UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

MILLER & ANDERSON, INC.,	)	
	)	
Employer,	)	
	)	
and	)	Case No. 05-RC-079249
	)	
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 19, AFL-CIO,	)	
	)	
Petitioner	)	

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE EMPLOYER MILLER & ANDERSON, INC.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of vital concern to the nation's business community. The Chamber has participated as amicus curiae in dozens of cases before the National Labor Relations Board.

Many of the Chamber's members regularly enter into agreements with other employers who are in the business of providing temporary labor. These agreements permit the employer using temporary labor to supplement its work force as necessary to meet changing economic conditions. In this manner, the entity using temporary labor is able to stabilize its own workforce and avoid layoffs, short work weeks, and temporary shutdowns that would otherwise be necessary as its business expands and contracts. These relationships are a cost-effective and efficient manner of operating for those employers who enter into such relationships. And they also create employment for individuals who prefer not to work full-time, who desire flexibility in their work schedules, or who might not be hired if the employer was required to treat them as a long term employee. The Board's *Oakwood* decision encourages these relationships by recognizing that an entity using temporary labor and an entity supplying temporary labor have different business models and interests and that, even though their respective employees may work side-by-side, they are not commonly employed and do not have identical interests. Overruling *Oakwood* and returning to the Board's short-lived decision in *Sturgis* would

discourage these relationships and potentially cause loss of employment opportunities for those individuals who are part of the "contingent" workforce. Pursuant to the Board's Notice and Invitation to File Briefs dated July 6, 2015, the Chamber files this brief setting forth its views.

QUESTIONS ADDRESSED

1. How, if at all, have the Section 7 rights of employees in alternative work arrangements, including temporary employees, part-time employees and other contingent workers, been affected by the Board's decision in *Oakwood Care Center*, 343 NLRB 659 (2004), overruling *M.B. Sturgis*, 331 NLRB 1298 (2000)?

2. Should the Board continue to adhere to the holding of *Oakwood Care Center*, which disallows inclusion of solely employed employees and jointly employed employees in the same unit absent the consent of the employers?

3. If the Board decides not to adhere to *Oakwood Care Center*, should the Board return to the holding of *Sturgis*, which permits units including both solely employed employees and jointly employed employees without the consent of the employers? Alternatively, what principles, apart from those set forth in *Oakwood* and *Sturgis*, should govern this area?

ARGUMENT

A. THE *STURGIS* AND *OAKWOOD* DECISIONS

To address the issues posed by the Board in its Notice and Invitation to File Briefs, it is helpful to discuss the Board' prior decisions in *Sturgis* and *Oakwood.* In *Sturgis*, the Board overruled its prior statement in *Lee Hospital*, 300 NLRB 947 (1990), that individuals employed by joint employers cannot be included in a unit with individuals employed by only one of the employers absent the employers' consent. In *Sturgis*, the Board found that this was an erroneous interpretation of the statute and prior decisions of the Board and the courts, which "effectively denied ["contingent" employees] representational rights guaranteed them under the National Labor Relations Act." 331 NLRB at 1298. The majority acknowledged that a true multiemployer

unit would only be appropriate if consented to by the employers, but noted that § 9(b) of the Act, 29 U.S.C. § 159(b), expressly defined an employer-wide unit as an appropriate unit. In the majority's view, the unit being sought—jointly employed employees and solely employed employees—was not a multiemployer unit as that term historically had been defined. Rather, it was an "employer" unit:

> 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.

While disclaiming any intent to declare all *Sturgis* units appropriate, the majority stated that "a group of employees working side by side at the same facility, under the same supervision, and under common working conditions, is likely to share a sufficient community of interest to constitute *an* appropriate unit." *Id.* at 1305-06. Finally, the *Sturgis* majority rejected the dissent's "contention that finding these units appropriate presents impediments to meaningful bargaining because employers are compelled to bargain at the table over employees with whom they have no employment relationship." *Id.* at 1306. In this regard, the majority noted that "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," *Id.* at 1306, and that "the collective-bargaining process encouraged by the Act, which covers a wide variety of activity, is capable of meeting the changing conditions and challenges posed by bargaining in these units." *Id.* at 1307.

Member Brame filed a passionate dissent, concluding that the majority's analysis created "both bad law and bad policy." *Id.* at 1309. In his view, the majority failed to recognize that a joint-employment relationship creates a new employer, separate and distinct, from the individual employers who comprise the joint employer. *Id.* at 1316. Thus, in a *Sturgis* unit, "some of the employees share joint employers, but those supplier joint employers are entirely strangers to the rest of the unit employees, who are solely employed by the user employer." *Id.* at 1318. "In short, having one employer *in common* differs fundamentally from having the *same* employer, and saying otherwise does not paper over the contrary reality." *Id.* Member Brame explained:

> Because joint employers share or codetermine terms and conditions of employment, both must participate in bargaining in order to negotiate concerning the full complement of subjects. Requiring that the joint employers engage in bargaining with another employer, be it one of the parties to the joint employer relationship or an outsider, without their consent, is coerced multiemployer bargaining, which is beyond the Board's statutory authority.

Id. at 1319.

The dissent posited numerous problems that would ensue, i.e., conflicts between employees within the unit, conflicts between employers, collective bargaining agreements being foisted on unsuspecting employers in accretion situations, and an undermining of the statutory protections against secondary activity provided by § 8(b)(4) of the Act, 29 U.S.C. § 158(b)(4). *Id.* at 1320-22. According to the dissent:

> Moreover, the majority contemplates bargaining in which the sole employer as well as each employer in the joint employer relationship will bargain concerning the employees and the subjects under its control. Such neatly parsed negotiations, however, are unlikely to materialize. In a more realistic scenario, this forced multiemployer bargaining would produce controversy and confusion as the employers strive to protect their differing interests even as they negotiate jointly with the union.

Id. at 1310.

Less than four years after the *Sturgis* decision, the Board reversed course in *Oakwood* and returned to the *Lee Hospital* view of multiemployer bargaining, concluding that *Sturgis* had reinterpreted the meaning of an "employer unit," thereby "sever[ing] that term from its statutory moorings." 343 NLRB at 661. In the view of the *Oakwood* majority:

> A joint employer, under the Board's traditional definition, is comprised of two or more employers (e.g., A and B) that "share or codetermine those matters governing essential terms and conditions of employment" for bargaining unit employees. All of the unit employees work for a single employer, i.e., the joint employer entity A/B. Therefore, a joint employer unit of A/B is not a multiemployer unit. In a *Sturgis* unit, in contrast, some of the employees are employed by A, and others are employed by A/B. It may be that, as to the latter group, A and B jointly set all terms and conditions of employment. Or, it may be that, as to that group, A sets some terms and B sets others. The critical point is that the one group has its terms set by A/B. The other group has its terms set only by A. Thus, the entity that the two groups of employees look to as their employer is not the same. No amount of legal legerdemain can alter this fact.

Id. at 662.

The majority further found that policy reasons supported a return to *Lee Hospital.* Relying on the *Sturgis* dissent, the *Oakwood* majority concluded that "the bargaining structure contemplated in [*Sturgis*] gives rise to significant conflicts among the various employers and groups of employees participating in the process," which "Section 9(b) and the Board's community-of-interest test are designed to avoid." *Id.* at 662-663. Finally, the *Oakwood* majority found that "combin[ing] jointly employed and solely employed employees in a single unit, with a single union negotiating with two different employers, each of which controls only a portion of the terms and conditions of employment for the unit, . . . subjects employees to fragmented bargaining and inherently conflicting interests, a result that is inconsistent with the Act's animating principles." *Id.* at 663.

Members Liebman and Walsh dissented, largely for the same reasons relied upon by the *Sturgis* majority. In their view, the majority "effectively bars yet another group of employees—the sizeable number of workers in alternative work arrangements—from organizing labor unions, by making them get their employers' permission first." *Id.*

B. *BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC.*

In *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), the Board recently addressed its standard for determining whether two or more employers constitute joint employers. The union already represented Browning-Ferris's ("BFI's") employees in a separate unit, but had filed a petition seeking to represent employees provided by Leadpoint to BFI and naming BFI and Leadpoint as joint employers. After the Regional Director found that Leadpoint was the sole employer of this group of employees, the union filed a request for review, which was granted by the Board. The Board then solicited briefs from the parties and interested amici regarding whether the Board should revise its joint-employer standard, as articulated in *TLI, Inc.*, 271 NLRB 798 (1984), *enf'd*, 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984). The Chamber filed an *amicus* brief in support of the Regional Director's decision, urging the Board to adhere to *TLI* and *Laerco.*

Upon receipt and consideration of these briefs, the Board, in a 3-2 decision, overruled *TLI* and *Laerco* and redefined the test for determining whether two or more employers are joint employers of certain employees. This redefined test involves a two-part inquiry. The first inquiry is whether there is a common-law employment relationship with the employees. If this question is answered in the affirmative, the Board proceeds to the second question, which asks "whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." If both questions are

answered affirmatively, the Board will find a joint employment relationship. *Slip Op.* at 12-13. The Board held, however, that "a joint employer will be required to bargain only with respect to those terms and conditions over which it possesses sufficient control for bargaining to be meaningful." *Slip Op.* at 16.

In *Browning-Ferris,* the Board noted that it would view the "essential terms and conditions of employment" in an expansive manner and would not limit its inquiry to "hiring, firing, discipline, supervision, and direction." *Slip Op.* at 15. Further, it concluded that the common law "does not require that control must be exercised in order to establish an employment relationship," nor "does it require that control (when it *is* exercised) must be exercised directly and immediately, and not in a limited and routine manner (as the Board's current joint-employer standard demands)." *Slip Op.* at 14.

Browning-Ferris is of interest in this case because of its discussion of the impact of the Board's new joint-employer standard on collective bargaining. As noted, the unit sought in *Browning-Ferris* was not a *Sturgis* unit as it did not group the employees jointly employed by BFI and Leadpoint with the employees employed solely by BFI. Instead, the Union sought a unit that designated BFI and Leadpoint, not as two separate employers acting jointly, but as a single joint-employer entity. The majority noted that in order to promote the policies of the Act, "our joint employer standard—to the extent permitted by common law—should encompass the full range of employment relationships wherein meaningful collective bargaining is, in fact, possible." *Slip Op.* at 13. Thus, the majority effectively found that meaningful bargaining was possible in a unit that included only the employees jointly employed by BFI and Leadpoint.

C. *OAKWOOD* HAS NOT ADVERSELY AFFECTED EMPLOYEE SECTION 7 RIGHTS.

The Chamber submits that *Oakwood* has not adversely affected employee § 7 rights. [29 U.S.C. 157.] Supplier employees are fully protected by § 7 of the Act and have all of the rights stated therein, including the right to engage in, or refrain from engaging in, union activities, collective bargaining, and other concerted activities for mutual aid or protection. Nothing in *Oakwood* diminishes these rights, and if employees are coerced in the exercise of those rights by either the user or the supplier, a remedy is available under § 8(a)(1) of the Act. [29 U.S.C. § 158(a)(1).] Similarly, if employees are discriminated against by either the user or the supplier, a remedy is available under § 8(a)(3) of the Act. [29 U.S.C. § 158(a)(3).] The Act draws no distinction between user employees and supplier employees.

One of the main concerns of the *Sturgis* majority and the *Oakwood* dissenters was that supplier employees not be denied the right to engage in collective bargaining. However, it is simply not true that supplier employees need the consent of their employers (joint or otherwise) to engage in collective bargaining. Under *Browning-Ferris,* a supplier's employees will almost always have two choices. One, the supplier employees may seek to bargain only with the supplier employer. Two, the supplier employees may engage in collective bargaining with the joint employer entity. *Browning-Ferris* clearly deemed collective bargaining to be "meaningful" in both of these situations. The only unit in which *Oakwood* precludes collective bargaining without employer consent is when the unit sought combines the supplier's employees with the user's solely-employed employees in a single bargaining unit. This limitation is no greater than the limitations that most employees encounter in seeking to be represented. They are limited to bargaining with their direct employer and may not seek to join forces with the employees of a

customer, a vendor, or the employer across the street. The right to engage in collective bargaining does not encompass the right to enjoy the maximum possible bargaining power. What is required is a right to engage in meaningful collective bargaining. Nothing in the *Oakwood* standard precludes meaningful bargaining.

D. THE BOARD SHOULD CONTINUE TO ADHERE TO *OAKWOOD*.

The competing views regarding *Oakwood* and *Sturgis* are fully set forth in those decisions, as discussed above. The Chamber contends that the Board should continue to adhere to *Oakwood*. First, *Oakwood's* characterization of a *Sturgis* unit as a multiemployer unit is more faithful to the Act and economic realities. Second, many of the reasons that motivated the *Sturgis* Board to overrule *Lee Hospital* no longer apply in light of the Board's decision in *Browning-Ferris.*

"A party cannot be compelled to join multiemployer bargaining" and "joining multiemployer bargaining is not a mandatory subject of bargaining," *Sheet Metal Workers' Internaqtional Assoc., Local 104*, 323 NLRB 227, 232 n. 6 (1997). "Given the strong protections the Act affords parties wishing to retain independent bargaining status," *Id.*, the Board should be extremely circumspect in compelling one employer to bargain jointly with another employer. As set forth in *Oakwood*, a joint employer, although composed of two independent entities, is an entity unto itself. When the Board certifies a union as the exclusive representative of the employees of a joint employer, the designated employer is the joint entity collectively, not the two constituent parts separately. After all, the parties will be bargaining a single collective bargaining agreement that covers the joint entity.

Consider the reverse situation where two unions jointly petition to represent a unit of employees. In such circumstances, the employees do not vote to be represented by Union A and

Union B as separate unions. They vote to be represented by A-B as a joint-entity. The representation obligation that follows runs to A-B jointly, not A and B individually. *Suburban Newspaper Publications, Inc.*, 230 NLRB 1215, 1217 (1977). The Board's holding in *Sturgis* that each component of the joint employer entity is only obligated to bargain with respect to the terms and conditions it controls artificially bifurcates the joint employer entity and is contrary to the representation obligation imposed on joint petitioners.

The bifurcated bargaining obligation is also largely unworkable. This is particularly true given the Board's decision in *Browning-Ferris* to revise the joint-employer standard. When *Sturgis* was decided, the Board required that an employer exercise direct and immediate control over the essential terms of employment of another entity's employees in order for a joint-employer relationship to be created. Thus, at that time, the impact of *Sturgis* was more limited. *Browning-Ferris,* however, potentially expands the number of joint employer relationships and reduces the required involvement of the user employer. In these circumstances, viewing an employer using temporary labor and the employer and its supplier of that labor as an "employer" unit rather than a "multiemployer" unit becomes far less justifiable.

Indeed, the potential conflicts will inevitably expand. The difficulty of determining who controls any specific term of employment will increase. What will be even more likely is that both companies will exercise some degree of control over the same terms of employment. For example, a company employing temporary labor and the supplier employer may both have some control over the wages paid to the supplying company's employees, but their interests will not be common. This will inevitably cause problems in bargaining, not only for the joint employers, but also for the union and the employees it represents. It is difficult to see how effective bargaining will be promoted in these circumstances. If the company supplying the labor states that it will

agree to a wage increase, but only if the company using the labor agrees to increase the reimbursement rate, and the user company declines to consent to any increased reimbursement, a stalemate is created that will be almost impossible to resolve. Neither the Union nor the Board can compel either of the joint employers to alter its position. Further, the potential for compromise is very limited inasmuch as the joint employers are not united in their respective positions or interests. Indeed, the union is placed in a difficult position because what it may be willing to offer as a tradeoff will need to satisfy both joint employers, not just one. The Union of course retains the right to strike, but the pressure that is created will not be the same for both of the joint employers. Thus, one joint employer may be subjected to a strike that it has no power to avoid or end because it lacks the ability to provide what the union wants. *Oakwood,* perhaps more than ever, promotes stability in collective bargaining.

E. THE BOARD SHOULD NOT RETURN TO *STURGIS*

Even assuming that the Board ultimately decides to overrule *Oakwood,* there is little that would commend a return to *Sturgis.* Indeed, some of the decisions that issued during the *four-year* period when *Sturgis* was controlling illustrate some of the difficulties with its analysis. For example, in *Sturgis* itself, it was the user employer, not the union, who sought to include the supplier's employees in the unit. Although the Board left open the question of whether the temporary employees must be included in the unit, it created an additional issue for litigation and potentially adversely impacted the right of the user's employees to engage in bargaining with their sole employer. This possibility came home to roost in *Outokumpu Copper Franklin, Inc.*, 334 NLRB 263 (2001), where the Board, over the objection of the union, required that temporary employees provided by a supplier be included in the unit because the few "dissimilar terms and conditions of employment are substantially outweighed by the many common terms and

conditions of employment shared by the regular and temporary employees." *Id.* at 263. Because the petition named only the user employer, the Board found it unnecessary to address the joint employer issue.

Sturgis and *Outokumpu* illustrate that employers may use *Sturgis* as a weapon to dilute a union's support and to preclude a user employer's employees from being represented at all. If the temporary employees outnumber the employees solely employed by the user, this possibility may well become likely. The notion that the interests and desires of temporary employees will always be aligned with those of the user's employees is fallacious and without support. Temporary employees may well value the flexibility that comes with temporary employment and may see the union as a threat to that flexibility. And the user's regular employees may well conclude that joining together with the "temporary" employees weakens, rather than strengthens, their bargaining power. The regular employees have one critical thing that the temporary employees do not possess, job security. That job security exists solely because the temporary employees serve as a buffer in good and bad times. From the perspective of the regular employees, aligning themselves with the temporary employees is likely to be seen as potentially eliminating this advantage, as well as any other advantages that the regular employees may have. Under *Oakwood*, however, there is no possibility for the user employer to insist that the supplier's employees be included in the unit. Thus, *Oakwood* ensures that the user's employees will, if they so choose, be able to bargain directly with their employer and that their bargaining rights will not be undermined by the unwanted inclusion of temporary employees.

There is little that would commend a return to *Sturgis.* The Board's decision in *Oakwood* is sound and should be retained. There are no compelling reasons for the Board to reverse course at this time.

CONCLUSION

The Chamber respectfully submits that the Board should reaffirm the holding of *Oakwood.*

Respectfully submitted, this 18th day of September 2015.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I certify that this day I served the foregoing AMICUS BRIEF on the following parties by electronic mail:

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Dated this 18th day of September 2015.

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