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TEMPORARY WORKERS ALLOWED TO JOIN THE UNIONS:

A CRITICAL ANALYSIS OF THE IMPACT OF M.B. STURGIS DECISION

JOY VACCARO

INTRODUCTION

Temporary workers compose a large segment of our nation’s workforce. These workers, who are often referred to as contingent workers, do the same work as their permanent counterparts without reaping the same benefits. On August 25, 2000 in M.B. Sturgis, Inc., the National Labor Relations Board (NLRB) allowed joint employees to be included for representational purposes in a bargaining unit with employees solely employed by the user, without consent of the user and supplier employers. Joint employees are employed by both the user and supplier employer. This ruling overruled Lee Hospital, which required the consent of their joint employers for temporary workers to unionize. This case highlights the ongoing changes in the American workforce and workplace. There has been significant growth in joint employers’ arrangements, including the increased use of companies that specialize in supplying temporary workers to augment their work force.

Part I of this Note discusses the current law for temporary workers. The recent decision in Sturgis extended the right for temporary workers to become unionized without consent of their joint employers. The Board overruled precedent due to the changing structure of the American workforce. In order for temporary workers to have the protections of the NLRA, the
Board must assess two factors: (1) whether they have joint employers' status; and (2) whether this particular multi-employer unit is conducive in accordance with Rule 9(b) through the community of interest analysis. Part II will discuss and outline the statutory inconsistencies and lack of practicality arguments that have been pointed to since the outcome of this decision. Some of these arguments are well grounded while others can be easily dismissed. Part III will conclude that the Court of Appeals should overall adopt the decision in *Sturgis*. Further, some solutions and suggestions will be offered to invalidate some of the loopholes in this current decision.

I. THE PRESENT DAY LAW FOR TEMPORARY EMPLOYEES

A. Landmark Decisions

Temporary employees have been addressed in three landmark NLRB decisions: *Greenhoot* in 1973;² seventeen years later in *Lee Hospital*³ and in August of 2000 in *Sturgis*.⁴ In 1973, the Board⁵ determined that a multi-employer unit needs consent of

1 See The N.L.R.B.: What it is, What it does, at http://www.N.L.R.B.gov/publications/whatitis.html, Jun. 2, 2002 (defining N.L.R.B. as independent Federal agency created in 1935 by Congress to administer National Labor Relations Act, which is basic law governing relations between labor unions and employers whose operations affect commerce, and finding that purpose of Board is to assure free choice and encourage collective bargaining); see also Compensation Resources, REP. ON HOURLY COMPENSATION, Jan. 2001, at 8 (noting that Board can petition court on behalf of workers); Pace International Union Hails National Labor Relations Board Administrative Law Judge Decision That Faults Cellu Tissue Bad Faith Bargaining at New York Mill, PUERTO RICO NEWSWIRE, Dec. 21, 2000 (finding that in bad faith bargaining decision N.L.R.B. is recommended to revoke any discipline that was imposed under bargaining and to pay backpay to employees harmed by company's unilateral change); Temps Are Entitled to Organizing Rights, ENG'G NEWS REC., Sept. 11, 2000, at 100 (asserting that most Board decisions result in confusion).


5 See The N.L.R.B.: What it is, What it does, supra note 1 (stating that Board has five members performing their formal function of administrative proceedings and observing that President of United States appoints Board members for five-year term, with consent of Senate); see also Richard Lapp, A Call for a Simpler Approach: Examining the NLRA's Section 10(j) Standard, 3 U. PA. J. LAB. & EMP. L. 251, 259 (2001) (stating that Board must petition for injunctive relief to stop certain union abuses); Anthony Ramirez, Metro Briefing, N.Y. TIMES, Feb. 12, 2001, at B4 (finding that N.L.R.B. has review process for administrative judge's decision, which consists of three-member Board panel); UFCW: Labor Board Orders Smithfield to Bargain with Union, U.S. NEWSWIRE, Feb. 8, 2001 (stating that Board has power to order bargaining agreements with workers' representative when anti-union tactics are used).
the affected employers before forming a union. In 1990, the Board in Lee Hospital extended the definition of multi-employer defined in Greenhoot, while still requiring both employers' consent when a union seeks to represent a single user employer who is solely a multi-employer in nature and obtains employees from one or more supplier employers. In the Board's most recent decision, Sturgis, the NLRB addressed the necessary circumstances where an employee can be included for representational purposes in a collective bargaining unit. While the 3-1 Board majority consisted of

6 See Greenhoot, 205 N.L.R.B. at 251 (holding there is no legal basis for two or more separate user employers to be bound by negotiations of union without their consent); see also Sturgis, 2000 N.L.R.B. LEXIS 546, at *30 (quoting Greenhoot language that "there is no legal basis for establishing a multi-employer unit absent showing that several employers have expressly conferred on joint bargaining agent power to bind them in negotiations or ... manifested consent through conduct); Lee Hosp., 300 N.L.R.B. at 950 (finding that AAI was not joint employer because Lee Hospital set non-negotiable reimbursement amount owed to them by AAI); Kenneth R. Dolin & Scott V. Rozmus, Temporary Workers: N.L.R.B. Trend of Easing Union-Organizing Activities Continues, EMP. L. STRATEGIST, Jan. 2001, at 1 (stating that in order to establish multi-employer bargaining unit, several employers must clearly manifest desire to be bound to future collective bargaining).

7 See Sturgis, 2000 N.L.R.B. LEXIS 546, at *10 (defining "user" as employer whose company uses those employees); see also Dolin & Rozmus, supra note 6, at 1 (noting that additional temporary employees could increase user employer's labor cost as well as limit operating flexibility); Michael Joe, N.L.R.B. Eases the Way for Temp Workers to Organize, LEGAL INTELLIGENCER, Sept. 18, 2000 at 4 (claiming that in multi-employer situations, user company is one of several parties that must agree to contract). See generally Temps Are Entitled to Organizing Rights, supra note 1, at 100 (stating that 1990 decision seemed to protect employers more than workers).

8 See Sturgis, 2000 N.L.R.B. LEXIS 546, at *10 (defining "supplier" employer as company that supplies employees); Perkins Cole, N.L.R.B. Lumps Temps with Regular Workers, ALASKA EMP. L. LETTER, Dec. 2000 (stating that temporary agency is example of supplier employer); see also Joe, supra note 7, at 4 (determining temporary employees who have been hired from more than one temp agency could not be represented by union); Temps Are Entitled to Organizing Rights, supra note 1, at 100 (understanding that "[t]emp agencies in construction crafts mostly supply the nonunion segment of the industry").

9 See Lee Hosp., 300 N.L.R.B. at 949-50 (holding that unit of Certified Registered Nurse Anesthetists (CRNA) did not constitute multi-employer bargaining and finding that CRNA could not be set apart from other hospital professionals, thereby not qualifying them as jointly employed); see also Sturgis, 2000 N.L.R.B. LEXIS, at *33 (finding that CRNA units were not considered jointly employed when "disparity of interest" test was applied); Legal Insights, HRFOCUS, Nov. 2000, at 2 (asserting that consent from all affected employers must be obtained in order to be legally recognized); Temps Are Entitled to Organizing Rights, supra note 1, at 100 (recognizing that under Lee Hospital, temporary employees as well as user-employer must consent to be part of multi-employer bargaining unit).

10 See 29 U.S.C.S. § 159(b) (Law. Co-op. 2000) (noting that to assure employees fullest freedom in exercising rights guaranteed by this Act, units appropriate for purposes of collective bargaining shall be employer unit, craft unit, plant unit or subdivision thereof); see also Dolin & Rozmus, supra note 6, at 1 (describing difference between multi-
Chairman Truesdale and Members Fox and Leibman, Member Brame's dissent was longer than the majority opinion. Chairman Hurtgen excused himself. Overall, the Board held, "that a unit composed of employees who are jointly employed by a user employer and a supplier employer, and employees who are solely employed by the user employer, is permissible under the state without the consent of the employers." As a result, temporary employees will be free to organize in three ways not previously available: (1) as part of a unit of employees of a single user employer also including the employer's "solely employed" employees; (2) as a separate unit of employees of a single supplier employer supplied to a single user employer; and (3) as part of unit of all of a single supplier employer's employees supplied to user employers.

employer unit and "employer unit" as provided in § 9(b)). See generally Pitney, Hardin, Kipp & Szuch LLP, Invalid Withdrawal Leaves Company Bound to Bargaining Agreement, N.J. EMP. L. LETTER, Feb. 2000 (finding under § 9(a) there are three ways employer can withdraw from multi-employer bargaining unit); A Guide to Basic Law and Procedures under the National Labor Relations Act, at http://www.N.L.R.B.gov/publications/basicguide.html (discussing § 9(b) employee representative in detail).

11 See Sturgis, 2000 N.L.R.B. LEXIS 546, at *59 (dissenting opinion) (finding that requirement of multi-employer bargaining units is impermissible under Act); Dolin & Rozmus, supra note 6, at 1 (claiming one problem with majority's decision was potential conflicts of interest among various employers); John P. Furfaro & Maury B. Josephson, Bargaining Units for Temporary Workers, N.Y.L.J., Oct. 6, 2000, at 3 (highlighting Brame's dissent which rejected idea that large number of "employees suffer the effective loss of representation rights guaranteed by the Act"). See generally Stanley S. Arkin, Trends New Obstacle to Corp. Internal Investigation, BUS. CRIMES L. REP., Jan. 2001, at 1 (noting that Member Brame believed that nonunion employers were burdened by having to allow employee representative to be present during investigatory meeting).

12 See Sturgis, 2000 N.L.R.B. LEXIS 546, at *9 (taking no part in decision); Dolin & Rozmus, supra note 6, at 1 (noting that Hurtgen did not participate in case); Eric Rosenfeld, N.L.R.B. Restores Representation Rights to Temps, N.Y.L.J., Sept. 25, 2000, at 1 (finding that Member Hurtgen disqualified himself from case). But see Arkin, supra note 11, at 1 (explaining that Member Hurtgen dissented in allowing union representative to be present during investigatory meeting because it added another cause of action in workplace).

13 Sturgis, 2000 N.L.R.B. LEXIS 546, at *36-37 (explaining logic and precedent of describing 'employer-unit' as unit of all of the user's employers, both those solely employed by the user and those jointly employed by the user and the supplier); see also Dolin & Rozmus, supra note 6, at 1 (asserting Sturgis decision enhanced risk of unions accreting temporary employees to existing units of employees solely employed by user employers); Joe, supra note 7, at 4 (finding no consent is needed when bargaining unit is made up of employees who are employed by both user and supplier employers and employees who are only employed by user employer); Legal Insights, supra note 9, at 4 (observing that "community of interest" test which determines whether unit is appropriate or not, looks for mutual interest in hours and wages of employees involved).

14 See Rosenfeld, supra note 12, at 1 (summarizing three ways unions are now able to organize); see also Joe, supra note 7, at 4 (observing Sturgis decision allows temporary workers hired by one company from variety of temp agencies to unite with permanent employees of that company, and together they can fight for better benefits); Maudlyne
B. Joint Employer Status

When a unit that combines jointly and solely employed workers of a single user employer desires a collective bargaining agreement, the unit must be considered a joint employer. It is well settled in the courts and through the Board's decision, that two or more firms can be joint employers of the same employees if they each exert significant control over the employees. The standard for determining the status of joint employer, which is accepted in our court system, is referred to as the "right of control" test.

The "right of control test" is a factual inquiry based on direct control and whether the employer "exercised substantial day-to-day control over referred employees." The following factors are primary:

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taken into consideration by the courts when determining whether the user should be considered a joint employer: (1) daily supervision of employees by the user employer; (2) the user employer’s discretion to hire and fire employees; (3) the user employer’s designation of work rules and conditions; (4) the user employer’s formulation of work instructions and work assignments; (5) the user employer’s right to refuse a “referred employee;” and (6) the method of employee compensation.

As a result, workers who are not under the direct control of the firm that compensates them will not be considered employees of the joint employer, regardless of their importance. In some respects, an employer can easily manipulate this system by giving extra delegation of authority and carefully structuring compensation to exclude workers whose mobility makes direct supervision unfeasible from the Act’s coverage. These small alterations by employers have changed the classification of joint employer to independent contractor. The use of an employee supplier agency and subcontracting of supervisory authority over workers has denied an increasing number of American workers protections under the NLRA. Still, a court can counter this

1275, 1278-79 (8th Cir. 1980) (applying joint-employer test).

19 See Pulitzer, 618 F.2d at 1278-79 (noting factors used in determining joint employer status in Parklane Hosiery Co., Inc., 203 N.L.R.B. 597, 612 (1973)); see also Laerco Transp. & Warehouse, 269 N.L.R.B. 324, 325 (1984) (concluding upon application of test that employer did not possess sufficient control over employee); Bita Rahebi, Comment, Rethinking the National Labor Relations Board’s Treatment of Temporary Workers: Granting Greater Access to Unionization, 47 UCLA L. REV. 1105, 1117 (2000) (reasoning right of control test employed by courts allows too much leeway for employers to avoid finding of joint employee status).

20 See Laerco, 269 N.L.R.B. at 325 (finding insufficient supervision over employees to meet standard); Hilton Int’l Co. v. N.L.R.B., 690 F.2d 318, 322 (2d Cir. 1982) (concluding that direct control did not exist in this case); see also Rahebi, supra note 19, at 1115-22 (discussing three different types of standards to determine joint employers: right of control test, economic realities test and hybrid standard).


23 See Am. Publ’g Co. of Mich., 306 N.L.R.B. 563, 564-65 (1992) (showing publisher can exclude newspaper deliverers from Act’s coverage merely by giving deliverers control over their own routes including ability to hire and fire assistants); Daily Mining Gazette, 273 N.L.R.B. 350, 352 (1984) (stating that drivers for newspaper are considered
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manipulation by not rigidly applying the standard and instead looking beyond the first factor only, and considering all the other factors.\(^{24}\)

Employers have advantages and disadvantages in seeking joint employer determination.\(^{25}\) If an employer has a joint employer status, the employer cannot gain the advantages of protection from secondary boycotts under section 8(b)(4).\(^{26}\) This statute prohibits a union from placing economic pressures on a neutral employer.\(^{27}\) Until the \textit{Sturgis} decision, a union could not organize without the consent of joint employers.\(^{28}\) As a result, prior to this decision the employer had the ability to determine their NLRA jurisdiction.\(^{29}\) This decision takes away the veto power of an employer and leaves the decision to unionize for the Board.\(^{30}\)

independent contractors based on factors including freedom to run their routes in any order they choose; see also M.B. Sturgis, Inc., 2000 N.L.R.B. LEXIS 546, \textsuperscript{\textsuperscript{40}} (Aug. 25, 2000) (explaining rationale in overruling \textit{Lee Hospital}).\(^{24}\) See N.L.R.B. v. United Ins. Co. of Am., 390 U.S. 254, 258-60 (1968) (taking into consideration only two or three factors). \textit{But see} Zarnoski v. Hearst Bus. Communications, Inc., 1996 U.S. Dist. LEXIS 181, at *25-29 (E.D. Pa. Jan. 11, 1996) (applying all factors and concluding that joint employer status did not exist).\(^{25}\) See Rahebi, supra note 19, at 1115-16 (outlining advantages and disadvantages of N.L.R.B. finding joint employer status); Charles P. Sabatino & Dr. Simi Litvak, Liability Issues Affecting Consumer-Directed Personal Assistance Services - Report and Recommendations, 4 ELDER L.J. 247, 290-91 (1996) (explaining advantages and disadvantages of joint employer status under workers' compensation law).\(^{26}\) See 29 U.S.C.S. § 158(8)(b)(4) (Law. Co-op. 2002). See generally NATIONAL LABOR RELATIONS BOARD, A GUIDE TO BASIC LAW AND PROCEDURES UNDER THE NATIONAL LABOR RELATIONS ACT 23-32 (U.S. Gov't Printing Office 1997), available at http://www.N.L.R.B.gov/publications/basicguide.html (outlining unfair practices of labor organizations); Rahebi, supra note 19, at 1119-21 (suggesting that hybrid test must be utilized to properly assess when entity is employer under definitions of Act).\(^{27}\) See \textit{Sturgis}, 2000 N.L.R.B. LEXIS 546, at *96 (Brame, J. Robert dissenting in part) (arguing Congress clearly intended to prohibit unions from forcing either employers or self-employed persons to join labor or employer organization); see also Rahebi supra note 19, at 1115-16 (illustrating dilemma of employers when deciding whether they want to be joint employers; while this quashes union organization efforts, employers still hope to retain protections of neutral-employer status).\(^{28}\) See \textit{Sturgis}, 2000 N.L.R.B. LEXIS 546, at *34 (explaining requirement of joint consent of both employers since \textit{Lee Hospital} ruling); see also Hexacom Corp., 313 N.L.R.B. 983, 983 (1994) (noting that neither party expressed consent to multi-employer bargaining); Int'l Transfer of Florida, Inc., 305 N.L.R.B. 150, 151 (1991) (stating party's challenge is clear indication that consent was never given).\(^{29}\) See \textit{Sturgis}, 2000 N.L.R.B. LEXIS 546, at *3 (stating that employees who were part of "contingent work force" were previously denied their rightful representation guaranteed under National Labor Relations Act); see also Greenhoot, Inc., 205 N.L.R.B. 250, *7-8 (1973) (proclaiming consent of joint employers is required for purposes of collective bargaining).\(^{30}\) See \textit{Sturgis}, 2000 N.L.R.B. LEXIS 546, at *35 (stating determination of appropriateness of union units, for collective bargaining purposes, is governed by community of interest analysis); see also, N.L.R.B. v. Action Automotive, Inc., 469 U.S. 490, 494 (1985) (noting Board's discretion in this area); Trs. of the Masonic Hall & Asylum Fund v. N.L.R.B., 699 F.2d 626, 632-33 (2d Cir. 1983) (articulating standard and
C. Community of Interest Analysis

After the Board determines that the relationship constitutes joint employer status, the next step is to determine whether the joint employers share a community of interest. The community of interest test serves to protect the interest of both employees and employers. It was Congress' intent to provide a workable framework for stable collective bargaining relationships, even if this involves a conflict of interest. Section 9(b) of the National Labor Relations Act provides a framework for deciding whether a unit is appropriate by stating that "the Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof."

The community of interest is satisfied if the collective bargaining is effective and protective of the proper employees' interests. In *Action Automotive, Inc.*, the Board eloquently reviewing decisions of other circuits).


32 See *Sturgis*, 2000 N.L.R.B. LEXIS 546, at *42 (rationalizing community of interest standard may not always be appropriate, therefore status should be determined based on particular circumstances using Board's traditional analysis); *see also* *Globe Discount City*, 209 N.L.R.B. at 214 (concluding jointly employed employees had "community of interest" with solely employed employees); *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. at 137 (determining predominant "community of interest" standard). *But cf* Rosenfeld, *supra* note 12, at 1 (criticizing Board's community of interest analysis because it was neither designated nor had been used to determined placement of supplied employees, since it only "compares apples (solely employed employees) to apples, whereas supplied employees are oranges").

33 See *Sturgis*, 2000 N.L.R.B. LEXIS 546, at *59-60 (Brame, Member, dissenting) (arguing employers may not be coerced into participation in multi-employer bargaining) (emphasis added); *see also* *Lee Hosp.*, 300 N.L.R.B. 947, 948 (1990) (holding employers' consent is required before Board will include their employees in same unit with other employers' employees); *Greenhoot, Inc.*, 205 N.L.R.B. 250, 251 (1973) (holding that joint employer unit will not be established unless several employers have expressly consented to joint bargaining agent power to negotiate on their behalf).


35 See *Sturgis*, 2000 N.L.R.B. LEXIS 546, at *99-100 (Brame, Member, dissenting) (stating basic requirement entails that negotiations only take place with those grouping of
defined this requirement, as "[a] cohesive unit - - one relatively free of conflicts of interests - - serves the Act's purpose of effective collective bargaining, . . . and prevents a minority interest from being submerged in an overly large unit."\textsuperscript{36} There are a number of factors the Board takes into consideration when determining whether community of interest is present with the employees seeking representation.\textsuperscript{37} In \textit{Kalamazoo Paper Box Corp.}, the Board listed seven factors, including a difference in method of wages or compensations, different hours of work, different employment benefits, and separate supervision to name a few.\textsuperscript{38} This, however, is not an automatic decision.\textsuperscript{39}

If the Board determines that these employers have a joint employees where effective bargaining will occur which protects employee interest); \textit{see also} Allied Chem. v. Pittsburgh Plate Glass Co., 404 U.S. 157, 172-73 (1971) (opining National Labor Relations Act prevents minority interest group from being submerged in "overly large unit"); Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 165 (1941) (concluding cohesive unit serves National Labor Relations Act's purpose of effective collective bargaining). \textit{See generally Frisch's Big Boy III-Mar., Inc.}, 147 N.L.R.B. 551, 551n.1 (1964) (developing presumption that single employer location is appropriate for community of interest test).


\textsuperscript{37} \textit{See Sturgis}, 2000 N.L.R.B. LEXIS 546, at *100 (Brame, Member, dissenting) (detailing factors taken into consideration to determine whether community of interest exists); \textit{see also Sturgis}, 2000 N.L.R.B. at *41 (stating group of employees under same employer, working together at same place under same boss and conditions, is likely to share appropriate community of interest); \textit{Globe Discount City}, 209 N.L.R.B. at 214 (deciding "community of interest" existed); \textit{Kalamazoo}, 136 N.L.R.B. at 138 (agreeing with \textit{Sturgis} on "community of interest" standard). \textit{But cf Rosenfeld supra note 12, at 1} (disagreeing with National Labor Relations Board's community of interest analysis).

\textsuperscript{38} \textit{See Kalamazoo}, 136 N.L.R.B. at 137 (positing following factors used in determining existence of substantial differences in interest and working conditions, which include: "a difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training, and skills."). \textit{See generally Harper, supra note 21, at 334-35} (discussing right of control test); \textit{Hiatt, supra note 21, at 747} (arguing right of control test allows company to shield itself from legal responsibility); \textit{Rahebi, supra note 19, at 1117} (listing factors courts take into consideration when determining whether user should be considered joint employer).

\textsuperscript{39} \textit{See S. Prairie Constr. Co. v. Int'l Union of Operating Eng'rs}, 425 U.S. 800, 805 (1976) (per curium) (deferring to Board's discretion in applying standard by stating that such decision is "rarely to be disturbed"); N.L.R.B. v. Food Store Employees Union, 417 U.S. 1, 9 (1974) (concluding guiding principle of administrative law is that administrative agencies are not foreclosed from enforcing legislative policy committed to its charge, even after error has been corrected by judicial review); \textit{FPC v. Idaho Power Co.}, 344 U.S. 17, 20 (1952) (stating "[t]he guiding principle, violated here, is that the function of the reviewing court ends when an error of law is \textit{laid bare}") (emphasis added); \textit{Packard Motor Car Co. v. N.L.R.B.}, 330 U.S. 485, 491 (1947) (noting because determination of unit of representation was not unreasonable or arbitrary as to surpass Board's power, court's power ended).
employer relationship, which is satisfactory under the community of interest analysis the courts normally uphold it. At this point the temporary employees may attain the benefit of the *Sturgis* decision. These workers can begin the negotiation process for a collective bargaining agreement with their prospective unions without consent of either employer.

**D. Sturgis Decision**

The Board asked Petitioners in October, 1996, to address issues raised by *Greenhoot* and *Lee Hospital* and clarify the test for determining joint employer status. The first Petitioner, M.B. Sturgis, Inc., involved Local 108 who filed a petition to represent "all employees" at a plant that produces and sells flexible gas hoses. Sturgis employs thirty-five employees and uses ten to fifteen temporary employees who are supplied by Interim, a national provider of temporary help personnel. The temporary workers work side by side with Sturgis' employees, performing

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40 See Action Auto v. N.L.R.B., 469 U.S. 490, 494 (1985) (explaining it is well settled in case law and accepted by courts that Board has authority to define collective bargaining units); *S. Prairie Constr. Co.*, 425 U.S. at 805 (reflecting Board's wide discretion in this area); *N.L.R.B. v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 134 (1944) (stating Congress has recognized Board's need for "flexibility in shaping the[bargaining] unit to the particular case."). But see *Sturgis*, 2000 N.L.R.B. LEXIS 546, at *42 (highlighting not every unit combining jointly employed and solely employed employees of a single user employer will be found appropriate).


42 See *Sturgis*, 2000 N.L.R.B. LEXIS 546, at *7-9 (explaining although there were originally three petitioners, one withdrew petition after oral arguments, and therefore case is no longer pending before Board).

43 See *Sturgis* at *8 (showing both parties and several amici curiae argued issue of appropriate test for joint employer status determination); see also *Lee Hosp.*, 300 N.L.R.B. 947, 948 (1990) (holding Board will not include employees with different employers in same unit without employers' consent); *Greenhoot, Inc.*, 205 N.L.R.B. 250, 251 (1973) (finding that joint employer unit will not be established absent showing that several employees have expressly granted joint bargaining agent power to negotiate on their behalf).

44 See *Sturgis*, 2000 N.L.R.B. LEXIS 546, at *10 (stating that unit of employees, represented by Local 108 in case, worked at M.B. Sturgis plant located in Missouri).

45 See *id.* at *5 (claiming they were not notified of suit and Interim joined suit only after Sturgis' request for review was granted).
the same work and are subject to the same supervision. All employees work the same hours, except temporary employees who are not permitted to work more than forty hours per week. Sturgis consented to having these temporary workers unionized, however, there is no evidence that Interim consented to the inclusion of them.

The second petitioner, Jeffboat Division, is the user employer that operates a large shipyard. TT&O is the supplier firm, which supplies Jeffboat with thirty first class welders and steamfitters. Local 89 petitioned those employees to a unit of 600 production and maintenance employees covered by a collective bargaining agreement between Jeffboat and Local 89. Jeffboat controls all aspects of the daily environment of the temporary employees. They also have authority to discipline the temporary employees for unsatisfactory performance or infraction of the rules and regulations. Jeffboat is also responsible for monitoring the time temporary employees spend on assignments. The Regional Director found that Jeffboat and TT&O were joint employers. In addition, he found a strong

46 See id. (discussing similarities in duties between permanent and temporary workers).
47 See id. at *10 (stating Interim's involvement in hiring and payment of temporary workers).
48 See id. (analyzing differences between temporary and permanent workers).
49 See id. at *11 (stipulating that record contained no evidence that Interim consented to temporary workers' inclusion).
50 See Sturgis, 2000 N.L.R.B. LEXIS 546, at *12-13 (describing Jeffboat Division as inland river shipbuilder, operating shipyard on Ohio River in Jefferson, Indiana).
51 See id. at *13 (discussing Jeffboat's business activities and duties of temporary workers).
52 See id. at *12 -13 (stating that Local 89 petitioned employees to unit covered by collective bargaining agreement between Jeffboat and Local 89); see also Paul H. Derrick, Unions Are Now Able to Organize Temporary Workers, 12 S.C. LAW. 14, 16 (2001) (asserting in 1995, Local 89 petitioned for unit clarification, insisting temporary employees constituted accretion to existing production and maintenance unit at shipyard).
54 See id. at *13, *21 (stating Jeffboat supervisors have authority to discipline supplied employees "as they see fit," including, but not limited to, written and verbal warning and suspension).
55 See id. at *13 (noting Jeffboat monitored time TT&O employees spent on Jeffboat assignments).
56 See id. at *6 (stating on November 8, 1995, it was Acting Regional Director for Region 9 who dismissed unit clarification petition sought by Teamster Local 89 on behalf of temporary employees at Jeffboat).
57 See id. at *13 (concluding Jeffboat exercises authority over daily work and has
community of interest between the temporary workers and their permanent counterparts because both groups did the same work. Since neither Jeffboat nor TT&O consented, the Regional Director could not force the two employers into collective bargaining.

In light of the common issues raised by these two cases, the Board decided to consolidate both Petitions. It should be noted, however, that only one member of the Board, Member Fox (part of the majority opinion), participated in the oral arguments and this decision. With regard to Petitioner Jeffboat, the Board affirmed the Regional Director's decision of joint employer and reverse the dismissal of the petition. Although Jeffboat and TT&O argued that TT&O was the sole employer of the temporary workers, the Board decided that Jeffboat supervisors have substantial authority over the temporary workers. The authority to act for any sub par performance or infractions of rules and regulations by temporary employees. See generally Derrick, supra note 52, at 16 (suggesting joint employer status is fairly easy to satisfy because it only requires both employers to share or co-determine matters governing essential terms of employment).

See Sturgis, 2000 N.L.R.B. LEXIS 546, at *13 (concluding that Jeffboat exercises authority over daily work and has authority to act for any sub par performance or infractions of rules and regulations on temporary employees).

See id. at *13-14 (finding both Jeffboat and TT&O are joint employed employers who have strong community of interest, but acting in accordance with Greenhoot and Lee Hospital, could not force joint bargaining); see also Rahebi, supra note 19, at 1129 (suggesting implied consent theory along with liberal joint employer hybrid test will facilitate temporary workers organizing in user units).


See Sturgis, 2000 N.L.R.B. LEXIS 546, at *21-22 (finding that Jeffboat and TT&O "meaningfully affect" and "co-determine" important employment decisions and areas including supervision, assignment, direction and discipline of TT&O supplied employees); see also Rahebi, supra note 19, at 1117 (explaining to establish joint employer status, employer must "meaningfully affect" employment relationship). See generally Grant Crandall, Sarah J. Starrett & Douglas L. Parker, Hiding Behind the Corporate Veil: Employer Abuse of the Corporate Form to Avoid or Deny Workers' Collectively Bargained and Statutory Rights, 100 W. VA. L. REV. 537, 572 (1998) (noting 3rd Circuit found joint employer even though two separate business entities were involved because they co-
majority relied on the following evidence: assigned and directed daily work, imposed discipline and monitored worktime.\textsuperscript{64} The Board declined the opportunity to determine whether the joint employer definition should be expanded.\textsuperscript{65} With respect to Petitioner Sturgis, the Board granted the motion to reopen the hearing.\textsuperscript{66} Neither Sturgis nor Interim contested their joint employer status.\textsuperscript{67} Both cases were remanded to the Regional Director\textsuperscript{68} to determine whether the jointly employed employees share a community of interest.\textsuperscript{69}

determined essential employment decisions).

\textsuperscript{64} See Sturgis, 2000 N.L.R.B. LEXIS 546, at *20 (producing more evidence of written contract granting Jeffboat broad authority over employees); see also Rahebi, supra note 19, at 1125 (noting court’s use of “right of control” test). See generally Dolin & Rozmus, supra note 62, at 3 (analyzing trend of recent N.L.R.B. decisions regarding non-traditional workforces).


\textsuperscript{66} See Sturgis, 2000 N.L.R.B. LEXIS 546, at *57-8 (asking Regional Director to determine unit irrespective of limits imposed by Lee Hospital); see also Lee Hosp., 300 N.L.R.B. 947, 950 (1990) (holding that bargaining units which include both regular employees and temporary workers are multi-employer bargaining units requiring consent of employers); Ostmann, supra note 62, at 1342-43 (stating that Lee Hospital was overruled to extent Sturgis covered).

\textsuperscript{67} See Sturgis, 2000 N.L.R.B. LEXIS 546, at *11-12 (explaining Sturgis position that consent of supply employer should not be required, considering only whether employees share community of interest); see also Rahebi, supra note 19, at 1126 (determining that while finding joint employer relationship, regional director was concerned about community of interest); Katherine V.W. Stone, The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law, 48 UCLA L. Rev. 519, 624 (2001) (commenting N.L.R.B. now allows temporary employees to be included in bargaining units which are mixed of temporary and regular employees of single employer, or comprised of all employees of single temporary agency).

\textsuperscript{68} See Sturgis, 2000 N.L.R.B. LEXIS 546, at *43, (emphasizing not every unit combining jointly and solely employed workers of a single user employer should be found appropriate under community of interest test); see also Michael D. Goldhaber, Is N.L.R.B. in a Pro-Labor Mood?, NAT’L L. J., Oct. 9, 2000, at B1 (quoting one AFL-CIO member that depending upon how “community of interests” is interpreted, decision may only affect “permatemps”); Paul Salvatore & John F. Fullerton III, Legacy of Clinton Labor Board, N.Y.L.J., Mar. 12, 2001, at 11 (stating Board’s factors for finding community of interest are common to many modern workplaces).

\textsuperscript{69} However, the dissent noted that when Jeffboat is remanded, an even more stringent community of interest standard will be applied because they are seeking an accretion to an existing bargaining unit. As a result, the accreted employees are not able to select their bargaining representative through an election. See Sturgis, 2000 N.L.R.B. LEXIS 546, at *102 (Brame, M. dissenting in part); Compact Video Servs., 284 N.L.R.B. 117, 119 (1987). Regardless, through either accretion or the formation of a new union, the result could greatly increase union membership in the workplace. Kenneth R. Plumb, Decision Signals New Source for Union Activity: Temporary Workers May Unionize with Regular Employees, CONN. L. TRIB., Nov. 8, 2001.
In addition to giving temporary employees the right to unionization without employers’ consent, this decision overruled \textit{Lee Hospital}. The majority of the Board found that \textit{Lee Hospital} was wrongly decided because it did not involve multi-employer bargaining, and therefore, no consent was required. The Board concluded that the multi-employer bargaining consent requirement, “[does] not apply to units that combine jointly employed and solely employed employees of a single user employer.” The NLRB recognized the faulty logic of \textit{Lee Hospital} and concluded that a user employer and a supplier employer were equivalent to the independent employers in multi-employer bargaining units.

Finally, the \textit{Sturgis} decision both clarified and limited the holding in \textit{Greenhoot}. The Board reaffirmed \textit{Greenhoot} to the extent that it requires employer consent for the creation of true multi-employer units when the petition names unrelated

\textit{Sturgis}, 2000 N.L.R.B. LEXIS 546, at *3 (restoring rights of contingent workers by overruling \textit{Lee Hospital}); see also Ostmann, supra note 62, at 1342-43 (explaining that Board overruled \textit{Lee Hospital’s} contention that bargaining units including both regular employees and temporary workers are multi-employer bargaining units requiring employer consent); Kimilyn C. Tomita, \textit{N.L.R.B. Places Temps and Regular Employees in Same Bargaining Unit, FAC. EMP. L. LETTER, Jan. 2001} (highlighting that in overturning \textit{Lee Hospital}, majority concluded case was incorrectly decided because it did not involve multi-employer bargaining and therefore no consent was required).

\textit{Sturgis}, 2000 N.L.R.B. LEXIS 546, at *34-35 (highlighting that \textit{Lee Hospital} did not involve multi-employer bargaining); see also Salvatore & Fullerton, supra note 68, at 11 (asserting that \textit{Greenhoot} and \textit{Lee Hospital} had held that to establish multi-employer unit required each employer’s consent); Tomita, supra note 70 (stating that \textit{Lee Hospital} did not involve multi-employer bargaining and therefore was incorrectly decided).

\textit{Sturgis}, 2000 N.L.R.B. LEXIS 546, at *40. See Mark Rubinelli, \textit{N.L.R.B. Rules Temporary Workers Can Be Included in Bargaining Units, Mo. EMP. L. LETTER, Oct., 2000} (deciphering Board’s holding and analyzing effect on both management and union side); see also Baker & Daniels, \textit{N.L.R.B. Applies Collective Bargaining Agreement to Temporary Workers, IND. EMP. L. LETTER, Jan., 2002} (arguing that \textit{Sturgis} ruling shows that despite long precedents of excluding temporary agency workers, unions can add these workers to contracts at any time).


\textit{Sturgis}, 2000 N.L.R.B. LEXIS 546, at *2-3 (stating Board in \textit{Lee Hospital} overextended ruling and is now taking opportunity to fine tune); see also Dolin & Rozmus, supra note 62, at 3 (noting majority’s discussion that until \textit{Lee Hospital} they had not found similar situations to be multi-employer bargaining); Salvatore & Fullerton, supra note 68, at 11 (claiming that this will lead to collective bargaining negotiations between employers and temporary employment agencies).
employers as the employers. This decision limited the *Greenhoot* doctrine by no longer requiring consent of the employers in two situations. The first scenario involves the user employer. A supplier's temporary employees now can be joined in the same unit with the user employer's regular employees, and the supplier can be forced to bargain over the terms and conditions of employment that it controls at the work site. The second scenario involves the supplier employer. A union can organize all of its employees, regardless of whether those employees are jointly employed by other user employers, as long as the union limits bargaining with the supplier employer to the terms and conditions controlled by the supplying employer. The Board's reasoning is logical because a multi-employer unit does not exist when the supplier employer is being petitioned to represent all the employees of a single unit and names only the supplier employer.

E. Rationale of the Board's Decision

The majority of the Board began their opinion by recognizing

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75 See Sturgis, 2000 N.L.R.B. LEXIS 546, at *3, *57 (showing Board's reaffirmation of *Greenhoot*); see also Dolin & Rozmus, supra note 62, at 3 (noting majority in *Sturgis* limited *Greenhoot*); G. Phillip Schuler, *Employees of Staffing Firms and Their User May Be Combined in One Bargaining Unit, LA. CONTRACTOR*, Nov. 2000, at 71 (stating that majority's decision undermined *Greenhoot*).

76 See Sturgis, 2000 N.L.R.B. LEXIS 546, at *55 (noting that *Greenhoot* decision never determined that consent was required); see also Dolin & Rozmus, supra note 62, at 3 (stating that accretion of temporary employees could increase labor costs and limit operating flexibility); Rahebi, supra note 19, at 1115 (discussing joint employer status and its effects on unionization).


78 See Sturgis, 2000 N.L.R.B. LEXIS 546, at *55. See generally Rahebi, supra note 19, at 1114 (discussing relationship between user employer and supplier employer).

79 See Sturgis, 2000 N.L.R.B. LEXIS 546, at *57 (providing that this particular unit only involves supplier employer and is not multi-employer unit). See generally Aaron B. Sukert, *Marionettes of Globalization: A Comparative Analysis of Legal Protections for Contingent Workers in the International Community*, 27 SYRACUSE J. INT'L L. & COM. 431, 453 (2000) (stating that when two separate entities are sharing or codetermining "terms and conditions" of employee's employment, they are considered joint employers).

80 See Sturgis, 2000 N.L.R.B. LEXIS 546, at *55 (stating that *Greenhoot's* requirements do not apply when bargaining relationship is only sought by supplier because there is no multi-employer unit); see also Permanent Workers, Temps Can be in Same Unit without Employer's Consent, N.J. EMP. L. LETTER, 2000 (arguing Board misconstrued multi-employer in *Lee Hospital*).
two major changes in society that occurred after *Greenhoot* and *Lee Hospital* were decided: the increase in the number of temporary workers and the growth of alternative employment arrangements. The Board acknowledged that the contingent workforce has been denied representation guaranteed to them under the National Labor Relations Act (hereinafter NLRA) and noted their history of altering previously adopted policies when those policies "unfairly prejudice the collective-bargaining rights of employees." The Board openly admitted that the ruling of *Lee Hospital* makes it nearly impossible for employees to form collective bargaining units. For those reasons, the Board decided to overrule *Lee Hospital*, in accordance with Section


84 See Quaker City Life Ins. Co., 134 N.L.R.B. 960, 962 (1961); see also Metro. Life Ins. Co., 156 N.L.R.B. 1408, 1416 (1966) (changing Board’s policy because denying insurance company employees same rights of other employees in industry frustrated policy). See generally Hayes, supra note 83, at 980 (discussing lack of benefits to part-time employees).

85 See Sturgis, 2000 N.L.R.B. LEXIS 546, at *53. See generally Ajalat, supra note 73, at 684-85 (arguing that Federal Constitution has role in protection of American workers); Crandall, supra note 63, at 544 (stating N.L.R.B. considers four issues to determine whether employer must recognize collective bargaining unit); Hayes, supra note 83, at 980 (discussing collective bargaining rights of contingent workers).

86 See Sturgis, 2000 N.L.R.B. LEXIS 546, at *54 (stating that *Lee Hospital* not only made it hard for employees to obtain union representation, but also resulted in fragmented units if employees did manage to successfully organize). See generally Ajalat, supra note 73, at 685 (discussing role of NLRA in promotion of collective bargaining); Harper, supra note 21, at 330-34 (explaining NLRA’s attempts to promote collective bargaining); Sukert, supra note 79, at 454 (postulating collective bargaining rights).
The Board relied on the following statistics when they concluded that the American workforce has changed since their prior rulings. The U.S. Department of Labor, Bureau of Statistics (BLS) found that 4.3% of all employment in February of 1999 was composed of contingent and alternative employee. A large segment of these temporary workers rely on staffing agencies to employ them. This then forms a triangular relationship in which there exists the supplier employer (the agency) and the user employer. As a result, staffing service increased nearly 250% in ten years from 417,000 in 1982 to 1.4 million in 1992. Finally, while the total number of jobs in the

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87 See Sturgis, 2000 N.L.R.B. LEXIS 546, at *53 (stating Board's duty under 9(b) is to enforce rights granted by ACT to employees). See generally David W. Orlandini, Employee Participation Programs: How to Make Them Work Today and in the Twenty-First Century, 24 CAP. U. L. REV. 597, 600-01 (1995) (discussing legislative history of NLRA); Sukert, supra note 79, at 442 (finding contingent worker's right to organize and bargain collectively in international arena).


90 See Bureau of Labor Statistics, supra note 89 (stating that 1% of this nation's work force, or 1.2 employees, works for temporary help agencies); see also Melissa A. Childs, The Changing Face of Unions: What Women Want from Their Employers, 12 DEPAUL BUS. L.J. 381, 412 (1999/2000) (explaining number of workers employed by temporary agencies nearly doubled in last decade); Schultz, supra note 89, at 1925 (discussing how several companies have outsourced full-time positions to temporary agencies).


work force has grown only 41% from 1982 to 1998, the number of jobs in the temporary help supply industry rose 577%. In 1998, temporary-staffing companies created more than 300,000 new jobs, and temporary agencies surpassed $58 billion industry-wide.

The temporary employee no longer works full-time, but rather they work for a short duration. A study from the National Association of Temporary and Staffing Services found that one third of former employees found permanent jobs from short-term assignments. In turn, these companies do not have to pay for medical, dental, vacation and other fringe benefits when deciding which temporary to hire on a permanent basis. Temporary employment allows an employer to assess an individual's ability without having to make a permanent commitment.

93 See General Accounting Office (GAO), In Contingent Workers: Income and Benefits Lag behind Those of the Rest of Workforce, July 26, 2000, at 16. See generally Maltby & Yamada, supra note 92, at 243-47 (developing statistical portrait of contingent and alternative employment relationships); Silverstein & Goselin, supra note 92, at 6-7 (discussing background statistics with contingent workforce).

94 See Rodney H. Glover, 'Employee' Defined, NAT'L L.J., Aug. 16, 1999, at B6 (analyzing various definitions of employees); see also Risa M. Mish, Perils of Temporary Employees: Liability Lurks under Several Fed'l Statutes, N.Y.L.J., June 1, 1998, at S1 (investigating increasing tendency for employers to turn to temp agencies to supplement staffing needs); Temporary Employment Becomes Big Business, FRESNO BEE, Jan. 23, 2000, at C1 (reporting that 90% of companies use temporary help services according to American Staffing Association).

95 See Dylan Loeb McClain, Labor Puzzle: As Need for Temporary Workers Soars, Pay Lags, N.Y. TIMES, Dec. 27, 2000, at G1 (reporting that 55% of temporary workers are in between jobs and 20% are occasional workers who do not want permanent jobs). But see Rahebi, supra note 19, at 1109 (stating that temporary work may last for years despite generalization that temporary work is short term); Temporary Employment Offers a Job with Plenty of Benefits, TREASURE COAST BUS. J., Sept. 3, 1999, at A6 (asserting that many temporary workers go on to hold permanent jobs).

96 See Rahebi supra note 19, at 1108-09 (reporting results of National Association study); From Temp to Permanent Job, STAR TRIB. (Minneapolis), Aug. 10, 1998, at D1 (stating results of National Association study); see also Temporary Employment Offers a Job with Plenty of Benefits, supra note 95, at A6 (describing temporary jobs as bridge to permanent employment).

97 See Jim Coughlin, Temporary Service Industry Seems to be Doing Just Fine as Rightsizing Still Flourishes, BUS. J., Nov. 8, 1993, at 25 (suggesting that companies prefer to hire temporary workers to avoid overhead of fringe benefits); see also McClain, supra note 95, at G1 (reporting that only 8.5% of workers provided by temporary agencies receive health insurance benefits and only 5.8% of these workers have pension plans); Clyde W. Summers, Contingent Employment in the United States, 18 COMP. LAB. L.J. 503, 511-12 (1997) (discussing effect of temporary agency employment on employee benefits).

98 See M.B. Sturgis, Inc., 2000 N.L.R.B. LEXIS 546, at *1 (2000) (dissenting opinion) (explaining that user employers benefit by these employment agencies as way to recruit temporary employees and test them before giving them permanent offers); Coughlin, supra note 97, at 25 (stating that companies hire temps-to-direct because then they can "try before they buy"); Diane Kunde, Firms Offer Perks to Lure, Keep Temps, RECORD
employers' get to “try before they buy.”\textsuperscript{99} Also, temporary employees do not reap the same benefits as their permanent counterparts.\textsuperscript{100} These contingent workers are not eligible for federal health benefits and can be dismissed at will with no appeal rights or other protection.\textsuperscript{101} In addition, temporary employees have no job security, because assignments may last a day, a week, a month or a year.\textsuperscript{102} The American Staffing Association found that in 1999 the average length of a typical employee’s assignment rose from the 9.5 week duration in 1998 to 10.3 weeks the following year.\textsuperscript{103}

There are a plethora of reasons why the numbers are rising in the contingent workforce.\textsuperscript{104} The U.S. Labor Department found

\begin{quote}
(Bergen County, N.J.), Dec. 19, 1999, at 2 (quoting Valerie Freeman, founder and chief executive officer of Dallas-based Imprimis, who stated, “40 to 45 percent of our business is temp to full time, try before you buy, or full time.”).
\end{quote}

\textsuperscript{99} See McClain, supra note 95, at G1 (comparing temporary workers to on-call workers and workers provided by contract firms with respect to receiving health insurance and pension plans); see also Summers, supra note 97, at 511-12 (discussing effect of temporary agency employment on employee benefits). But see Sturgis, 2000 N.L.R.B. LEXIS 546, at *84-85 (dissenting opinion) (explaining how temporary employment has multiple benefits: supplier employers are able to provide greater opportunity for job progression; valuable contacts and references; job opportunities during swing economy; reducing time and cost of job search; and training).

\textsuperscript{100} See McClain supra note 95, at G1. But see Sturgis, 2000 N.L.R.B. LEXIS 546, at *84-85 (dissenting opinion).

\textsuperscript{101} See U.S. to Hire Temporaries to Cut Costs, CHI. TRIB., Jan. 2, 1985, at 1 (stating that temporary employees receive fewer fringe benefits and are dismissed more easily than Civil Service workers); see also Developments in the Law- Employment Discrimination, 109 HARV. L. REV. 1647, 1648 (1996) (asserting that growth of temporary-employment industry reflects deteriorating employee entitlements); Laura Gentile, Defeating the Special Employment Defense, N.Y.L.J., Oct. 25, 2000, at 1 (recognizing that consequences of being temporary employee is loss of employment benefits).

\textsuperscript{102} See Rahebi, supra note 19, at 1111 (stating that temporary work is characterized by reduced job security); Summers, supra note 97, at 509 (asserting that although temporary employment is usually for short duration, it can extend into months or years); Ihejirika, supra note 14, at C16 (stating that despite initial duration expectations, there are no guarantees).

\textsuperscript{103} See Wayne Tompkins, Workplace: Temps Find New Niches, COURIER (Louisville, KY), July 3, 2000, at 1C (listing that statistic); see also Sturgis, 2000 N.L.R.B. LEXIS 546, at *77 (dissenting opinion) (stating 1997 Bureau of Labor Statistic (BLS) study showed median tenure was five months for single temporary assignment and six months for temporary agency overall); Maureen Dobie, Temp Firms Turn to Benefits to Attract Workers, INDIANAPOLIS BUS. J., Feb. 17, 1997, at 21 (commenting on National Association of Temporary and Staffing Services study showed average temp agency worker held job for less than thirteen weeks).

\textsuperscript{104} See Juliet F. Brudney, Contingent Work Arrangements Vary Greatly, BOSTON GLOBE, Feb. 7, 1999, at G4 (listing desire to be one’s own boss and earn more as reasons for becoming temporary employees); Genevieve Giuliano, Information Technology, Work Patterns and Intra-Metropolis Location: A Case Study, URBAN STUDIES, June 1, 1998 (explaining high labor costs, increased marker uncertainties and change in labor force composition as reasons for rise in use of contingent workers); Rahebi, supra note 19, at 1110 (finding different theories on rise of contingent workers and concluding both
that 32% of all temporary workers took their present job because they could not find a permanent one. On the other hand, this industry offers flexibility to both employees and companies because people can choose when, where, and how they want to work. In turn, the temporary workforce benefits the employer by providing necessary help during busy times, without the employer having to pay for a permanent counterpart during slow times.

III. THE EFFECTS OF UNIONIZATION ON THE TEMPORARY WORKFORCE

Since the Board decided this case on August 25, 2000, there has been uproar not only among the labor and employment community, but also in our government over this change in policy. Critics and advocates of this decision are usually split on employee flexibility and management's "bottom line" are significant reasons).

See Jim Barlow, Temping is Not Permanent Trend, HOUS. CHRON., Aug. 24, 2000, at 1 (listing other reasons as family, personal obligations, desire for flexibility and hope that temp job would lead to permanent employment); see also Brudney, supra note 104, at G4 (noting individuals take temp jobs because they cannot find regular jobs with sufficient pay, benefits, or career development opportunities); Thomas A. Stewart, Planning a Career in a World Without Managers, FORTUNE, Mar. 20, 1995, at 72 (explaining survey by National Technical Services Association, trade group for employers of contingent workers, showed 23% of contract employees were between "permanent" jobs).

See Brudney, supra note 104, at G4 (stating some prefer contingent work for freedom in choosing what they do, for whom, when and where); Temporary Employment Offers a Job with Plenty of Benefits, supra note 95, at A6 (claiming two-thirds of assigned employees find flexible work time important to them and eight in ten companies define flexibility as primary reason for turning to temporary employees); see also Gene Koretz, Taking Stock of the Flexible Work Force, BUS. WEEK, Jul. 24, 1989, at 12 (reporting many contingent workers welcome flexibility).

See Carrie Johnson, Ruling on Temps Reflect a Changing Workplace, WASH. POST, Sept. 10, 2000, at M1 (reporting most businesses lean on temporary workers during seasonal shifts in demand, however, technology companies rely on contingent workers during unpredictable business cycles); Carolyn Shaw Bell, Tight Job Market Allows Alternatives to Full-Time Work; The Rise of Contingent Labor, B. GLOBE, June 29, 1999, at D4 (noting contingent workers often cover seasonal bulges in production or sales); see also Sturgis, 2000 N.L.R.B. LEXIS 546, at *71-72 (dissenting opinion) (commenting some businesses turn to temporary agencies to focus on core functions, improve response to changing circumstances, or acquire expertise in new areas).

See Bush Second-Tier Transition Speculation, BULLETIN'S FRONTRUNNER, Jan. 12, 2001 (predicting President Bush's potential replacement of four N.L.R.B. members by 2002 could overturn Sturgis); Steven Greenhouse, Temps Ok'd to Join Unions, DENV. POST, Aug. 31, 2000, at A7 (stating business groups' criticism of ruling based on potential increase of employer's production costs); see also Testimony Changing Trends in Labor Management Relations, Before the House Banking and Financial Services Comm., FDCH CONG. TESTIMONY (2000) (statement of John A. Boehner, Representative, Chairman of Subcommittee on Employer-Employee Relations) (testifying to N.L.R.B.'s overturning numerous well-established labor laws within last year).
along the lines of pro-union and pro-labor. Officials with the A.F.L.-C.I.O. said it would help improve wages, benefits, and working conditions for many of the 1.2 million people employed by temporary agencies. The President of the A.F.L.-CIO reacted positively to the decision, describing the ruling as "an important step in addressing the rights of contingent work force employees, who have too often been relegated to second class status and rights, if any."

Even the advocates of this decision, however, will admit that there are some major loopholes. The most noteworthy of these loopholes is the limited impact this decision will have on the temporary workforce. Sturgis only applies to long-term temporary employees. The nation has 3.1 million temporary employees, but the user employer only employs a small percentage of them for a significant period of time. As a result,

109 See Susan J. McGolrick, Will N.L.R.B.'s Recent Sturgis Ruling Help or Hurt Organizing, Bargaining?, DAILY LAB. REP., Sept. 6, 2000, at 2284 (reporting AFL-CIO President John J. Sweeney has described ruling as "an important step in addressing the rights of contingent workforce employees, who have too often been relegated to second class status and rights," while former N.L.R.B. member characterized it as limited victory for unions); Temps Gain Right to Join Unions, ORLANDO SENTINEL, Aug. 31, 2000 at A11 (stating AFL-CIO officials hail ruling because it will help improve wages, benefits and working conditions for temporary employees); see also Susan J. McGorlick, N.L.R.B.: House Subcommittee Chair Questions Board Decisions Overturning Precedent, DAILY LAB. REP., Sept. 20, 2000 (explaining Chairman of House Education and the Workforce Subcommittee on Employer/Employee Relations, Republican John Boehner's concern that this ruling will only exacerbate backlog of pending cases).


111 See Greenhouse, supra note 10, at A16; see also Mulholland, supra note 110.

112 See Greenhouse, supra note 110, at A16 (asserting decision may provide lower incentive for employer use of outsider work).

113 See Stephanie Armour, Temps Get a Bargaining Boost, CHI. SUN TIMES, Sept. 3, 2000, at 1 (stating decision mostly impacts long-term temporary employees); George Hohmann, Impact of Labor Decision Unclear, Temp Workers Allowed to Join Union after Ruling, CHARLESTON GAZETTE, Sept. 11, 2000, at P2A (observing ruling will mostly impact temporary workers on long-term assignments at companies attempting to save money on training and benefits); see also Jonathan Segal, Organizing Temporary Employees, MONDAY BUS. BRIEFING, Oct. 20, 2000 (noting only long-term jointly employed individuals would feel incentive to unionize).

114 See McGolrick, supra note 109 (finding temporary agencies have 400% turnover rate); Jianfeng Pei, Labor Shortage Restrains Temporary-Staffing Firms, Purchasing, May 18, 2000, at 165 (noting 1999's 405% turnover rate for temporary employees was down from 446% in 1998); see also Will Temps Get Organized?, MAG. FOR SENIOR FIN.
this decision will have little impact on the American workforce as a whole.\textsuperscript{115}

\textbf{A. Inconsistencies with the Statutory Principles of the NLRA}

The Board took into consideration the changing workforce in the United States when they redefined the rights of temporary workers.\textsuperscript{116} The Board concluded that the expansion of temporary workers included in collective representation, without consent of either employer, is consistent with respect to the statute.\textsuperscript{117}

In order to determine the merit of the NLRB's decision, an analysis of the NLRA\textsuperscript{118} and its purposes is appropriate.\textsuperscript{119} The NLRA was enacted in 1935 with a two-fold purpose: (1) improve the dignity and status of the working class and (2) encourage industrial peace through collective bargaining.\textsuperscript{120} The

\textsuperscript{115} See Will Temps Get Organized?, supra note 114 (characterizing impact of \textit{Sturgis} on American workforce as “less than meets the eye”). \textit{But see} Doug Brown, \textit{Temps Rule in Big Reversal, Unions Open Up}, INTERACTIVE Wk., Oct. 19, 2000 (laying out experts' view that \textit{Sturgis} will have more immediate impact on organizations with both labor unions and high concentrations of contingent workers); Mark H. Floyd, \textit{Union Organizing of Temporary Employees Subject to New Standards}, 37 TENN. B. J. 23, 27 (2001) (arguing \textit{Sturgis} will have greater impact on employers with existing labor unions).

\textsuperscript{116} See Brown, supra note 115 (noting change in workplace from one of stability gained from life-time employees to today's workplace of fluidity and instability); McClain supra note 95, at G1 (finding temporary workers make up fastest growing segments of workforce). \textit{But see} Diane Stafford, \textit{72 Percent of American Workers Have Traditional Full-Time Jobs, Report Says, KAN. CITY STAR}, Oct. 26, 2000, at C1 (reporting no trend exists to compare temporary workers' growth or decline).


\textsuperscript{118} Section 1 of the National Labor Relations Act posits that the Act will promote the free flow of commerce through “removing recognized sources of industrial strife...by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working condition by restoring the equality of bargaining power between employers and employees.” 29 U.S.C § 151 (1982). The National Labor Relations Board is the independent federal agency created to administer the NLRA. \textit{See The N.L.R.B.: What it is, What it does, supra note 1. Due to the N.L.R.B.'s special competence in the field of labor relations, the N.L.R.B. has the primary responsibility for applying the general provision of the Act with the complexity of industrial life. See Pattern Maker League v. N.L.R.B., 473 U.S. 95, 100 (1985); N.L.R.B. v. Erie Resister Corp., 373 U.S. 221, 236 (1963)).

\textsuperscript{119} See \textit{The N.L.R.B.: What it is, What it does, supra note 1 (outlining purposes of NLRA and N.L.R.B.).}

substantive goal of the NLRA was to allow workers to unite to increase their wages through collective bargaining.\footnote{1}

In the dissenting opinion of \textit{Sturgis}, Member Robert Brame III states that this decision sacrifices the fundamental statutory principle.\footnote{2} Member Brame believes that forcing employers of different employee groups to bargain, despite their conflicting interests with respect to the bargaining unit employees, will destroy the commonality of interest.\footnote{3} Member Brame acknowledges that Section 9(b) gives the Board substantial discretion in determining the appropriateness of bargaining units within the framework of the statute, but he concludes that the express language of Section 9(b) clearly evinces the appropriate units.\footnote{4} Member Brame relies on the fourth circuit decision in \textit{NLRB vs. Lundy Packing Co.},\footnote{5} which overturned a prior Board’s ruling where the Board erred in establishing a standard for unit determination.\footnote{6} The Court of Appeals stated that the


\footnote{1}{See, e.g., \textit{Weingarten, Inc. v. N.L.R.B.}, 420 U.S. 251, 261 (1975) (holding that supermarket clerk, who was accused of minor pilfering, had right to request presence of her union steward at her investigatory interview which could have reasonably resulted in discipline); see also \textit{Am. Ship Bldg Co. v. N.L.R.B.}, 380 U.S. 300, 316 (1965) (reviewing employer action of shutting down plant in order to pressure employees to change their bargaining possession).

\footnote{2}{See \textit{Sturgis}, 2000 N.L.R.B. LEXIS 546, at *59-60 (2000). Brame found the unit at issue in \textit{Sturgis} to entail multi-employer bargaining because it included employees of more than one bargaining unit. See \textit{id.} at 59-60.

\footnote{3}{See \textit{Sturgis}, 2000 N.L.R.B. LEXIS 546, at *60-61 (dissenting opinion) (stating that to ensure common interests among bargainers, section 9(b) requires employee’s must share a community of interest.”); see also \textit{id.} at *60 (expressing Brame’s fear that by lumping temporary workers with regular workers, an impermissible conflict of interest was manifested).

\footnote{4}{See \textit{Sturgis}, 2000 N.L.R.B. LEXIS 546, at *60. Section 9(b) of the National Labor Relations Act states, in pertinent part: “The Board shall decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this act, the unit appropriate for the purposes of collective bargaining shall be the unit, craft to unit, plant unit, or subdivision thereof.” 29 U.S.C. § 159(b) (1982). Brame noted that section 9(b) clearly shows that appropriate units are to be drawn along the presented grouping of employees and not combinations thereof. \textit{Sturgis}, 2000 N.L.R.B. LEXIS 546, at *91-92. See generally \textit{South Prairie Constr. Co. v. Operating Eng’rs Local 627}, 425 U.S. 800 (1976) (holding features relevant in determining extent of employer’s operation are not necessarily determinative of extent of suitable unit).

\footnote{5}{68 F.3d 1577 (4th Cir. 1995).

\footnote{6}{See \textit{Lundy Packing Co.}, 314 N.L.R.B. 1042, 1043 (1994). The fourth circuit decision in \textit{Lundy} overturned the N.L.R.B.’s adoption of a legal standard which mandated that “any union proposed unit is presumed appropriate unless an overwhelming community of
Board is prohibited from determining the appropriate units for collective bargaining.\textsuperscript{127}

The majority in \textit{Sturgis} reasoned their prior policy in \textit{Lee Hospital} denied numerous employees the right of collective representation accorded to other employees.\textsuperscript{128} Section 9 (b) explicitly states that the Board is to decide the appropriate bargaining unit that ensures employees their rights and protections guaranteed by the NLRA.\textsuperscript{129} In essence, the majority of the Board concluded that the appropriate bargaining unit should apply the same standard to analyze whether temporary and permanent employees should be included in the same bargaining unit.\textsuperscript{130}

\section*{B. Practical Problems}

1. Community of Interest

One reason why temporary employees advocated union involvement is the lack of close relationships with their employers.\textsuperscript{131} Since temporary employees do not have lengthy relationships with their employer, they are not able to become

interest exists between the excluded employees and the union proposed unit." \textit{Lundy}, 314 N.L.R.B. at 1043. The fourth circuit found it problematic that the board afforded controlling weight to the "extent" of the union organization. \textit{Lundy Packing Co.}, 68 F.3d 1577, 1581 (4th Cir. 1995); \textit{see also Sturgis}, 2000 N.L.R.B. LEXIS 546, at \textsuperscript{*}91 (dissenting opinion) (stating importance of Board acting within their discretion while under statutory framework).

\textsuperscript{127} \textit{See Lundy Packing Co.}, 68 F.3d at 1579 (refusing to enforce Board's bargaining unit determination because it contravened its own standards and violated NLRA).

\textsuperscript{128} \textit{See Sturgis}, 2000 N.L.R.B. LEXIS 546, at \textsuperscript{*}2-3 (concluding that decision in \textit{Lee Hospital}, which treated unit at issue as multiunit-employer, denied growing number of employees who make up contingent workforce representational rights guaranteed under NLRA). \textit{See generally Michael D. Goldhaber, Is NLRA in a Pro-Labor Mood?}, NAT'L L.J., Oct. 9, 2000 (reporting that N.L.R.B. has issued eight decisions overruling precedent, seven of which had come in last three months).

\textsuperscript{129} \textit{See} 29 U.S.C. \S 159(b) (1982) (stating that purpose of this provision is to assure employee's freedom to fully exercise their rights under Act).

\textsuperscript{130} \textit{See Sturgis}, 2000 N.L.R.B. LEXIS 546, at \textsuperscript{*}27-30 (discussing prior cases and history of decisions on this subject to conclude what proper standard is); \textit{see also Harper}, \textit{supra} note 21, at 334-35 (analyzing predominant use of control test throughout employment law jurisprudence).

\textsuperscript{131} \textit{See Sturgis}, 2000 N.L.R.B. LEXIS 546, at \textsuperscript{*}65-66 (noting that Sturgis employs thirty-five full time workers and has ten to fifteen temporary workers and within seven month period, agency which supplied temporary workers placed approximately fifty different employees in ten to fifteen positions); \textit{see also Ihejirika}, \textit{supra} note 14, at 16 (explaining when company tells temporary employee that their job is indefinite, in reality that means until employer does not need temporary employee any more).
members of the corporate family. As a result, temporary workers are less in tune with the workplace conditions and politics.

Ironically, although there is a pressing need for temporary workers to become unionized, this decision may result in the employers isolating temporary workers even more. Employers may try to distinguish the permanent employees from the temporary workers to ensure that there is no community of interest. A number of suggestions have been made to minimize the impact of this decision by reducing the degree of control over the temporary employees. This can be accomplished by: (1) establishing a fixed time when the temporary employees become permanent employees or are replaced; (2) requiring them to sign an agreement with the temporary service that such service has the authority to discipline the temps; (3) acknowledging that the temps' employment is of temporary nature and that they aren't entitled to the same benefits as your regular workforce; (4) making it a policy for the temporary employee to report harassment or mistreatment by regular employees to the temporary agency.

132 See Mary E. O'Connell, Contingent Lives: The Economic Insecurity of Contingent Workers, 52 WASH. & LEE L. REV. 889, 913 (1995) (stating "in the hard, cold world where work is a transaction and not a relation, many contingent workers are simply on their own.").

133 See Baugh, supra note 81, at 192 (describing how temporary employees are less likely to know safety rules or where to report unsafe conditions); Rahebi, supra note 19, at 1112 (summarizing why temporary employees have detached relationships from their employer).

134 See Greenhouse, supra note 110, at A16 (reporting criticism based on raised production costs and less incentive to use outside workers); Vai Io Lo, Atypical Employment: A Comparison of Japan and the United States, 17 COMP. LAB. L.J. 492, 500 (1996) (discussing general reasons why unionized workers distrust temporary employees).

135 See L.M. Sixel, Ruling on Temps Pleases Unions, HOUS. CHRON., Sept. 8, 2000 (showing how employers could alienate temporary employees from their permanent counterparts in order to ensure there is no "community of interest"); see also Kiesling, supra note 81, at 2 (describing temporary employee relationships with employers).

136 See McGolrick, supra note 109 (reporting on recommendations that employers should structure their relationships with temporary employees to defeat community of interest by separating them, giving them different badges, and having on site supervision by temp agency). But see H. Lane Dennard, Jr., Leased Employment: Character, Numbers, and the Labor Law Problems, 28 GA. L. REV. 683, 691 (1994) (suggesting that there is no data to support view that temporary employees are utilized to prevent unionization).

137 See Temps Eligible for Union Representation at Job Assignments, ALA. EMP. L. LETTER, October 2000 (listing ways employer can reduce control over their temporary employees); see also Developments in the Law—Employment Discrimination, 109 HARV. L. REV. 1647, 1652 (1996) (discussing history of legislative attempts to improve treatment of temporary employees); Temps May Be Included in Regular Employees' Bargaining
2. Who is in charge?

If a union is made up of both groups of employees, the question arises as to who will negotiate the contract: the company that supplies the employees or the company where the employees work. Other questions arise as to who is responsible in negotiating the pay or the working conditions. As a result, these temporary workers could ultimately be wondering, “who is my boss?” Daniel Yager, the general counsel for the Labor Policy Association, stated that the Board’s ruling will “create chaos” because the temporary employees will be subject to two different sets of rules: those of the supplier employer and those of the user employer.

3. Temps May Be Accreted to Union Without A Vote

One very critical issue, which was not addressed in the Sturgis decision, is whether employers who currently have a union can add temporary employees by accreting them without their vote. Temporary employees may not want to become unionized with their permanent counterparts because they are probably in the minority. In reality, persons, with different interests may

Unit, KY. EMP. L. LETTER, Oct. 2000, (describing other ways of reducing control).


139 See King Testimony, supra note 138 (questioning result when temporary workers are subjected to two different sets of rules); see also Gillian Lester, Careers and Contingency, 51 STAN. L. REV. 73, 79 (1998) (discussing temporary employee’s tendency to have weak affiliations with companies for whom they work).

140 See Rahebi, supra note 19, at 1108 (discussing role of safety agencies who secure work for temporary employees); Ruling on Temps Pleases Unions, HOUS. CHRON., Sept. 8, 2000, at B1 (questioning who has authority between temporary and contract firms).

141 See Hiatt, supra note 21, at 741-42 (discussing how temporary employment agencies possess little ability to actually affect working conditions); N.L.R.B.: House Subcommittee Chair Questions Board Decisions Overturning Precedent, supra note 109 (questioning how seniority would be determined or 401K plans applied).

142 See N.L.R.B.: House Subcommittee Chair Questions Board Decisions Overturning Precedent, supra note 109 (summarizing testimony of former board member, Charles I. Cohen, on behalf of U.S. Chamber of Commerce, which stated temporary employees are subject to coverage by bargaining agreement, “without ever having an opportunity to opt for or against representation by a union.”). See generally Elizabeth J. Fullenkamp, Goodman v. Sioux Steel Co.: South Dakota Limits Temporary Employee’s Recovery to Workers Compensation, 38 S.D. L. REV. 379, 384 (1993) (describing dramatic increase of temporary employees in recent years and their affect on labor costs and productivity).

143 See Susan McGolrick, Contingent Workers: N.L.R.B. 3-1 Allows Certain
decide some of these decisions. Another view could argue that the temporary employees cannot be added to the unit because they have been historically excluded, and as a result, the temporary employees would be given the right to decide for themselves whether they wish to be added to the unit. Such arguments will not work if the employer wishes to use temporary workers in the future. One can also argue that employers will want to put the temporary workers in with their permanent counterparts in order to dilute the pool of voters to work against the unions.

It is possible that labor unions only have to petition the labor board to rule that temporary employees at a unionized work site should be added to the union bargaining unit, without a vote by the temporary workers. One of the major disagreements with

Bargaining Units Including Both Temporary, Regular Workers, DAILY LAB. REP., Aug. 31, 2000 (purporting that majority instructed regional directors to determine whether temporary employees share same community interest as regular employees); see also Mark Berger, The Contingent Employee Benefits Program, 32 IND. L. REV. 301, 306 (1999) (discussing ambiguities in benefits eligibility for temporary employees, and difficulty they face in qualifying for benefits).

144 See N.L.R.B. Opens Door to Union Organizing by Temporary Workers, ME. EMP. L. LETTER, Oct. 2000 (describing fate of temporary employees, who are usually minorities with substantially different interests from regular employees).

145 See Temps Eligible for Union Representation at Job Assignments, ALA. EMP. L. LETTER, Oct. 2000 (suggesting to minimize impact of this decision by establishing fixed time when temporaries either become regular employees or are replaced; written agreement that temporary service has authority to discipline employees; encouraging temps to report harassment or mistreatment by regular employees; and not conducting performance reviews for temporary employees); see also Aaron B. Sukert, Marionettes of Globalization: A Comparative Analysis of Legal Protections for Contingent Workers in the International Community, 27 SYRACUSE J. INT'L L. & COM. 431, 442 (2000) (discussing various regulatory protections in international arena for contingent workers such as prohibition of discrimination, right to organize and bargain collectively, occupational and safety guarantees, and written employment contracts).

146 See Temporary Workers May Now Join Unions with Regular Employees, MINN. EMP. L. LETTER, Oct. 2000 (explaining that employers who merely discontinue using temporary employees who express interest in joining union, run risk of facing unfair labor practice charge). See generally Eileen Silverstein & Peter Goselin, Intentionally Impermanent Employment and the Paradox of Productivity, 26 STETSON L. REV. 1, 3 (1996) (proposing how employers of temporary employees are reluctant to train contingent employees, because they will soon leave and take training investment with them).

147 See L.M. Sixel, Ruling on Temps Pleases Unions, HOUS. CHRON., Sept. 8, 2000, at 1 (suggesting ruling may work against unions as employers put temps into bargaining units in attempt to dilute voting pools); see also Mark Berger, Unjust Dismissal and the Contingent Worker: Restructuring Doctrine for the Restructured Employee, 16 YALE L. & POLY REV. 1, 15 (1997) (proposing contingent employment environment, which offers substantially increased flexibility in handling workforce for employers who have high-low production volume).

148 See Steven Greenhouse, supra note 110, at A16 (announcing that under decision of N.L.R.B. labor unions can petition board to rule that several dozen employees should be added to bargaining unit without obtaining vote of temporary workers).
the majority view involved the accretion context for Petitioner Jeffboat. On remand, if the Board concludes that these joint employers share a community of interest, the supplier employer will be bound by the collective bargaining agreement negotiated with permanent employees. As a result, the supplier employers will be forced to abide by contracts that they did not negotiate.

This argument fails to take into consideration the Board's restrictive policy when seeking accretion. The Board will only find accretion when the temporary employees can not be considered a separate appropriate unit because they have little or no separate group identity and they share a community of interest with the pre-existing bargaining unit. The Board has

149 See Rosenfeld, supra note 12, at 1 (reporting that unions who presently represent unit of employees will now be able to "accrete" these temporary employees, but Board has not decided whether unit will be given opportunity to vote on matter); see also Rahebi, supra note 19, at 1113 (explaining temporary workers generally are not embraced by unions due to adverse effects on status of full-time workers); Clyde W. Summers, Contingent Employment in the United States, 18 COMP. LAB. L.J. 503, 513 (1997) (indicating temporary employee's rights, while simultaneously espousing N.L.R.B.'s and unions strenuous efforts to exclude 'temps' from bargaining units).

150 See N.L.R.B. Opens Door to Union Organizing by Temporary Workers, supra note 144 (discussing how this policy could be major problem for temporary employees, as their fate will be decided by those with substantially different interests); see also Permanent Workers, Temps Can Be in the Same Unit Without Employer's Consent, N.J. EMP. L. LETTER, Dec. 2000 (explaining greatest impact on already unionized employers that use temps, as unions begin to file unit clarification petitions). But see Kimilyn C. Tomita, N.L.R.B. Places Temps and Regular Employees in Same Bargaining Unit, PAC. EMP. L. LETTER, Jan., 2001 (noting problems for user employers, as "contracting out" does not serve as insulation from N.L.R.B. decision).

151 See Sturgis, 2000 N.L.R.B. LEXIS 546, at *123 (2000) (dissenting opinion) (identifying accretion problem with respect to jointly employed employees and unit of solely employed employees obligating supplier employer to comply with existing collective bargaining agreement that employer had no hand in negotiating); see also Dolin & Rozmus, supra note 6, at 1 (including among problems for employers increased labor costs and limited operating flexibility); Matthew S. Miner, Reforming Accretion Analysis under the NLRA: Supplementing a Borrowed Analysis with Meaningful Policy Considerations, 31 U. MICH. J.L. REF. 515, 533-34 (1998) (recognizing overlooked factor of employer motive for accretion analysis).

152 See Towne v. Ford Sales, 270 N.L.R.B. 311, 311 (1984), aff'd, 759 F.2d 1477 (9th Cir. 1985) (rationalizing that these employees are not accorded self-determination and Board seeks to insure that employees' right to determine their own bargaining representative is not foreclosed); Westinghouse Elec. Corp. v. N.L.R.B., 440 F.2d 7, 12 (2d Cir. 1971) (finding general rule that accretion doctrine should be applied restrictively because it denies employees opportunity to express their desires regarding membership in unit); see also Miner, supra note 151, at 527 (commenting on consideration of employee interest and reluctance to expand doctrine of restrictive application regarding accretion).

153 See Kalamazoo Paper Box Corp., 136 N.L.R.B. 134, 137 (1962) (holding that separate truck drivers' unit was warranted because functional distinctions demonstrated differing interests); Alexander Colvin, Rethinking Bargaining Unit Determination: Labor and the Structure of Collective Representation in a Changing Workplace, 15 HOFSTRA LAB. & EMP. L.J. 419, 445n.170 (1998) (stating "[a]ccretions involve the addition of
identified certain factors in their previous decisions that are critical to finding an accretion: (1) degree of interchange of employees between the affiliated companies;\textsuperscript{154} (2) whether day to day supervision of employees is the same in the group sought to be accreted;\textsuperscript{155} (3) terms and conditions of employment;\textsuperscript{156} (4) similarity of skills and functions;\textsuperscript{157} (5) physical, functional, and administrative integration;\textsuperscript{158} (6) and bargaining history.\textsuperscript{159}

employees to an existing unit where these employees share a ‘community of interest’ with that unity’); Rahebi, supra note 19, at 1129 (explaining evaluation of community does not require complete similarity of interest, rather similarities among skills, wages, hours and other working conditions).

\textsuperscript{154} See MacTowing, 262 N.L.R.B. 1331, 1334 (1982) (holding petitioner created separate unit due to lack of interchange of employees). See generally Int'l Assoc. of Machinists and Aerospace Workers v. N.L.R.B., 759 F.2d 1477, 1479 (9th Cir. 1985) (articulating factors N.L.R.B. uses in determining accretion of group of employees into existing bargaining unit which include degree of employee interchange between groups); Miner, supra note 151, passim (suggesting that answers, when using accretion analysis, depend on myriad of factors).

\textsuperscript{155} See Save-It Discount Foods, 263 N.L.R.B. 689, 694 (1982) (proposing most relevant factor to be whether or not employees perform day-to-day work under immediate supervision of one involved in similar work); see also Renzetti's Mkt., Inc., 238 N.L.R.B. 174, 175 (1978) (emphasizing significance of this element because daily problems and concerns among employees may not be same for similar employees at other sites with different supervision); Purity Supreme, Inc., 197 N.L.R.B. 915, 917 (1972) (extrapolating additional factors in considering day-to-day operations including same supervision and duties of that supervisor).

\textsuperscript{156} See, e.g., W. Cartridge Co., 134 N.L.R.B. 67, 69 (1961) (finding employees in pyrotechnic department and employees in detonator department within same unit after recognizing same conditions of employment between these two); see also Staten Island Univ. Hosp. v. N.L.R.B., 24 F.3d 450, 455 (2d Cir. 1994) (announcing that differences in employment conditions is more significant factor). See generally Local 144 v. N.L.R.B., 9 F.3d 218, 223 (2d Cir. 1993) (listing as one of several similarities in conditions of employment).

\textsuperscript{157} See N.L.R.B. v. Stevens Ford, Inc., 773 F.2d 468, 473 (2d Cir. 1985) (stating similarity of skills and functions is criteria used to determine whether employees should be accreted into unit); see also Jos. Schlitz Brewing Co., 192 N.L.R.B. 553, 554 (1971) (applying factor of “shared responsibility for and participation in operation of the equipment” to decide production and maintenance employees constitute a unit). But see Beacon Photo Serv., Inc., 163 N.L.R.B. 706, 707 (1967) (finding although work was same at both plants, accretion was not appropriate to existing unit).

\textsuperscript{158} See N.L.R.B. v. Chicago Health & Tennis Clubs, Inc., 567 F.2d 331, 331 (7th Cir. 1977) (determining appropriate bargaining unit by contrasting Chicago Health and Tennis and Saxon Paint workforces); Pullman Indus., 159 N.L.R.B. 580, 582 (1966) (finding that because this factor was lacking and second plant was completely autonomous, this tended to establish there was no accretion to contracting unit); see also Appropriateness of Requested Single Location Bargaining Units in Representation Cases, 60 Fed. Reg. 50146 (proposed September 28, 1995) (to be codified at 29 C.F.R. pt. 103) (denying N.L.R.B. litigation-reducing proposal to make single-location units appropriate bargaining unit without regard to employee relationships).

\textsuperscript{159} See N.L.R.B. v. Local Union 103, 434 U.S. 335, 339-41 (1978) (ruling that strong history of bargaining amongst one location’s employees does not command employer obligation for another’s); N.L.R.B. v. Metro. Life Ins. Co., 380 U.S. 438, 441-44 (1965) (instructing N.L.R.B. not to blindly rely on extent to which employees have organized when determining proper bargaining unit); Aerojet-Gen. Corp., 185 N.L.R.B. 794, 797 (1970) (looking to bargaining history and lack of contact with unit members to deny
4. Three Different Groups at the Bargaining Table

The Board failed to properly address the practical problems of forcing two employers to bargain together with a divided union regarding terms and conditions of employment.\[^{160}\] In his dissenting opinion, Member Brame, addressed this concern arguing, “coercing combined bargaining by the joint employers and the sole employer will highlight and exacerbate any conflicting interests between these two employing entities and create new conflict.”\[^{161}\] The majority did not give any guidance as to how the union, the supply employer and the user employer should engage in collective bargaining.\[^{162}\] Rather, they dismissed Member Brame’s contention by stating that the only requirement is for the union to negotiate with the jointly employed employees to the extent that they each control the employees’ conditions of employment.\[^{163}\]

5. Elimination of Temps

According to Charles Craver, a labor relation’s expert, *Sturgis* 


\[^{161}\] See *Sturgis*, 2000 N.L.R.B. LEXIS 546, at *121 (dissenting opinion); *see also* N. Am. Soccer League v. *N.L.R.B.*, 613 F.2d 1379, 1383 (5th Cir. 1980) (distinguishing professional soccer league from building owners in *Greenhoot*). *But see* *S.S. Kresge Co. v. N.L.R.B.*, 416 F.2d 1225, 1231-32 (6th Cir. 1969) (stating that despite divergent interests, chance of serious conflict resulting was speculative).

\[^{162}\] See *N.L.R.B. Opens Door to Union Organizing by Temporary Workers*, supra note 14 (outlining problems of new rule); *see also* Derrick, supra note 52, at 17 (highlighting management’s perspective on how to prepare for union efforts in organizing temporary workers); Nancy Schiffer, *Organizing Contingency Workers: Community of Interest v. Consent*, 17 LAB. LAW. 167, 180-81 (2001) (concluding from union’s perspective that some temporary employees rights were gained in *Sturgis*, but questions of bargaining obligations still must be sorted out).

\[^{163}\] See *Sturgis*, 2000 N.L.R.B. LEXIS 546, at *45 (stating that despite any absence of employment relationship between supplier and employer, they are still able to bargain to extent of supplier controls terms and conditions of jointly owned employees); *see also* W. Temp. Servs. v. *N.L.R.B.*, 821 F.2d 1258, 1265 (7th Cir. 1987) (finding user employer and supplier need only negotiate with union over jointly owned employees to extent they control conditions of employment); *S.S. Kresge Co.*, 416 F.2d at 1231 (rejecting similar challenge that dissent in *Sturgis* presented, and stating that whether collective bargaining process would be disrupted because independent ideas of joint employers were speculative). *See generally* Gallenkamp Stores v. *N.L.R.B.*, 402 F.2d 525, 531 (9th Cir. 1968) (noting employers had worked out problems before to meet needs of joint enterprise, and like efforts would be effective when bargaining with unions).
will create disincentive to use outside workers." If the union demands higher pay and benefits for temporary employees accreted into a unit this will raise employer's cost and the temporary industry will suffer the effects. This decision may have harmful effects through increased production cost and may force companies to pay their temporary workers more than they had contractually agreed with temporary staffing agencies. If a company chooses to eliminate temporary employees from their workforce, it may result in an unfair labor practice unless the company asserts a sound business reason. A sound business reason may be easy to justify considering that many employers pay temporary employees less than regular employees.

6. Greater Backlog for the NLRB
The decision will probably create a greater backlog at the administrative level because there will be an increasing number of representation hearings. Before this case was decided there was already concern at the congressional level regarding how long it took for cases to be investigated, considered and

164 See Labor: Temps Win Right to Unionize, FACTS ON FILE WORLD NEWS DIG., Aug. 30, 2000, at 650A3 (quoting Charles Craver's view that companies may lose financial benefits of hiring temps); see also Michael D. Goldhaber, Is N.L.R.B. in a Pro-Labor Mood?, NAT'L L.J., Oct. 9, 2000, at B1 (referring to statements made by Charles Craver where he responded to N.L.R.B. Sturgis ruling as response to emergence of temps as large, permanent part of workplace); Greenhouse, supra note 110, at A16 (quoting Charles Craver that there will be "less incentive" to use outside workers).

165 See Goldhaber, supra note 164, at B1 (commenting both pro-labor and independent observers argue that Sturgis was "no home run" for unions); Greenhouse, supra note 110, at A16 (stating many business groups criticized ruling because it may force companies to pay temp workers more than they contracted for); Labor: Temps Win Right to Unionize, supra note 164, at 650A3 (reporting many employers criticized Sturgis decision).

166 See NAT'L LABOR RELATIONS BD., A GUIDE TO LAW AND PROCEDURES UNDER THE NATIONAL LABOR RELATIONS ACT 2 (rev. ed. 1997) (noting company may avoid unfair labor practice if it states sound business reason for practice). See generally Kiesling, supra note 81, at 1 (stating temporary workers present issue whether "on-site employer" can be held liable for violations of temp's Title VII rights).

167 See Kiesling, supra note 81, at 2 (noting temporary employees work for lower wages and fewer benefits saving employer significant costs); Summers, supra note 97, at 510 (stating temp workers receive wages twenty percent lower than permanent workers performing similar work); see also McClain, supra note 95, at G1 (reporting small percentage of temporary employees receive benefits); Rahebi, supra note 19, at 1111 (stating temporary work is characterized by low pay and reduced benefits).

168 See N.L.R.B.: House Subcommittee Chair Questions Board Decisions, supra note 109 (reporting on Representative John Boehner's position that N.L.R.B. should concentrate on reducing backlog and not expanding it further); see also Will N.L.R.B.'s Recent Sturgis Ruling Help or Hurt Organizing Bargaining?, supra note 109 (citing John S. Irving, former N.L.R.B. general counsel, as stating that Sturgis complicates things and creates potential to delay election process).
completed. This decision will only add to the problem. There will be more hearings to determine whether a joint employer exists, and if that answer is in the affirmative, then another set of hearings will be held to determine whether a "community of interest" exists between such joint employers.

Although there is considerable backlog at the administrative level, the Board is not to blame. Representative Dale Kildee, a Michigan Democrat, defended the NLRB on September 19, 2000 at the hearing regarding the change in precedent. He identified the problem, pointing out that in the late 1990's Congress did not provide the agency with adequate funding to reduce the case backlog to a reasonable level. Last year,

169 See Drew Douglas, Liebman Says Reducing Delays, Maintaining Workplace Relevance are N.L.R.B.'s Challenges, DAILY LAB. REP., Mar. 24, 2000 (reporting lengthy case backlogs represent major challenges to N.L.R.B.); Susan J. McGolrick, Truesdale Reflects on Tenure as Chairman: Discusses Factors that Affect Case Backlog, DAILY LAB. REP., Nov. 16, 1999 (stating N.L.R.B. focused on issuing decisions for older pending cases in attempt to reduce backlog of old cases); Rick Valliere, N.L.R.B.: Truesdale Says Cleaning up Caselog First Priority in Fourth Term on Agency, DAILY LAB. REP., Aug. 3, 1999 (citing chairman Truesdale's agenda to reduce backlog of old cases in his fourth appointment of N.L.R.B.); see also Will N.L.R.B.'s Recent Sturgis Ruling Help or Hurt Organizing Bargaining?, supra note 109 (referring to attorney J. Hamilton Stewart who recognized Sturgis ruling will create "lots of litigation").

170 See N.L.R.B.: House Subcommittee Chair Questions Board Decisions, supra note 109 (discussing backlog); see also Sturgis, 2000 N.L.R.B. LEXIS 546, at *43 (exemplifying how case returns back for another hearing to determine community of interest of joint employers); Will N.L.R.B.'s Recent Sturgis Ruling Help or Hurt Organizing Bargaining?, supra note 109 (outlining Jeffboat's attorney's plan for another hearing to determine whether temps share community interest with regular employees, and then going to N.L.R.B. for second ruling).

171 See Sturgis, 2000 N.L.R.B. LEXIS 546, at *43 (exemplifying how case returns back for another hearing to determine community of interest of joint employers); Will N.L.R.B.'s Recent Sturgis Ruling Help or Hurt Organizing Bargaining?, supra note 109 (explaining that John S. Irving, former N.L.R.B. general counsel, believes that this will create more legal issues before representation election because hearings are necessary to determine status of joint employer and community of interest standard).

172 See Douglas, supra note 169 (noting hostility of Congress towards N.L.R.B. and blaming small budget for inability to hire, unprecedented turnover, long vacancies, and inability to train current N.L.R.B. workforce); McGolrick, supra note 169 (citing high turnover, short recess appointment and budget cuts as factors impacting case backlog); N.L.R.B.: House Subcommittee Chair Questions Board Decisions, supra note 109 (reporting James B. Coppess observation of low funding, insufficient staff, and high board turnover); Valliere, supra note 169 (discussing Truesdale attributing backlog to budget cuts and appointment delays).

173 See N.L.R.B.: House Subcommittee Chair Questions Board Decisions, supra note 109 (reporting Representative Dave Kildee's advocacy of N.L.R.B. and noting Congress did not approve adequate funding to reduce case backlog).

174 See id. (noting Representative John Tierney, Democrat from Massachusetts, agreed with Kildee, saying that it is Congressional practice to cut budget and then complain that agency is not performing up to par); see also Douglas, supra note 169 (finding hostility of Congress towards N.L.R.B. and blaming small budget for inability to hire, unprecedented turnover, long vacancies, and inability to train current N.L.R.B.
Congress gave the Board more than a $20 million dollar funding increase, and there is hope for the future, because the House and Senate approved a 5.2% increase for the 2001 fiscal year.\footnote{175}

C. Parallel Situations

Another recent decision that will further impact the use of temporary workers is Microsoft v. Vizcaino.\footnote{176} After a decade of appeals, the 9th Circuit decided Vizcaino last year, ultimately giving temporary employees the same compensation as their permanent counterparts.\footnote{177} This case can be analogized to the Sturgis decision by the way the Court of Appeals rejected Microsoft's pseudo transformation of independent contractors to temporary employees.\footnote{178} The Court declared Microsoft a co-workforce); McGolrick, \textit{supra} note 169 (citing high turnover, short recess appointment and budget cuts as factors impacting case backlog); Valliere, \textit{supra} note 169 (reporting Truesdale attributing backlog to budget cuts and appointment delays).


\footnote{177} See Vizcaino, 97 F.3d at 1189 (pointing out that Microsoft avoided payment of employee benefits to increase profits by hiring temporary employees as independent contractors); Paul Kellogg, \textit{Independent Contractor or Employee: Vizcaino v. Microsoft Corp.}, 35 HOUS. L. REV. 1775, 1778-79 (1999) (noting IRS ruling that Microsoft's independent contractors were in fact common law employees); James G. McMillan, III, \textit{Comment: Misclassification and Employer Discretion under ERISA, 2 U. PA. J. LAB. & EMP. L. 837, 837 (2000) (stating that Circuit has declined to pass legislation to allow laborers to unionize).}\footnote{178} See generally Mark Berger, \textit{The Contingent Employee
employer with its supply agency and required Microsoft to provide the workers with stock-option benefits. The outcome of this decision forced Microsoft to compensate about 10,000 temporary workers who were originally not allowed to join the company’s stock-purchase program.

Prior to this case the Internal Revenue Service determined that Microsoft’s independent contractors were actually employees for tax purposes. In turn, Microsoft changed the status of the independent contractors to temporary employees by requiring them to become associated with employment agencies. The

Benefits Problem, 32 IND. L. REV. 301, 301-06 (1999) (noting costly benefits such as pensions, stock options, and medical insurance plans have historically only been enjoyed by “traditional employees,” and not contingent contract or temporary employees); Renate M. de Haas, Employee Benefits: Vizcaino v. Microsoft, 13 BERKELEY TECH. L.J. 483, 483-86 (1998) (describing how Vizcaino changed landscape for previously exploited contract workers and temporary workers).

See Vizcaino, 97 F.3d at 1191 (explaining various employee benefits); de Haas, supra note 178, at 488 (stating that 9th Circuit concluded that ERISA guidelines entitled all persons employed by Microsoft and paid from its United States accounts to participate in stock purchase plan, regardless of whether they were paid through payroll accounts or accounts receivable); Gartland, supra note 176, at 518-19 (discussing 9th Circuit holding that Vizcaino plaintiffs should be allowed to reap benefits of stock purchase plan); Kellogg, supra note 177, at 1785 (asserting that 9th Circuit holding temporary employees were eligible to participate in stock purchase plan decided an ambiguously phrased provision in favor of Vizcaino plaintiffs).

See de Haas, supra note 179, at 488 (stating that after many appeals, 9th Circuit decided that “all persons employed by Microsoft and paid from its United States accounts [could] participate in [Stock Purchase Plan]”); Richard J. Freddo, Contingent Workers: A Full-Time Job for Employers, Benefit Plan Administrators and the Courts, 52 SMU L. REV. 1817, 1823 (1999) (explaining that Microsoft I proclaimed employees were misclassified as independent contractors, and many brought action against Microsoft to recover their denied employee benefits); Gordon, supra note 178, at 1531-32 (discussing that despite growth of contract and temporary workers in labor market, legislators have not sought to protect such employees even if they work substantially full time); Jessica Guynn, Microsoft Case Sets New Rules for Treating Temps, CONTRA COSTA TIMES, Dec. 19, 2000 (reporting Microsoft’s settlement of $96.9 million dollars for denying benefits to these temporary employees).

See Vizcaino, 97 F.3d at 1190 (outlining that examination of Microsoft’s employment records in 1989 and 1990 showed “Microsoft’s freelancers were not independent contractors, but employees for withholding taxes and the employer’s portion of Federal Insurance Contribution Act tax.”); de Haas, supra note 178, at 486 (stating that Vizcaino held that because Microsoft had substantial control over the working conditions of its temporary workers, the IRS determined that the workers were employees and not independent contractors); Kellogg, supra note 177, at 1779 (asserting that “for Microsoft, the fateful evolution of its employees was complete when the Internal Revenue Service . . . ruled that the company’s independent contractors were in fact common law employees.”). See generally Gartland, supra note 176, at 505-06 (describing right-to-control test used by IRS to determine whether worker is independent contractor).

See Vizcaino, 97 F.3d at 1191 (answering IRS ruling by changing some of independent contractors into permanent positions while giving others option of terminating their employment or to continue but only with temporary agency); Gartland, supra note 176, at 518 ( noting that after complying with the IRS decision, Microsoft changed its system for the freelance workers and offered some freelance workers permanent employee positions, and rest opportunity to work for temporary employment
plaintiffs were comprised of individuals who opted against Microsoft’s policy change and sued for their pension and welfare benefits.\textsuperscript{183} The plaintiff class argued that they were common law employees and were allowed the same benefits as their permanent counterparts.\textsuperscript{184} Microsoft’s main argument was contingent on the fact that these employees signed an independent contractor agreement expressly providing that they were responsible for their own benefits.\textsuperscript{185}

The Court of Appeals disagreed with Microsoft and relied on Microsoft’s treatment of the workers, not on its classification.\textsuperscript{186}
Although Microsoft did take steps in preventing these workers from being defined as employees, this did not preclude the court from granting common law employee status. Microsoft used the same tactics to avoid employee status as the recommendations of lawyers did to avoid the community of interest standard. This decision exemplifies how the court will assert the true intentions of the parties by examining multiple facets before rendering an opinion.

IV. Future for Temporary Employees

The *Sturgis* decision had merit, but there are still a number of substantial questions and problems for both the supplying employer and user employer. Unfortunately, the Court of agreement which precluded freelancers from obtaining employee benefits); *Ninth Circuit Finds That Misclassified Employees Are Eligible for Federally Regulated Employee Benefits*, 111 HARV. L. REV. 609, 613 (1997) (describing how *Vizcaino* court imputed Microsoft with intent to avoid unlawful conduct, despite fact that many corporations intentionally include “no benefits” clauses in contracts of misclassified, temporary or contract employees to limit overhead costs).

See *Cmty. Bob-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (outlining factors to determine who qualifies as employee); *Ninth Circuit Finds That Misclassified Employees Are Eligible for Federally Regulated Employee Benefits*, supra note 186, at 613 (stating 9th Circuit interpreted Microsoft’s involvement in questionable employment agreements was mistake rather than intentional avoidance of law). But see *Kellogg*, supra note 177, at 1805 (proposing that 9th Circuit should have honored employment contracts made by Microsoft and its freelancers, and not have inferred benefits when both parties had not assented to such arrangement).

See *Vizcaino*, 97 F.3d at 1189 (recognizing problems with large corporations avoiding payment of employee benefits by hiring temporary workers or independent contractors); *Hixon*, supra note 182, at 684 (stating that misclassification of independent contractors is common and often deliberate by employers to avoid payroll taxes and federally mandated work-related benefits, such as unemployment benefits and workers’ compensation”); *Ninth Circuit Finds That Misclassified Employees Are Eligible for Federally Regulated Employee Benefits*, supra note 186, at 613 (realizing that many corporations knowingly take advantage of vague area of law to avoid obligations incident to employment relationship like benefits). But see *Kellogg*, supra note 177, at 1805 (arguing generally that courts should not interfere with right of corporations and contingent workers to contract freely regarding employment agreements and should not infer rights into contracts that are absent).

See *Vizcaino*, 97 F.3d at 1190-1200 (concluding Microsoft misrepresented plaintiffs’ actual employment status and benefits eligibility premised upon examining IRS viewpoint, qualifications of common-law employee, and reading contract in light of rule *contra proferentum*); *de Haas*, supra note 178, at 497 (stating language of employment agreements is only one factor considered when deciding whether both parties “truly intend” worker to be traditional employee with benefits or contractor); *Hixon*, supra note 182, at 684 (asserting misclassification of independent contractors is common and often deliberate).

See Furfaro & Josephson, supra note 11 (outlining uncertainties Board left in *Sturgis* decision including: accretion of temporary workers into existing bargaining units, procedure for conducting collective bargaining negotiations involving multiple employers with responsibilities to different employees, and when and if temporary employees will have sufficient community of interest with regular employees to warrant inclusion of two groups in single unit).
Appeals may never get to address this particular case\textsuperscript{191} because it has been remanded to the Board to determine the community of interest.\textsuperscript{192} Since neither M.B. Sturgis nor Interim objected to being a joint employer, there is a good chance that this case will not go any further.\textsuperscript{193} As for Petitioner Jeffboat, who objected to the joint employer status along with TT&O, this case is being "remanded to the Regional Director to determine whether the TT&O supplied employees are an accretion to the contractual bargaining unit, including the consideration of Jeffboat's other contentions for dismissing the petition which were held in abeyance for our consideration of the Lee Hospital and joint employer issues."\textsuperscript{194} As a result, the only way for Jeffboat to obtain appellate review is to refuse to bargain with a certified union.\textsuperscript{195} The Board would then have to rule that Jeffboat committed an unfair labor practice.\textsuperscript{196} This could take years before the appeals court examines the underlying ruling.\textsuperscript{197} Even if this case does reach the federal court system, it is very difficult to secure a reversal on the merits of a Board's decision.\textsuperscript{198}

\textsuperscript{191} See ARCHIBALD COX ET AL., LABOR LAW 303-4 (12th ed. 1996) (stating that NLRA has no provision for direct judicial review of Board determinations, however Section 9(d) does certify federal courts when aggrieved party commits unfair labor practice); see also Leedom v. Kyne, 358 U.S. 184 (1958) (exploring Congress' reluctance to provide for direct judicial review of representation decisions).

\textsuperscript{192} See Sturgis, 2000 N.L.R.B. LEXIS 546, at *43 (remanding case to Regional Director who failed to determine this issue previously).

\textsuperscript{193} See Sturgis at *5-6 (indicating neither party's objection as to joint employer status classification); see also Rahebi, supra note 19, at 1107 (noting debates still exist about what standard to apply when determining joint employer status).

\textsuperscript{194} Sturgis, 2000 N.L.R.B. LEXIS 546, at *58. See Rahebi, supra note 19, at 1125 (discussing Jeffboat's argument against joint employer status).


\textsuperscript{196} See A Guide to Basic Law and Procedures under the National Labor Relations Act, supra note 10 (explaining duty of employers to bargain collectively); see also 29 U.S.C. § 8(a)(5) (2000); Linden Lumber Div., Summer & Co. v. N.L.R.B., 419 U.S. 301, 311 (1974) (Stewart, J., dissenting) (stating it is unfair labor practice for employer to refuse to bargain with his employee's representative).


\textsuperscript{198} See Beth Israel Hosp. v. N.L.R.B., 437 U.S. 483, 501 (1978) ("[T]he judicial role is very narrow: The rule which the Board adopts is judicially reviewable for consistency with the Act and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced.");
Although there is heated debate over the choice in overruling precedent, the Court of Appeals should not reverse the Board's decision. It is evident that there are multiple shortcomings in the Sturgis holding, the overall decision is conducive to the changing contemporary structural makeup of the American employee. Accordingly, the Board needs to address these problems in their upcoming cases to ensure a peaceful transition in the workforce. Through Board decisions, both the boundaries of a joint employer and the application of the community of interest standard will become clearer. At the same time, Congress needs to continue providing adequate funding so the Board does not get too backed up with cases.

Most importantly, the Board needs to strictly adhere to the

Brownstone, supra note 197, at 246 (indicating N.L.R.B. decision will be upheld if reasonable and supported by record). But see N.L.R.B. v. Chicago Health & Tennis Clubs, Inc., 567 F.2d 331 (7th Cir. 1977) (demonstrating that courts do not look to make sure that Board is not making arbitrary decisions).

See Brownstone, supra note 197, at 243 (suggesting reversal of N.L.R.B. decisions has correlated directly with changes in Board composition resulting from changing political climate); Goldhaber, supra note 128 (outlining specific overturns in labor law within past year).

See Rahebi, supra note 19, at 1133 (suggesting Sturgis decision will benefit temporary workers, who have become a marginalized segment of American workplace); Megan Mulholland, National Labor Officials Make Changes in Interpretation of Labor Relations Act, POST-CRESCENT, Oct. 16, 2000 (quoting president of AFL-CIO, David Newby, "American labor law gives workers fewer rights than labor laws in any other industrialized country. We only need rulings which reinforce the basic rights of workers but we also need changes in the labor law itself that gives workers the protections they need.").


See Aimable v. Long & Scot Farms, 20 F. 3d 434, 443 (11th Cir. 1994) (discussing determination of joint employer status on case by case basis); Sturgis, 2000 N.L.R.B. LEXIS 546, at *42 (holding that community of interest will be decided on case by case basis); Leigh Ann Flavin, The Thomas-Davis Cases: The Appropriateness of Physicians as Bargaining Units and the Possible Implications for Insurance Companies under the National Labor Relations Act, 30 ARIZ. ST. L.J. 811, 825 (1998) (noting Board will have to conduct case by case analysis to determine existence of joint employer).

See McGorlick, supra note 169 (recognizing need for Congress to continue to provide increasing funds to N.L.R.B.). But see John G. Adam, Achieving Compliance with N.L.R.B.-Ordered Remedies, 75 U. DET. MERCY L. REV. 323, 324 (1998) (stating that N.L.R.B. budget has been slashed by 17.8% since 1985); James A. Gross, The Kenneth M. Piper Lecture: The Broken Promises of the National Labor Relations Act and the Occupational Safety and Health Act: Conflicting Values and Conceptions of Rights and Justice, 73 CHI.-KENT. L. REV. 351, 360 (1998) (stating Congressional opponents of N.L.R.B. have in recent years cut funds).
policy of accretion as they have in the past.204 It is not fair that temporary employees are forced to comply with contract obligations set by their permanent counterparts.205 It is obvious that temporary employees have substantively and procedurally different needs than the regular employees.206 One of the main objectives of the NLRA is to promote peace and tranquility between the parties, while affording employees the opportunity to be represented by the union of their choice.207 As a result, this argument fails unless the Board decides to depart from precedent once again when deciding this issue.208

Conclusion

The Sturgis decision highlights the ongoing changes in our society. Temporary workers are no longer a rarity as they compose a significant segment of the working world. As a result, they deserve the protections of the NLRA, which Sturgis provides for them. The majority of the Board members overruled Lee Hospital, enabling joint employees to be represented in a bargaining unit with employees, who are solely employed by the user, without consent of both parties. Although Sturgis failed to provide a workable framework in applying the decision, in the long term these are only small bumps that will be smoothed over


205 See Greenhouse, supra note 148 (explaining unfairness of accreting contract because permanent and temporary employees have different interest); McGregor, supra note 109 (noting temporary employees are commonly subject to coverage by bargaining agreements without having opportunity to opt for or against representation); Sukert, supra note 79, 439 (2000) (claiming temporary worker is vulnerable because he is not party to indeterminate contract).

206 See generally Ihejirika, supra note 14, at C16 (discussing fact that some temporary employees prefer flexibility that temporary work provides); McClain, supra note 95, G1 (stating typical contingent workers special need for legal representation; U.S. to Hire Temporaries to Cut Costs, supra note 101 (noting that temporary employees have significantly fewer rights and receive less benefits).

207 See Am. Bread Co., 411 F.2d 147, 155 (6th Cir. 1969 (promoting peace and tranquility as one objective of National Labor Act); Bierman & Gely, supra note 201, at 827 (noting NLRA's objective of industrial peace); See generally A Guide to Basic Law and Procedures under the National Labor Relations Act, supra note 10, at 26-29 (discussing N.L.R.B.'s general objective of promoting peace between parties and giving examples of violations).

208 See generally Ihejirika, supra note 14, at C16 (commenting that some temporary employees prefer flexibility that temporary work provides); McClain, supra note 95, G1 (discussing typical contingent workers special need for legal representation; U.S. to Hire Temporaries to Cut Costs, supra note 101 (noting that temporary employees have significantly fewer rights and receive less benefits).
time. The Court of Appeals, therefore, should affirm the *Sturgis* decision.