority’s inability to make the Act relevant to today’s workforce. By this decision, the Board has effectively denied collective bargaining rights to almost one-fourth of the nation’s workers. Hence, is the question “Whither the NLRA?” or “Wither the NLRA?”

The *Oakwood* decision not only represents a failure of policy, but also a failure of process and of precedent. As an Agency that proceeds largely through adjudication, and especially as an Agency whose mission is to provide stability and guidance for our nation’s labor management relations, the National Labor Relations Board must respect norms of procedural fairness and existing precedent; it must explain policy changes in terms that deal honestly with the text of the statute and its legislative history. And it must not only provide guidance that has consistency and constancy, but it must also let parties know when major policy reversals are being contemplated. In overturning *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), through its *Oakwood* decision, the Board did none of these.

At stake in *Oakwood* were the collective bargaining rights of regularly employed and temporary agency workers at a long-term residential care facility. The regularly employed and the temporary agency workers worked side-by-side, performing the same tasks under the same supervision and subject to the same discipline and evaluation by the same supervisors; they even wore identical identification tags issued by the user employer and identifying them as workers of the facility [user employer]. The Board held that these employees, although jointly employed by the user and supplier employers and obviously sharing a strong community of interest, could not be placed in the same bargaining unit unless both of their employers consented. The result was to block them from joining together to address their clearly common concerns. Indeed, post-*Oakwood*,
the only opportunity for the temporary agency workers to achieve collective bargaining is to bargain with both the supplier and user employers, but in complete isolation from the user employer’s own employees.

**A Failure of Process:**

The Board’s rush to overturn precedent in this case is evidenced by the fact that it did not solicit input from interested parties before deciding an issue of such major importance to the labor-management community. This failure of process stands in stark contrast with the Clinton Board’s deliberations of the very same issue.

Prior to its decision in *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), which the Board overruled in *Oakwood*, the Clinton Board issued notices of oral argument, open not only to the parties but also to other interested organizations. It solicited pre- and post-argument briefs. This signaled to those who desired input that the Board was considering a change in direction and it identified the two cases, *M.B. Sturgis* and *Jeffboat*, in which that consideration would be made. In its notice, the Board delineated specific issues for consideration. This allowed interested parties to comment on and argue with respect to the very questions the Board was considering. And they did. Briefs were filed by major employers and employer associations and also by the AFL-CIO and various national and international unions. The two cases were consolidated for decision-making. 331 NLRB at 1299.

In marked contrast, the Board overruled *Sturgis* on November 19, 2004, with no advance notice whatsoever. *Oakwood Care Center*, 29-RC-10101, was just one case among others pending before the Board that raised *Sturgis*-like issues. [*Massey Metals, Inc. et al. and Sheet Metal Workers Int’l Assn.*, Case 27-RC-8142 (formerly 12-RC-7815), review granted April 2002; *Microflect Co., Inc. d/b/a Valmont Microflect and Plumbers Local 290*, Case 36-RC-6056, review granted May 2001.] The Board’s review grants in these cases did not indicate any impending policy shifts. And so the reversal of a case of major significance was contemplated and effectuated by the Board with no input from the organizations which had been so involved and interested in the issue four years earlier. And without the benefit of the experience of interested parties in organizing and bargaining pursuant to the *Sturgis* decision. For practitioners, such a process presents an
unsettling, shifting jurisprudence that makes legal guidance difficult, if not futile, and labor-management stability impossible.

A Rejection of Precedent:


Oakwood is a long-term care facility that employed some workers who were solely employed by Oakwood and other workers supplied by N&W, a personnel staffing agency. N&W and Oakwood were joint employers of the workers supplied by N&W. Not only did Oakwood and N&W together determine the pay and benefits of the workers supplied by N&W, but both groups of employees performed regular nursing home functions and were supervised and directed by Oakwood supervisors who determined their work schedules, approved schedule changes, assigned overtime work, and approved requests for time off – as to both groups of workers. Both groups of employees were disciplined and evaluated by Oakwood supervisors. Both wore identical identification tags issued by Oakwood which identified them as employees of the nursing home. The parties stipulated that the two groups of employees shared a community of interest sufficient to warrant their inclusion in a combined, single unit.

Notwithstanding this close community of interest, the Board held that the two groups of nursing home workers could not be included in a single unit for purposes of collective bargaining unless both N&W and Oakwood consented. Consent was required, according to the Board majority, even though the two groups were indistinguishable in terms of their working conditions, manner and method of work, supervision, and contribution to the nursing home. Sturgis, which it was overruling, had been wrongly decided, according to the majority in Oakwood, because it departed from the statutory directive of Section 9(b) and from Board precedent. The Oakwood Board took the position 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.” Slip Op at p. 3.

The *Sturgis* Board erred, according to the *Oakwood* majority, in interpreting the phrase “employer unit” in Section 9(b) as consisting of employees of a user employer and employees jointly employed by a user and a supplier employer. Rather, it held, employees of a single user employer (Employer A) cannot be combined with employees jointly employed by the user and a supplier employer (Employer A/B) without creating a multiemployer unit. According to the *Oakwood* majority, such a combined unit constitutes a multiemployer unit because it is comprised of two or more employers (Employer A and Employer A/B). Yet, according to the same Board, a unit of the workers jointly employed by the user employer and the supplier employer (Employer A and Employer B) is NOT a multiemployer unit, presumably because the employer is A/B and not A+B. Slip Op. at p. 4.

The *Oakwood* Board also rejected *Sturgis* as “giv[ing] rise to significant conflicts among the various employers and groups of employees participating in the [collective bargaining] process.” Slip Op. at pp. 4-5. It speculated that bargaining would be bifurcated between the two employers, that the supplier employer would be hampered in its options by the user employer’s status as its customer, and that the resulting “fragmentation thus undermines effective bargaining.” According to the *Oakwood* Board, “the bargaining regime posited in *Sturgis* also fails to adequately protect employee rights” because it “subjects employees to fragmented bargaining and inherently conflicting interests.” Slip Op. at p. 5. As the dissent points out, the Board majority cites no authority, pre- or post-*Sturgis*, for these pronouncements. Slip Op. at p. 8. Nor did the Board majority have, for its consideration, any empirical evidence that such conflicts predominated in the years following the *Sturgis* decision.

*M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000)

In the now-overruled *Sturgis* case, the Board set forth a coherent policy that opened the door to a voice at work for contingent workers by securing for them the protections of the Act. In *Sturgis*, the Board held that there is “no statutory requirement of employer consent to a unit combining solely and jointly employed employees of a
single use employer” because no multi-employer bargaining is implicated. The Board based this decision on its interpretation that an “employer unit” within the meaning of Section 9(b) is “delineated by work being performed for a single employer.” 331 NLRB at 1304-1305. According to the Sturgis Board, a plain interpretation of “employer unit” in Section 9(b) of the Act could encompass a “unit of all the user’s employees, both those solely employed by the user and those jointly employed by the user and the supplier.”

Separating “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. 331 NLRB at 1305.

The Sturgis Board based its determination of when such “supplied” workers and “user” workers could be combined into a single bargaining unit on the traditional community of interest standard. 331 NLRB at 1308. It explained that its decision was consistent with well-established precedent that both preceded and postdated the former contrary policy, a policy, it pointed out, which wrongly denied contingent workers their rights under the Act. 331 NLRB at 1305.

In Sturgis, the Board rejected the prior cobbled approach of Lee Hospital, 330 NLRB 947 (1990) and Greenhoot, Inc., 205 NLRB 250 (1973). In Lee Hospital, certified registered nurse anesthetists sought representation separately from other hospital professionals, arguing that they were jointly employed by the hospital and by Anesthesiology Associates, Inc. The Board rejected any joint employer relationship and held that the nurse anesthetists had not demonstrated sufficient disparities to justify their representation in a unit separate from other hospital professionals. In reaching this conclusion, the Board opined, with no analysis whatsoever, that it “does not include employees in the same unit if they do not have the same employer, absent employer consent,” citing Greenhoot. 300 NLRB at 938, n. 12. In Greenhoot, the union had petitioned for a unit of building maintenance employees employed by Greenhoot, a management company, at 14 building locations in the District of Columbia; the union named Greenhoot as the employer. The Board ruled that the separate building owners at each building location were joint employers with Greenhoot. It treated the petition as seeking a multi-employer unit of Greenhoot and the building owners not named in the petition and concluded that, absent consent by the employers, the unit was inappropriate.
The *Sturgis* Board rejected the conclusion of *Lee Hospital* as contrary to its historical treatment of such units.

We decline to accept the faulty logic of *Lee Hospital* … that a user employer and a supplier employer – both of which employ employees who perform work on behalf of the user employer – are equivalent to the completely independent employers in multiemployer bargaining units. No pre-*Lee Hospital* Board conceived of such units as multiemployer units, and neither do we. 331 NLRB at 1305.

As the *Sturgis* Board explained, a joint employer relationship does not create a “completely separate and distinct employer from either the user employer or the supplier employer.” In its view, such a fictitious entity is the only way to support a conclusion that combining jointly employed employees in a unit with user employer employees could violate the statute’s ban on units broader than employer-wide. 331 NLRB at 1305.

According to the *Sturgis* Board, its approach is supported by the legislative history of Section 2(2), is consistent with Board precedent, and furthers important, legitimate statutory interests. The Board noted that when the Wagner Act was amended in 1974, the definition of “employer” was left unchanged. This expressly allowed the Board to continue its practice of certifying multi-employer units either where employers voluntarily formed an association or where two or more companies operated as a single business enterprise.

In addition, both before and after 1947, with court approval, the Board repeatedly included jointly employed employees in broader units with employees of only one of the joint employers despite employer objections and without requiring employer consent. *Gallenkamp Stores Co. v. NLRB*, 402 F.2d 525 (9th Cir. 1968), enforcing *K-Mart*, 162 NLRB 498 (1966); *S. S. Kresge Co. v. NLRB*, 416 F.2d 1226 (6th Cir. 1970), enforcing *S. S. Kresge Co.*, 169 NLRB 442 (1968); *Walgreen Louisiana Co., Inc., d/b/a Globe Discount City*, 209 NLRB 213 (1974); *Globe Discount City*, 161 NLRB 830 (1968); *Red-More Corp., d/b/a Disco Fair*, 164 NLRB 638 (1967), enfd. 418 F.2d 890 (9th Cir. 1969); *Thriftown, Inc., d/b/a Value Village*, 161 NLRB 603 (1966); *Jewel Tea Co., Inc.*, 162 NLRB 503 (1966); *Stack & Co.*, 97 NLRB 1492 (1952); *Taylor Oak Ridge Corp.*, 74 NLRB 947 (19??); *Louis Pizitz Dry Goods, Co.*, 71 NLRB 579 (1946); *Hale Brothers Stores, Inc.*, 62 NLRB 367(1945). Even post-*Greenhoot*, such units have been approved,
and they have not been limited to retail stores that constituted joint enterprises, but have included manufacturing operations, *NLRB v. Western Temporary Services, Inc.*, 821 F.2d 1258 (7th Cir. 1987); schools, *Archdiocese of Philadelphia*, 227 NLRB 1178 (1977); and apartment buildings, *Seligman & Associates, Inc.*, 240 NLRB 110 (1979), enf’d 639 F.2d 307 (6th Cir. 1981).

Finally, the Board’s approach in *Sturgis* furthers the statutory purposes of the Act. It allows contingent workers to exercise their Section 7 rights to organize and bargain without making their Section 7 rights subject to the consent of their employers. And it furthers the collective bargaining process by ensuring that employees grouped together with a sufficient community of interest are permitted to engage in collective action and to formulate common demands. Absent such a grouping, bargaining would be fragmented and difficult, yet resulting labor disputes could envelop the entire workforce.

**Bargaining:**

The *Oakwood* Board, in sharp contrast to the *Sturgis* Board, took the position that bargaining with a combined unit of user and supplied employees is “problematic.” It posited that bargaining as contemplated by *Sturgis* “gives rise to significant conflicts among the various employers and groups of employees participating in the process.” 343 NLRB No. 76 at Slip Op. p. 4-5. The Board speculated regarding specific scenarios as to which it believed bargaining would be difficult or compromised. However, as the dissent in *Oakwood* pointed out, none of the hypothetical scenarios are incompatible with the give-and-take of routine bargaining and the union’s regular role in resolving competing interests and prioritizing employees’ interests. Slip Op. at p. 11. Rather, it is *Oakwood’s* contrary result that will lead to a collective bargaining nightmare, for both employees and employers.

In *Oakwood*, the Board initially considered what it viewed as the detrimental impact of *Sturgis* on employer bargaining, conflicts it claims that Section 9(b) “is designed to avoid.” Slip Op. at p. 5. It specifically referenced the harm of placing employers “in the position of negotiating with one another as well as with the union” and of restrictions created by the “user employer’s status as the customer of the supplier.” Slip Op. at p. 5. Only secondarily did it examine what it described as a detrimental
impact on employee rights, i.e., that there would be inherent conflicting interests between
the two groups of employees. This upside down view of the Act places employer
convenience over employees’ Section 7 rights and gives overriding importance to the
former. Moreover, the Oakwood Board totally ignores the realities of everyday collective
bargaining – that workers and their unions are constantly prioritizing and balancing the
interests of different groups of workers within the context of bargaining with their
employer: high vs. low seniority workers, night shift vs. day shift workers, skilled vs.
non-skilled workers, and so on and so on.

In contrast, the Sturgis Board focused on employee rights. It recognized that the
pre-Sturgis policy had “the potential for denying numerous affected employees the same
Section 7 rights to self-organization accorded other employees under the Act.” 331
NLRB at 1308. According to the Board, its prior holdings had made it “more difficult for
employees to obtain union representation, or result[ed] in fragmented units if they [we]re
successfully organized,” creating a “diminished bargaining power.” 331 NLRB at 1307 –
1308.

The pre-Sturgis rule required the creation of parallel bargaining units, one for
solely employed employees and an additional one for the jointly employed employees
performing the same work in the same location for the same employer with the same
supervision. The existence of such parallel units seriously undermines and dilutes the
bargaining rights of both employee groups. Neither can advance their common interests
when divided by a Board mandate which allows their employer to determine their
bargaining strength.

Bargaining strength is not found in fragmentation, but in density. Requiring
numerous splintered bargaining units for employees who share a single community of
interest is contrary to the statutory purposes of the Act. It defeats the collectiveness of
collective bargaining and, in so doing, it defeats the effectiveness of collective
bargaining. Both the unit of user employees and the unit of contingent employees are
hampered in their collective bargaining when confined in separate units. In contrast, by
allowing workers who share a community of interest to bargain together collectively,
Sturgis protects the organizing and bargaining interests of both the user and supplied
workers. This, Oakwood fails to do.
The Sturgis Board facilitated bargaining in a combined unit of user and supplied employees by describing the scope of the bargaining obligation so that each employer would bargain only as to the terms and conditions it controlled:

In these units each employer is obligated to bargain only over the employees with whom it has an employment relationship and only to the extent it controls or affects their terms and conditions of employment. 331 NLRB 1306.

In reaching this determination, the Sturgis Board specifically referenced Management Training Corp., 317 NLRB 1355 (1995) in which the Board took jurisdiction over a private employer that was a joint employer with an NLRA-exempt political subdivision. There, the Board expressly rejected the notion that an employer that “controls only some aspects of the employment relationship cannot engage in meaningful bargaining.” 331 NLRB 1306. This case provides a precedential framework for collective bargaining in which the union and the user employer engage in bargaining to the extent that the user employer controls or affects the terms and conditions of employment of its workers and the union and supplier employer to do the same.

This common sense approach to bargaining in the context of a combined unit of user and supplier employees eliminates the conflicts about which the Oakwood Board hypothesizes and it allows the collective bargaining process to work. At the bargaining table, each employer bargains with the union to the extent of the workers it employs and to the extent that it controls their terms and conditions. This approach recognizes that different outcomes might be reached with the different employers based on differing considerations and circumstances. Collective bargaining has a long and rich tradition of such accommodations. Many industries follow a model in which certain terms and conditions are bargained at the national level and others at the local level, with increasingly independent local negotiations; others engage in joint bargaining in which different unions representing different facilities of a common employer participate in common negotiations even though a single contract is not the intended result; still others engage in pattern bargaining in which one employer of an industry is the “lead” and similar, albeit not identical, contracts with other employers follow, each tailored to their specific needs.
In sum, the Oakwood Board’s analysis of the impact on collective bargaining is overly narrow and inflexible. Rather than seeking to encourage and enhance collective bargaining, it erects hurdles and creates divisions. Moreover, it misrepresents the Act’s priorities as protecting employer bargaining over employee rights, and ends up “protecting” employees’ bargaining rights by effectively denying them.

Supplier Employer-Only Bargaining Units:

The Oakwood Board not only eliminated representation rights for contingent workers in a combined unit of user and supplied employees, it also rejected a bargaining unit of supplied employees in which the union names only the supplier employer or only the user employer. This result, the Oakwood Board concluded, is required by Section 7:

Because the supplier employer generally controls the economic terms of its employees, a petition that names only the user employer potentially saddles the jointly employed employees with a representative that will be unable to bargain with the employer that controls their wages. Slip Op. at p. 5.

This conclusion has no empirical basis, is directly contrary to Sturgis, and serves to further deny contingent workers their rights under the Act to representation and collective bargaining. In fact, in Oakwood, the user and the supplier employer together determined the pay and benefits of the supplied employees. Slip Op. at p. 1.

According to the Sturgis Board, a union must be permitted to petition for all the employees of a single supplier and name only the supplier employer. Its rationale was that “the absence of one of the joint employers at the bargaining table does not destroy the ability of the joint employer who is at the table … to engage in effective bargaining to the extent that it controls the terms and conditions of employment of its employees.” 331 NLRB 1308, n. 22. This recognition of the ability of the collective bargaining process to accommodate bargaining notwithstanding varying control over terms and conditions of employment is consistent with the Act’s goal of promoting collective bargaining.

Post-Sturgis, in Professional Facilities Management, Inc., 331 NLRB 345 (2000), the union’s petition named only the user employer and all of the user’s employees were supplied by a staffing service as to which the union did not seek bargaining; there were
no solely employed user employees. The Board held that it would not require “the naming of all potential joint employers” and would not require litigation of “the existence of a joint employer relationship” in such circumstances. 331 NLRB at 346. Rather, the union would be permitted to name the employer with which it chooses to bargain and to engage in collective bargaining with that employer to the extent of its control over employees’ terms and conditions of employment. The Oakwood Board rejected this approach.

Under Oakwood, the only remaining collective bargaining rights for contingent workers are in a unit of just contingent workers which must bargain with both the user and supplied employer. This requirement serves to create all of the bargaining issues for both employers and employees that the Oakwood Board argues it is trying to avoid. As the dissent in Oakwood stated, this result “make[s] it impossible for joint employees to exercise their Section 7 rights effectively” and, as well, “seem[s] to be creating a collective bargaining nightmare for employers.” Slip Op. p. 12.

Post-Sturgis:

In one of the most significant post-Sturgis cases, Tree of Life d/b/a Gourmet Award Foods, NE, 336 NLRB 872 (2000) the Board considered a case in which the employer was alleged to have violated its statutory bargaining obligations by refusing to extend the terms of an existing collective bargaining agreement to newly hired temporary agency workers. Such employees had been hired in the past during brief periods of high demand for the employer’s products, but now the employer began bringing in agency employees as regular warehouse workers because it was unable to successfully hire new workers on its own. The union demanded that the newly hired workers be covered under its existing contract.

The Board included the temporary agency employees in a unit with the regularly employed user employees on the strength of the parties’ negotiated unit description. According to then-Member Truesdale and Member Liebman, “the unit definition [in the parties’ collective bargaining agreement], is plain and includes the classification … to which the temps are assigned.” 336 NLRB at 874. Since the employer hired temporary agency employees to perform work which it concededly would have hired “regular”
employees to perform if any could have been found, they were appropriately considered part of the existing unit. The temporary agency employees performed the same work as their solely employed counterparts, working side by side under the same supervision, at the same facility, and under common working conditions. Under *Sturgis*, as consent of the user and supplier employers was no longer required for a combined unit, the contingent workers became part of the existing bargaining unit and, as such, subject to that unit’s collective bargaining agreement just as it would have been applied to any other employees newly hired into the unit.

Then-Chairman Hurtgen dissented. He urged an accretion test for determining whether the temporary agency workers should be included in a unit with solely employed user employees, and concluded that the newly hired temporary employees did not meet that standard. He disagreed that the contract covering the unit of regular employees permitted the inclusion of “employees who are employed by the Company and another company,” arguing that the Board has “no power to modify a contract” by subjecting temporary employees to its terms and that the supplier employers should have been given notice of the proceedings. 336 NLRB at 877.

The two members of the majority differed on the scope of the remedy. According to then-Member Truesdale, the employer must apply the contract provisions to the temporary agency employees “only as to the working conditions the Respondent controls.” 336 NLRB at 875. Member Liebman, concurring, would have applied “all of the agreement’s terms … just as if the Respondent had hired them without using an intermediary.” 336 NLRB at 876. In the end, the employer was required only to apply non-economic contract terms.

*Oakwood* and *Sturgis* do not present multi-employer bargaining:

The multi-employer bargaining model does not encompass the employment arrangements in *Sturgis* and *Oakwood*. Multi-employer bargaining units occur where unrelated employers, on their own initiative, combine themselves into associations to bargain through a mutually selected agent for substantially similar contracts. Such associations are created with little regard for the community of interest of the employees involved. According to the *Oakwood* majority, such arrangements are permissible
without regard for the community of interest of the employees involved because “multi-
employer bargaining can bring about industrial stability for the benefit of all.” Slip Op.
at p. 5, n. 24.

Consent is necessary in multi-employer arrangements because each employer
grants to an agent the authority to act on its behalf and because it agrees to be bound by a
single outcome which it cannot entirely control once consent is given. The employer
members of the multi-employer association each delegate their bargaining authority to
one voice at the bargaining table in pursuit of a single set of contract terms. Each
employer is giving up its opportunity to bargain a separate, individual collective
bargaining agreement. Hence, consent is required.

Under Sturgis, joint employers are brought to the bargaining table to advance their own bargaining interests. They are joined by the fact that they each employ employees in the bargaining unit jointly with the other employers, albeit not all may solely employ all bargaining unit employees. They bargain only as to the employees with whom they have an employment relationship and just to the extent of their control over the terms and conditions of those employees. A single contract is may well not be the desired outcome. Rather, this bargaining arrangement more closely resembles the model the Board adopted in Management Training Corp., 317 NLRB 1355 (1995), in which the employer bargains only to the extent that it controls workers’ terms and conditions of employment and no employer is bound by the collective bargaining of any other employer. Since the requisite attributes for multi-employer bargaining are totally lacking in this situation, so is the concomitant justification for the consent requirement. As the Sturgis Board properly found, consent is not required in a user/supplier employer relationship.

A Failure of Policy:

Through its decision in Oakwood Care Center, 343 NLRB No. 76 (2004), the Board has effectively barred contingent workers from exercising their right to self-
organization under the Act. These workers’ rights to “form, join or assist labor
organizations” are now subject to their employers’ consent. As the dissent notes, this “result is surely not what Congress envisioned when it instructed the Board, in deciding
whether a particular bargaining unit is appropriate, ‘to assure to employees the fullest freedom in exercising the rights guaranteed by th[e] Act.’ 29 U.S.C. Section 159 (b).” Slip Op. at p. 6.

The number of workers affected by this decision – denied the Act’s protections unless their employers agree – is startling. More than one quarter of the workforce is employed in nonstandard working arrangements. GAO/HEHS-00-76, Contingent Workers (June 2001), p. 14. During the past ten years, this proportion has remained virtually constant and contingent workers are typically the first to be added when the economy starts to turn upward following a slide.

What are nonstandard working arrangements?

This term is broad and encompasses a wide variety of different employment schemes:

- **Part-time:** work fewer than 35 hours/week
- **Seasonal:** work only certain times during the year
- **Temporary/Agency:** work on an as-needed basis for an agency that supplies their work to other employers
- **Day Laborer:** picked up at a waiting place to work for a day
- **On-call:** work on an as-needed basis, such as substitute teachers and construction workers
- **Contract:** workers’ services are contracted out, e.g., security, landscaping or computer programming
- **Independent Contractors/Self-employed:** consultants, freelance workers
- **Leased:** workers work for a single employer, on a contract basis, with that employer [not through an agency]

Who is employed in nonstandard working arrangements?

Nontraditional working arrangements can provide workers with flexibility, training, and an entrée into the workforce. They are favored by some workers, the most stereotypically examples being women trying to balance work and family or students supporting themselves while going to school. But studies show that the majority of contingent workers are not contingent by choice.

Although independent contractors, the self-employed and certain part-time workers are typically relatively satisfied with their voluntarily chosen lifestyle, most temporary agency and on-call workers would prefer standard employment to their current
arrangements. Statistics show that most workers employed in nonstandard working arrangements are women and minority workers.

- 54.5% of nonstandard workers are women, compared with 46.9% of all workers;
- Blacks and Hispanics are overrepresented in the lowest-paying jobs.
- 31% of women worked in nonstandard jobs in 2001, compared to 22.8% of men.

Although some nonstandard jobs reflect seasonal fluctuations in needs, the huge increase in contingent jobs in recent years is an effort by employers to cut employment costs by replacing standard jobs with contingent ones. [North American Alliance for Fair Employment, Strategy Series, Working Paper Two, September 2002.] This is achieved through nonstandard work arrangements because such jobs provide lower pay, fewer benefits, limited or no on-the-job training, and reduced expectations of employment security.

The pay penalty for non-standard work, especially for part-time workers and temps, is real and dramatic. It applies to not only wages, but also to health care benefits and retirement security.

- Wages:
  - Part-time, temporary and on call/day workers are paid lower wages than regular full-time workers, even after adjusting for age, education and race.

- Health Care Benefits:
  - Only 14.8% of women and 12.4% of men in nonstandard jobs receive health insurance from their employer compared with 66.8% of women and 70.8% of men in regular full-time jobs.

- Retirement Benefits:
  - Only 20.1% of women and 11.1% of men in nonstandard employment receive a pension through their employer, compared to 66.5% of women and 66% of men in regular full-time jobs.

Nonstandard Work, Substandard Jobs, Flexible Work Arrangements in the U.S.,
Economic Policy Institute/Women’s Research & Education Institute, 1997. The Oakwood decision perpetuates and rewards this move by employers from standard jobs to contingent jobs. The result will be a greatly expanded second-class workforce of low-paid workers who lack adequate health and retirement benefits.
Not all nonstandard work arrangements are created equally. The self-employed and independent contractors earn more per hour than regular full-time workers. Who are the beneficiaries of these more lucrative forms of nonstandard working arrangements?

- Whites, especially white men, are overrepresented in the most remunerative forms of nonstandard employment – independent contracting, contract work and self-employment.

[Share of Workers in “Nonstandard” Jobs Declines, Jeffrey Wenger, Briefing Paper, Economic Policy Institute.] These are the exceptions and they are not affected by Oakwood.

The substandard wages and benefits which are associated with most nonstandard working arrangements affect not only contingent workers, but also other workers who are put in actual or implicit competition with contingent workers. As to these regularly employed workers, the use of contingents reduces their bargaining power, undermines their unions, drives down their wages, and imposes on them an insecurity approaching that of some contingent workers. As to society as a whole, these substandard wages and benefits widen the gap between the haves and have-nots. In fragmenting the bargaining power of both contingent and regular workers, the Oakwood Board has denied both groups effective bargaining opportunities that might correct these imbalances.

Not only do contingent workers suffer wage and benefit disadvantages, but they are also denied legal rights because they are not covered by employment laws that protect regular full-time workers. [Contingent Workers Incomes and Benefits Lag Behind Those of Rest of Workforce, June 2000, U.S. General Accounting Office, Health, Education and Human Services Division.] Even when contingent workers are technically covered, many are denied statutory benefits and protections because they cannot fulfill specified conditions or meet eligibility requirements or because they are misclassified by their employer. With Oakwood, the Board has added the National Labor Relations Act to this list of “MIA” employment protections for contingent workers. These workers are effectively denied their rights under the NLRA because their opportunities to organize and bargain have been so severely circumscribed.

The Oakwood Board purports to protect employees’ NLRA rights, asserting that dicta in Sturgis regarding a union petition that names only one of the joint employers
“profoundly diminishes employee Section 7 rights.” 343 NLRB No. 76, Slip Op. at p. 5. But the real result in Oakwood is that, under the guise of preventing “diminished” rights, the Board has robbed contingent workers of any effective Section 7 right to organize and bargain.

Conclusion:

When the Board rolled back four years of precedent by overruling Sturgis, it succeeded in denying contingent workers their rights under the National Labor Relations Act to form unions and bargain collectively. Rather, it reinstituted Board-imposed obstacles to self-organization, which Sturgis had partially undone, and it re-established the denial of rights under the NLRA to the nearly 25% of the workforce who work as contingent workers.
Development of the Law Under the NLRA and Practice and Procedure Under the NLRA
A Joint Committee Program

Sturgis Revisited
Care d/b/a Oakwood Care Center

John M. Skonberg
Littler Mendelson
San Francisco, CA

Nancy Schiffer
AFL-CIO
Washington, DC
Greenhoot, Inc.
Management company: supplies building maintenance workers
SUPPLIER EMPLOYER
All Professional Employees
Lee Hospital: User Employer

Nurse Anesthetists
AAI operates the anesthesia department

Petitioned for Unit: Nurse Anesthetists
M.B. Sturgis

User Employer

Manufacturer of gas hoses -- 35 workers

Interim, Inc.:
Temporary Agency Supplier Employer
10-15 workers
H.S. Care L.L.C.,
d/b/a Oakwood Care Center

N&W:
personnel staffing agency

Same:
Duties Supervision Discipline Evaluations ID tags
H.S. Care L.L.C., d/b/a Oakwood Care Center
H.S. Care L.L.C., d/b/a Oakwood Care Center

A + B = Multiemployer

A \div B = \text{Not Multiemployer}