Miller & Anderson, Inc. and Tradesmen International *and* Sheet Metal Workers International Association, Local Union No. 19, AFL–CIO. Case 05–RC–079249

July 11, 2016

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

I. INTRODUCTION

The fundamental issue raised by the Petitioner's request for review is whether under the National Labor Relations Act ("the Act") the employees who work for a user employer—both those employees the user alone employs and those employees it jointly employs (along with a supplier employer)—must obtain employer consent if they wish to be represented for purposes of collective bargaining in a single unit, even if both groups of employees share a community of interest with one another under the Board's traditional test for determining appropriate units.[1]

Anyone familiar with the Act's history might well wonder why employees must obtain the consent of their employers in order to bargain collectively. After all, Congress passed the Act to compel employers to recognize and bargain with the designated representatives of appropriate units of employees, even if the employers would prefer not to do so. But most recently in *Oakwood Care Center*, 343 NLRB 659 (2004) ("*Oakwood*"), the Board held that bargaining units that combine employees who are solely employed by a user employer and employees who are jointly employed by that same user employer and an employer supplying employees to the user employer constitute multi-employer units, which are appropriate only with the consent of the parties. Id. at 659. The *Oakwood* Board thereby overruled *M. B. Sturgis, Inc.*, 331 NLRB 1298 (2000) ("*Sturgis*"), which had held that the Act permits such units without the consent of the user and supplier employers, provided the employees share a community of interest. *Sturgis*, 331 NLRB at 1304–1308.

The Petitioner requests that the Board overturn *Oakwood* and return to the rule of *Sturgis* in its request for review of the Regional Director's administrative dismissal of its petition seeking to represent a unit of all sheet metal workers employed by Miller & Anderson, Inc. and/or Tradesmen International as either single employers or joint employers on all job sites in Franklin County, Pennsylvania.[2]

We granted review to consider the important issue raised by the Petitioner. Following our grant of review, we issued a Notice and Invitation to File Briefs ("NIFB"). The NIFB invited the parties and interested amici to address one or more of the following questions:

> 1. How, if at all, have the Section 7 rights of employees in alternative work arrangements, including temporary employees, part-time employees and other contingent workers, been affected by the Board's decision in *Oakwood Care Center*, 343 NLRB 659 (2004), overruling *M.B. Sturgis*, 331 NLRB 1298 (2000)?
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> 2. Should the Board continue to adhere to the holding of *Oakwood Care Center*, which disallows inclusion of solely employed employees and jointly employed employees in the same unit absent the consent of the employers?
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> 3. If the Board decides not to adhere to *Oakwood Care Center*, should the Board return to the holding of *Sturgis*, which permits units including both solely employed employees and jointly employed employees without the consent of the employers? Alternatively, what principles, apart from those set forth in *Oakwood* and *Sturgis*, should govern this area?

The briefs filed in response to the NIFB largely mirror the reasoning of the dueling majority and dissenting opinions in *Oakwood* and *Sturgis*. In short, the briefs that favor adhering to *Oakwood* largely argue that its holding is compelled by the Act and that returning to *Sturgis* would be unwise as a policy matter in any event.[3] On the other hand, the briefs that favor returning to *Sturgis* argue that the Act does not preclude the Board from returning to *Sturgis*, and that the Board should do so to

[1] Consistent with previous Board decisions, this decision refers to the company that supplies employees as a "supplier" employer and the company that uses those employees as a "user" employer.

[2] The Regional Director's letter administratively dismissing the petition noted that both Miller & Anderson and Tradesmen International declined to consent to a combined unit.

[3] Tradesmen International, the American Hospital Association and the Federation of American Hospitals, the American Staffing Association, Associated Builders and Contractors, Inc., the Chamber of Commerce of the United States of America, the Coalition for a Democratic Workplace and the National Association of Manufacturers, the Council on Labor Law Equality, and the National Right to Work Legal Defense Foundation, Inc. have filed briefs urging the Board to adhere to *Oakwood*. Although the briefs also argue that the Board should not return to *Sturgis* even if the Board decides to overturn *Oakwood*, they do not explain precisely what the Board should do in that event.

effectuate the Act's fundamental policies that are plainly frustrated by *Oakwood*.[4]

After carefully considering the briefs of the parties and amici and the views of our dissenting colleague, we conclude that *Sturgis* is more consistent with our statutory charge. Accordingly, we overrule *Oakwood* and return to the holding of *Sturgi*s. Employer consent is not necessary for units that combine jointly employed and solely employed employees of a single user employer. Instead, we will apply the traditional community of interest factors to decide if such units are appropriate. *Sturgis*, 331 NLRB at 1308. We also agree with the *Sturgis* Board's clarification that there is no statutory impediment to processing petitions that seek units composed only of the employees supplied to a single user, or that seek units of all the employees of a supplier employer and name only the supplier employer. Ibid. We remand the case to the Regional Director for further proceedings consistent with this Decision.

II. OVERVIEW OF PRECEDENT

A. Board Precedent Prior to Sturgis

A review of Board precedent demonstrates that units combining employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer are not novel. In the early years of the Act's administration and continuing for 4 decades, the Board routinely found units of the employees of a single employer appropriate, regardless of whether some of those employees were jointly employed by other employers. The Board used its traditional community of interest test to decide whether such units were appropriate. Significantly, the Board identified no statutory impediment to such units, and the issue of employer consent was neither raised nor discussed.

Thus, in the 1940's, the Board included employees who worked for concessionaires in a unit of the employees of the retail department store where the concessions were located. Some of these employees were referred to as "employees" of the concessionaire or as being "retained" by the concessionaire to work in the store. See *Louis Pizitz Dry Goods Co.*, 71 NLRB 579 (1946); *Taylor's Oak Ridge Corp.*, 74 NLRB 930 (1947); *Denver Dry Goods Co.*, 74 NLRB 1167 (1947). Although these concessionaires operated whole departments, the Board included the employees in these departments in the unit with the solely employed department store employees where the evidence demonstrated that the department store possessed sufficient control over the former to be deemed their employer, and where those employees shared a community of interest with the store's solely employed employees. On the other hand, the Board excluded employees in the departments operated by the concessionaires pursuant to lease or similarly-styled arrangements if they were solely employed by the concessionaires. In these cases, the Board noted that they did not share "sufficient interests" with the employees in the other departments to be joined for collective bargaining. See *J. M. High Co.,* 78 NLRB 876, 878 (1948); and *Block & Kuhl Department Store*, 83 NLRB 418, 419–420 (1949). In the 1950s, the Board continued to include the employees in the leased departments in units with the store's employees. See, e.g., *Stack & Co.*, 97 NLRB 1492, 1493–1494 (1952).

In the 1960s, the Board recognized that control over employees in leased departments may be shared between user and supplier employers and, hence, the employees may be jointly employed. See *Frostco Super Save Stores, Inc.*, 138 NLRB 125 (1962);[5] *Spartan Department Stores*, 140 NLRB 608, 610–611 fn. 8 (1963). With this shared employment relationship, the Board continued to sanction units combining solely employed department store employees with jointly employed employees working in the leased departments, applying the community of interest test to decide whether jointly employed employees should be included in the unit. See *Frostco*, 138 NLRB at 129; *Thriftown, Inc.*, 161 NLRB 603 (1966); and *Jewel Tea Co.*, 162 NLRB 508 (1966). In *Thriftown*, the Board majority included jointly employed employees of those leased departments in the same bargaining unit with the solely employed department store employees. Although Chairman McCulloch

[4] The Petitioner, the General Counsel, the American Federation of Labor and Congress of Industrial Organizations and North America's Building Trades Unions, Construction and Master Laborers' Local Union 11, affiliated with the Laborers' International Union of North America, the Service Employees International Union, and the University of Wisconsin-Extension, Labor Education Department, the School for Workers have filed briefs urging the Board to overturn *Oakwood* and to return to *Sturgis*.

[5] The circumstances in *Frostco* illustrate (1) that the Board found no impediment to combining employees of solely employed/jointly employed employees; and (2) that the Board utilized a community of interest analysis in determining appropriate units in such instances. In *Frostco*, the Retail Clerks sought an overall store unit of all employees of the Sav-Mart store. The Meat Cutters sought a unit of the employees in the grocery and meat department operated by Frostco. The Culinary Workers sought employees operating popcorn concessions, who were also employed by yet another company. The Board found that Sav-Mart was a joint employer with each licensee. Yet the Board found a storewide unit, including the jointly employed employees, was appropriate. In addition, the Board permitted the Frostco employees to decide whether they wished to be represented in the overall unit or separately "[i]n view of all the indicia of separateness" such employees enjoyed. The Board found, however, that the jointly employed employees sought by the Culinary Workers "do not comprise a group with sufficiently disparate employment interests" and the Board dismissed the petition for a separate unit of these employees. 138 NLRB at 129.

and Member Fanning, in dissent, objected to the joint employer finding, they expressed no concern over the inclusion of the jointly employed employees in the unit with the solely employed store employees. 161 NLRB at 608. Compare *United Stores of America*, 138 NLRB 383, 385 (1962), in which a separate unit of jointly employed grocery and meat department employees was found appropriate because of the "indicia of separateness" from solely employed storewide employees.

In 1969, the United States Court of Appeals for the Sixth Circuit rejected an employer's challenge to a storewide unit that included jointly employed employees supplied by several employers in a unit with Kresge's employees. *S. S. Kresge Co. v. NLRB*, 416 F.2d 1225 (6th Cir. 1969), enfg. in relevant part, *S. S. Kresge Co.*, 169 NLRB 442 (1968). The employer contended that "to compel unwilling employers to bargain as joint employers will disrupt the collective bargaining process because each licensee may have independent ideas about appropriate labor policy." 416 F.2d at 1231. The court specifically rejected this contention, relying on a similar case from the U.S. Court of Appeals for the Ninth Circuit which rejected an employer's contention that a userwide (storewide) unit would have a "highly disruptive effect upon the store's operation, [and] will prejudice the licensees and not produce sound and stable collective bargaining relationships." See *Gallenkamp Stores Co. v. NLRB*, 402 F.2d 525, 531 (9th Cir. 1968). The *Gallenkamp* court also had rejected the employer's contention that the jointly employed employees of one the licensees "lack[ed] a sufficient community of interest" with the store employees to be included in the unit. Id.

In short, as of the end of the 1960s, no Board or court decision had barred, absent employer consent, units combining solely employed employees and jointly employed employees. To the contrary, the Board and the courts perceived no statutory impediments to units combining solely employed employees and jointly employed employees. Inclusion of the jointly employed employees was subject only to the Board's traditional community of interest standards.[6]

During the next 2 decades, the Board continued to find appropriate collective bargaining units that combined employees solely employed by a single user employer and employees jointly employed by that same user employer and a supplier employer, provided the employees shared a community of interest under the Board's traditional test for determining unit appropriateness. For example, in *Globe Discount City*, 209 NLRB 213 (1974), the Board found that the Regional Director erred in excluding jointly employed employees from a unit of Globe's employees (and other jointly employed employees). The Board found that the jointly employed employees shared "a substantial community of interest" with the solely employed and other jointly employed store employees and that a unit combining them was an appropriate unit.[7]

Similarly, the U.S. Court of Appeals for the Seventh Circuit found no impediment to bargaining in units of these mixed groups of employees absent employer consent. Thus, in *NLRB v. Western Temporary Services, Inc.*, 821 F.2d 1258, 1265 (7th Cir. 1987), the court found that a user employer, Classic, was not prejudiced by the inclusion—in a unit with Classic's solely employed employees—of the part-time employees supplied to it by Western Temporary Services ("Western") whom Classic jointly employed (along with Western).

However, the Board's treatment of units combining jointly employed and solely employed user employees abruptly changed in *Lee Hospital*, 300 NLRB 947 (1990), without any explanation or even so much as an acknowledgement from the Board that it was breaking with precedent. The issue arose there in a convoluted manner. The petitioner sought a unit limited to certified registered nurse anesthetists (CRNAs) who worked in a department operated by Anesthesiology Associates, Inc. (AAI) for the hospital.[8] The Regional Director found that CRNAs did not constitute an appropriate unit separate from other hospital professionals, because under the then applicable "disparity of interest" test applied to health care institutions, the CRNAs possessed no sharper than usual differences from the other professionals employed by the hospital. Accordingly, the Regional Director dismissed the petition. The petitioner sought review of this decision arguing, among other things, that the CRNAs were jointly employed by Lee Hospital and AAI, and that this joint employer relationship further evidenced a disparity of interest between the CRNAs and

[6] In 1970, the United States Court of Appeals for the Fifth Circuit pointed out that the Board "often" had found appropriate units of the user's employees and licensees' employees, especially when the user employer exercised substantial control over the employment practices of the licensees and "was in practical effect a joint-employer." *NLRB v. Zayre Corp.*, 424 F.2d 1159, 1165 (5th Cir. 1970).

[7] In several unfair labor practice cases, the Board also imposed a bargaining obligation on the joint employers of employees in contractual units that included employees employed by only one of the joint employers. See, e.g., *Sun-Maid Growers of California*, 239 NLRB 346, 352–353 (1978), enfd. 618 F.2d 56, 59–60 (9th Cir. 1980); and *U.S. Pipe & Foundry Co.*, 247 NLRB 139, 142 (1980). The Board found that "no policy of the Act" was offended by imposing a bargaining obligation "for that portion of the overall unit." *Sun-Maid Growers*, 239 NLRB at 353.

[8] The Hospital had contracted with AAI for the operation of the anesthesiology department and recovery room.

the other hospital professionals who were not jointly employed.

On review, the Board, unlike the Regional Director, concluded that the joint employer issue had to be resolved to determine whether a separate CRNA unit was appropriate. This was so because, according to the Board, "as a general rule, the Board does not include employees in the same unit if they do not have the same employer, absent employer consent[.] Thus, if AAI is a joint employer, the CRNAs could be included in the unit with other professionals employed by Lee Hospital only with the hospital's consent[,] and [i]t is clear that Lee Hospital does not consent to such an arrangement." Id. at 948 (footnote omitted).[9]

In announcing this "general rule," however, *Lee Hospital* entirely ignored the Board's routine practice of finding appropriate units that combined employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer. *Lee Hospital* also failed to offer any rationale in support of its supposed general rule. Instead, it simply cited in a footnote (300 NLRB at 948 fn. 12) a single case—*Greenhoot, Inc.*, 205 NLRB 250 (1973)—in support of the supposed general rule.

The Board's decision in *Greenhoot*, however, had left undisturbed—indeed it had said nothing about—the Board's long-standing practice of finding appropriate units that combined employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer absent employer consent.[10] Instead, *Greenhoot* addressed the entirely different situation where a union seeks to represent a unit of employees who perform work for, and who are employed by, different user employers.[11]

Subsequently, the Board applied the "rule" of *Lee Hospital* to prohibit any unit that would combine jointly employed employees with solely employed employees of one of the joint employers, absent consent of both employers. See, e.g., *International Transfer of Florida, Inc.*, 305 NLRB 150 (1991); and *Hexacomb Corp.*, 313 NLRB 983 (1994). These cases applying *Lee Hospital* did not discuss, explain, or rationalize the "rule."

B. Sturgis

A decade later, the Board reexamined *Lee Hospital* in *Sturgis*. The Regional Director for Region 14 had issued a Decision and Direction of Election in *M. B. Sturgis, Inc.*, Case 14–RC–11572, in which he found appropriate a petitioned-for unit consisting of all employees employed by M. B. Sturgis, with the exception of 10–15 "temporary" employees used by Sturgis and supplied by Interim, Inc. The Regional Director found that the temporary employees were jointly employed by Sturgis and Interim, but that under *Lee Hospital*, they could not be included in the same unit with employees employed solely by Sturgis absent the consent of both Sturgis and Interim. *Sturgis*, 331 NLRB at 1298–1299.[12]

On review, the Board concluded that *Lee Hospital* had improperly extended the multi-employer analysis in *Greenhoot* to situations where a single user employer obtains employees from a supplier employer and a union is seeking to represent both those jointly employed employees and the user's solely employed employees in a single unit. The Board rejected the "faulty logic" of *Lee Hospital* that a user employer and a supplier employer—both of which employ employees who perform work on behalf of the same user employer pursuant to the user's arrangement with the supplier—are equivalent to the completely independent user employers in multi-employer bargaining units. Id. at 1298, 1305. The Board

[9] The Board ultimately did not apply this rule in *Lee Hospital* because it concluded that Lee Hospital and AAI were not joint employers of the CRNAs at issue.

[10] Following *Greenhoot*, the Board, with court approval, continued to find appropriate units that combined employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer, without suggesting that they implicated the consent requirement of multi-employer bargaining. See, e.g., *NLRB v. Western Temporary Services, Inc.*, supra, 821 F.2d at 1265 (finding no impediment to bargaining in units of these mixed groups of employees absent employer consent) (enfg. 278 NLRB 469 (1986)).

[11] The issue presented there involved a multi-employer bargaining unit where the petitioner sought a unit consisting of the engineers and maintenance employees at 14 separately owned office buildings. The Board found that "Greenhoot and each of the Building owners are joint employers at each of the respective buildings." *Greenhoot, Inc.*, 205 NLRB at 251. The Board further found that the petitioned-for unit composed of employees working at, and employed by, each of the separately owned buildings constituted a multi-employer unit. As there was no consent as required for a multi-employer unit, the Board found "separate units [of the engineers and maintenance men] at each location" to be appropriate, rather than the combined unit sought by the petitioner. Id. *Greenhoot* therefore stands for the proposition that where two or more otherwise separate user employers obtain employees from the same supplier employer, and a union is seeking to represent the employees in a single unit for the purposes of collective bargaining with all the user employers, the unit sought is a multi-employer unit.

[12] In the meantime, the Acting Regional Director for Region 9 had issued a Decision and Order in *Jeffboat Division*, Case 9–UC–406, in which he dismissed a unit clarification petition by which the petitioning union had sought to clarify the bargaining unit of Jeffboat employees covered by its existing collective-bargaining agreement with Jeffboat to include employees supplied by T.T. & O. Enterprises (TT&O) for use by Jeffboat. The Acting Regional Director found that Jeffboat and TT&O were joint employers of the TT&O-supplied employees but that *Greenhoot* and *Lee Hospital* precluded the inclusion of the jointly employed employees in the existing unit, because Jeffboat and TT&O would not consent to joint bargaining. See *Sturgis*, 331 NLRB at 1299. The Board granted review in both *Sturgis* and *Jeffboat*.

found that employer consent is not required for a unit combining the employees solely employed by a user employer and the employees jointly employed by that same user employer and a supplier employer, because such a unit is an "employer unit" given that all the employees in such a unit perform work for the user employer and all are employed by the user employer. Id. at 1304–1305. The Board held that it would apply traditional community of interest factors to decide if such units are appropriate. Id. at 1308. Accordingly, the Board remanded the cases to the Regional Directors to decide the unit questions without regard to the restriction imposed by *Lee Hospital.* Ibid.[13]

C. Oakwood

Four years later, however, the Board changed course. In *Oakwood*, the Regional Director for Region 29 had issued a Decision and Direction of Election, in which he found appropriate a petitioned-for unit of nonprofessional employees at Oakwood's residential care facility. 343 NLRB at 659. The petitioned-for unit included both the employees who were solely employed by Oakwood and the employees who were jointly employed by Oakwood and its supplier employer, a personnel staffing agency. The parties stipulated that under *Sturgis*, the petitioned-for unit of the employees solely employed by Oakwood and the jointly employed supplier employees (who wore identification tags that were issued by Oakwood and that identified them as employees of Oakwood's facility) was appropriate. However, Oakwood urged the Board to reverse *Sturgis*, contending that it was wrongly decided. Ibid.

After granting review, the Board concluded that *Sturgis* was misguided both as a matter of statutory interpretation and sound national labor policy. Id. at 662. The Board concluded that Congress had not authorized the Board to direct elections in units encompassing the employees of more than one employer, and that the bargaining structure contemplated by *Sturgis* gives rise to significant conflicts among the various employers and groups of employees participating in the process. Id. at 661–663.

III. DISCUSSION

With the foregoing review of the Board's and the courts' historical treatment of combined units of jointly employed and solely employed employees in mind, we turn to our own analysis of the issue. We begin, as we must, with the statute itself. Section 1 of the Act sets forth the Congressional findings that the denial by some employers of the right of employees to organize and bargain collectively and the inequality of bargaining power between employers and employees, who do not possess full freedom of association, lead to industrial strife that adversely affects commerce. Congress therefore declared it to be the policy of the United States to mitigate or eliminate those adverse effects by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. In short, the central purpose of the Act is "to protect and facilitate employees' opportunity to organize unions to represent them in collective bargaining negotiations." *American Hospital Assn. v. NLRB*, 499 U.S. 606, 609 (1991). Thus, Section 7 of the Act grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]" 29 U.S.C. §157.

Section 9 of the Act, in turn, speaks to the implementation of employees' right to bargain collectively through representatives of their own choosing. Section 9(a) thus provides that representatives "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment[.]" 29 U.S.C. §159(a). And Section 9(b) relevantly provides that "[t]he 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[.]" 29 U.S.C. § 159(b). But neither Section, nor any other portion of Section 9[14] or the Act itself, explicitly addresses whether the Board may find appropriate a unit that combines employees solely employed by a user employer and

[13] *Sturgis* also clarified that employer consent is not required when a petition seeks a unit only of the employees supplied to a single user, or seeks a unit of all the employees of a supplier employer and names only the supplier employer. Id. at 1308. The *Sturgis* Board, however, reaffirmed the decision in *Greenhoot* insofar as it requires employer consent for the creation of true multi-employer units involving employees who do not share a user employer in common and where the union seeks to bargain with those separate user employers. Id. at 1298.

[14] Notably, Sec. 9 expressly deems certain other units not appropriate for purposes of collective bargaining. See, e.g., Sec. 9(b)(3) (expressly barring the Board from finding appropriate a unit including guards and nonguards).

employees jointly employed by that same user employer and a supplier employer.[15]

That circumstance establishes two important foundations for our consideration of the employer-consent issue. First, the Act does not compel *Oakwood's* holding that bargaining units combining solely employed and jointly employed employees are appropriate only with the consent of the user and supplier employers. Second, precisely because the Act does not dictate a particular rule, we may find that another rule is not only a permissible interpretation of the statute, but also that it better serves the purposes of the Act. For the reasons explained below, we find that the *Sturgis* rule, not requiring employer consent to units combining jointly employed and solely employed employees of a single user employer, meets both of those criteria.

A. Sturgis Is Consistent With Section 9(b)

The "exact limits of the Board's powers" under Section 9 and "the precise meaning" of the term "employer unit" are not defined by the statute. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 165 (1941). Notably, however, the statutory definition of the terms "employer" and "employee" in Sections 2(2) and 2(3) of the Act are very broad,[16] and, as described, Congress's "statutory command" to the Board, in deciding whether a particular bargaining unit is appropriate, is "to assure to employees the fullest freedom in exercising the rights guaranteed by th[e] Act[.]" *Gallenkamp Stores Co. v. NLRB*, supra, 402 F.2d at 532 (quoting Section 9(b)). In that context, we are persuaded that a unit combining employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer logically falls within the ambit of a 9(b) employer unit. All the employees in such a unit are performing work for the user employer and are employed within the meaning of the common law by the user employer. Thus, the user employer and the supplier employer are joint employers of the employees referred by the supplier to the user for the latter's use.[17] The employees solely employed by the user employer likewise plainly perform work for the user employer and are employed by the user within the meaning of the common law. In sum, a *Sturgis* unit comprises employees who, working side by side, are part of a common enterprise.

As *Sturgis* explained,

> That a unit of all of the user's employees, both those solely employed by the user and those jointly employed by the user and the supplier, is an "employer unit" within the meaning of Section 9(b), is logical and consistent with precedent. The scope of a bargaining unit is delineated by the work being performed for a particular employer. In a unit combining the user employer's solely employed employees with those jointly employed by it and a supplier employer, all of the work is being performed for the user employer. Further, all of the employees in the unit are employed, either solely or jointly, by the user employer. Thus, it follows that a unit of employees performing work for one user employer is an "employer unit" for purposes of Section 9(b).

331 NLRB at 1304–1305.

The restrictive view that the *Oakwood* Board and our dissenting colleague place on Section 9(b) is based on the erroneous conception that bargaining in a *Sturgis* unit constitutes multi-employer bargaining, which requires the consent of all parties. However, in the traditional multi-employer bargaining situation, the employers are entirely independent businesses, with nothing in common except that they operate in the same industry. They are often in competition for work with each other, operate at separate locations on different work projects, and hire their own employees.[18] Multi-employer bargaining units are created without regard for any preexisting community of interest among the employees of the various separate employers. In fact, the Board developed the consent requirement in such cases precisely because the employers at issue were physically and economically separate

[15] See *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–843 (1984).

[16] Sec. 2(2) of the Act (29 U.S.C. §152(2)) states that "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act . . ., or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization" (and Sec. 2(1) of the Act (29 U.S.C. §152(1)) defines the term "person" to include "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, . . . or receivers"). Sec. 2(3) of the Act (29 U.S.C. §152(3)) states that "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise[.]"

[17] Under Board precedent, an entity may not be found to be a joint employer unless, among other things, it *is* an employer within the meaning of the common law of the employees in question. See *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 2 (2015) ("*BFI*").

[18] In a *Sturgis* unit, the user and supplier employers are not competitors. As Associated Builders and Contractors, Inc. acknowledges in its brief, the supplier and user employers "almost always serve different business purposes. For example, a typical staffing agency's primary purpose is to provide labor for its customers to utilize. The user's primary purpose is to satisfy its own business objectives, such as sell[ing] goods or services to a different set of customers."

from each other, their operations were not intermingled, and their employees were not jointly controlled.[19]

In multi-employer bargaining, the unrelated employers on their own initiative decide to join an employer association and bargain through a mutually selected agent to match union strength and to avoid the competitive disadvantages resulting from nonuniform contractual terms. As an agency relationship cannot be compelled, multi-employer bargaining is voluntary in nature; unions may not coerce employers into joining associations which negotiate labor contracts on behalf of their members. See generally *NLRB v. Truck Drivers Local Union No. 449, IBT*, 353 U.S. 87, 94–96 (1957); *Florida Power & Light Co. v. NLRB*, 417 U.S. 790, 798, 803 & n.14 (1974); *NLRB v. Amax Coal Co*., 453 U.S. 322, 335 (1981); *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 412 (1982). Indeed, by conceding that employer consent is not required when a petition names two employers and seeks a unit composed of the employees jointly employed by the two employers, *Oakwood* itself recognized that a bargaining unit involving more than one employer is not ipso facto a "multi-employer bargaining unit."

There plainly is a distinction of substance between a *Sturgis* unit and a multi-employer bargaining unit. Put simply, as shown, in a *Sturgis* unit, all of the employees are employed by the user employer. *Sturgis*, 331 NLRB at 1305. After all, the employees who are solely employed by the user employer share an employer (the user employer) with the contingent employees who are jointly employed by that same user employer and a supplier employer.[20] Thus, a *Sturgis* unit fits comfortably within 9(b)'s sanctioning of an "employer unit." By contrast, although a multi-employer bargaining unit also involves more than one employer, there is no common user employer for all the employees in such a unit.

The legislative history relied on in *Oakwood*, 343 NLRB at 661, which indicates that "Congress included the phrase 'or subdivision thereof' [in Section 9(b)] to authorize other units 'not as broad as 'employer unit,' yet not necessarily coincident with the phrases 'craft unit' or 'plant unit,'" does not persuade us that a single user employer unit is inappropriate. That Congress sought to authorize the Board to find appropriate employer subunits hardly establishes that Congress sought to disallow units of employees of a user employer combined with employees who the user jointly employs with a supplier. Indeed, our dissenting colleague, like the *Oakwood* majority, cites no legislative history expressing disapproval of such units. The only concern expressed by either the Wagner Act Congress or the Taft-Hartley Congress with respect to bargaining units that included more than one employer was focused on industrywide or anti-competitive bargaining units and on multiple-worksite situations.[21]

Tradesmen, several amici, and our dissenting colleague nevertheless contend that the Board is precluded from returning to *Sturgis*, relying on the following single phrase from Section 9(b) of the Act to support their argument:

> 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*[.]

29 U.S.C. §159(b) (emphasis added). Citing *Oakwood*, they reason that because the broadest permissible unit category listed in Section 9(b) is the "employer unit," with each of the other delineated types of appropriate units representing subgroups of the work force of an employer, "the text of the Act reflects that Congress has not authorized the Board to direct elections in units encompassing the employees of more than one employer." *Oakwood*, 343 NLRB at 661.

[19] See, e.g., *Chapman Dehydrator Co.*, 51 NLRB 664, 666–667 (1943) (multi-employer unit not appropriate absent consent, where there was no evidence of "any managerial interrelationship between members of the Association," and employers "operate … as separate and distinct business organizations with no interchange of employees"); *Sagamore Mfg.*, 39 NLRB 909, 915–916 (1942) (same result where employers were "independent and competing" with each other); *F. E. Booth & Co.*, 10 NLRB 1491, 1496 (1939) (same result where interchange of employees between employers was "not effectuated by any plan of [the union] or through any common agency of the companies" and "each of the companies hires its own employees as the conditions of its business require"); *Alaska Packers Assn.*, 7 NLRB 141, 148 (1938) (same result even though "the three companies constitute an economic [regional industry] aggregate," because they are "separate and distinct business organizations"). See also *Bull-Insular Line Co.*, 56 NLRB 189, 193–194 (1944) (Puerto Rico-wide employer unit not appropriate absent consent, but unit of two employers appropriate where they were "interlocking corporate organizations" and their employees "together are engaged in various tasks incidental to the loading or unloading of cargo vessels at the [two] companies' piers in the Harbor of San Juan"). Cf. *Rayonier, Inc.*, 52 NLRB 1269, 1274 (1943) (multi-employer unit appropriate in view of implied consent through collective-bargaining history, in contrast to cases where employers are merely "competing companies not otherwise related except through membership in an [e]mployer [a]ssociation").

[20] We take this opportunity to reiterate that we will not find any entity to be a joint employer unless, among other things, it *is* an employer within the meaning of the common law. See *BFI*, 362 NLRB No. 186, slip op. at 2.

[21] 1 Leg. Hist. 1300 (NLRA 1935) (1985 reprint), 2 Leg. Hist. 3219–3221, 3253–3256, 3264–3269 (NLRA 1935) (1985 reprint); 1 Leg. Hist. 58–61, 117, 299–300, 535–536, 550–551, 584, 612, 636, 643–644, 663, 672–674 (LMRA 1947) (1985 reprint).

However, the proponents of this argument put more weight on those few words than they can reasonably carry. As we have explained, given the broad definition of "employer" and "employee" in Sections 2(2) and 2(3) of the Act, along with our statutory charge to afford employees "the fullest freedom" in exercising their right to bargain collectively, a combined unit of employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer does not fall outside the ambit of a Section 9(b) "employer unit," because all work is performed for the user employer and all employees are employed, either solely, or jointly, by the user employer. And, as we explain below, finding such a unit to be appropriate is responsive to Section 9(b)'s statutory command and effectuates fundamental policies of the Act. Accordingly, we conclude that the Act does not preclude us from returning to *Sturgis*.[22]

B. Sturgis Effectuates Fundamental Policies of the Act that Oakwood Frustrates

Sturgis is manifestly more responsive than *Oakwood* to Section 9(b)'s "statutory command" to the Board, in deciding whether a petitioned-for bargaining unit is appropriate, "'to assure to employees the fullest freedom in exercising the rights guaranteed' by th[e] Act[.]" *Gallenkamp Stores Co. v. NLRB*, supra, 402 F.2d at 532 (quoting Section 9(b)). The Board has recognized that "[a] key aspect of the right to 'self-organization' is the right to draw the boundaries of that organization—to choose whom to include and whom to exclude." *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 941 fn.18 (2011) ("*Specialty Healthcare*"), *affd sub. nom*, *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). The *Sturgis* approach honors that principle because it does not require employees to obtain employer permission before they may organize in their desired unit. Nor does *Sturgis* mandate any particular bargaining unit for the contingent employees (who are jointly employed by a user employer and a supplier employer) and the employees solely employed by that same user employer. Rather, *Sturgis* leaves the employees free to choose the unit they wish to organize, provided their desired unit is appropriate under the Board's traditional test for determining unit appropriateness. Thus, *Sturgis* permits the jointly employed contingent employees to organize in bargaining units with their coworkers who are solely employed by the user employer if they share the requisite community of interest, while also leaving both groups free to organize separately if they would prefer to do so.

In contrast, *Oakwood* denies employees in an otherwise appropriate unit full freedom of association. Thus, even if the jointly employed employees and their coworkers who are solely employed by the user employer wish to be represented for purposes of collective bargaining in the same unit, and even if both groups share a community of interest with one another, *Oakwood* prevents them from so organizing unless the employers consent. Requiring employees to obtain employer permission to organize in such a unit is surely not what Congress envisioned when it instructed the Board, in deciding whether a particular bargaining unit is appropriate, "to assure to employees the fullest freedom in exercising the rights guaranteed by th[e] Act." 29 U.S.C. §159(b). In fact, by requiring employer consent to an otherwise appropriate bargaining unit desired by employees, *Oakwood* has upended the Section 9(b) mandate and allowed employers to shape their ideal bargaining unit, which is precisely the opposite of what Congress intended.

Oakwood also potentially limits the contingent employees' opportunity for workplace representation. Under *Oakwood*, the contingent employees cannot organize in the same unit as the employees solely employed by the user employer unless the user and supplier employers consent. Some amici argue that *Oakwood* does not deprive the contingent employees of their Section 7 rights to organize because a union does not need employer consent if it files a petition that names just the supplier employer and seeks a unit of just the supplier employees or if it files a petition that names both the user and supplier employers and seeks a unit limited to the jointly employed employees. However, *Oakwood* would appear to deny employees and unions the first option in cases where the supplier employer establishes that the petitioned-for employees are jointly employed by a user employer. See *Oakwood*, 343 NLRB at 663, 669. Moreover, many supplier employers do not just serve one client; rather they serve many clients simultaneously, and accordingly, the supplier employees may be scattered

[22] Equally unavailing is our dissenting colleague's reliance on Sec. 8(a)(5) of the Act, which makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Sec. 9(a). The first sentence of Sec. 9(a), which sets forth the right of employees to have an exclusive bargaining representative, does not even refer to an "employer." Moreover, as discussed below, if a union is certified as the collective-bargaining representative of a *Sturgis* unit, each employer is obligated to bargain only over the employees with whom it has an employment relationship. Accordingly, the supplier employer cannot possibly be found to have violated Sec. 8(a)(5) by refusing to bargain over terms and conditions of employment of the employees solely employed by the user employer. Nor, for similar reasons, does Sec. 8(b)(3) advance the dissent's case. A union cannot be deemed to have violated Sec. 8(b)(3) by refusing to bargain with an employer regarding employees whom that employer does not employ.

among various locations. Given their isolation from one another, those employees may face near-insurmountable challenges in attempting to organize, and even if they do, it may prove extremely difficult for them to have their collective voice heard by their referring employer. As for the second option, there may be no union that wishes to name the user and supplier employers on a petition that seeks to represent a unit limited to the jointly employed contingent employees.

In any event, limiting the contingent employees to these options, by definition, deprives them of the full ability to associate for collective bargaining purposes with their coworkers who are solely employed by the user employer. It also deprives the solely employed employees of their full ability to associate with their contingent coworkers. And, as discussed below, it dilutes the bargaining power of both groups. In short, *Oakwood*'s interjection of a consent requirement in workplaces utilizing contingent workers creates an obstacle to workers' freedom to organize and bargain collectively as they see fit even when the contingent workers share a broad community of interest with the user's solely employed employees they work alongside.[23]

Sturgis is also more consistent with the premise upon which national labor policy is based, because it permits employees in an otherwise appropriate unit to pool their economic strength and act through a union freely chosen by the majority so that they can effectively bargain for improvements in their wages, hours and working conditions. See *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967) (our national labor policy "has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions."). Accord *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 735 (1981). On the other hand, by requiring the two groups of employees to engage in parallel organizing drives and then parallel bargaining relationships, despite their shared community of interest and desire to bargain in a single unit, the *Oakwood* approach diminishes the bargaining power of both the employees solely employed by the user employer and the employees jointly employed by that same user employer and a supplier employer.

These deleterious effects of the *Oakwood* rule requiring employer consent are all the more troubling because of changes in the American economy over the last several decades. In *BFI*, 362 NLRB No. 186, slip op. at 11 (footnotes renumbered), we recently characterized these changes as follows:

> [T]he diversity of workplace arrangements in today's economy has significantly expanded. The procurement of employees through staffing and subcontracting arrangements, or contingent employment, has increased[.][24] The most recent Bureau of Labor Statistics survey from 2005 indicated that contingent workers accounted for as much as 4.1 percent of all employment, or 5.7 million workers.[25] Employment in the temporary help services industry, a subset of contingent work, grew from 1.1 million to 2.3 million workers from 1990 to 2008.[26] As of August 2014, the number of workers employed through temporary agencies had climbed to a new high of 2.87 million, a 2 percent share of the nation's work force.[27] Over the same period, temporary employment also expanded into a much wider range of occupations.[28] A recent report projects that the number of jobs in the employment services industry, which includes employment placement agencies and temporary help services, will increase to almost 4 million by 2022, making it "one of the largest and fastest growing [industries] in terms of employment."[29]

The Petitioner notes that while the temporary help services industry is historically associated with clerical positions, by 2008 temporary workers in clerical positions

[23] The American Hospital Association and the Federation of American Hospitals contend that both before and after *Oakwood*, unions have sometimes sought to exclude contingent employees from bargaining units of solely employed user employees. However, that the two groups of employees may not wish to associate with one another for collective bargaining purposes in a particular case does not mean that employers should have veto power to prevent the employees from organizing together in a combined unit when the employees do desire to do so. Put simply, *Sturgis* does not mandate any particular bargaining unit; it simply respects the Sec. 7 rights of employees.

[24] The Board previously recognized the "ongoing changes in the American work force and workplace and the growth of joint employer arrangements, including the increased use of companies that specialize in supplying 'temporary' and 'contract workers' to augment the workforces of traditional employers." *M. B. Sturgis, Inc.*, 331 NLRB 1298, 1298 (2000).

[25] Bureau of Labor Statistics, U.S. Department of Labor, "Contingent and Alternative Employment Arrangements, February 2005," (July 27, 2005).

[26] See Tian Luo, et al., "The Expanding Role of Temporary Help Services from 1990 to 2008," Monthly Labor Review, Bureau of Labor Statistics, August 2010 at 12.

[27] Steven Greenhouse, "The Changing Face of Temporary Employment," NY Times website, August, N.Y. TIMES, Aug. 31, 2014, at http://www.nytimes.com/2014/09/01/upshot/the-changing-face-oftemporary-employment.html

[28] See Luo et al., supra at 5.

[29] Richard Henderson, "Industry Employment and Output Projections to 2022," Monthly Labor Review, Bureau of Labor Statistics, December 2013.

represented less than one quarter of employment in this industry and only 16 percent of the industry's revenue. See Luo, et al., supra at 5. Industrial and factory staffing is the single largest source of revenue for the employment services industry, which includes both temporary staffing agencies and more permanent employee leasing firms, further evidence of the massive changes it has undergone since 1990. Rebecca Smith & Claire McKenna, *Temped Out: How the Domestic Outsourcing of Blue-Collar Jobs Harms America's Workers* l, 4 (National Employment Law Project, Sept 2. 2014). The Petitioner further contends that industrial or "blue collar" workers account for the largest single occupational group of temporary and contingent workers, with recent estimates placing them at 37 percent of that workforce. American Staffing Association, *Fact Sheet* (last visited Nov. 24, 2015); see also GAO Report to the Ranking Member, Committee on Health, Education, Labor, and Pensions, U.S. Senate: *Contingent Workforce: Size, Characteristics, Earnings, and Benefits*, 9 GAO-15–168R 19 (April 2015). It also claims that over 10 percent of contingent workers are employed in the construction industry, and contingent workers are approximately twice as likely as other workers to be employed in construction and extraction occupations. Id. at 45, 49–50.

In *BFI*, we concluded that given our "responsibility to adapt the Act to the changing patterns of industrial life,"[30] this change in the nature of the workforce was reason enough to revisit the Board's then current joint-employer standard. 362 NLRB No. 186, slip op. at 11. Just as was the case with respect to that standard, *Oakwood* imposes additional requirements that are disconnected from the reality of today's workforce and are not compelled by the Act. We correspondingly conclude that to fully protect employee rights, the Board should return to the standard articulated in *Sturgis*.[31]

C. The Policy Arguments Advanced by Sturgis' Opponents Are Unpersuasive

Tradesmen, several amici, and our dissenting colleague also argue that returning to *Sturgis* would be unwise as a policy matter because it would hinder meaningful bargaining, threaten labor peace, and harm employee rights. They argue that this is so because *Sturgis* permits a bargaining structure that allegedly gives rise to significant conflicts both among the various employers and among the groups of employees participating in the process, thereby making agreement much less likely and increasing the chances for labor strife.[32]

However, the specter of conflicts posited by *Sturgis*' opponents did not materialize during the many decades before *Sturgis* that the Board had "routinely found units of the employees of a single employer appropriate, regardless of whether some of those employees were jointly employed by other employers." *Sturgis*, 331 NLRB at 1302–1307. And *Sturgis*' opponents do not demonstrate that those problems materialized in the years between *Sturgis* and *Oakwood*.

Moreover, the amici and our dissenting colleague fail to show that collective bargaining involving a *Sturgis* unit is significantly more complicated than if the jointly and solely employed employees were in separate bargaining units, as envisioned by *Oakwood*. Under *Oakwood*, a union does not need a user employer's consent if it wishes to organize a unit limited to the employees solely employed by the user employer. Nor does a union need the consent of the user employer and supplier employer if it wishes to organize a unit limited to the employees who are jointly employed by user and supplier employers. Accordingly, if a union were to successfully organize both units, then the user employer would have an obligation to bargain in good faith with both units of employees. Thus, in the unit composed of employees solely employed by the user employer, the user employer would have an obligation to bargain over all those employees' terms, and the supplier employer would have no bargaining obligation whatsoever vis-a-vis the solely employed employees (because it does not employ any of them). In the unit of the jointly employed contingent employees, the user employer, like the supplier employer, would have an obligation to bargain only as

[30] See *NLRB v. J. Weingarten*, *Inc*., 420 U.S. 251, 266 (1975).

[31] The American Staffing Association argues that there is no reason to return to *Sturgis* because the market for domestic temporary workers has consistently topped out at 2 percent of the total domestic nonfarm workforce in recent years. However, as the Board noted in *BFI*, as of August 2014, the number of workers employed through temporary agencies, a subset of contingent work, had grown to 2.87 million workers, a not insignificant number. 362 NLRB No. 186, slip op. at 11. Moreover, as shown, *Oakwood* also denies the Section 7 rights, and dilutes the bargaining power, of the many more solely employed employees in the workforce.

[32] For example, the Council on Labor Law Equality states in a passage typical of those favoring adhering to *Oakwood*:

> If the user employer and supplier employer are forced into such a bargaining relationship without their consent, there will likely be disputes on the employers' side of the table (over who has the responsibility to bargain, and ultimately pay for, certain terms and conditions of employment) as well as with the union. And there will likely be divisions on the union's side of the table if the terms and conditions of employment for the user employer's employees are different (*i.e.*, more or less favorable to the employees) than for the jointly employed employees. And there will be no agreement unless the parties can reach agreement on all terms and conditions of employment for both groups of employees (the user employer's employees and the jointly employed employees). The Board should not mandate bargaining relationships that are so fraught with the potential for failure.

to the terms and conditions it has the authority to control. See *NLRB v. Western Temporary Services, Inc.*, supra, 821 F.2d at 1265; *BFI*, supra, 362 NLRB No. 186, slip op. at 16.

The user and supplier employers would face the precisely the same obligations in a *Sturgis* unit. Our caselaw makes clear that each employer is obligated to bargain only over the employees with whom it has an employment relationship and only with respect to such terms and conditions that it possesses the authority to control.[33] Thus, in a *Sturgis* unit, the user employer has an obligation to bargain over all the terms of the employees it solely employs, and only has an obligation to bargain over its jointly employed employees' terms and conditions which it possesses the authority to control. Similarly, in a *Sturgis* unit, the supplier employer has no obligation to bargain regarding any of the terms of the employees who are solely employed by the user employer. Allowing jointly employed employees to be included in a bargaining unit with their solely employed coworkers imposes no additional burden on the supplier employer because its bargaining obligation extends only to the employees it jointly employs and only with respect to such terms and conditions which it possesses the authority to control. And the user employer has exactly the same size pocketbook regardless of whether it bargains in a *Sturgis* unit or whether it bargains in two parallel units (i.e., one limited to the employees solely employed by it and the other limited to the employees it jointly employs with the supplier employer). The supplier employer likewise has the same size pocketbook under both the *Oakwood* and *Sturgis* regimes.

Accordingly, the claim that *Sturgis* gives rise to an unworkable bargaining structure—because there may be disputes on the employer side of the table over who has the responsibility to bargain over or pay for certain items—is unconvincing, because the potential for such disputes could be said to exist in every case involving joint employer bargaining, which has long been sanctioned by the Board and the courts. After all, in every joint employer bargaining case, more than one employer must sit at a bargaining table and bargain with the union that represents the unit employees.

Not surprisingly, the appellate courts have also rejected claims that inclusion of jointly employed employees in a unit of solely employed employees over the objections of one or more of the joint employers is inimical to effective collective bargaining. For example, as noted, in *S.S. Kresge Co. v. NLRB*, the Sixth Circuit rejected the claim that "to compel unwilling employers to bargain as joint-employers will disrupt the collective bargaining process" because each of the joint employers may have independent ideas about appropriate labor policy. 416 F.2d at 1231–1232. The court explained (id. at 1231): "Whether [this] asserted practical difficult[y] will occur is speculative." The court also agreed with the Ninth Circuit that just as the different entities have managed to resolve any differences between them in agreeing to do business with one another, so too should they be able to resolve any differences between them when it comes to bargaining. See id. quoting *Gallenkamp Stores Co. v. NLRB*, supra, 402 F.2d at 531 ("'K-Mart and the licensees have worked out their diverse business problems to meet the needs of their joint enterprise, as is shown in their uniform license agreements. Like efforts should be as effective in their bargaining with the Union.'").[34]

As for employee interests, to the extent that the user and supplier employers are unable or unwilling to give both the solely employed and the jointly employed employees everything they want, tradeoffs may have to be made. But the same would be true regardless of whether the bargaining takes place in two parallel units or one *Sturgis* combined unit. And, as *Sturgis* noted, "Even in units composed only of solely employed employees, it is common for groups of employees to have differing, even competing, interests. Unions and employers are routinely called upon to handle such differences, and do so successfully." *Sturgis*, 331 NLRB at 1307. In *S.S. Kresge Co. v. NLRB*, the Sixth Circuit rejected a similar claim that the rights of the licensees' employees would be impaired if they were included in the same unit as the employees solely employed by Kresge because the solely employed employees would outnumber the others and

[33] *Sturgis* phrased the obligation as follows: "[E]ach employer is obligated to bargain only over the employees with whom it has an employment relationship *and only to the extent it controls or affects their terms and conditions of employment*." *Sturgis*, 331 NLRB at 1306 (emphasis added). In light of the Board's recent decision in *BFI*, we find it appropriate to slightly rephrase the obligation as follows: Each employer is obligated to bargain only over the employees with whom it has an employment relationship and "*only with respect to such terms and conditions which it possesses the authority to control*." *BFI*, 362 NLRB No. 186, slip op. at 2, 16 (emphasis added).

[34] Contrary to our dissenting colleague's claim, it is of no legal consequence that the supplier employer is not a joint employer of some of the employees in a *Sturgis* unit. To repeat, in a *Sturgis* unit, all the employees perform work for the user employer, and all are employed (either solely or jointly) by the user employer. And if a union prevails in an election involving a *Sturgis* unit, the Board does not require the supplier employer to engage in bargaining as to the entire bargaining unit; it must bargain only as to those unit members whom it employs. The same is true if the user employer contracts with multiple supplier employers. There too, all the employees perform work for the user employer; all the employees are employed (either solely or jointly) by the user employer; and no supplier employer is required to bargain as to the entire unit, but only as to its own employees.

therefore dominate union policy. 416 F.2d at 1231. The court explained (id. at 1232):

> There is the possibility that the employees in the departments operated by Kresge will dominate union policy. This, however, is a problem which is germane to all units encompassing different departments with divergent interests. Indeed, the same problem could arise if the appropriate unit consisted solely of Kresge employees, because employees in larger Kresge departments could impose their decisions on employees in smaller departments. Such a result does not mean that the unit is inappropriate, particularly when, as in the present case, there is a sufficient community of interest among the employees in the unit to suggest the problem will not be serious if it does occur.

Contrary to amici, *Sturgis* does not encourage a tyranny of the majority over minority interests. Under *Sturgis* (331 NLRB at 1305–1306, 1308), the Board will not find a combined unit appropriate for the purposes of collective bargaining unless the two groups share a community of interest; moreover, by virtue of the union's status as exclusive representative of the unit, the union has a duty to fairly and in good faith represent the interests of *all* the unit employees, including in collective bargaining. See generally *Emporium Capwell Co. v. NLRB*, 420 U.S. 50, 64 (1975); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

Nor are we persuaded by the other policy arguments opposing a return to *Sturgis*. For example, some amici argue that the Board would harm contingent workers and the economy as a whole if it were to return to *Sturgis*. They reason that if the Board were to overturn *Oakwood* and return to *Sturgis,* it would discourage employers from entering into, or maintaining, alternative staffing arrangements because user employers will wish to avoid the costs, uncertainty and inherent difficulties presented by the prospect of bargaining in *Sturgis* units. But this employer wish runs counter to the Act's stated policy of encouraging the practice of collective bargaining. In any event, *Sturgis* leaves employers free to enter into, or maintain, such arrangements. In other words, we have decided to return to *Sturgis*, not to prevent employers from entering into, or maintaining user-supplier arrangements, but rather to better effectuate the policies of the Act if the employees affected by such arrangements choose to exercise their Section 7 rights.

The Chamber of Commerce of the United States of America cautions that overturning *Oakwood* and returning to *Sturgis* would be bad for unions seeking to organize just the employees solely employed by the user employer, because "employers may use *Sturgis* as a weapon to dilute a union's support" and to preclude employees solely employed by a user employer "from being represented at all." The Chamber adds, "If the temporary [supplier] employees outnumber the employees solely employed by the user, this possibility may well become likely." In our view, rather than undermining the case for returning to *Sturgis*, the suggestion that employers might choose which positions to take regarding the inclusion of the supplier employees based solely on tactical considerations relating to the election, contradicts their claims that combined units hinder collective bargaining, foster labor strife, and undermine employee rights.[35]

Nor, contrary to the claims of some amici and our dissenting colleague, can it fairly be said that returning to *Sturgis* would undermine Section 8(b)'s prohibitions. For example, nothing in *Sturgis* permits a union in any way to restrain or coerce an employer in the selection of his collective bargaining representative or grievance adjustor. Nothing in *Sturgis* permits a union to strike or to threaten, coerce, or restrain an employer to join an employer organization. Nothing in *Sturgis* forces an employer to bargain with a labor organization before it has been certified. And nothing in *Sturgis* eliminates the prohibition on secondary boycott activity. See *Sturgis*, 331 NLRB at 1307 (rejecting dissent's secondary boycott concerns).[36]

D. Response to the Dissent

Our dissenting colleague offers both policy arguments and statutory arguments against a return to *Sturgis*, but, for reasons already suggested, we are not persuaded.

We have explained that our interpretation of the Act is consistent with its text and supportive of its policies. Our dissenting colleague does not argue, nor could he, that Congress has spoken directly to the issue in this case. Instead, the dissent repeatedly—but mistakenly—characterizes the bargaining that takes place in a *Sturgis* unit as "multi-employer/non-employer bargaining." As discussed above, it is not "multi-employer" bargaining because all the employees in a *Sturgis* unit perform work for the user employer and all the employees are em-

[35] In any event, as we recently reiterated, the fact that an employer's proposed alternative unit may be appropriate does not necessarily render the employees' proposed unit inappropriate. See *Specialty Healthcare*, 357 NLRB 934, 941–943.

[36] As for the National Right to Work Legal Defense Foundation, Inc.'s claim that employees' rights to decertify or deauthorize third-party representation would, in most cases, be difficult, if not impossible, given the disparate interests and the numerosity of a user employer's own employees, the same problem could be said to exist whenever a small group of employees is included in the same unit as a larger group of employees. And *Sturgis* requires that the two groups share a community of interest. See *Sturgis*, 331 NLRB at 1305–1306, 1308. Moreover, as the Chamber's argument implicitly concedes, it is by no means clear that the contingent workers will always be outnumbered by the employees who are solely employed by the user employer.

ployed (either solely or jointly) by the user employer. By contrast, there is no common user employer for all the employees in a multi-employer bargaining unit.

The dissent's contention that under *Sturgis*, an employer is required to bargain with respect to non-employees—in contravention of Section 8(a)(5)—is likewise mistaken. As explained above, in a *Sturgis* unit, each employer is obligated to bargain only over the employees with whom it has an employment relationship (and only with respect to such terms and conditions which it possesses the authority to control). *Sturgis*, 331 NLRB at 1306. Accordingly, no employer bargains regarding employees it does not employ, and so our colleague's use of the term "non-employer" bargaining is inaccurate. To the extent that multiple employers will be required, as a practical matter, to cooperate or coordinate in bargaining, that is a function of the freely chosen business relationship between user and supplier employers that defines all joint-employer situations.[37]

Contrary to our dissenting colleague's suggestion, we are not, by returning to *Sturgis*, abdicating our responsibility to carefully review and make an appropriate bargaining unit determination in each case. As the *Sturgis* Board explained, "By our decision today, we do not suggest that every unit sought by a petitioner, which combines jointly employed and solely employed employees of a single user employer, will necessarily be found appropriate. As in the Board's pre-*Greenhoot* cases, application of our community of interest test may not always result in jointly employed employees being included in units with solely employed employees." *Sturgis*, 331 NLRB at 1305–1306 (and cases cited therein). The Board continued to carefully examine the community of interest factors in determining the appropriateness of petitioned-for units while *Sturgis* was in effect. For example, as the Chamber of Commerce notes, in the *Sturgis*-governed case of *Outokumpu Copper Franklin, Inc.*, the Board rejected the unit sought by the petitioning union on community-of-interest grounds. 334 NLRB 263, 263–264 (2001). And, as our order in this case makes clear, no election can be conducted in the combined unit sought by the petitioner here unless, among other things, it is established that the employees supplied by Tradesmen to Miller & Anderson (who are allegedly jointly employed by both entities) share a community of interest with the employees solely employed by Miller & Anderson.

Our dissenting colleague is mistaken in asserting that the return to *Sturgis,* coupled with *BFI*'s restatement of the joint-employer standard, somehow creates an unprecedented situation. In *BFI*, the Board returned to its traditional test, endorsed by the Third Circuit. *BFI*, 362 NLRB No 186, slip op. at 15, 20. *BFI* merely represents a return to the Board's "earlier reliance on reserved control and indirect control as indicia of joint-employer status." See *BFI*, 362 NLRB No. 186, slip op. at 8–10, 13–16, 18–20. Indeed, *Sturgis* itself cited several cases that relied on such factors. 331 NLRB at 1302–1303.[38] Before the Board's restrictive joint-employer decisions of 1984 (overruled in *BFI*) and before 1990's *Lee Hospital* decision, the Board followed the same approach we endorse today: a broad definition of joint employment and a practice of including jointly-employed and solely-employed employees of a single user employer in the same bargaining unit, where they shared a community of interest. There is no evidence of destabilized collective bargaining during that long period. In any event, for the reasons explained here and in *BFI*, both rules are based on permissible constructions of the Act and effectuate the Act's policies.[39]

IV. CONCLUSION

We hold today that *Sturgis* is more consistent with our statutory charge than *Oakwood.* Accordingly, we overrule *Oakwood* and return to the holding of *Sturgis*. Em-

[37] Our dissenting colleague misunderstands the reference in Sec. 9(b) to "assur[ing] employees the fullest freedom in exercising the rights guaranteed by th[e] Act." The reference is plainly to the statutory rights granted to *employees*. No provision in the Act guarantees employers that they will be required to bargain only with respect to a unit to which they have consented.

[38] See, for example, *S.S. Kresge Co. v. NLRB*, supra, 416 F.2d at 1229–1231 (Board did not act arbitrarily in concluding that Kresge and its licensees are joint employers and that a storewide unit is appropriate based on its finding that Kresge retained the right to control substantially the labor relations of the various licensees); *Thriftown, Inc.*, supra, 161 NLRB at 607 (whether or not exercised, Thriftown's power to control is present by virtue of its operating agreement with licensee Astra); *Jewel Tea Co., Inc.*, supra, 162 NLRB at 510 (finding relevant that the license agreements expressly give Jewel Tea the power to control effectively essential terms and conditions of employment of the employees of certain licensees even if licensor has not actually exercised such power); *Taylor's Oak Ridge Corp.*, supra, 74 NLRB at 932 ("That the Employer's power of control [over the individuals working in the departments leased to concessionaires] may not in fact have been exercised is immaterial, since the right to control, rather than the actual exercise of that right, is the touchstone of the employer-employee relationship.").

[39] The Board will address jurisdictional issues the same way it did before, and, unlike the dissent, we do not anticipate any jurisdictional problems. For example, prior to *Sturgis*, the Board had held that the fact that some terms of employment are controlled by a government entity that is outside of the Board's jurisdiction does not mean that meaningful bargaining is not possible with the government contractor that is subject to the Act regarding the significant terms of employment that the latter employer controls. See *Management Training Corp.*, 317 NLRB 1355 (1995). See also *BFI*, 362 NLRB No. 186, slip op. at 13 fn.70, 20–21 fn. 121 (discussing *Management Training*).

ployer consent is not necessary for units that combine jointly employed and solely employed employees of a single user employer. Instead, we will apply the traditional community of interest factors to decide if such units are appropriate. *Sturgis*, 331 NLRB at 1308. We likewise agree with the *Sturgis* Board's sanctioning of units of the employees employed by a supplier employer, provided the units are otherwise appropriate. Ibid.

ORDER

The Regional Director's administrative dismissal of the petition is reversed, and the petition is reinstated. The petition is remanded to the Regional Director for further action consistent with this Decision.[40]

Dated, Washington, D.C. July 11, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) (*Browning-Ferris*), the Board majority substantially expanded the circumstances when multiple entities would be deemed a joint employer of particular employees.[1] Under *Browning-Ferris*, if two businesses have sufficient control over employment terms and conditions within an appropriate bargaining unit, then (i) both entities are jointly deemed the "employer," and (ii) if the union prevailed in an election, both business entities would be required to jointly engage in collective bargaining, with each entity negotiating "such terms and conditions which it possesses the authority to control."[2] Former Member Johnson and I dissented in *Browning-Ferris*, based on our view that the expanded joint-employer standard was contrary to our statute and because it left employees, unions and employers "in a position where there can be no certainty or predictability regarding the identity of the 'employer.'"[3] We were especially critical of the multiple-entity bargaining obligation described in *Browning-Ferris*, where each entity would be responsible for bargaining over some subjects and not others.[4] In our view, this type of bargaining would "foster substantial bargaining instability by requiring the nonconsensual presence of too many entities with diverse and conflicting interests on the 'employer' side," and "even the commencement

[40] After the Board issued its NIFB on July 6, 2015, Tradesmen International moved to dismiss as moot the petition and the request for review on July 20, 2015. Tradesmen's motion claimed that the work described in the petition had ended and that neither Tradesman nor Miller & Anderson expected to perform sheet metal work in Franklin County, Pennsylvania in the foreseeable future. Petitioner opposed the motion, claiming, among other things, that if the Board reverses the Regional Director's decision to dismiss the petition for lack of employer consent, it would test Tradesman's factual claims at hearing. We find that Tradesmen's motion to dismiss raises material factual issues warranting a hearing. Accordingly, we remand the case to the Regional Director to determine whether Miller & Anderson, Inc. and Tradesmen have ceased performing sheet metal work in Franklin County, Pennsylvania with no plans to resume such work. If that is not the case, the Regional Director must determine the appropriate unit under the holding of *Sturgis*, which we return to today. See *BFI*, 362 NLRB No. 186, slip op. at 2 (noting that the Board's "established presumption in representation cases like this one is to apply a new rule retroactively."). In other words, in the event that Miller & Anderson, Inc. and Tradesmen have not permanently ceased performing sheet metal work in Franklin County, Pennsylvania, the Regional Director must determine whether Miller & Anderson and Tradesmen are joint employers of the employees supplied by Tradesmen to Miller & Anderson, and, if so, whether those employees share a community of interest with the employees solely employed by Miller & Anderson on its jobsites in Franklin County, Pennsylvania.

Our dissenting colleague complains that rather than deciding the applicability of *Oakwood*, the Board should have simply remanded this case for a hearing to resolve the factual dispute regarding the continued existence of the petitioned-for unit. However, we deem it more appropriate to address the thoughtful arguments raised by the parties and amici. Then, if the Regional Director determines on remand that the unit continues to exist, the Director can also promptly decide, based on record evidence, whether the petitioned-for unit is appropriate, rather than make the employees and parties wait still longer while the Director transfers the case back to the Board for resolution of the *Oakwood* issue, as our colleague recommends.

[1] See, e.g., *Browning-Ferris*, supra, slip op. at 2, where the Board majority stated: "We will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but also exercise that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry. . . . Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly—such as through an intermediary—may establish joint-employer status" (citations and footnotes omitted).

[2] Id., slip op. at 16.

[3] Id., slip op. at 22–23 (Members Miscimarra and Johnson, dissenting).

[4] Id., slip op. at 22–24, 37–43, 48 (Members Miscimarra and Johnson, dissenting).

of good-faith bargaining may be delayed by disputes over whether the correct 'employer' parties are present."[5]

In today's decision, my colleagues substantially enlarge the expanded joint-employer platform created by *Browning-Ferris* and require a more attenuated type of multi-employer/non-employer bargaining[6] in a single unit when the multiple business entities do *not* even jointly employ all unit employees. Specifically, my colleagues hold that the Board may require two or more businesses to engage in multi-employer bargaining without their consent, even though one of the entities *has no employment relationship* with some of the unit employees, provided that *other* employees in the same unit are jointly employed by the employer entities. The latter determination (whether some individuals are jointly employed) will be governed by the expanded *Browning-Ferris* joint-employer standard.

My colleagues overrule *Oakwood Care Center*, 343 NLRB 659 (2004) (*Oakwood*), and adopt standards governing multi-employer bargaining that have never previously existed, except for a 4-year period after the Board decided *M. B. Sturgis, Inc.*, 331 NLRB 1298 (2000). However, I do not agree that my colleagues today "return to the holding of *Sturgis*." It is true that *Sturgis* permitted the certification of multi-employer bargaining units, without consent, where some unit employees were jointly employed, and where other unit employees were employed only by one employer entity. However, throughout the 4-year period governed by *Sturgis* (and for many years before and after *Sturgis* was decided), the joint-employer landscape was circumscribed by well-known limiting principles that were repudiated, with considerable fanfare, in *Browning-Ferris*.[7] Thus, my colleagues do not "return" to a legal regime that has ever existed. The Board and the courts have never previously applied the expansive joint-employer standards articulated in *Browning-Ferris* combined with the multi-employer/non-employer bargaining that will result from today's decision.[8]

For several reasons, I respectfully dissent from the majority's approval of multi-employer/non-employer bargaining in the circumstances presented here.

First, as noted above, the Board majority in *Browning-Ferris* already created a new type of multi-employer bargaining, in joint-employer situations, that will predictably result in confusion and instability, which is compounded by the multi-employer/non-employer bargaining approved by the Board majority here. Given that *Browning-Ferris* has already created an "analytical grab bag from which any scrap of evidence regarding indirect control or incidental collaboration" may result in joint-employer status,[9] the majority's expansion of *Browning-Ferris* here will only make it more difficult for parties to anticipate whether, when or where this new type of multi-employer/non-employer bargaining will be required by the Board, nor can anyone reasonably predict what it will mean in practice.

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[5] Id., slip op. at 23 (Members Miscimarra and Johnson, dissenting).

[6] The phrase "multi-employer bargaining" is misleading in the instant case because the type of bargaining contemplated by my colleagues involves two or more management entities, but only one has an employment relationship with all employees in the bargaining unit, and the other management entity or entities has or have no employment relationship whatsoever with some of the unit employees (i.e., with the employees who are solely employed by the first entity). To avoid confusion, I refer to this as "multi-employer/non-employer bargaining," which reflects the fact that one management entity employs everyone in the bargaining unit (either jointly or solely), and the other management entity lacks any employment relationship with some employees in the unit.

This type of bargaining differs from "joint-employer" status, which exists when two or more entities are found to have sufficient control over employment terms and conditions to warrant a finding that they *jointly* have an "employer" relationship with *all* employees in the bargaining unit—although, in *Browning-Ferris*, the Board majority indicated that each joint-employer entity would only be responsible for bargaining "with respect to such terms and conditions which it possesses the authority to control," id., slip op. at 16.

[7] *Browning-Ferris* overruled two longstanding joint-employer decisions—*Laerco Transportation*, 269 NLRB 324 (1984), and *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985)—which the Board majority described as follows:

> *Laerco* and *TLI*, both decided in 1984, marked the beginning of a 30-year period during which the Board . . . effectively narrowed the joint-employer standard. Most significantly, the Board's decisions have implicitly repudiated its earlier reliance on reserved control and indirect control as indicia of joint-employer status. The Board has foreclosed consideration of a putative employer's right to control workers, and has instead focused exclusively on its *actual* exercise of that control—and required its exercise to be *direct*, *immediate*, and *not "limited and routine*."

362 NLRB No. 186, slip op. at 10 (emphasis added). In addition to overruling *Laerco* and *TLI*, the Board in *Browning-Ferris* abandoned all three of the limiting principles described above. Id., slip op at 15–16 ("[W]e will no longer require that a joint employer . . . exercise [its] authority . . . directly, immediately, and not in a 'limited and routine' manner.").

[8] My colleagues dispute this assertion and persist in characterizing *Browning-Ferris* as a return to the pre-1984 standard, before *Laerco* and *TLI*. However, as former Member Johnson and I explained in our *Browning-Ferris* dissent, the Board majority's decision there "expand[ed] joint-employer status far beyond anything that . . . existed . . . under precedent predating *TLI* and *Laerco*." 362 NLRB No. 186, slip op. at 25. Further, as explained below in footnote 29, the few cases cited by the majority today—to support their contention that the Board, early in its history, approved of units combining employees solely employed by a store with employees jointly employed by the store and its licensees—did not address the issue raised here: whether Sec. 9(b) precludes nonconsensual multi-employer bargaining units where one of the "employer" entities lacks *any* employment relationship with some or many employees in the unit.

[9] Id., slip op. at 26 (Members Miscimarra and Johnson, dissenting).

Second, I believe the Act's requirements and sound policy considerations prevent the Board from certifying multi-employer bargaining units without the consent of the parties.

Third, I also disagree with my colleagues' use of this case as the vehicle for overruling existing precedent. In a timely "Motion to Dismiss Petition and Request for Review as Moot" that was filed more than 11 months ago,[10] the Board was placed on notice that the petitioned-for unit in the instant case no longer exists and has not existed for several years. The Motion to Dismiss, supported by an affidavit, indicated that (i) nobody has been employed in the multi-employer unit for *more than 3 years*, (ii) there is no expectation that anyone will ever be employed in the unit, and (iii) the petitioned-for unit is defunct. Instead of ruling on the pending Motion to Dismiss on the basis that it pleads facts that would render this proceeding moot, my colleagues moved forward with the disposition of this case on the merits. The available evidence indicates no employees of the Employers will be affected by the Board's decision in this case, which means the Board is essentially issuing an advisory opinion that overrules existing precedent. I believe the Board should have fairly considered and resolved the Motion to Dismiss, especially considering it was filed so long ago, before expending the considerable resources required to decide the merits.

For these reasons, which are explained more fully below, I respectfully dissent.

DISCUSSION

The representation petition in this case, filed by the Sheet Metal Workers International Association, Local Union No. 19, AFL–CIO (Union), seeks to represent a bargaining unit consisting of two groups of employees: (i) sheet metal workers solely employed by Miller & Anderson at a construction project in Franklin County, Pennsylvania, and (ii) sheet metal workers directly employed by Tradesmen International (Tradesmen) who were assigned to perform services for Miller & Anderson at the Franklin County project. (Using the standard terminology, Tradesmen was the "supplier employer," and Miller & Anderson was the "user employer.") It is undisputed that Tradesmen and Miller & Anderson jointly employed the employees supplied by Tradesmen to Miller & Anderson. However, Tradesmen had no employment relationship with the sheet metal workers solely employed by Miller & Anderson. Nonetheless, the Union's petition sought a combined unit as to which the "employer" entities would include both Tradesmen and Miller & Anderson. Tradesmen and Miller & Anderson did not consent to the multi-employer/non-employer bargaining unit sought by the Union.

On April 26, 2012, the Regional Director dismissed the election petition, correctly finding that the petitioned-for unit was inappropriate under *Oakwood*. On May 18, 2015, the Board granted the Petitioner's request for review of the Regional Director's decision.[11] On July 20, 2015, as noted previously, one of the employer entities, Tradesmen, filed a "Motion to Dismiss Petition and Request for Review as Moot," with a supporting affidavit, indicating that nobody has been employed in the unit for *more than 3 years*, there is no expectation that anyone will ever be employed in the unit, and the petitioned-for unit is defunct. My colleagues, overruling *Oakwood*, hold that it is appropriate to conduct an election in a multi-employer/non-employer bargaining unit where the employer entities are a joint employer of some employees, and where no employment relationship of any kind exists between one or more employer participants and other employees. And if the union prevails in an election,[12] the Board will impose a statutory obligation on all of the employer entities, without the parties' consent, to engage in multi-employer bargaining. Contrary to my colleagues, I believe the Regional Director properly dismissed the petition, and by overruling *Oakwood*, the Board majority improperly expands the *Browning-Ferris* joint-employer standard by requiring multi-employer/non-employer bargaining that will be even more unworkable in a unit where one of the joint employers does not even have an "employer" relationship with everyone in the bargaining unit.

[10] See Tradesmen International's Motion to Dismiss Petition and Request for Review as Moot (filed July 20, 2015) (Motion to Dismiss). Attached to Tradesmen's Motion to Dismiss is the sworn affidavit of Scott Hilligoss, Tradesmen International's Mid-Atlantic Manager, who swears under penalty of perjury that the project that was the subject of the election petition was completed on or before July 6, 2012, that employees of Tradesmen International have not performed any work for Miller & Anderson for more than 3 years, that Tradesmen International itself has not employed any employees within the unit's geographic boundaries in the last 3 years, and that Tradesmen International has no expectation of performing unit work in the foreseeable future.

[11] On July 6, 2015, the Board issued a Notice and Invitation to File Briefs.

[12] As noted previously, it is highly likely that no election will be conducted in this case because the Motion to Dismiss filed by Tradesmen, with a supporting affidavit, indicates that the bargaining unit no longer exists, no employees have been employed in the unit for more than 3 years, and there is no reasonable expectation that any employees will ever be employed in the petitioned-for unit.

A. Multi-Employer/Non-Employer Bargaining Units, in Tandem with the Expanded Browning-Ferris Joint-Employer Standard, Will Produce Bargaining That Is Even More Unworkable, Contrary to the Board's Primary Duty to Foster Stable Labor Relations

One of the Board's primary roles is to foster stability in bargaining relationships when employees choose to be represented by a union. *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) ("A basic policy of the Act [is] to achieve stability of labor relations."); *Northwestern University*, 362 NLRB No. 167, slip op. at 1 (2015) (declining to assert jurisdiction where the union sought to represent grant-in-aid scholarship football players because doing so "would not serve to promote stability in labor relations"). As I stated in *CNN America, Inc.*, "[n]othing is more fundamental when interpreting and applying the Act than correctly identifying the parties," which includes "establishing what parties and representatives may appropriately engage in bargaining." 361 NLRB No. 47, slip op. at 38 (2014) (Member Miscimarra, dissenting in part).

In *Browning-Ferris*, supra, Member Johnson and I dissented in large part because the Board majority's expanded joint-employer standards would require an unprecedented array of diverse business entities, with conflicting interests, to participate in collective bargaining. As we explained:

> Collective bargaining was intended by Congress to be a process that could conceivably produce agreements. One of the key analytical problems in widening the net of "who must bargain" is that, at some point, agreements predictably will not be achievable because *different parties involuntarily thrown together as the "bargainers" under the majority's new test will predictably have widely divergent interests*. Today's marked expansion of bargaining obligations to other business entities *threatens to destabilize existing bargaining relationships and complicate new ones*.[13]

Although the Board majority in *Browning-Ferris* stated that each joint-employer participant would only be responsible for bargaining over "such terms and conditions which it possesses the authority to control,"[14] former Member Johnson and I pointed out that our statute provides virtually no guidance (nor did the *Browning-Ferris* majority) regarding how such bargaining is supposed to work:

> [H]ow exactly are joint user and supplier employers to divvy up the bargaining responsibilities for a single term of employment that they will be deemed under the new standard to codetermine, one by direct control and the other by indirect control? How does one know who has authority at all over a term and condition of employment, under the majority's vague formulation? What if two putative employer entities get into a dispute over whether one has authority over a certain term or condition of employment? What if the putative employers are competitors? . . . What if there are too many entities to come to an agreement? How does bargaining work in this circumstance? . . . So questions exist as to (i) which entities are the "employer," (ii) which entities must (or must not) engage in bargaining over particular employment terms, and even (iii) what party—the respondent(s) versus the General Counsel—bears the burden of proof regarding this assortment of issues.[15]

The above questions (and more) arise where, under *Browning-Ferris*, the multiple business entities at least nominally have an employer relationship with *all* employees in the bargaining unit—specifically, a joint-employer relationship based on the substantially enlarged *Browning-Ferris* standard. As a result of today's decision, our statute is being stretched further to combine (i) all the challenges associated with joint-employer bargaining under the expansive *Browning-Ferris* standard, plus (ii) additional issues caused by mandating bargaining where one or more business entities do not have *any* employment relationship with some employees in the bargaining unit. Indeed, if the unit consists mostly of employees who are solely employed by one joint employer (the user employer), the *majority* of unit employees will have no employment relationship with the other employer (the supplier employer).

To be clear, whenever the Board recognizes this type of multi-employer/non-employer bargaining unit, the "non-employer" businesses—like Tradesmen here, which never employed *any* of the unit members solely employed by Miller & Anderson—will be required to engage in bargaining, even though, as to some or even most individuals in the unit, the businesses *fail* the extremely lenient *Browning-Ferris* joint-employer test. In other words, as to these individuals solely employed by

[13] *Browning-Ferris*, supra, slip op. at 38 (Members Miscimarra and Johnson, dissenting) (emphasis added).

[14] *Browning-Ferris*, supra, slip op. at 16.

[15] *Browning-Ferris*, supra, slip op. at 42 (Members Miscimarra and Johnson, dissenting).

the user employer, the non-employer business is a Board-mandated participant in negotiations even though it does not even have potential (i.e., "reserved") authority to "indirectly" affect employment terms and conditions. *Browning-Ferris*, supra, slip op. at 15–16 (quoted in fn. 7, supra).[16] I recognize my colleagues are motivated by a good-faith desire to further the Act's purpose of encouraging collective bargaining, but I believe the Board cannot reasonably find that a bargaining unit structured in this manner is "appropriate" for the "purposes of collective bargaining." NLRA Sec. 9(a).

The multi-employer/non-employer bargaining contemplated by today's decision is complicated in another way that former Member Johnson and I described in our *Browning-Ferris* dissent: most businesses have more than one client, and most clients have relationships with multiple suppliers. Therefore, in our *Browning-Ferris* dissent, Member Johnson and I depicted a single cleaning company named "CleanCo," which was a joint employer with three clients with the prospect of adding one future client.[17] This simplistic "CleanCo" example looked like Figure 1 below:

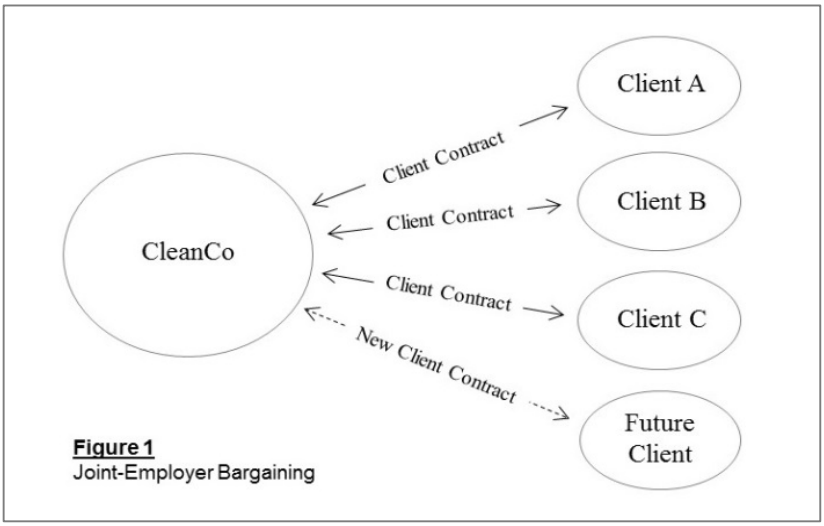

Figure 1
Joint-Employer Bargaining

[16] Contrary to my colleagues' suggestion, I recognize that the Board majority imposes no duty to bargain on the non-employer entity (e.g., the supplier employer) regarding employment terms that relate exclusively to bargaining unit members that entity does not employ (i.e., employees who are solely employed by the user employer). However, this scenario—in which one employer seated at the bargaining table purportedly plays no role in negotiating employment terms of bargaining unit members employed by another employer seated at the same table—highlights the fact that the Board-mandated employer-side participants do not comprise a single "employer," and the resulting negotiations, in the absence of consent, will involve inherent confusion and instability. This becomes even more apparent when the negotiations involve *multiple* non-employer entities (i.e., multiple supplier employers), each of which has no employment relationship *either* with (i) bargaining unit members who are solely employed by the user employer, or (ii) bargaining unit members who are jointly employed by the user employer and each of the *other* supplier employers. See *Gourmet Award Foods, Northeast*, 336 NLRB 872 (2001) (finding appropriate a unit comprising a user employer's solely employed employees plus jointly employed employees supplied by *three* supplier employers); infra fn. 18. In my view, it defies logic and reason to suggest that this type of highly fragmented bargaining involves a single "employer" unit in conformity with Sec. 9(b). Moreover, even if one could accept this characterization, I believe my colleagues do not adequately consider the practical difficulties and substantial challenges this type of bargaining will present for employees, employers and unions alike, given the Board-mandated participation by diverse nonconsenting parties on the "employer" side.

[17] See *Browning-Ferris*, supra, slip op. at 38 (Members Miscimarra and Johnson, dissenting).

Starting with the same "CleanCo" business model, the multi-employer/non-employer bargaining approved by the Board majority today includes all of the complexity associated with *Browning-Ferris* joint-employer bargaining, plus additional variables caused by the fact that one business entity (CleanCo) has no "employer" relationship whatsoever with many bargaining unit employees (those solely employed by Clients A, B, and C). Taking these additional variables into account, the *Browning-Ferris* CleanCo example looks like Figure 2 below:

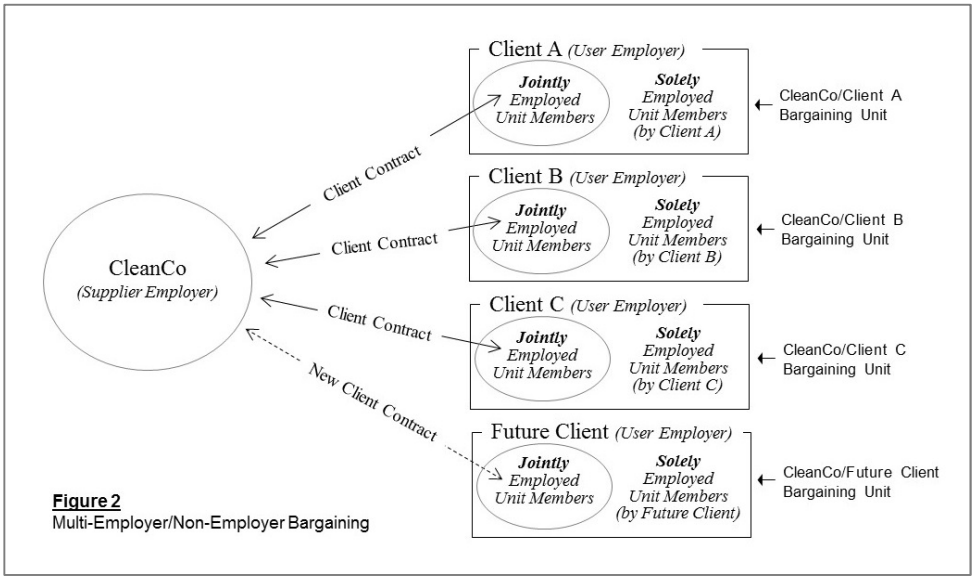

Figure 2
Multi-Employer/Non-Employer Bargaining

It bears emphasis that the four multi-employer/non-employer bargaining units depicted above are a small sampling of potential unit configurations approved by my colleagues today.[18] However, they all suffer from the infirmities that Member Johnson and I discussed in *Browning-Ferris*, and then some. There will be greater uncertainty and instability based on each bargaining unit's inclusion of some employees who lack *any* employment relationship (even an "indirect" one) with a business entity, or multiple business entities, that must nonetheless participate in negotiations. Here, as in *Browning-Ferris*, my colleagues provide no clear answer regarding questions such as (1) how the management parties will determine between or among themselves who is required to bargain over which subject(s) regarding what employees; (2) how disputes will be resolved when the management parties cannot agree;[19] (3) what obligation will exist for the management parties to disclose

[18] The example depicted in Figure 2 involves a single *supplier employer* (CleanCo) and multiple *user employer* clients (Clients A, B and C), resulting in three bargaining units: (1) CleanCo and Client A (with some employees being solely employed by Client A); (2) CleanCo and Client B (with some employees being solely employed by Client B); and (3) CleanCo and Client C (with some employees being solely employed by Client C).

Significantly, the majority's multi-employer/non-employer bargaining unit test would also apply where a single *user employer* (e.g., Client A) obtained personnel from multiple *supplier employers* (e.g., CleanCo and two CleanCo competitors, which I will call TidyCo and NeatCo). In this type of situation, my colleagues' decision today would potentially produce a single bargaining unit consisting of all four entities on the "employer" side—CleanCo, TidyCo, NeatCo *and* Client A—where some employees are solely employed by Client A, other employees are jointly employed by *CleanCo* and Client A, additional employees are jointly employed by *TidyCo* and Client A, and a different group of employees are jointly employed by *NeatCo* and Client A. In this scenario, featuring a single user employer and multiple supplier employers, there would be even *more* diverse interests and conflicts among the employer parties, since each supplier employer would be a direct competitor of the other supplier employers. There would also be more "non-employers," since in addition to each supplier having no employment relationship with Client A's solely employed employees, each supplier would also have no employment relationship with employees provided by the other suppliers.

[19] As former Member Brame has observed, the type of multi-employer/non-employer bargaining required by the Board in *Sturgis*—and approved by my colleagues here—not only will require user and supplier employers, who will have different economic interests, to engage in multi-employer bargaining with the union, but will also entail the need for the management parties to engage in simultaneous negotiations *with each other*. *Sturgis*, 331 NLRB at 1321 fn. 62.

information to the union(s) when the same information may never have been shared between or among the management parties themselves; (4) how client contracts will affect the rights and obligations of the management parties, and whether the client contracts will control bargaining or whether the outcome of bargaining will control what must be negotiated (or renegotiated) in client contracts; or (5) how the Board will address jurisdictional problems that arise when one management party is covered by the NLRA and the other management party is not.[20] On top of all these issues, the NLRA protects neutral parties from secondary picketing that has an object of inducing one employer to cease doing business with another, and one can anticipate arguments that Board-mandated participation of supplier employers in multi-employer bargaining will render supplier employers non-neutral parties who will be denied secondary-boycott protection they would otherwise have under Section 8(b)(4) and 8(e) of the Act. See *M. B. Sturgis*, 331 NLRB at 1322 (Member Brame, dissenting in part) ("[T]he placement of the two groups of employees in the same unit might deny the supplier employer the protection guaranteed by Section 8(b)(4)(ii)(B).").

Moreover, similar to the CleanCo example in *Browning-Ferris*, the above illustration—involving only one service (or supplier) company and three clients (or user employers)—dramatically understates the scope of the problems the majority has created. In the real world, by comparison, many businesses, large and small, rely on services or personnel provided by large numbers of separate vendors, and many service or staffing companies have dozens or hundreds of clients. The Board's responsibility is to discharge the "special function of applying the general provisions of the Act to the complexities of industrial life."[21] Consistent with this responsibility, I believe the Board must recognize that stable bargaining relationships are unlikely to result from the type of multi-employer/non-employer bargaining unit recognized by my colleagues today. For this reason alone, I disagree with the Board majority's decision, which I believe is contrary to one of the Board's primary duties under our statute—to foster reasonable certainty and stable bargaining relationships. See *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. at 362–363; *NLRB v. Appleton Electric Co.*, 296 F.2d at 206; *Northwestern University*, 362 NLRB No. 167, slip op. at 1; see also *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679, 685–686 (1981) (the Board must provide "certainty beforehand" for employers and unions so employers can "reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice," and so a union may discern "the limits of its prerogatives, whether and when it could use its economic powers . . . , or whether, in doing so, it would trigger sanctions from the Board").

B. The Board Cannot Properly Direct an Election in a Multi-Employer Unit, Absent Consent, Where No Employment Relationship Exists Between Some Unit Employees and One or More Employers

I believe the Board majority's decision is also contrary to our statute. Section 9(a) of the Act provides that employees have a right to representation by a labor organization "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." Congress was especially clear about the Board's responsibility when evaluating bargaining units under the Act: Section 9(b) states that "[t]he 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*" (emphasis added). See generally *Macy's, Inc.*, 361 NLRB No. 4, slip op. at 25–27 (2014) (Member Miscimarra, dissenting) (describing legislative history underlying Section 9(b) of the Act), enfd. No. 15–60022, ___ F.3d ___ (5th Cir. June 2, 2016).

Neither the Act nor its legislative history suggests that Congress contemplated the Board would certify a bargaining unit in which one or more "employer" entities do not have *any* employment relationship with some of the

[20] My colleagues say the Board "will address jurisdictional issues the same way it did before," citing *Management Training Corp.*, 317 NLRB 1355 (1995), where a Board majority held it was appropriate to selectively impose bargaining obligations on one entity (e.g., a private contractor) without determining whether it exercised sufficient control over employment terms to enable it to engage in meaningful bargaining, and even though the Board lacked jurisdiction over an exempt government entity that might otherwise be deemed a joint employer. However, as I have explained elsewhere, *Browning-Ferris* emphasizes the critical need to have participation in bargaining by *all* entities that have actual or potential control over employment terms, even if the control is indirect, never exercised, and only reserved in relevant documentation. Accordingly, I believe the Board majority's position in *Browning-Ferris* cannot be reconciled with the Board majority's holding in *Management Training* that participation in bargaining by all joint-employer entities is not essential. See *Airway Cleaners, LLC*, 363 NLRB No. 166, slip op. at 1–3 & fn. 8 (2016) (Member Miscimarra, concurring). Thus, it remains to be seen whether and how the Board can appropriately address problems arising where the Board lacks jurisdiction over one or more entities deemed joint employers under *Browning-Ferris*, and where the Board lacks jurisdiction over one or more non-employer entities whose participation in multi-employer bargaining is required by the majority's decision in the instant case.

[21] *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 236 (1963); see also *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266–267 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

unit employees.[22] To the contrary, as noted above, Section 9(a) states that employees may designate or select a representative only in a unit "appropriate" for "the purposes of collective bargaining." In turn, Section 8(a)(5), which sets forth the bargaining duties the Act places on employers, states an employer may not "refuse to bargain collectively with the representatives of *his employees*" (emphasis added). Section 8(b)(3), the source of the bargaining requirements the statute places on unions, likewise states a union may not "refuse to bargain collectively with an employer, provided it is the representative of *his employees* . . ." (emphasis added). This statutory language compels a conclusion that, absent the consent of all parties to engage in multi-employer bargaining, Congress contemplated that bargaining units would consist of employees of an employer that has an employment relationship with *all* employees in the unit.

As explained in *Oakwood* and in former Member Brame's dissenting opinion in *Sturgis*, the Act and its legislative history preclude the Board from certifying multi-employer bargaining units absent the consent of all parties. Section 9(b), quoted above, refers to "the employer unit" as the broadest possible appropriate bargaining unit, and the Act's legislative history reveals that the phrase "or subdivision thereof" in Section 9(b) was intended by Congress to permit the Board to direct elections in bargaining units "not as broad as 'employer unit,' yet not necessarily coincident with the phrases 'craft unit' or 'plant unit.'"[23] When the Act was amended in 1947, Congress specifically considered whether the term "employer" in Section 9(b) should include multi-employer associations. Amendments were proposed that would have expressly precluded multi-employer associations "except where . . . employers have voluntarily associated themselves for the purpose of collective bargaining."[24] However, the conference committee found such language unnecessary because it merely restated existing Board practice.[25] Thus, Section 9(b) of the Act and its legislative history establish that the Board lacks authority to direct an election in a bargaining unit broader in scope than the employees of a single employer. Multi-employer bargaining requires the consent of all parties.[26]

I do not agree with my colleagues' reasoning that the petitioned-for unit is an "employer unit" because "[a]ll the employees in such a unit are performing work for the user employer and are employed within the meaning of the common law by the user employer." Member Brame succinctly responded to the same rationale in *Sturgis*, stating that "having one employer *in common* differs fundamentally from having the *same* employer, and saying otherwise does not paper over the contrary reality."[27] As depicted in Figure 2 above, the inescapable reality is that the multi-employer/non-employer bargaining units my colleagues approve today will consist, in part, of employees with whom one of the management participants does not have *any* employer relationship whatsoever. The first sentence in the Board majority's opinion states the issue in this case as whether, in the context of a user employer/supplier employer relationship, the Board may approve a single bargaining unit consisting, in part, of employees whom "the user alone employs." If the user alone employs certain employees in the bargaining unit, this means the Board is going *beyond* the "employer unit" by requiring the participation of a second management entity (i.e., the supplier employer) that does not

[22] The majority attaches significance to the fact that Sec. 9(b)(3) of the Act expressly precludes the Board from certifying a specific type of bargaining unit—consisting of guards and nonguards—and the Act contains no specific prohibition against having a single bargaining unit consisting of some employees who are jointly employed by two employer entities, and other employees who are solely employed by a single entity and have no employment relationship with one or more other employer entities. However, Sec. 9 also does not expressly prohibit the inclusion of animals in bargaining units, but the Board would be hard pressed to argue that it is appropriate to certify bargaining units that include service dogs, race horses, livestock and beasts of burden. The fact that the Act prohibits one specific type of bargaining unit does not mean Congress gave the Board carte blanche to include employees of multiple employers in a single bargaining unit where one or more "employer" entities have no employment relationship whatsoever with some or most unit employees. Indeed, Sec. 9(a) specifically requires that the Board only certify bargaining units that are "appropriate" for the "purposes of collective bargaining," and my colleagues agree that Sec. 9(b) permits, at most, an "employer unit." As explained in the text, I believe the Board cannot reasonably conclude that a bargaining unit constitutes an "employer unit" when it consists of employees of *multiple* employers, one or more of which have no employment relationship with some or even most unit employees.

[23] H.R. Statement on Conf. Rep. S. 1958, 79 Cong. Rec. 10297, 10299 (1935), reprinted in 1 Leg. Hist. 3260, 3263 (NLRA 1935). See also *Oakwood*, 343 NLRB at 661–662.

[24] House Conf. Rep. No. 510 on R. 3020, reprinted in 2 Leg. Hist. 535–536 (LMRA 1947).

[25] Id. (cited in *M. B. Sturgis*, 331 NLRB at 1315 (Member Brame, dissenting in part)).

[26] "The Board has long adhered to the rule that in order to bind an employer to multiemployer bargaining in the first instance, there must be evidence of that employer's unequivocal intent to be bound by the actions of the multiemployer bargaining representative." *Plumbers Local 669 (Lexington Fire Protection Group)*, 318 NLRB 347, 348 fn. 14 (1995); see also *Callier's Custom Kitchens*, 243 NLRB 1114, 1117 fn. 8 (1979) ("The essence of multiemployer bargaining is a consensual, tripartite relationship between the union, the multiemployer bargaining association, and the individual employer-members of the association."), enfd. 630 F.2d 595 (8th Cir. 1980); *Retail Associates, Inc.*, 120 NLRB 388, 393 (1958) ("[M]utual consent of the union and employers involved is a basic ingredient supporting the appropriateness of a multiemployer bargaining unit . . . ."); see also *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982).

[27] *M. B. Sturgis*, 331 NLRB at 1318 (Member Brame, dissenting in part).

have any employer relationship with those bargaining-unit employees. See *Oakwood*, 343 NLRB at 662 ("[T]he entity that the two groups of employees look to as their employer is not the same. No amount of legal legerdemain can alter this fact.").

I likewise disagree with my colleagues' rationale that Section 9(b), which states that the Board's bargaining-unit determinations must "assure employees the fullest freedom in exercising the rights guaranteed by this Act," actually *supports* the approval of multi-employer/non-employer bargaining units. Preliminarily, Section 9(b) places an affirmative obligation on the Board to carefully review and make an appropriate bargaining unit determination "in each case," which is far different from suggesting that the Board should indiscriminately approve whatever bargaining unit may result in an election.[28] Similarly, Section 9(b)'s reference to the "rights guaranteed by this Act" requires an evaluation of the petitioned-for unit in light of Act's other provisions, which include the requirement—set forth in Section 9(a)—that elections be conducted in a bargaining unit that is "appropriate" for "purposes of collective bargaining"; and the duty to bargain established in Section 8(a)(5) and 8(b)(3), quoted above, contemplates at a minimum that the employer that participates in collective bargaining will have an employment relationship with the unit employees—i.e., *all* of them.[29]

Based on the above considerations, I do not believe the Board may approve a multi-employer/non-employer bargaining unit, absent the consent of the parties. However, even if the Board had the statutory authority to approve such a unit, I agree with the *Oakwood* majority and the *Sturgis* dissent that, as a matter of policy, the Board should not process petitions for multi-employer/non-employer units absent the consent of all parties. As noted above, the type of bargaining unit my colleagues approve here will produce enormous challenges based on the diverse interests of the multiple management entities who must participate in bargaining, and it will generate immense uncertainty regarding what management party is responsible for negotiating over particular employment terms (and for deciding what competing proposals are acceptable regarding those particular terms). My colleagues' recipe for addressing these challenges and uncertainties—that each management entity will bargain over the terms and conditions it controls—profoundly oversimplifies the situation. As the Board indicated in *Oakwood*, 343 NLRB at 663, "the reality of collective bargaining defies such neat classifications." Moreover, the Board majority's decision today compounds the plethora of unworkable bargaining issues created by the expanded *Browning-Ferris* joint-employer standard. See Part A, supra. As the Board explained in *Oakwood*, "[f]or employees to enjoy the full prospect of effective representation, the Act contemplates that employees be grouped together by common interests *and* a common employer." 343 NLRB at 663. "The nonconsensual mixing of employees of different employers vitiates that basic principle." Id.

C. This Case Should Not Have Been Decided On the Merits Because the Board Was Placed on Notice More Than 11 Months Ago that No Bargaining-Unit Employees Exist

Putting aside my disagreement with the Board majority's overruling of *Oakwood*, the instant case is especially inappropriate to use as a vehicle for overruling existing law to require multi-employer/non-employer bargaining in a unit consisting, in part, of employees with whom one or more of the management participants does not have any employment relationship. As noted previously, the evidence currently available to the Board indicates that the multi-employer/non-employer bargaining unit at issue here ceased to exist years ago. Thus, on July 20, 2015, one of the management entities—Tradesmen International—filed a Motion to Dismiss Petition and Request for Review as Moot, supported by an affidavit, indicating that (i) nobody has been employed in the multi-employer/non-employer unit for *more than 3 years*, (ii) there is no expectation that anyone will ever be employed in the unit, and (iii) the petitioned-for unit is defunct.[30] Instead of ruling on the

[28] As I stated in *Macy's, Inc.*, the Act's "legislative history demonstrates that Congress intended that the Board's review of unit appropriateness would *not* be perfunctory." 361 NLRB No. 4, slip op. at 26 (Member Miscimarra, dissenting) (emphasis in original). Contrary to the suggestion at footnote 37 of the majority opinion, I am not suggesting that "the Act guarantees employers that they will be required to bargain only with respect to a unit to which they have consented." Rather, I believe the Act precludes the Board from finding that a bargaining unit is "appropriate" for the "purposes of collective bargaining" (Sec. 9(a)), or that it consists of an "employer unit" (Sec. 9(b)), when the unit, in fact, includes employees of multiple employers, including one or more entities that have no employment relationship with some unit employees.

[29] My colleagues rely on a number of cases in which the Board approved of bargaining units combining employees solely employed by a store with employees jointly employed by the store and its licensees. See, e.g., *S.S. Kresge Co. v. NLRB*, 416 F.2d 1225 (6th Cir. 1969), enfg. in relevant part *S.S. Kresge Co.*, 169 NLRB 442 (1968). However, as explained in *Oakwood*, those cases are not determinative of the issue presented here "because no party raised, and the Board and the reviewing courts did not consider, the statutory restrictions imposed by Section 9(b) on nonconsensual units that are multiemployer in scope." *Oakwood*, 343 NLRB at 662; see also *M. B. Sturgis*, 331 NLRB at 1317 fn. 49 (Member Brame, dissenting in part).

[30] Tradesmen (the supplier employer), with a supporting affidavit, indicated that the project that was the subject of the instant election

pending Motion to Dismiss on the basis that it pleads facts that would render this proceeding moot, my colleagues have instead proceeded to reach and decide the issue of whether an election can be directed in the petitioned-for unit *if* any unit exists, and then to remand the case to determine *whether* any unit exists, which it almost certainly does not. In other words, they have decided an election case, overruling *Oakwood* in the process, when the available evidence makes it virtually certain that no election will *ever* take place.

For several reasons, I believe these issues should have been handled in the opposite manner: we should have fairly considered and resolved the Motion to Dismiss when Tradesmen filed it.

First, by overruling *Oakwood* to permit an election that will not take place (because the petitioned-for unit does not exist), the Board today essentially issues an advisory opinion, where the available evidence indicates there is no actual case or controversy, and where the absence of any factual context or evidentiary record renders even more abstract the new standards that have been adopted by my colleagues. It is well established the Board does not give advisory opinions except as to narrow jurisdictional questions arising in circumstances not applicable here. *Broward County Port Authority*, 144 NLRB 1539 (1963); *James M. Casida*, 152 NLRB 526 (1965).[31]

Second, we have no shortage of cases involving *actual* employees whose interests will be affected by the Board's resolution of their dispute. Rather than expending the considerable resources required to decide this case, which necessarily operates to the detriment of other parties whose matters are pending before the Board, I believe the Board should have fairly considered and appropriately resolved the Motion to Dismiss. I do not discount the significance of the substantive issues presented in this case, which have also been the subject of extensive briefing. However, the importance of an issue does not warrant the issuance of a decision in the absence of an actual case or controversy. Moreover, given the breadth of the new joint-employer standards adopted in *Browning-Ferris*, the issues presented here will undoubtedly arise in another case involving parties whose dispute has not been rendered moot, and the existence of an evidentiary record in such a case would predictably render any resulting Board decision more concrete and, hopefully, more understandable.

For these reasons, I believe the Board should have decided Tradesmen's Motion to Dismiss before proceeding with the resolution of the merits. In my view, the evidence presented in the Motion and supporting affidavit, and the absence of any response creating a genuine issue of material fact, warrants dismissal (which would effectively uphold, on a different basis, the Regional Director's dismissal of the petition). Alternatively, the Board could have issued an order suspending the notice and invitation to file briefs, similar to action taken by the Board in *Steelworkers Local 1192 (Buckeye Florida Corp.)*, 362 NLRB No. 187 (2015),[32] and remanded this case to the Regional Director for a determination of whether the petition should be dismissed as moot.[33]

CONCLUSION

For the reasons set forth above, I respectfully dissent.

Dated, Washington, D.C. July 11, 2016

Philip A. Miscimarra, Member

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petition was completed on or before July 6, 2012; employees of Tradesmen have not performed any work for Miller & Anderson for more than 3 years; Tradesmen has not employed any employees within the geographic limits of the petitioned-for unit in the past 3 years; and Tradesmen has no expectation of performing unit work in the foreseeable future. Responding to Tradesmen's motion, the Union did not identify any facts that contradicted the information supplied by Tradesmen. Rather, the Union contended that "no factual record exists regarding whether work was or will be performed by the employer(s) in Franklin County."

[31] Under Sec. 102.98 and 102.99 of the Board's Rules and Regulations, an agency or court of any State or territory in doubt whether the Board would assert jurisdiction over the parties in a proceeding pending before such court or agency may file a petition with the Board for an advisory opinion on whether the Board would decline to assert jurisdiction over the parties before the agency or the court (1) on the basis of the Board's current standards, or (2) because the employing enterprise is not within the jurisdiction of the National Labor Relations Act. Otherwise, the Board does not issue advisory opinions, and petitions seeking such opinions are subject to dismissal. See, e.g., *Broward County Port Authority*, above; *James M. Casida*, above.

[32] In *Steelworkers Local 1192*, the Board received a potentially dispositive motion and promptly issued an order suspending a previously issued notice and invitation to file briefs, and the Board ultimately withdrew the notice entirely. See *Steelworkers Local 1192 (Buckeye Florida Corp.)*, 362 NLRB No. 187 (2015).

[33] See *Jeld-Wen of Everett, Inc.*, 285 NLRB 118, 118 fn. 1 (1987) (representation case was remanded by the Board, notwithstanding a pending grant of review, based on proffered evidence suggesting the representation issue was moot); *M. B. Kahn Construction Co.*, 210 NLRB 1050 (1974) (finding "no useful purpose would be served by conducting elections in the units found appropriate" and dismissing representation petitions where evidence showed the petitioned-for units would cease to exist based on imminent completion dates for relevant projects); *Douglas Motors Corp.*, 128 NLRB 307, 308–309 (1960) (dismissing representation petition based on evidence that employer "was in the process of effectuating a program to eliminate all its production operations").