

Chapter 17

Labor Law: When Contingent Workers Become Part of the Bargaining Unit

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17.1 Introduction

Most companies, when dealing with a union, focus their attention on effectively negotiating and abiding by the terms of the collective bargaining agreement (CBA). Significant attention is also given to the concerns of the company employees represented by the union. However, companies give little, if any, attention to the concerns of their contingent workers,¹ i.e., the temporary employees jointly employed by the company and a temporary agency, but assigned to work for the company.

Unlike regular employees, contingent workers are often unable to pursue their rights to be represented guaranteed by the National Labor Relations Act (NLRA).² The issue arises when contingent workers are assigned to a company for temporary work. In these cases, the contingent workers may be jointly employed by the temporary agency and the company where they are assigned. Until recently, either the temporary agency or the company could prevent contingent workers from becoming part of a petitioned-for unit by withholding their consent to include the contingent workers in the unit.³

In August 2000, the National Labor Relations Board (Board) consolidated cases *Sturgis* and *Jeffboat*, and essentially granted contingent workers their right to NLRA representation⁴ and eliminated the need for “consent” of both employers when a union petitions for a unit consisting of contingent workers and a company’s regular employees.

This chapter discusses the *Sturgis* and *Jeffboat* decision, the Board’s reasoning, and the impact the decision will have on a union’s collective bargaining efforts to include contingent workers in the bargaining unit of regular company employees. The chapter also provides strategies for companies to consider when dealing with temporary agencies to minimize a union’s attempts to organize contingent workers assigned to the company.

1. Besides temporary employees, contingent workers include on-call workers, independent contractors, self-employed workers, day laborers, leased workers and part-time workers. The constant moving from company to company; working short, sporadic assignments; and in some cases, the inconsistent work schedules restrict pay and benefits for contingent workers. Many have no health insurance or pension benefits, lack promotional opportunities and earn less per year than regular company employees.

2. *M.B. Sturgis, Inc. and Textile Processors, Serv. Trades, Health Care, Prof’l. & Technical Employees Int’l Union Local 108, and Jeffboat Div., Amer. Commercial Marine Serv. Co. and T.T.& O. Enter. Inc. and Gen. Drivers, Warehousemen & Helpers Local Union 89, affiliated with the Int’l Bhd. of Teamsters, AFL-CIO*, 331 NLRB No. 173 (Aug. 2000).

3. *Lee Hosp. and Laurel Certified Register Nurse Anesthetist Assoc.*, 300 NLRB 947 (December 1990).

4. *Sturgis*, 331 NLRB 173.

17.2 The *Sturgis* and *Jeffboat* Decision

17.2.1 The *Sturgis* Facts

In *M.B. Sturgis, Inc. and Textile Processors Serv. Trades, Healthcare, Prof'l. & Technical Employees, Int'l Union Local 108*, the union petitioned for a unit consisting of all M. B. Sturgis's thirty-five regular employees at its Maryland Heights, Missouri, plant. The petition excluded ten to fifteen "temporary" employees used by Sturgis and supplied by Interim, Inc., a national provider of temporary personnel. The temporary employees worked side by side with Sturgis's employees, performed the same duties, and were subject to the same supervision. Interim hired the temporary employees, determined their wages and benefits, and paid them. All employees worked the same hours, except temporary employees were not permitted to work more than 40 hours per week.⁵

The Regional Director, in a Decision and Direction of Election, found that the temporary employees were jointly employed⁶ by Sturgis and Interim, but in reliance upon his reading of *Lee Hosp. and Laurel Certified Register Nurse Anesthetists Assoc.*,⁷ did not

5. *Id.*

6. The "joint employer" doctrine involves another set of circumstances in which an employer, by operation of law, may become bound by a collective bargaining relationship that was entered into by another business entity. Joint employer issues commonly arise in scenarios where the business entities are completely separate and unrelated. The Board's current test for determining joint employer status was formulated by the Court of Appeals for the Third Circuit in *NLRB v. Browning-Ferris Indus.* Under that test, which is applied on a case-by-case basis, a joint employer relationship will be found to exist when *two or more separate, unrelated business entities share or co-determine matters governing the essential terms and conditions of employment for a group of workers nominally employed by one of the entities.* To establish joint employer status, it must be shown that the employer in question meaningfully affects matters relating to the employment relationship, such as hiring, firing, discipline, supervision, and direction of the employees. The extent to which the purported joint employer may have participated in the collective bargaining process also is a relevant factor. A finding of joint employer status will result in each of the joint employers being liable for any refusal to bargain by the other employer. Under current Board law, prior to *Sturgis* and *Jeffboat*, however, a group of employees who were jointly employed by two or more entities could not be included in the same bargaining unit with other employees of one of those entities without the express consent of all parties. BRENT GARREN, ET AL., HOW TO TAKE A LEASE BEFORE THE NLRB, 84-85 (BNA Books 2000) (emphasis added).

7. 300 NLRB 947 (1990). In *Lee Hosp.*, the union petitioned for a unit of all certified registered nurse anesthetists (CRNAs) employed by Lee Hospital. Anesthesiology Associates, Inc., (AAI), a professional corporation, independently contracted with the hospital to operate the anesthesia department and recovery room. The regional director found that no disparity of interest existed between the CRNAs and the other hospital professional employees sufficient to justify creating a separated unit for the CRNAs. The petitioner also argued that *AAI was a joint employer with Lee Hospital of the CRNAs.* The Board concluded that the joint employer issues must be resolved to determine whether a separate CRNA unit

include the temporary employees in the same unit with Sturgis's regular employees because Sturgis and Interim did not both consent to the temporary employees' inclusion in the unit.⁸

The Parties' Positions

The union opposed the inclusion of the temporary employees because of the short-term nature of their employment with Sturgis. The union also relied upon the *Greenhoot*⁹ doctrine as applied to *Lee Hospital* and argued that these decisions excluded the temporary employees from the unit of Sturgis's regular employees unless both Sturgis and Interim consented.

Sturgis presented several arguments for including temporary employees in a unit. Sturgis argued that the unit would be inappropriate without the temporary employees, that Interim's consent was not required to include the temporary employees in the unit and that the Board need only look to whether the temporary employees shared a community of interest with Sturgis's regular employees. Sturgis also argued that *Greenhoot* "does not stand for the principle that everyone has cited it for, and that [*Greenhoot's*] progeny has improperly expanded its underlying meaning."¹⁰

Interim sided with the union and contended that *Greenhoot* and *Lee Hospital* should control the decision. Those decisions prevented the Board from including the temporary employees in the unit without Interim's consent, and to do so would violate the principles of multiemployer bargaining.¹¹

was appropriate because, 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. *Lee Hosp.*, 300 NLRB at 947(emphasis added).

8. Interim did not consent to including its temporary employees in the unit of regular Sturgis employees.

9. In *Greenhoot*, a 1973 Decision and Direction of Election, the union petitioned for a unit of all licensed and unlicensed engineers, apprentice engineers and maintenance employees at fourteen office buildings managed by Greenhoot. Greenhoot argued in the alternative that it was a joint employer with each of the building owners and therefore, a combined unit was not appropriate. The Board essentially found that a unit that combined employees employed by Greenhoot and fourteen separate employers—the fourteen building owners—constituted a multiemployer unit. *Greenhoot, Inc. and Local 99-99A, Int'l Union of Operating Eng'r AFL-CIO*, 205 NLRB 250 (1973).

10. *Sturgis*, 331 NLRB 173. (i.e., improperly requiring consent of both employers in a joint-employment situation before jointly and solely employed workers can be included in the same unit).

11. *Id.* (citing *Hughes Aircraft Co.*, 308 NLRB 82 (1992) (citing *Greenhoot* and *Lee Hospital*)). Multiemployer bargaining requires employers to expressly consent to joint negotiations or have unequivocally manifested through a course of conduct an intent to be bound by group collective bargaining; see also HOW TO TAKE A CASE BEFORE THE NLRB, *supra* note 6 at 22.

17.2.2 The *Jeffboat* Facts

A month after *Sturgis*, in *Jeffboat Division, Am. Commercial Marine Serv. Co.*, a Regional Director for Region 9 considered a similar issue as that presented in *Sturgis* involving temporary employees. *Jeffboat*, an inland river shipbuilder, operates a large shipyard on the Ohio River in Jefferson, Indiana. T.T.&O. Enterprises (TT&O), a temporary supplier firm, supplied to *Jeffboat* thirty first-class welders and steamfitters. The Teamsters Local 89 sought to accrete¹² temporary employees to include them in the unit of 600 *Jeffboat* employees covered by the CBA.¹³

The Regional Director found that *Jeffboat* and TT&O jointly employed the TT&O-supplied employees (TT&O employees). *Jeffboat* controlled practically all aspects of the daily environment of the TT&O employees; its supervisors assigned, directed and oversaw the daily work of the TT&O employees; had authority to discipline the TT&O employees for unsatisfactory performance or any infraction of *Jeffboat*'s rules and regulations and were responsible for monitoring the time TT&O employees spent on different *Jeffboat* assignments.¹⁴

The Director also found that the TT&O employees shared a strong community of interest with the bargaining-unit employees. However, the Director found that under the *Greenhoot* and *Lee Hospital* decisions, the TT&O jointly employed employees could not become part of the existing unit because *Jeffboat* and TT&O did not consent to joint bargaining.

The Parties' Positions

The Teamsters filed a request for review of the Regional Director's dismissal of the petition, contending that the Director's reliance on *Greenhoot* and *Lee Hospital* and requiring consent of both *Jeffboat* and TT&O was wrong because the petitioned-for unit was not a "true" multiemployer unit.

Jeffboat and TT&O argued that the Board should adhere to the *Greenhoot* decision, which provided the underlying policy reasons for prohibiting any change in the established bargaining unit without their mutual consent. TT&O further argued that its consent was appropriate and necessary because without it, TT&O would be bound by a CBA without ever having the opportunity to bargain over the terms and conditions contained in it.¹⁵

17.3 Joint Employers or Multiemployers

12. Accretion of a unit may occur when an employer expands or relocates some or all of its operations. Questions that arise concerning the inclusion of new or relocated employees in an existing bargaining unit may be determined by a petition for clarification. HOW TO TAKE A CASE BEFORE THE NLRB, *supra* note 6 at 341–342 (discussing accretion and relocation and citing *Armco Steel Co.*, 312 NLRB 257, 144 LRRM 1111 (1993); *see also Gitano Districts Ctr.*, 308 NLRB 1172, 141 LRRM 1129 (1992)).

13. *Sturgis*, 331 NLRB 173.

14. *Id.*

15. *Id.*

Joint employment exists when two or more employers share or codetermine matters governing essential terms and conditions of employment¹⁶ and meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.¹⁷

A multiemployer unit, containing the employees of more than one employer, will be found appropriate only if all affected employers and the union clearly consent to the arrangement. Employers may manifest their consent either by participating in bargaining as a group or by designating a joint agent to bargain for them.¹⁸

The Board found Sturgis and Interim were joint employers of the employees Interim supplied to Sturgis, and Jeffboat and TT&O were joint employers of the TT&O employees supplied to Jeffboat. Sturgis and Jeffboat shared matters governing the essential terms and conditions of the employees supplied to them.

Consent of both employers before including contingent workers in a unit of regular employees is not required in joint-employment cases like it is in multiemployer cases. Prior to *Greenhoot*, the Board routinely found units of employees of a single employer appropriate, regardless of whether some of the employees in the unit were jointly employed by other employers.¹⁹ In those cases, the Board relied upon the traditional community-of-interest test²⁰ to determine if the units were appropriate. *Lee Hospital* was the first case in which the Board found that joint-employment units were multiemployer units subject to the consent requirement of multiemployer bargaining.²¹

17.3.1 *Greenhoot* Reconsidered

At the end of the 1960s, no Board or court decision barred units, absent employer consent, combined of solely-employed employees and jointly-employed employees on the basis that they constituted multiemployer units.²² Nor was there any statutory authority for such a requirement.

The Board reconsidered *Greenhoot*, which was a multiemployer case, and limited its holding by stating that a union petition that names unrelated companies as the employers will

16. *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1123 (3rd Cir. 1982); *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995).

17. *Sturgis*, 331 NLRB 173 (citing *Riverdale*, 317 NLRB at 882 (citing *TLL, Inc.* 271 NLRB 798 (1984)); see also HOW TO TAKE A CASE BEFORE THE NLRB, *supra* note 6.

18. HOW TO TAKE A CASE BEFORE THE NLRB, *supra* note 6 at 222.

19. *Sturgis*, 331 NLRB 173 (citing *Frostco Super Save Stores, Inc.*, 138 NLRB 125 (1962); *Thrift town, Inc.*, 161 NLRB 603 (1966); *Jewel Tea Co.*, 162 NLRB 508 (1966)).

20. The Board remanded both *Sturgis* and *Jeffboat* to decide those cases consistent with the decision and applicable community of interest and accretion principles. The community of interest test examines a variety of factors to determine whether a mutuality of interests in wages, hours, and working conditions exists among the employees involved. Under section 9(b) of the NLRA, a group of employees working side by side at the same facility, under the same supervision, and under common working conditions, is likely to share a sufficient community of interest to constitute an appropriate unit. See *Swift & Co.*, 129 NLRB 1391 (1961); *Kalamazoo Paper Box*, 136 NLRB 134 (1962).

21. *Sturgis*, 331 NLRB 173 (citing *Bennett Stone Co.*, 139 NLRB 1422, 1424 (1962)).

22. *Id.*

be treated as seeking an inappropriate multiemployer unit absent the consent of all employers. A union petition that 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, does not involve a multiemployer unit, and no consent would be required.²³

17.3.2 *Lee Hospital Overruled*

The confusion over whether both employers' consent was required in joint-employment cases was created by *Lee Hospital*. In 1990, 17 years after *Greenhoot*, the Board in *Lee Hospital*—without any rationale—changed its analytical course and brought units consisting of jointly- and solely-employed employees, like those in *Sturgis* and *Jeffboat*, within the ambit of *Greenhoot* and the consent requirement of multiemployer bargaining.²⁴ However, a careful reading of *Lee Hospital*, as correctly raised by *Sturgis*, shows that it merely cited *Greenhoot* in a footnote for the proposition that “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.”²⁵ The Board ultimately did not apply that rule in *Lee Hospital* because it concluded that *Lee Hospital* and the AAI, the supplier employer, were not joint employers of the employees in question. However, in later cases, the Board applied what became known as the “rule” of *Lee Hospital*, which prohibited any unit that combined jointly- and solely-employed employees unless both employers consented.²⁶

The Board in *Sturgis* and *Jeffboat*, overruled *Lee Hospital's* mistaken extension of the multiemployer principle to joint-employment cases and, in doing so, pointed out that no case since *Lee Hospital* has discussed, explained or even rationalized the “rule” of *Lee Hospital*.²⁷

17.4 Employer Strategies for Dealing with Temporary Agencies after *Sturgis* and *Jeffboat*

What can employers learn from *Sturgis* and *Jeffboat*? The most noteworthy change involves the ease at which a union may now petition to represent contingent workers assigned to the company in the same unit as regular employees. The Board, in its reconsideration of *Greenhoot*, essentially instructed unions on how to draft petitions to include both contingent and regular employees without the hassle of obtaining both employers' consent.²⁸ Gone are the days when unions seeking to represent jointly employed contingent workers are prevented from doing so simply because one or both employers withhold their consent.

In light of *Sturgis* and *Jeffboat*, companies should take precautions when dealing with a temporary agency and their contingent workers. Although it may be difficult to achieve, companies may want to create a relationship with the temporary agency that prevents a find

23. *Id.*

24. *Lee Hospital*, 300 NLRB 947, 948 (1990).

25. *Id.* at 948, fn. 12.

26. *Sturgis*, 331 NLRB 173 (citing *Int'l Transfer of Fla.*, 305 NLRB 150 (1991); *Hecatomb Corp.*, 313 NLRB 983 (1994)).

27. *Id.*

28. *Sturgis*, 331 NLRB 173 (citing *Bennett Stone Co.*, 139 NLRB 1422, 1424 (1962)).

of joint employment of any contingent workers assigned to the company. Be specific in the contract with the temporary agency about the terms and conditions of employment your company will control for the contingent workers and the terms and conditions the agency will control.

17.4.1 Let the Temporary Agency Control Contingent Workers

To the extent possible, require the temporary agency to “meaningfully control” the contingent workers’ employment relationship. Allow the agency to hire, fire, discipline, supervise and/or direct the contingent workers assigned to you. Shifting meaningful control of the contingent worker to the temporary agency may be prohibitive in most companies, especially manufacturing companies. The company supervisors know the machines, work schedules, production and quality standards and, in most cases, must actively supervise the contingent workers. However, the Board decides joint-employment issues on a case-by-case basis and companies should allow the temporary agency to control as much of the contingent workers employment as possible while they are assigned to work at the company, in hopes of preventing a joint-employment relationship.

17.4.2 Differentiate Work Assignments

Companies should also ensure that no community of interest exists between the contingent workers and the company’s regular employees. Try to differentiate contingent workers’ duties from the duties being performed by regular employees. If sufficient differentiation is established and continued throughout the contingent worker’s joint employment, a compelling argument can be made against including the contingent workers in a unit with regular employees because no community of interest exists between them, i.e., the contingent workers have no mutuality of interest in wages, hours, working conditions, etc.

17.4.3 Research the Temporary Agency for Union Activity

Companies should aggressively research the temporary agency’s background with respect to union activity prior to entering into an agreement with a temporary agency. Ask pertinent questions about the agency and any dealings it has experienced with unions. Obtain information about present union issues and past attempts to unionize the agency’s employees, especially when the contingent workers were assigned to a company.

If union activity has occurred at companies where the temporary employees previously worked or at the agency itself, find out what role the agency played in defending against a petitioned-for unit. Call other companies where the agency supplied contingent workers and find out what efforts were made in organizing the agency’s temporary employees when they worked at their company. If union efforts were attempted, find out how involved the agency was in defending against the union and any strategies that were implemented in that regard. Ask what steps the agency could have taken to prevent union activity. Were the agency’s employees disgruntled and, if so, find out why. Determine up front the agency’s designated union negotiator and discuss his/her style and the agency’s method of dealing with union activity.

17.4.4 Open Lines of Communication

Armed with answers to these questions, make sure the agency knows your company, the terms and conditions of your employment, and any concerns you may have about union activity in the jobs the company considers filling with contingent workers. Ensure that all employees, regular and contingent, have access to open lines of communication with management about their working conditions. Develop open lines of communication between your company and the temporary agency as well to ensure that any union issues raised by contingent workers to the agency are immediately brought to the company's attention and vice versa.

17.5 Conclusion

Contingent workers in joint-employment situations have easier access to union representation after *Sturgis* and *Jeffboat*. No consent is required from both employers to enable the contingent workers to become a part of a unit of regular employees. Once joint employment is established, the union must only show that sufficient community of interest exists between the contingent workers and the regular employees to include the contingent workers in the unit.

Companies can take steps to prevent contingent workers from being included in a unit of regular employees by requiring, to the extent possible, the temporary agency to control terms and conditions of the contingent workers' employment. Differentiation of work assignments given to contingent workers and regular employees may also be useful in preventing contingent workers from being included in a unit of regular employees because this differentiation may prevent a union from establishing a sufficient community of interest between the contingent workers and the regular employees for an appropriate unit. Companies must also aggressively research the temporary agency and its history of union activity to determine the probability of future attempts to organize contingent workers once assigned to the company.