

Labor Management

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Temporary agency employees will no longer be included as part of a user employer's regular bargaining unit without both employers' consent.

Bush Board Overrules *M.B. Sturgis* Rule Regarding Bargaining Units That Include Leased Employees

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In a 3-2 decision issued November 19, 2004, the National Labor Relations Board ("NLRB" or "Board") overturned a controversial 2000 ruling that had shaken one of the foundations of the temporary employment industry. As a result of the decision, the NLRB has returned to the position that temporary agency employees who are *jointly employed* by *supplier* (i.e., the temporary agency) and user (i.e., the contracting employer) employers cannot be made part of a single bargaining unit without the consent of both employers. *H.S. Care L.L.C.*, 343 NLRB No. 76 (2004).

H.S. Care involves a residential care facility, which was staffed by a group of employees employed solely by the operator of the facility, as well as a contingent of employees supplied by a personnel staffing agency. At issue was the attempt of the Service Employees International Union (SEIU) to represent a bargaining unit consisting of both groups of employees. As discussed below, the Board determined that SEIU could not represent such a bargaining unit without the express consent of both the facility operator and the staffing agency, and therefore dismissed the Union's petition for a representation election.

Background: The NLRB's Ruling in *M.B. Sturgis*

For decades, in decisions typified by *Greenhoot, Inc.*, 205 NLRB 250 (1973), the NLRB had consistently found bargaining units to be inappropriate whenever a union sought to include employees of one employing entity together with employees of another, separate employing entity unless all of the employers involved consented. The basis for the Board's reasoning in previous cases was that separate employing entities could not be required to negotiate in a "multiemployer" unit unless the employers specifically consented to negotiate through a joint bargaining agent or else agreed to bargain as a group.

In *M.B. Sturgis*, 331 NLRB 1298 (2000), the Board took a controversial new approach, holding that temporary employees supplied

by a staffing agency could be included in a single bargaining unit with regular employees of the contracting employer, without the consent of both the staffing agency and the contracting employer. Under *Sturgis*, as long as the regular and agency employees in the petitioned-for bargaining unit shared a sufficient community of interest, the bargaining unit would be found appropriate.

As a side note, the Board in *Sturgis* also indicated that a union could file an election petition naming only the temporary agency, and not the joint, contracting employer, and thus avoid the multiemployer bargaining issue altogether.

Sturgis Revisited

In *H.S. Care*, a Board majority consisting of Bush appointees Chairman Battista and Members Schaumber and Meisburg overruled *Sturgis*, finding that the 2000 decision was "misguided both as a matter of statutory interpretation and sound national labor policy." The NLRB rejected the conclusion that employees employed solely by a contracting employer could be included in a bargaining unit with employees jointly employed by the contracting employer and a temporary agency without the consent of both employing entities. Instead, the NLRB concluded that a contracting employer, and the staffing agency and the contracting employer acting as joint employers, are in fact different employers. As such, the consent of both the contracting employer and the staffing agency are necessary in order for the two groups of employees to be included in a single bargaining unit.

Importantly, the Board in *H.S. Care* emphasized that a proposed bargaining unit consisting solely of employees of two joint employers (just the agency employees utilized by the user employer), without any individuals solely employed by only one of those employers, can be an appropriate bargaining unit without the express consent of each of the joint employers. In such a case, the joint employers constitute a single employer because they jointly codetermine the terms

and conditions of employment for all of the employees in the proposed bargaining unit.

Finally, the *H.S. Care* majority pointed out an additional problem created by *Sturgis*. According to the majority, collective bargaining with only one of two companies that are joint employers would make it impossible for employees to negotiate over those terms and conditions of employment under the exclusive control of the joint employer excluded from the bargaining relationship. Accordingly, the majority suggested — but did not specifically conclude — that such bargaining relationships should not be permitted under the NLRA.

In a lengthy dissent, Members Liebman and Walsh argued against the majority holding and in favor of the continuing viability of the rule set forth in *Sturgis*.

What Does This Mean for Employers?

The *H.S. Care* decision is important for both contracting employers and temporary agencies because it restores their ability to refuse to engage in multiemployer bargaining in units consisting of employees of the contracting employer together with employees jointly employed by the contracting employer user and the temporary agency. *H.S. Care* does not, however, resolve all issues confronted by joint employers under the NLRA. In fact, the decision, while certainly good news for employers using contingent workers, raises some new issues. For example:

- *H.S. Care* applies only in the context of representation disputes. It has no applicability to, and does not alter, the NLRB's analysis of joint employer liability to remedy unfair labor practices.
- The *H.S. Care* decision creates the possibility that a contracting employer could face dual election petitions from one or more unions seeking to organize separate bargaining units consisting, respectively, of those employees employed solely by the contracting employer and those employees jointly employed by both the contracting employer and a temporary agency. It remains to be seen how such bargaining relationships would function side-by-side. For example, the union representing the employees employed solely by the contracting employer may desire to restrict the use of employees provided by a temporary agency. Obviously, the contracting employer would be placed in a potentially untenable position in such a situation.

- The *H.S. Care* decision may create an additional hurdle for unions seeking to organize the employees of temporary agencies. The Board in dicta indicated that temporary agency employees wishing to organize their temporary agency coworkers — even coworkers working for different contracting employers — would not be permitted to file an election petition naming only the temporary agency as the employer. Rather, it appears to be the *H.S. Care* majority's view that a union would also be required to name the contracting joint employer in its petition. To the extent that the union seeks to organize employees assigned to more than one company, each contracting joint employer would have to consent to multiemployer bargaining.
- *H.S. Care* does not provide direction for employers with certified *Sturgis* units. Does *H.S. Care* render the previously certified *Sturgis* bargaining unit inappropriate? Can a decertification petition be filed during the midterm of a contract? Can an employer contest the prior certification by refusing to bargain? Should the employer petition the Board for a unit clarification? These questions remain to be answered.

In conclusion, *H.S. Care* should be welcome news to employers who make frequent use of contingent workers. Nevertheless, the case leaves open many issues, so it is advisable to “stay tuned” for future developments.

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