DECISION AND ANALYSIS

Labor Board Issues Major Ruling on Unionization

Unions Can Organize Temporary Employees Along with Regular Workforce

In a significant ruling serving the interests of organized labor, the National Labor Relations Board has handed down a sweeping decision extending the rights guaranteed by the National Labor Relations Act to temporary and other contingent workers. Labor unions will now be able to organize nontraditional employees and include them in collective bargaining units along with regular employees. M.B. Sturgis, Inc., 331 NLRB No. 173.

The August 25 decision in two consolidated cases, M.B. Sturgis, Inc. and Jeffboat Division, American Commercial Marine Service Company, 331 NLRB No. 173, significantly altered the legal framework under the NLRA for temporary employees procured through a “supplier employer” (i.e., temporary agency) in both unionized and union-free work environments. Since 1990, the NLRB has held that the only way temporary workers could be represented by a union and bargain with the “user” employer was if both the temporary agency and its client company consented to multi-employer bargaining. The Board’s new decision overrules its prior position in Lee Hospital, 300 NLRB 947, clearing the way for temporary workers to be included along with a company’s regular workforce in unorganized units voting for union representation and merged into existing bargaining units.

The M.B. Sturgis Case in the Nonunion Setting

M.B. Sturgis, Inc. manufactures flexible gas hoses at its Maryland Heights, Missouri facility. The company has approximately 35 full-time employees and uses 10-15 temporary employees, supplied through a temporary agency, to perform the same work as Sturgis’ employees. In 1995, the Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 108 filed a petition to represent Sturgis’ full-time employees. The company argued that the voting unit should include the temporary
employees, but the NLRB Regional Director, citing the Lee Hospital decision, ruled the temporary employees could not be included in the unit without the consent of the temporary agency. The Regional Director directed an election among the full-time employees only and the company appealed.

The Jeffboat Division Case in the Unionized Setting

The case consolidated with the Sturgis case, involved a unionized employer, Jeffboat Division, which operates an inland river shipbuilding facility in Jefferson, Indiana. The company has 600 employees in a production and maintenance unit represented by the International Brotherhood of Teamsters, Local 89. On a regular basis, the company also uses 30 welders and steamfitters supplied by a temporary agency. Jeffboat managers and supervisors direct the temporary employees and have the authority to discipline them. The temporary employees are not represented by Local 89.

In 1995, Local 89 filed a unit clarification petition with the NLRB, asserting the temporary employees constituted an “accretion” to the existing production and maintenance unit at the shipyard. Under “accretion” a smaller group of nonunion employees is merged into a larger group of unionized employees without holding an election. Relying on Lee Hospital, the NLRB Regional Director dismissed Local 89's petition because the temporary agency had not consented to multi-employer bargaining.

Understanding the Legal Analysis of the Sturgis Decision

At the heart of the Labor Board’s reversal of opinion in the Sturgis decision is the increased reliance on temporary or “contingent” workers by employers. Recognizing the reality of today’s workforce, the Board found that requiring the consent to bargain of both the supplier employer and the user employer “effectively denied representation rights guaranteed them under the National Labor Relations Act.” In overruling the Lee Hospital decision, the Board formulated a new analysis for temporary workers that does not depend upon the consent of the supplier and the user companies.

Under the Board’s new analysis, temporary workers may be included in a bargaining or voting unit with a user employer’s regular employees if two factors are present: (1) the supplier company and the user company are determined to be joint employers; and (2) the temporary employees share a community of interest with the user company’s regular workforce.

As a practical matter, satisfying joint employer status in the context of supplier and user companies is very easy, particularly in a manufacturing setting like Sturgis. Under NLRB case law, employers are joint if they “share or co-determine matters governing essential terms and conditions of employment.” NLRB v. Browning Ferris Industries, 691 F.2d 1117, 1123 (3d Cir. 1982). If two employers have the authority to affect matters of the temporary workers, such as hiring, firing, discipline, supervision, and direction, then they are joint employers. For example, in the Jeffboat case, the Board found joint employer status in the fact Jeffboat managers directed the work of the temporary employees and disciplined them. Even where employers have
taken the step of having a supervisor from the supplier company on-site to assist in disciplining the temporary workers, the day-to-day direction almost always lies with the supervisors of the user company.

If joint employer status exists, the Board will then decide whether the temporary workers share a community of interest with the user company’s regular workforce. Community of interest means there is a “mutuality of interests” in wages, hours and working conditions. However, if the temporary employees are performing the same work as the employees of the user company, and if they interact with each other and share facilities such as break rooms, parking lots and restrooms, then more likely than not the Board will find a community of interest and will grant representational rights.

There is another community of interest factor when the Board is considering whether temporary workers who have been hired directly by an employer without the involvement of a supplier company are eligible for inclusion in a bargaining unit. In those situations, temporary employees who are employed on the eligibility date for a union election but whose tenure remains uncertain can vote if they otherwise share a community of interest with eligible employees. To make this determination, the Board looks at two factors: a reasonable expectation of further employment and, more importantly, a date certain. Generally, if temporary workers do not have a reasonable expectation of further employment, or their tenure is to end on a “date certain,” they are not eligible to vote. The *Sturgis* decision clouds the issue of whether inclusion of temporary employees not provided by a supplier company is appropriate.

**Preparing for Union Efforts to Organize the Growing Ranks of Temporary Employees**

The *Sturgis* decision has been hailed as "an important step" in organizing temporary workers by AFL-CIO President John Sweeney. Labor unions are eager to tap the temporary worker population who are seen as vulnerable to organizing around issues including regular employee status, job security, and enhanced benefits.

**The Implications for Union-Free Employers**

In the event of union organizing, a union free employer utilizing temporary employees may now have no choice in whether those workers would be included in a voting unit. Given the way most employers use temporary workers, they will be granted the franchise to vote. It is likely that to reach this new potential source of new members, unions will actually start the organizing around the issues involving temporary workers and enmesh a larger part of the regular workforce in a costly campaign. In this event, the user company would be tied to the temporary agency for the duration of the organizing, and perhaps beyond it. Undoubtedly, terminating the business relationship with the temporary agency during active organizing would be considered an unfair labor practice, which could subject both companies to liability.

Under this ruling remaining union free will now require a more complex employee relations strategy, including working with legal counsel experienced in handling multiple employer issues. Some of the areas to be considered include:
• How does your company use temporary workers? Is there a good chance the temporary agency and your company will be considered joint employers? If so, is there a community of interest between the groups of employees?

• Do your temporary workers have a reasonable expectation of continued employment or do they have a “date certain” for the employment to end?

• How does your company treat temporary workers? Companies that utilize “temp to hire” arrangements - where companies use temporary employment as a screening process and offer regular employment status to individuals who meet performance standards - are likely to be less vulnerable to a union foothold.

• How are the temporary employees perceived by your regular workforce? Do the regular employees have strong feelings one way or the other about them?

• How close a relationship does your company have with the supplier company? If union organizing occurs at your company, the two entities may have different views on how to handle it. Who would make the important decisions? What happens if the supplier company takes an approach decidedly different than yours?

The Implications for Unionized Employers

The impact of the *Sturgis* decision on employers with unions is arguably greater and more immediate. If the union claims the temporary workers should be part of an existing bargaining unit, the union can file a petition to clarify the unit and request that they be “accreted” (immediately merged) into it. The Labor Board would simply apply the two-step analysis: are the supplier company and the user company joint employers, and do the employees share a community of interest. If yes, then the user company would be forced to apply the terms of the collective bargaining agreement, including all wages, benefits and terms and conditions of employment, to all of the temporary workers accreted to the bargaining unit. This could be an extremely costly experience for both the supplier and the user company.

As with the considerations for union-free employers, the issues in this area are complex and actions should not be taken without proper legal counsel. At a minimum, the user company should:

• Analyze how your company uses temporary workers. Is there a good chance the temporary agency and your company will be considered joint employers? If so, is there a community of interest between the groups of employees?
• Analyze your collective bargaining agreement. Does it include express language concerning the use of temporary workers? What does the recognition clause say? What has been the history of using such workers? The answers to these questions are of great importance to whether your company can withstand an effort to accrete temporary workers.

• Again, what is the relationship with the supplier company? What is that company’s position on the issue?

As we saw recently in the NLRB’s decision in *Epilepsy Foundation, Inc.*, guaranteeing the right of non-union employees to co-worker representation during workplace investigations and disciplinary interviews, the *Sturgis* decision confirms the inclination of the current Labor Board members to disrupt legal precedent. Clearly the Board is advocating increased rights for individuals. How the Board applies the new legal standards established in the *Sturgis* and *Epilepsy Foundation* cases will be seen in the coming months.

Jackson Lewis attorneys are experienced in counseling employers on their legal obligations and rights regarding unionization of temporary employees and co-worker representation in workplace investigations and employee interviews. For more information or assistance, please contact the attorney with whom you regularly work, or call Margaret Bryant, at 1-800-648-2551 or by e-mail at bryantm@jacksonlewis.com.

For a description of our services and more information on workplace law issues, please visit our web site, [www.jacksonlewis.com](http://www.jacksonlewis.com).

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