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Sturgis Revisited: The Board’s Decision In Oakwood Care Center

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Experienced labor lawyers know that when the composition of the National Labor Relations Board changes as a result of a change of Administration, there will likely be corresponding changes in the Board’s interpretation of the Act. One of the most recent examples of this phenomenon occurred in late November 2004, when the Board issued its decision in H.S. Care L.L.C., d/b/a Oakwood Care Center, reversing the short-lived M.B. Sturgis decision, which itself reversed the existing, 10-year precedent of Lee Hospital. In Oakwood Care Center, the Board held that employees who are jointly employed by a supplier of contingent employees and by the user of those employees cannot be included in the same bargaining unit with employees who are solely employed by the user employer without the consent of both the user employer and the supplier employer. The Board’s latest reversal of position has been cited as a setback to union efforts to organize employees in an increasingly important segment of the overall U.S. workforce.

This paper will discuss the rationale of the Oakwood Care Center decision and the case law that preceded the decision, and will conclude that while the stated rationale for the decision may be subject to debate, the result is supported by the need for effective bargaining.

The Oakwood Care Center Decision

Oakwood Care Center involved a long-term residential care facility operated by Oakwood Care Center, in which some of the non-professional employees were employed solely

1 343 N.L.R.B. No. 76 (2004) [Battista, Schaumber, and Meisberg; Liebman and Walsh dissenting].
2 331 N.L.R.B. 1298 (2000) [Truesdale, Fox, and Liebman; Brame dissenting in part].
4 343 N.L.R.B. No. 76, slip op. at 6 (Liebman and Walsh, M., dissenting).
by Oakwood, but other non-professional employees were jointly employed by Oakwood and N&W, a personnel staffing agency. The parties stipulated that Oakwood (the user employer) and N&W (the supplier employer) together determined pay and benefits of the jointly employed employees, but that Oakwood alone supervised and directed those employees, determined their work schedules, approved schedule changes, assigned their overtime, approved leave requests, and evaluated and disciplined employees. The unionpetition, apparently filed only against Oakwood, sought a unit that included both employees solely employed by Oakwood and employees jointly employed by Oakwood and N&W. The Regional Director found the petitioned-for unit appropriate, relying on *M.B. Sturgis*. On review, the Board overruled *Sturgis* and returned to the Board’s pre-*Sturgis* position that employer consent is required for the Board to approve of such bargaining units.⁵

The *Oakwood Care Center* majority based its decision on the long-established principle that the Board will not require employers to participate in a multi-employer bargaining unit without each employer’s consent. Concluding that the solely employed employees of a user employer and the jointly employed employees of user and supplier employers are employees of different employers, and that their inclusion in the same bargaining unit creates a multi-employer unit, the Board dismissed the union’s petition, as neither the user employer nor the supplier employer had consented to be included in a multi-employer bargaining unit.⁶

The majority’s analysis began with Section 9(b) of the NLRA, which provides that bargaining units “shall be the employer unit, craft unit’s, plant unit, or subdivision thereof.”⁷ The majority concluded that in situations such as those presented in *Oakwood Care Center* and

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⁵ *Id.*, slip op. at 5.  
⁶ *Id.*  
⁷ 29 U.S.C. § 159(b)
There are, in effect, two separate employers: (1) the user employer (A), which is the sole employer of the employees of the user; and (2) the joint employer (A/B), which is the employer of the employees jointly employed by the user (A) and supplier (B). Despite the fact that the user employer (A) is an employer common to both groups of employees, the majority stated that the entity that each of these two groups look to as their employer is different [sole employer (A) versus the joint employer (A/B)]. The Board majority thus rejected the conclusion reached by Sturgis: that the “employer unit” required by Section 9(b) encompassed both employees working solely for the user employer and employees working for the joint employer because of the existence of one employer [user employer (A)] common to all the employees.8

As authority for its position, the majority cited Greenhoot9 and Lee Hospital, and distinguished a number of pre-Greenhoot and post-Greenhoot cases in which the Board and the courts had approved of Sturgis-type units without specifically addressing the multi-employer unit/consent issue.

The Setting Before Sturgis

The current interest in the issues presented by Sturgis and Oakwood Care Center has been caused by the enormous and relatively recent rise in the use of contingent employees. But the case law underlying the Oakwood Care Center decision dates back several decades.

In Greenhoot, the seminal case relied upon by the majority in Oakwood Care Center, the supplier employer contracted with the owners of 14 separate buildings to provide engineers and maintenance employees. The owners of the buildings shared no connection with one another aside from their relationship with the supplier employer. The employees were hired

8 343 N.L.R.B. No. 76, slip op. at 4-5.
and paid by the supplier, but were primarily supervised in their daily work activities by the individual building owners.

The union petitioned the supplier employer\textsuperscript{10} to represent the engineers and maintenance employees employed in each of the 14 buildings in a single bargaining unit. The supplier argued that it did not employ these individuals, and that the building owners were the sole employers. Alternatively, the supplier argued that, if anything, it was a joint employer together with each building owner, and accordingly, a multi-employer unit was not appropriate without the consent of the building owners.

The Board concluded that the supplier and each of the building owners were in fact joint employers of the employees employed at each building.\textsuperscript{11} The Board went on to recite the principle that a multi-employer unit will not be imposed by the Board without the consent of the several employers and with such consent lacking in the case at hand, found that separate units for each building were appropriate.

In \textit{Lee Hospital}, the other key Board decision cited by the \textit{Oakwood Care Center} majority, the union filed a petition to represent a unit of certified registered nurse anesthetists ("CRNAs") at a hospital. The CRNAs worked within the hospital’s anesthesia department, which was supervised by a subcontractor. Under unit determination standards in effect in the health care industry at the time, the union argued that the CRNAs constituted an appropriate unit separate from the other hospital professional employees because the CRNAs were subject to different working conditions. In order to resolve the question of whether such a separate unit

\textsuperscript{10} The decision in \textit{Greenhoot} does not expressly state whether the union petitioned the supplier alone. However, the caption of the case and the fact the decision mentions that the building owners were served with a notice of hearing by the Board, and only two attorneys representing six of the building owners appeared at the hearing, suggests that only the supplier was named on the petition.

\textsuperscript{11} 205 N.L.R.B. at 251.
was appropriate, the Board considered whether the subcontractor and the hospital were joint employers because “the Board does not include employees in the same unit if they do not have the same employer, absent employer consent.”12 The Board cited only Greenhoot as authority for that proposition and gave no further rationale.13

Ultimately, the Board held that the subcontractor was not a joint employer with the hospital and dismissed the petition on the basis that the separate unit sought by the union did not meet the then-existent “disparity of interests” test in the health care industry. However, Lee Hospital was thereafter cited as authority for the proposition that employer consent is necessary whenever there is a mixed unit of jointly employed employees and solely employed employees.14

**Sturgis**

In *Sturgis*, the Board reviewed two Regional Director decisions, *M.B. Sturgis* and *Jeffboat Division*. In *M.B. Sturgis*, the union sought to represent the 34-35 regular employees at the user employer’s manufacturing plant. 10 to 15 temporary workers were also employed at the plant, and it was conceded that these temporary workers were jointly employed by the user, Sturgis, and a supplier employer. Sturgis argued that the only appropriate bargaining unit must include the jointly employed temporary workers. The Regional Director, relying on *Lee Hospital*, found appropriate the petitioned-for unit consisting of all of the user employer’s solely employed employees and excluded the jointly employed temporary employees. Thereafter, the user employer, Sturgis, filed a request for review of the Regional Director’s decision, contending that excluding the jointly employed employees from the unit raised substantial issues regarding Greenhoot and its progeny.

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12 300 N.L.R.B. at 948.
13 Id.
In *Jeffboat Division*, the companion case decided along with *Sturgis*, the user employer operated a large shipyard where its solely employed employees were covered under an existing collective bargaining agreement. The user employer also utilized 30 first-class welders and steamfitters supplied by an outside company. The union filed a unit clarification petition seeking to accrete the jointly employed welders and steamfitters into the existing bargaining unit. The Regional Director dismissed the unit clarification petition on the basis that neither the user employer nor the supplier employer would consent to joint bargaining as required under *Greenhoot* and *Lee Hospital*. The union filed a request for review of the Regional Director’s decision, contending that a substantial issue was raised by the Regional Director’s reliance on *Greenhoot* and *Lee Hospital*.

In reviewing these Regional Director determinations, the *Sturgis* majority overruled *Lee Hospital* in a 3-1 decision. In its analysis, the Board reviewed pre-*Greenhoot* precedent involving department stores, in which the Board and some appellate courts had determined that units combining employees solely employed by department stores with employees jointly employed by the stores and their licensees were appropriate.\(^\text{15}\) Citing these cases, the majority noted that at the end of the 1960’s, no Board or court decision had rejected units combining solely employed employees and jointly employed employees on the basis that such units constituted multi-employer units that required employer consent. The *Sturgis* Board also cited post-*Greenhoot* cases where the Board and courts had found appropriate units.

\(^{15}\) 331 N.L.R.B. at 1302-03 citing *S.S. Kresge Co. v. N.L.R.B.*, 416 F.2d 1225, 1231 (6th Cir. 1969), *enfg. in relevant part, S.S. Kresge*, 169 N.L.R.B. 442 (1968); *Gallenkamp Stores Co. v. N.L.R.B.*, 402 F.2d 525, 531 (9th Cir. 1968).
comprised of both solely employed employees and jointly employed employees without requiring employer consent.\textsuperscript{16}

After reviewing the \textit{Greenhoot} and \textit{Lee Hospital} decisions, the \textit{Sturgis} Board determined that \textit{Lee Hospital} was wrongly decided.\textsuperscript{17} The Board interpreted Section 9(b) as permitting a unit of all of an employer’s employees, including a subgroup of such employees jointly employed by a supplier. The Board noted that in a unit combining solely employed employees with jointly employed employees, all of the work is performed for the user employer. As such, the majority found that a unit of employees performing work for the same user employer constituted an “employer unit” under Section 9(b) as the scope of a bargaining unit “is delineated by the work being performed for a particular employer.”\textsuperscript{18}

The Board explicitly rejected \textit{Lee Hospital}’s conclusion that a unit combining jointly employed employees and solely employed employees is a multi-employer unit. The majority opined that unlike “true” multi-employer units, the jointly employed employees and solely employed employees in the employment relationship in \textit{Sturgis} shared the same employer—the user employer. According to the reasoning of the majority in \textit{Sturgis}, because all of the work in a \textit{Sturgis} unit was performed for the user employer, such a unit was not a multi-employer unit.

In overruling \textit{Lee Hospital}, the \textit{Sturgis} Board also “clarified” the \textit{Greenhoot} decision.\textsuperscript{19} While affirming that under \textit{Greenhoot}, employer consent is required if the union seeks to bargain with multiple user employers, the \textit{Sturgis} majority ruled that a union could


\textsuperscript{17} 331 N.L.R.B. at 1304.

\textsuperscript{18} \textit{Id.} at 1305.

\textsuperscript{19} \textit{Id.} at 1308.
avoid the consent requirement by naming only the supplier, and thereby could seek representation of all of the supplier’s employees even at locations where there were joint employer relationships.

In dissent, Member Robert Brame criticized the majority’s decision as running “counter to statute, sound labor policy, and the reality of collective bargaining.”\(^{20}\) Citing Section 9(b)’s statement that “the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof,” he argued that Section 9(b) permits only units of “prescribed groupings of employees or subdivisions, but not combinations, thereof.”\(^{21}\) Therefore, the Board could not establish units broader than the employees of a particular employer. Member Brame contended that where jointly employed employees and solely employed employees have different employers, multi-employer bargaining rules apply. Accordingly, requiring joint employers to bargain with one another over a unit comprised of jointly employed employees and solely employed employees without employer consent constituted coerced multi-employer bargaining. Furthermore, in Member Brame’s opinion, bargaining in a unit comprised of both solely employed employees and jointly employed employees would inevitably create conflicts of interest and practical bargaining problems.

Union representatives were pleased with the *Sturgis* decision, as they saw it as a means of organizing the growing number of contingent workers.\(^{22}\) Reaction among management-side attorneys was less enthusiastic. Former Board General Counsel John Irving stated his belief that *Sturgis* might be a “Phyrhric victory” for unions.\(^{23}\) In his view, *Sturgis* only

\(^{20}\) *Id.* at 1310 (Brame, M. dissenting).

\(^{21}\) *Id.* at 1315 (Brame, M. dissenting) (emphasis in original).

\(^{22}\) *Will NLRB’s Recent Sturgis Ruling Help Or Hurt Organizing, Bargaining?* DAILY LABOR REPORT, September 6, 2000, No. 173, Pg. AA-1.

\(^{23}\) *Id.*
created more questions that needed to be answered before an election could take place, such as who was the employer or joint employer and whether the jointly employed employees shared a community of interest with the solely employed employees. Resolving these issues could require a hearing before the Board, which would cause delays in the election process. Board Member Peter Hurtgen expressed his belief that there was “no necessary impediment” to combining jointly employed employees into a unit of employees employed solely by the user employer.\textsuperscript{24} However, Member Hurtgen had “serious concerns” over whether a community of interest between jointly employed employees and solely employed employees could be demonstrated. He cited the fact that the user employer normally sets the compensation for the solely employed employees, while the supplier employer typically establishes the compensation for the jointly employed employees. As such, the two groups are likely subject to different methods and terms of compensation. In light of such differences, Member Hurtgen remained troubled as to whether there could ever be a sufficient community of interest between jointly employed employees and solely employed employees to justify including the two groups within the same bargaining unit.\textsuperscript{25}

**Post-Sturgis Developments**

Following *Sturgis*, the Board clarified some of the required procedural steps necessary prior to an election where a union sought to include supplier employees in a unit with employees solely employed by the user employer. In *Professional Facilities Management*,\textsuperscript{26} the Board determined that a union could name only the user or only the supplier employer in a representation petition, and never have to reach the issue of whether the user and supplier were joint employers. In a subsequent General Counsel Memorandum, the General Counsel stated

\textsuperscript{24} *J.E. Higgins Lumber Co.*, 332 N.L.R.B. 1172, 1172-73 (2000).
\textsuperscript{25} *Id* at 1173.
\textsuperscript{26} 332 N.L.R.B. 345 (2000).
that in a Sturgis situation, a union could name whomever it wished—the user employer, the supplier employer, or both the user and supplier employers as joint employers—on the petition.\textsuperscript{27}

In another case post-Sturgis case, Gourmet Award Foods,\textsuperscript{28} the Board stretched the principle of Sturgis to hold that jointly employed temporary employees should be automatically added to a bargaining unit of solely employed employees, provided there is a community of interest between the two groups of employees. In Gourmet Award Foods, the union filed an unfair labor practice charge against the user employer alleging that the user employer violated Sections 8(a)(1) and 8(a)(5) by failing to apply the provisions of its collective bargaining agreement to its jointly employed temporary employees. The user employer’s collective bargaining agreement had previously been applied only to the user employer’s solely employed employees. Despite the fact that the user employer had utilized the jointly employed temporary employees for approximately five years before the union sought to have the existing collective bargaining agreement applied to them, the Board concluded that the jointly employed temporary workers were in effect no different from new employees hired into a unit classification, and thus should be included within the existing bargaining unit and be covered by the collective bargaining agreement without any employee vote.\textsuperscript{29} The Gourmet Award Foods decision thus achieved an accretion result, adding a new classification of employees to an existing bargaining unit, without an accretion analysis, as the Board did not consider whether the jointly employed temporary workers shared an overwhelming community of interest with the preexisting unit to which they were to be added.

\textsuperscript{27} Memorandum OM 01-31 (January 26, 2001).
\textsuperscript{28} 336 N.L.R.B. 872 (2001).
\textsuperscript{29} The Board held that the user employer was required to apply the existing contractual provisions to the jointly employed employees only to the extent that the user employer controlled the working conditions of the jointly employed employees. \textit{Id.} at 874-75.
Was *Oakwood Care Center* Correctly Decided?

The fact that the *Oakwood Care Center* majority overturned *Sturgis* without any intervening statutory change and without any empirical evidence of problems caused by *Sturgis* invites the question whether the reversal was justified. The answer to the question lies in the meaning of “employer unit” in Section 9(b); the definition of “multi-employer unit;” the policy underlying Section 9(b); and the importance that one attaches to achieving effective bargaining as opposed to merely making organizing easier.

**The Language Of Section 9(b)**

The heart of the *Oakwood Care Center* decision is its interpretation of Section 9(b), rejecting *Sturgis*’ interpretation of that section. Section 9(b) states that “the unit appropriate for the purposes for collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” The *Sturgis* Board concluded that a unit of all of a user employer’s employees, regardless whether that unit also includes jointly employed employees of a supplier employer, is an “employer unit” within the meaning of Section 9(b) because the scope of a bargaining unit is “delineated by the work being performed for a particular employer.”

*Sturgis*’ analysis thus focused on employees and the work they perform rather than on the employer for whom the employees work. Therefore, under *Sturgis*, in determining whether a bargaining unit is appropriate under Section 9(b), the Board would first determine whether the employees share a community of interest without first determining by whom the employees are employed.

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31 331 N.L.R.B. at 1304.
In contrast, the Oakwood Care Center majority’s interpretation of Section 9(b) focused on the employer for whom the employees work.\(^{32}\) Noting that the largest permissible unit under the wording of Section 9(b) is an “employer unit,” the Oakwood Care Center majority held that Section 9(b) did not authorize the Board to direct elections in units encompassing the employees of more than one employer. Thus, under Oakwood Care Center, the Board, in determining whether a bargaining unit is appropriate under Section 9(b), must first identify who the employer is before determining whether the employees have a sufficient community of interest.

On the whole, Oakwood Care Center’s interpretation of Section 9(b) is more consistent with the plain language of Section 9(b). Significantly, Section 9(b) uses the phrase “employer unit” rather than “employee unit” or “employment unit.” The plain language of Section 9(b), therefore, suggests that a unit must consist of employees who all share the same employment relationship with the same employer. Such language precludes the units at issue in Sturgis because jointly employed employees and solely employed employees would not all share the same employer—some would only have one employer, the user, while others would be employed by both the user and the supplier.

The Meaning Of “Multi-Employer Unit”

The Sturgis majority concluded that a unit combining jointly employed employees and solely employed employees is not a multi-employer unit.\(^{33}\) It determined that unlike “true” multi-employer units, the jointly employed employees and solely employed employees in such employment relationships share the same employer—the user employer. According to the

\(^{32}\) 343 N.L.R.B. No. 76, slip op. at 3-4.
\(^{33}\) 331 N.L.R.B. at 1305.
reasoning of the *Sturgis* majority, such a unit is not a multi-employer unit because all of the work in a *Sturgis* unit is performed for the user employer.

The *Oakwood Care Center* majority disagreed, as it opined that solely employed employees and jointly employed employees are employees of different employers. Under that reasoning, because these employees are employed by different employers, inclusion of both employee groups within the same bargaining unit creates a multi-employer unit.

Whether the *Oakwood Care Center* majority was correct in finding that a *Sturgis/Oakwood Care Center* fact pattern constitutes “multi-employer bargaining” is open to debate. It must be admitted that a *Sturgis/Oakwood Care Center* situation does not present the “classic” multi-employer situation where the employers are entirely separate companies with absolutely no control over the other’s work force (except for the control voluntarily conferred in multi-employer bargaining). However, that does not mean that the “classic” multi-employer scenario is the only multi-employer situation in which employer consent should be required.

The *Oakwood Care Center* majority recognized that supplier employers and user employers are usually very different in their business purposes and interests, and therefore, are likely to have different goals in negotiations. The fact that a user employer may have some control over jointly employed employees does not negate the inherent differences between user and supplier employers. *Oakwood Care Center*’s definition of multi-employer unit prevents a supplier employer from being directly affected by the bargaining goals of the user employer *vis a vis* the user employer’s solely employed employees.

Further undermining *Sturgis’* conclusion that the existence of a common employer among mixed single and joint employees negates the existence of a true multi-

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34 343 N.L.R.B. No. 76, slip op. at 3-4.
employer unit is *Sturgis*’ schizophrenic treatment of *Greenhoot*. Despite the presence of a common employer in *Greenhoot*, the *Sturgis* majority did not reverse *Greenhoot*. Instead, the *Sturgis* majority limited *Greenhoot*’s consent requirement to the situation where a union seeks a bargaining relationship with user employers when they are in multiple joint employer relationships with their supplier. As pointed out by Member Brame and even prominent union counsel, such a limitation is illogical. Either the presence of a common employer negates the existence of a multi-employer unit or it does not—regardless of whether the employer is a user or a supplier. This logical inconsistency undercuts the *Sturgis* majority’s narrow definition of multi-employer bargaining unit.

**The Board’s Historical Treatment Of Mixed Units**

The *Oakwood Care Center* majority stated that *Sturgis* was a departure from longstanding prior Board precedent. This may be somewhat of an overstatement because, as noted by the *Sturgis* majority, before and after *Greenhoot* the Board and some appellate courts had determined that units combining employees solely employed by a store with employees jointly employed by a store and its licensees were appropriate.

The *Oakwood Care Center* majority correctly noted, however, that the precedential value of the department store cases cited by the *Sturgis* majority is questionable. In the department store cases, the parties did not raise, and the Board did not consider whether

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35 331 N.L.R.B. at 1319 (Brame, M. dissenting).
37 343 N.L.R.B. No. 76, slip op. at 1-2.
Section 9(b) permitted nonconsensual units that are multi-employer in scope. Rather those cases analyzed only whether there was a community of interest among the employees in the petitioned-for bargaining unit. Therefore, the central issue raised in *Sturgis* was not brought before the Board in those earlier cases.

In addition, the *Oakwood Care Center* majority noted that the facts of the department store cases were distinguishable because those cases involved joint employers whose business operations were aligned in such a manner that their relationship would more appropriately be labeled a “joint enterprise.”

The department stores and the licensees in the department store cases were involved in the same line of business—sales. In contrast, user employers and supplier employers are involved in different enterprises. While the user employer operates its core business, typically the supplier employer is exclusively involved in the business of providing employees to other employers. Therefore, the user and the supplier run different enterprises and have divergent interests that can very likely result in conflicts at the bargaining table.

While there are a handful of post-*Greenhoot* cases in which the Board found appropriate non-department store units which included jointly employed employees and employees of other employers (whether solely employed or jointly employed), none of those cases treated the issue of whether such units were multi-employer in scope. Therefore, the precedential value of those cases is also dubious. Indeed in all of the post-*Greenhoot* cases...
where the multi-employer bargaining unit and consent issues were raised, the Board uniformly found that mixed units of solely employed employees and jointly employed employees were improper absent employer consent.42

**The Purpose Of Section 9 Is To Promote Effective Bargaining**

In addition to the above-described definitional issues that favor the *Oakwood Care Center* decision over the *Sturgis* decision, there is a strong public policy argument in favor of the *Oakwood Care Center* decision.

The *Sturgis* majority focused primarily on the impact that allowing mixed units of jointly employed and solely employed employees would have on union organizing. This is clearly seen by the statements of Members Liebman and Walsh in the opening sentence of their dissent in *Oakwood Care Center*: “The Board now effectively bars yet another group of employees—the sizeable number of workers in alternative work arrangement—from organizing labor unions.”43 That focus is too narrow, however. The goal of the NLRA is not simply to organize employees, but to allow employees to organize for a purpose: dealing with employers with respect to wages, hours, and working conditions.44

This larger goal is seen in the very wording of Section 9(a), which states, “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining in respect

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43 343 N.L.R.B. No. 76, slip op. at 6 (Liebman and Walsh, M., dissenting).
44 The fact that union organizing *per se* is not the central purpose underlying the Act is seen in Section 9(c)(5), which prohibits the consideration of the extent of union organizing in making appropriate unit determinations. *See NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995).
to rates of pay, wages, hours of employment, or other conditions of employment ...."\textsuperscript{45} This same larger focus is also seen in Section 9(b), which states, “[T]he unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof ...."\textsuperscript{46} Therefore, the \textit{Sturgis} majority’s goal of simply making organizing easier without regard to the impact on bargaining is not consistent with the overall purposes of the Act. As the \textit{Oakwood Care Center} decision is more concerned about the impact which merging user and supplier employees in the same bargaining unit will have on bargaining, it is more consistent with the overall purposes of Section 9.

\textbf{Conflicts At The Bargaining Table}

The \textit{Sturgis} decision created serious issues concerning the effectiveness of bargaining in units comprised of both solely employed employees and jointly employed employees. As bargaining inherently involves parties exchanging concessions in one area for gains in another, the addition of extra parties to the bargaining table undoubtedly creates serious practical problems for both employers and employees. As Member Brame noted in his dissent in \textit{Sturgis}, the give-and-take essential for bargaining “demands that the employer operate from a position of unified economic control, or at least, in the case of joint employers, a common base balanced to reflect the respective roles of the joint employers.”\textsuperscript{47} User employers and supplier employers bring different interests to the bargaining table. As such, they may have different goals and demands with respect to bargaining. While employer conflicts may also arise with respect to joint employer bargaining, which is permissible under \textit{Oakwood Care Center}, the \textit{Sturgis} scenario is different in that at least one employer will have no employment relationship

\textsuperscript{45} 29 U.S.C. § 159(a) (emphasis added).
\textsuperscript{46} 29 U.S.C. § 159(b) (emphasis added).
\textsuperscript{47} 331 N.L.R.B. at 1321 (Brame, M., dissenting).
with certain employees within the bargaining unit.\textsuperscript{48} The fact that units like those in \textit{Sturgis} and \textit{Oakwood Care Center} could force to the bargaining table employers who have no relationship with some of the employees in the bargaining unit only compounds this problem.

It is far more likely that such conflicts among joint employers in a \textit{Sturgis} situation would hinder effective bargaining than in a normal joint employer scenario. While typical joint employers voluntarily agree to share and codetermine the terms and conditions of their joint employees’ employment within the same unit, joint employers in a \textit{Sturgis} situation do not voluntarily reach such an agreement. In a \textit{Sturgis} unit, the jointly employed employees are lumped into a unit with solely employed employees with whom they have different interests, and the supplier employer has no employment relationship with the user employer’s solely employed employees. Under this situation, the joint employers do not consent to share or codetermine the terms and conditions of employment of the other employers’ solely employed employees.

The \textit{Sturgis} Board attempted to minimize these concerns by noting that in \textit{Sturgis} units, each employer is only obligated to bargain over the employees with whom it has an employment relationship and only to the extent that it can control or affect their terms and conditions of employment.\textsuperscript{49} Such a demarcation is more easily stated than achieved. Neutrality clauses, union security clauses, dues check-off clauses, and successor clauses are frequently used as bargaining chips for economic concessions. In a \textit{Sturgis} unit, which employer has “control” of these issues? What happens when they have different positions on those issues? The presence of two employers at the bargaining table which do not consent to such bargaining and whose

\textsuperscript{48} As Member Brame cited in his dissent in \textit{Sturgis}, over 58.2\% of companies that outsource their temporary staffing function use multiple suppliers. \textit{Id.} at 1314 (Brame, M., dissenting).

\textsuperscript{49} \textit{Id.} at 1306.
interests may be antagonistic, would drastically impair effective bargaining with regard to Sturgis units.

**Conflicts Among Employees**

Sturgis also created inevitable conflicts between jointly employed employees and solely employed employees who are included within the same bargaining unit. The interests of temporary employees may be very different from the interests of regular employees. One can easily foresee a situation where a union would agree to less favorable wages and benefits for the jointly employed employees in order to accommodate the interests of the solely employed employees—who more often than not would outnumber the jointly employed employees. The interests of one group of employees, the jointly employed employees in this instance, could be sacrificed in exchange for gains realized by the other group of employees, the solely employed employees.

Such difficulties may also arise where the supplier employer’s benefits are more desirable than those provided by the user employer. In this instance, the jointly employed contingent employees would have a strong interest in maintaining the benefits that the solely employed employees do not share. These examples illustrate the complications that are likely to arise where two groups of employees, whose interests are not necessarily similar, are required to bargain as one unit. Authorizing such units would result in ineffective bargaining, contrary to the underlying purpose of the NLRA.

**Secondary Boycotts**

Sturgis also created new issues with regard to secondary boycotts prohibited under Section 8(b)(4)(ii)(B). In order to avoid engaging in unlawful secondary activity, a

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union must be able to identify the primary employer. With *Sturgis* units, unions would have considerable difficulty identifying the primary employer because the union may have no idea which employer has control over the issues in dispute and so may, even innocently, apply economic pressure to the wrong employer. The picketed neutral employer would then have to seek recourse through the Board and the courts, all the while suffering from a dispute not its own.51

**Accretion**

*Sturgis* and its progeny also created serious accretion issues. *Jeffboat Division* opened the door for accreting jointly employed employees into an existing bargaining unit composed of solely employed employees.52 Allowing accretion in that situation would automatically bind the supplier employer to the user employer’s existing collective bargaining agreement even though the supplier employer had no role in negotiating the contract.

*Jeffboat Division* was extended even further in *Gourmet Award Foods* when the Board added contingent employees to an existing bargaining unit of the user employer’s employees without engaging in an accretion analysis.53 Thus, the contingent employees were stripped of their Section 7 rights and the supplier employer was swept under another employer’s collective bargaining agreement which it did not negotiate. This result was obtained despite the fact that for five years the contingent employees had never been treated as falling under the user employer’s collective bargaining agreement. The draconian result of *Gourmet Award Foods* was given an even more bizarre twist when the Board ruled that only those portions of the contract that pertained to issues controlled by the user employer would be applied to the contingent employees.

51 See 331 N.L.R.B. at 1322 (Brame, M., dissenting).
52 *Id.* at 1309.
53 336 N.L.R.B. at 874.
employees. Thus, the user employer’s collective bargaining agreement was effectively rewritten. Presumably, the demise of Sturgis will signal the demise of Gourmet Award Foods.

Life After Oakwood Care Center

While Oakwood Care Center clearly creates an extra hurdle for unions desiring to organize contingent employees in certain settings, it certainly does not prevent unions from organizing such employees. Oakwood Care Center presents no problems for unions seeking to represent contingent employees in non-joint employer situations. Nor does Oakwood Care Center affect unions that seek to organize separate bargaining units consisting solely of jointly employed employees. The Oakwood Care Center majority explained that its decision had no impact on units composed exclusively of jointly employed employees because such units are not multi-employer units. Accordingly, a union can organize temporary employees by filing a petition to represent only the jointly employed employees within the unit. Such units are appropriate even where each employer in the relationship may control only some of the aspects of the employment relationship, provided that both employers meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. Because joint employers share or codetermine the terms and conditions of their employees’ employment, both joint employers are obligated to participate in bargaining in order to negotiate concerning the full complement of subjects.

In some circumstances, Oakwood Care Center may actually aid union organizing efforts by preventing user employers from diluting a union’s strength in the user’s regular

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54 Id. at 875.
55 Prior to Sturgis, unions were able to experience some “spectacular organizing successes” with contingent workers. Nancy Schiffer, Organizing Contingent Workers: Community of Interest v. Consent, 17 Labor Law. 167, 169-70 (Summer, 2001).
57 See 331 N.L.R.B. at 1319 (Brame, M., dissenting).
workforce by adding temporary employees to the voting unit. It must be remembered that it was the user employer in *Sturgis* which sought the inclusion of contingent employees in the voting unit, over the objection of the union which was trying to organize only the regular employees of the user.

It is unclear what impact *Oakwood Care Center* will have on attempts to organize supplier-wide bargaining units of contingent employees, as *Oakwood Care Center* did not address the continued viability of *Sturgis’ “clarification”* of *Greenhoot*. It will be recalled that *Sturgis’ “clarification”* of *Greenhoot* permitted unions to organize all of a supplier’s employees—even where some of the supplier’s employees were jointly employed by user employers—by simply naming only the supplier employer in the petition.\(^{58}\) *Oakwood Care Center*’s broad definition of multi-employer units would seemingly apply to such a situation and preclude the practice sanctioned by the *Greenhoot* “clarification.”\(^{59}\)

Therefore, *Oakwood Care Center* may allow supplier-wide units only where the supplier has no joint employer relationships with its user customers. At locations where the supplier has a joint employer relationship with its user customer, the union would be required to petition for the joint employer unit only, absent consent by both user and supplier employers.

\(^{58}\) *Id.* at 1310.

\(^{59}\) In dicta, the *Oakwood Care Center* majority suggested that the NLRA does not allow unions to file petitions naming only one employer in a joint employer setting. The *Oakwood Care Center* majority noted that authorizing such petitions would diminish the jointly employed employees’ Section 7 rights because the jointly employed employees would be left with a representative who would be unable to bargain with the other joint employer, who also shares or codetermines the employees’ terms and conditions of employment. *Oakwood Care Center*, therefore, suggests that jointly employed employees must be allowed to bargain with both joint employers. 343 N.L.R.B. No. 76, slip op. at 5.
Conclusion

While it is open to debate whether the Sturgis majority or the Oakwood Care Center majority was correct in interpreting Section 9(b) or properly determining what constitutes a “multi-employer” unit, it is clear that Sturgis and its progeny created serious practical problems for negotiations. Because the purpose of Section 9 is to facilitate effective bargaining, the practical problems created by Sturgis and its progeny justified the Oakwood Care Center Board’s decision to set it aside. And while it would be wrong to say that union organizing will be unaffected by Oakwood Care Center, it would be equally wrong to ignore the fact that unions can, even in the wake of Oakwood Care Center, continue to organize contingent employees in single location units and in many multi-location units.