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May 10, 2012

Lester A. Heltzer
Office of the Executive Secretary
Franklin Court Building National
Labor Relations Board 1099 14th
Street, NW Washington, DC
20570

Electronically Filed

RE: *Miller & Anderson, Inc.*
NLRB Case No. 05-RC-079249
Request for Review

Dear Mr. Heltzer:

This office represents Sheet Metal Workers International Association, Local Union No. 19 ("Local 19" or "Union"). Please accept this correspondence as a Request for Review of the Regional Director's decision to dismiss the petition for election filed by Local 19, in which it sought representation of employees in the following bargaining unit: "All sheet metal workers employed by [Miller & Anderson, Inc. and/or Tradesmen International] as either single or joint employers on all job sites in Franklin County, Pennsylvania." This petition was filed on April 20, 2012, as an amendment of a petition initially filed on April 13, 2012.

By letter of April 26, 2012, Region 5 Director Wayne R. Gold rejected the Union's petition on the following basis:

> The petition in this matter, filed April 20, 2012, seeks to represent a unit of all sheet metal workers employed by Miller & Anderson, Inc. and Tradesmen International "as either single employers or joint employers" on all jobsites in Franklin County,

> Pennsylvania. Pursuant to the Board's decisions in *Greenhoot, Inc.,* 205 NLRB 250 (1973) and *Oakwood Care Center,* 343 NLRB 659 (2004), a unit consisting of employees employed by a single employer and by a joint employer is a multiemployer bargaining unit and is appropriate only if all employers consent. Under extant Board law, the petition in this matter seeks a three-employer unit consisting of (1) employees employed by Miller & Anderson, (2) employees employed by Tradesmen International, and (3) employees jointly employed by Miller & Anderson and Tradesmen International. The employers subject to the petition have advised the undersigned that they do not consent to multiemployer bargaining. Consequently, the petition does not raise a question concerning representation, and further proceedings on this matter are unwarranted. *Oakwood Care Center, supra.*

Local 19 submits that first, the cited cases do not reflect the reality of modern employment practices, and that the Act would be better served by a return to the rule of *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000); and second, that the Region failed to address whether an election was proper in the alternative separate bargaining units of Miller & Anderson employees or Tradesmen International employees.

Miller & Anderson is a mechanical and electrical contractor based in Clear Brook, Virginia. Miller & Anderson perform work in Virginia, West Virginia, Maryland, and Pennsylvania. It is currently performing projects in Franklin County, Pennsylvania, specifically the Chambersburg Hospital project, the Wilson College Science Center, and Manitowoc Crane Group Grove Crane Care Office Center. Tradesmen International is a nationwide "construction recruiter and construction employer" that provides contractors with temporary employees. Tradesmen provided Miller & Anderson with the core of the workforce performing sheet metal work at the Chambersburg Hospital site from its West Chester, Pennsylvania office. It is believed that Miller & Anderson's other Franklin County jobs were also staffed with sheet metal workers from this office. Upon being sent to the Miller & Anderson job, it was made clear to Tradesmen employees that they "serve two masters" — Miller & Anderson, the user employer, and Tradesmen, the supplier employer. Local 19 believes it acquired a sufficient showing of interest necessary to initiate a representation election for the sheet metal work these employees perform in Franklin County, whether they do so for the user, the supplier, or jointly.

In its brief decision to dismiss the petition, the Region cites *Greenhoot* and *Oakwood* for the proposition that where a user employer obtains employees from a supplier employer, and a union is seeking to represent the employees in a single unit for the purposes of collective bargaining with the user employer, the unit sought is a multiemployer unit and, under established principles of multiemployer bargaining, cannot be found appropriate absent the consent of the affected employers. While *Greenhoot* does set the stage in many respects for the outcome in *Oakwood,* it involved two or more otherwise separate *user* employers who obtain employees from the same supplier employer, and a union seeking to represent the employees in a single unit. *Oakwood* revitalized the 1990 case *Lee Hospital,* 300 NLRB 947 (1990), the extension of *Greenhoot* overruled in *Sturgis,* that applies to situations where a single user employer obtains employees from one or more supplier employers and a union is seeking to represent both those jointly employed employees and the user's solely employed employees in a single unit. It would seem that *Lee Hospital* is the more appropriate

citation on the facts submitted to the Region.

In *Sturgis,* the Board recognized that a significant share of the American workforce was working in what the Bureau of Labor Statistics labeled "contingent and alternative employment arrangements." *Sturgis,* 331 NLRB at 1298. *Strugis* relied on studies conducted by the BLS and GAO to demonstrate that the contingent and temporary workforce had grown dramatically since the early 1980s and by the time of the decision in 2000, had become a permanent, significant portion of the workforce. *Id.* In 2006, studies showed that the number of contingent and temporary workers increased by about 3 million, while the percentage of these workers relative to the total workforce remained relatively consistent. *GAO Report to the Ranking Minority Member, Committee on Health, Education, Labor, and Pensions, U.S. Senate Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification,* GAO-06-656 (July 2006). It is undeniable that contingent and temporary workers, like the jointly employed sheet metal workers here, constitute — now and by all indications in the future — a significant number of "employees" in this country. As employees, they are worthy of the Act's protection.

After an extensive recitation of the Board's history of finding combined units of jointly and solely employed employees and review of Section 9(b), the *Sturgis* Board ruled that "[s]eparating `regular' employees— i.e., the solely employed— from the 'temporaries' who may (as in the instant cases) share the same classifications, skills, duties, and supervision, creates an artificial division that is not required by the statute." *Sturgis,* 331 NLRB at 1305. More particularly, the Board found:

> After carefully reviewing our precedent and the policy questions raised, we find that the units at issue — all the employees performing work on behalf of the user employer. . .do not constitute multiemployer units requiring consent.
>
> 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), is logical and consistent with precedent. The scope of a bargaining unit is delineated by the work-being performed for a particular employer. 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. Further, all of the employees in the unit are employed, either solely or jointly, by the user employer. Thus, it follows that a unit of employees performing work for one user employer is an "employer unit" for purposes of Section 9(b).

Id. at 1304-05. The logic of this ruling is simple, and can be distilled to: what work is being done and who is the work being done for? Where a company employs a permanent staff and temporary employees to accomplish the same objectives, that company, as the "user employer" has ultimate control over the wages, hours, terms and conditions of employment of all of the petitioned-for unit, even if some members also happen to serve a second master in the temp agency who sent them. Granted, it may force an additional negotiation between the temp agency and the user employer, but a complication in the relationship between those entities is not the concern of the Act, even though the *Oakwood* Board argued that such complications were grounds to reject *Sturgis* as a matter of

policy. *Oakwood,* 343 NLRB 659, 663 (2004).

The measured, direct dissent by Board Members Liebman and Walsh in the *Oakwood* case, articulated a strong defense *of Sturgis* and rebutted each of the *Oakwood* majority's arguments. We respectfully submit that this dissent should guide this case.

In dissecting the construction of Section 9(b) in *Oakwood,* Members Liebman and Walsh focused on the central mistake of the majority: conflating "joint employer" and "multiemployer" bargaining. They note:

> The critical difference, noted in *Sturgis,* 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. 331 NLRB at 1304-1305. Hence the unit scope is employerwide. Surely employees who are working side by side, for employers who have voluntarily created that arrangement, should be able to join together in the same bargaining unit, if they choose to. They are part of a common enterprise and, absent a common union representative, they are potential competitors with each other with respect to the terms and conditions of their work. Accordingly, where the Board's other criteria for determining community of interest are met, it is appropriate for the joint employees to be combined with the user employer's sole employees in a joint bargaining unit.

Id. at 666.

Further, it was not lost on the *Oakwood* dissenters that Sturgis is consistent with economic realities and the goals of the Act. In truth, it is impossible to deny that the requirement of consent from both employers effectively prevents the representation of temporary workers. Temporary employees have become a very permanent segment of the American workforce. The Act does not exclude them from protection, only the misguided rulings in *Lee Hospital* and *Oakwood* deny them their Section 7 rights.

Finally, the Union's petition for election in this matter posited alternative units for the Region to consider by requesting representation of the employees whether they were singly employed by Miller & Anderson, singly employed by Tradesmen, or jointly employed. The Regional director should have proceeded to hearing on the appropriateness of those alternative units. Consequently, for all of the foregoing reasons, Local 19 respectfully requests that decision of the Regional Director be reversed.

Sincerely yours,
SPEAR WILDERMAN, P.C.

BY: MARTIN ILZ

cc: Wayne R. Gold, Region 5 Director
Douglas M. Nabhan, Esq.
James D. Kurek, Esq.

CERTIFICATION OF SERVICE UPON COUNSEL

I hereby certify that I served a True and correct copy of the foregoing document, by mail, upon the following on the date indicated.

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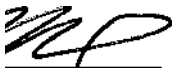
Dated: May 10, 2012



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