

# The Impact of *Sturgis* on Bargaining Power for Contingent Workers in the U.S. Labor Market

Michael J. Hely\*

## I. INTRODUCTION

In *M.B. Sturgis, Inc. and Jeffboat Division* (Sturgis),<sup>1</sup> decided in August, 2000, the National Labor Relations Board (NLRB) held that contingent workers could be included alongside core workers<sup>2</sup> in

---

\* J.D. Candidate, 2003, Washington University School of Law.

1. *M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000). *See also* Interstate Warehousing of Ohio, 333 N.L.R.B. No. 83 (2001) (holding contingent workers from supplier work alongside core workers under same conditions, who were “largely interchangeable” with core workers, and where user employer hired all of its workforce from supplier, the contingent workers should be included in the bargaining unit with core workers); Outokumpu Copper Franklin, Inc., 334 N.L.R.B. No. 39 (2001) (ruling that contingent workers must be included with core workers with whom they share job duties, where user employer sets all conditions of employment for contingent workers and hires core workers from pool of agency-supplied contingent workers); *but cf.* Engineered Storage Products Co. and Teamsters Local 330, 334 N.L.R.B. No. 138 (where supplier hires and fires, sets wages and conditions of contingent workers in joint-employer situation, community of interest is not strong enough for contingent workers and core workers to be included in same bargaining unit).

2. A “core worker” is an employee solely employed by a “user employer.” A “user employer” is the term for an employer who hires “core workers” and/or “contingent workers” for its own use—oversees hiring the workers out to third parties. For the sake of clarity, this Note borrows the NLRB terminology—except that this Note uses “core worker” instead of the NLRB’s rather unfortunate and misleading appellation, “user employee,” to refer to core workers. The NLRB refers elsewhere to these employees as “permanent,” “core,” “single-employer employees,” or “regular” employees. This Note presumes, unless noted otherwise, that when discussing bargaining units in connection with contingent workers, core workers share the same job duties as contingent workers.

The NLRB uses the term “contingent workers” to refer to workers who are recruited and hired by an agency or company that supplies employees to another enterprise. *Id.* at 3. Contingent workers are elsewhere classified, *inter alia*, as “temporary workers,” or “leased workers.” The NLRB uses the term “supplier” to refer to the agency or company that supplies employees.

This Note is chiefly concerned with supplied contingent workers, but much has been written about contingent workers and independent contractors employed by a single employer, such as those whom Microsoft uses as a regular part of its operations. *See, e.g.*, Victoria Roberts, *Economy: Attorneys, Staffing Firms, Advocates Differ on Upshot of Microsoft Rulings*,

creating a collective bargaining unit,<sup>3</sup> without the consent of both the supplier agencies and user employers. The ruling is a historic departure from longstanding NLRB policy that contingent workers could not accrete<sup>4</sup> to a core unit without the consent of both the user and the supplier.<sup>5</sup>

---

DAILY LAB. REP. (BNA), July 17, 2000, at C-1.

3. The collective bargaining unit is the group of workers that a union organizes and then represents after it is certified. Under § 9 of the National Labor Relations Act, the NLRB must determine the proper bargaining unit where the union and the employer do not agree. 29 U.S.C. § 159 (1994) [hereinafter NLRA]; *see also, e.g.*, MICHAEL R. CARRELL & CHRISTINA HEAVRIN, LABOR RELATIONS AND COLLECTIVE BARGAINING: CASES, PRACTICE, AND LAW 120 (5th ed. 1998). Jobs, not individuals, comprise the bargaining unit membership. For example, a unit may be comprised of all mechanics, or of a whole class of jobs such as administrative workers, including secretaries, filing clerks, information techs, etc. The NLRA allows any job classifications to be included in a bargaining unit so long as it does not include professionals without their consent. NLRA § 9(a). Carrell & Heavrin list a variety of factors used in determining bargaining units. Among them are community of interest (the doctrine at the crux of *Sturgis*, to be discussed *infra*), the history of bargaining between a particular unit and an employer, the employees' wishes, prior unionization, the relationship of the bargaining unit to the employer's organizational structure, and the public interest. CARRELL & HEAVRIN, *supra*, at 120-23.

If there is a dispute over the composition of a bargaining unit, the NLRB decides the appropriate bargaining unit. NLRA § 9(a). The NLRB decides this based on the commonalities shared by the workers, or whether a "community of interest" exists. To determine whether an appropriate community of interest exists, the NLRB examines, *inter alia*, salaries, hours, how hired/terminated, and mobility between jobs. Francis M. Flougherty, Annotation, "*Community of Interest*" Test in NLRB Determination of Appropriateness of Bargaining Unit, 90 A.L.R. FED. 16 (1988).

A common question becomes whether all the employees at one location should be part of one unit or different units. Historically, the disputes have been over the inclusion of craft and industrial workers into a unit. *Sturgis* represents the latest major change in the form these disputes have taken, where an employee's permanence, or lack thereof, is a greater issue than her skill set.

4. Labor law uses the term "accretion" to denote the addition of workers to a pre-existing collective bargaining unit.

5. The previous policy, established in the 1990 *Lee Hospital* decision, considered contingent workers working for user employers to be part of a multiemployer unit. 300 N.L.R.B. 947 (1990). Under *Lee Hospital*, multiemployer units included both units comprised of core and contingent workers working for one user, as well as workers from one supplier who may work for several different employers. *Id.* As a multiemployer unit, the Board in *Lee Hospital* held that, according to the well-established *Greenhoot* doctrine, both employers had to consent before contingent workers and user employees could form a bargaining unit together. *Id.* at 948 (citing *Greenhoot, Inc.*, 205 N.L.R.B. 250 (1973)). The *Sturgis* decision thereby overruled *Lee Hospital in toto*, and clarified its position on multiemployer units found at multiple user employers, versus joint employer units found at single user employers. *Sturgis*, 331 N.L.R.B. at 1298.

In its amicus brief, AFL-CIO argued that *Greenhoot* should be overruled as *Lee Hospital* had been. *Id.* at 1300. It argued that appropriate units should be decided on the basis of

Currently, NLRB-watchers are wondering whether the new Republican-controlled NLRB will reverse its decision in *Sturgis*.<sup>6</sup> As observers expect that President George W. Bush's nominees will take the side of management over organized labor and individual workers' concerns, those who predict *Sturgis*' reversal clearly see the case as a pro-labor decision. Its effect on the workplace, however, is still less than clear. Commentators vary greatly in the importance they attach to *Sturgis*. Some view it as a breakthrough for union organizing,<sup>7</sup> as protection for a vulnerable portion of the working population,<sup>8</sup> or as an interference in both employer-employee relations and in employee autonomy.<sup>9</sup> Some experts contend that *Sturgis* is hardly significant at all.<sup>10</sup> None of these individuals, however, appear to consider why unions have taken diverse, often conflicting, viewpoints of the issues in *Sturgis*, whether accretion is best for contingent workers, or if the current collective bargaining system will best meet their needs.

Part II of this Note outlines the main players in *Sturgis*: contingent workers, users, and core workers. Part III of this Note examines

---

community of interest, regardless of employer consent. *Id.* at 1300-01.

Nancy Schiffer, associate general counsel for AFL-CIO, argues in her article, *Organizing Contingency Workers: Community of Interest v. Consent*, 17 LAB. LAW. 1, 67 (2001), that *Sturgis* did not go far enough for the same reason—that the NLRB should have overruled *Greenhoot in toto*. *Id.* Schiffer argues that *Greenhoot* perpetuates the mistaken rule that employers must consent to a unit consisting of a single supplier and multiple user employers, as a multiemployer unit. *Id.* at 171-73. The same reasons that the Board used in *Sturgis* for overturning *Lee Hospital*, where there were multiple suppliers and a single user employer, should logically apply to *Greenhoot*. *Id.* Further, Schiffer contends that *Greenhoot*'s holding is contrary to the legislative history of the NLRA, to NLRB precedent, and "any legitimate statutory policy. *Id.* at 171.

Conversely, labor lawyer Robert W. Tollen argues that multiemployer units should still apply where there is one supplier with multiple users, as well as multiple-user and multiple-supplier arrangements. Robert W. Tollen, *When Is a Multiemployer Bargaining Unit a "Multiemployer Bargaining Unit?"*, 17 LAB. LAW. 183 (2001).

6. See, e.g., Tamara Loomis, *Power Shift: NLRB Reversals May Be on the Horizon. Bush Appointees Will Overturn Key Labor Law Rulings, Experts Predict*, NAT. L.J., July 29, 2002, at B11.

7. See, e.g., Kenneth R. Dolin & Scott V. Rozmus, *NLRB Trend Of Easing Union-Organizing Activities Continues*, EMP. L. STRATEGIST, Jan. 2001, at 1.

8. See, e.g., Mark H. Floyd, *Union Organizing of Temporary Employees Subject to New Standards*, 37 TENN. B. J. 23 (Jan. 2001).

9. Greenbaum Doll & McDonald PLLC, *You May Have to Bargain with a Union Your Employees Don't Want*, 11 NO. 2 KY. EMP. L. LTR. 1 (2000).

10. See Susan J. McGolrick, *Contingent Workers: Will NLRB's Recent Sturgis Ruling Help or Hurt Organizing, Bargaining?*, 173 DAILY LAB. REP. (BNA), Sept. 6, 2000, at AA-2.

*Sturgis*, the mechanisms of bargaining unit accretion, and the degree to which it blurs the roles of these players. Part IV discusses the impact of the *Sturgis* decision and examines how labor market forces might correct for its shortcomings. Part V concludes with recommendations for achieving greater bargaining power for contingent workers.

## II. PLAYERS IN THE CONTEMPORARY LABOR MARKET

### *A. Users, Core Workers, and Contingent Workers in the Labor Market*

The contemporary economy emphasizes mobility and flexibility, and contingent workers are attractive to user employers because of their flexibility.<sup>11</sup> In order to stay afloat, managers must heed this imperative for meeting fluxes in the business cycle. These fluxes increasingly demand versatility, not just in production quotas, but in the labor supply, in accordance with supply and demand.<sup>12</sup> A steady

---

11. See, e.g., SUSAN N. HOUSEMAN, WHY EMPLOYERS USE FLEXIBLE STAFFING ARRANGEMENTS: EVIDENCE FROM AN ESTABLISHMENT SURVEY (Upjohn Institute Staff Working Paper No. 01-67, 2d rev., Oct. 2000). See also Bitu Rahebi, Comment, *Rethinking the National Labor Relations Board's Treatment of Temporary Workers: Granting Greater Access to Unionization*, 47 UCLA L. REV. 1105 (2000).

12. See, e.g., PAUL OSTERMAN, SECURING PROSPERITY: THE AMERICAN LABOR MARKET: HOW IT HAS CHANGED & WHAT TO DO ABOUT IT (1999). Writing in a good year for the stock-market and for supply-side economists, Osterman warns:

[D]espite good economic news on many dimensions, there remains a widespread sense that the labor market is a riskier and more dangerous place than in the past. In some measure this feeling is based on what is in the air, as many firms continue to restructure and rhetoric takes hold proclaiming that everyone is responsible for his or own career and that one can expect little from one's employer. . . . [W]hile many people are benefiting from the new economy, a larger number are not, and inequality has grown.

*Id.* at 3.

The supplier industry's spokesgroup, The American Staffing Association, rather succinctly summed up why unions are concerned with this issue:

Unions' share of the private-sector workforce in the United States has shrunk to less than 10 percent, forcing organized labor to look for ways to stem the decline. According to a recent report from the General Accounting Office, from 1982 to 1998, the number of jobs in the staffing industry dramatically rose by 577 percent, whereas the number of jobs in the entire workforce grew by 41 percent.

core of workers whose numbers remain static in the face of all but the most extreme market fluctuations is disappearing in accordance with this demand for versatility. Consequently, while profits may increase, workers share less of the profitability than ever before.<sup>13</sup> Earnings have not kept pace with increases in productivity.<sup>14</sup> There has been a decrease in the number of permanent jobs with full benefits. Many positions have seen a decrease in compensation.<sup>15</sup> The recent slowing of the U.S. economy has shown that we are not immune from the business cycle, and that employers are quite devoted to the proposition that all positions are created fungible.<sup>16</sup> Employers,

---

American Staffing Association, *Unions at the Door? They'll Huff and They'll Puff, but They Can't Blow Your Staffing Firm Down*, STAFFING TODAY-STAFFING SUCCESS, Sept. 2001, available at <http://staffingtoday.com/memberserv/1100ss/story2.htm> (last visited Oct. 30, 2002).

This is consistent with the report by the National Alliance for Fair Employment (NAFFE), the AFL/CIO's organizing campaign for contingent workers. NAFFE, *Contingent Work and Organized Labor*, at <http://www.fairjobs.org/report/orglabor.php> (last visited Feb. 18, 2002). "[A] growing sector of contingent jobs in any workplace, company, or industry threatens to undermine hard-won standards for all workers as those in standard jobs lose their leverage in collective bargaining." *Id.*

Leo Troy applauds the existence of non-union jobs as an indication that U.S. workers eschew organization in favor of what he calls "individual representation," where the worker fends for herself in the job marketplace and negotiates for compensation as an individual rather than collectively. LEO TROY, BEYOND UNIONS & COLLECTIVE BARGAINING 16 (1999). Troy views the statistic that ninety percent of U.S. private-sector workers are not union members as an empirical demonstration that "the majority believe that the market can satisfy their needs and consequently prefer and vote for individual rather than organized representation." *Id.* He quotes the Harris survey, conducted for the AFL-CIO in 1984, to support this idea that the preference for non-union jobs is pragmatic, rather than ideological: the workers polled simply saw unions as "irrelevant." *Id.* at 17 (quoting HARRIS, LOUIS, AND ASSOCIATES, A STUDY ON THE OUTLOOK FOR TRADE UNION ORGANIZING, STUDY NO. 84308 (1984)).

13. TROY, *supra* note 12, at 89.

14. *Id.* at 89.

15. *Id.*

16. See Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001). Many "dynamic" U.S. employers have "radically transformed their employment practices" in the past decade, substituting practices that emphasize flexibility for the old ways. *Id.* at 523. Employers therefore highly value workers who are versatile in terms of skills and their ability to move between job assignments. *Id.*

But see a study by Susan M. Houseman of the Upjohn Institute for Employment Research, and Anne E. Polivka of the Bureau of Labor Statistics, THE IMPLICATIONS OF FLEXIBLE STAFFING ARRANGEMENTS FOR JOB STABILITY, which argues that workers in a variety of flexible work arrangements experience only moderately less job stability. UPJOHN INSTITUTE, STAFF WORKING PAPER NO. 99-056, Feb. 1998, rev. May 1999. Job instability is greatest among contingent workers working for supplier agencies, however. *Id.* at 12.

therefore, lay off scores of core and contingent workers when downturns occur.<sup>17</sup> Indeed, much of the value that contingent workers have for an employer is to provide a “buffer” staff that can absorb the shock of economic downturns.<sup>18</sup> The current spate of layoffs in core positions makes it clear that contingent workers do not absorb all of the shock.<sup>19</sup>

All of us work in a climate where economic exigencies require us to serve at some point as a “buffer” for other market players (core workers, stockholders, or perhaps colleagues), regardless of whether we are currently served by any buffers ourselves. If job fungibility increases according to the above predictions, so will the resemblance between the average job on the market and the jobs currently available in the contingent labor market.

### *B. Contingent Workers*

Contingent workers are an almost infinitely diverse group. They range from unskilled or semi-skilled workers, who are looking for permanent work, to highly skilled workers who may be called independent contractors, and who may not be seeking permanent

---

17. See, e.g., *Goodrich to Cut 2,400 Jobs, Close 16 Plants*, SEATTLE POST-INTELLIGENCER, Oct. 26, 2001, at E1 (layoffs due to decline in airline industry leading to profits less than previously forecast); *Earnings*, ATLANTA J. CONST., Oct. 27, 2001, at 1G (“Crawford cutting 95 Atlanta jobs as rising costs hurt bottom line. . . . Crawford & Co., an insurance services company, reported lower third-quarter earnings and announced about 95 job cuts in Atlanta.”).

18. See KATHERINE G. ABRAHAM & SUSAN N. HOUSEMAN, *JOB SECURITY IN AMERICA: LESSONS FROM GERMANY 86-95* (1993) (comparing the use of “short term” workers versus layoffs to adjust for market dips); see also STANLEY NOLLEN & HELEN AXEL, *MANAGING CONTINGENT WORKERS: HOW TO REAP THE BENEFITS AND REDUCE THE RISKS 138-39* (AMACOM 1996). The idea of a “buffer” of contingent workers caught on in the 1980s as a way of ensuring some employment security for core employees. NOLLEN & AXEL, *supra*, at 39. John Atkinson at the U.K.’s Sussex University articulated a “core-ring” model that put permanent, full-time workers at the core, while the “ring” was made up of contingent workers, hourly part-timers, and independent contractors. *Id.* at 38 (citing John Atkinson, *Manpower Strategies for Flexible Organizations*, Personnel Mgmt. (BNA) (Aug. 1984)). The “buffer” strategy serves to prevent the financial and morale costs (to permanent staff) of laying off workers; supplier agencies promote this idea to potential users as a way of increasing the use of contingent workers. *Id.* at 39.

This use of contingent workers as a “buffer” may have consequences for organizing combined units of contingent and core workers. See *infra*, Part IV, for a further discussion of this issue.

19. See *supra* note 17 and accompanying text.

jobs.<sup>20</sup> The majority, however, are clerical or light industrial workers.<sup>21</sup> Many are looking for full-time, permanent work with benefits.<sup>22</sup>

According to the Bureau of Labor Statistics' broadest measurement, contingent workers make up four percent of the U.S. workforce.<sup>23</sup> Manpower Temporaries, Inc. boasts that it is the single largest employer in the United States.<sup>24</sup> Contingent workers are a

---

20. In its 2001 study on contingent workers, based upon data from the Current Population Survey, the Bureau of Labor Statistics defines contingent workers as "those who do not have an explicit or implicit contract for long-term employment." Bureau of Labor Statistics, *Contingent And Alternative Employment Arrangements*, February 2001 (May 24, 2001) [hereinafter BLS 2001], available at <http://www.bls.gov/news.release/conemp.nr0.htm> (last visited Oct. 3, 2002).

The Bureau of Labor Statistics used several factors in discerning a contingent employment arrangement:

[W]hether the job was temporary or not expected to continue, how long the worker expected to be able to hold the job, and how long the worker had held the job. For workers who had a job with an intermediary, namely a temporary help agency or a contract company, information was collected about their employment at the place they were assigned to work by the intermediary as well as their employment with the intermediary itself.

Bureau of Labor Statistics, *Contingent And Alternative Employment Arrangements*, February 2001 Technical Note (May 24, 2001), available at <http://www.bls.gov/news.release/conemp.tn.htm> (last visited Oct. 3, 2002).

21. A 2000 U.S. Bureau of Labor Statistics survey of contingent workforce at supplier agencies for the year 1998 lists 1,178,176 out of a total 3,229,700, or 36.5% of the contingent workforce is made up of administrative/clerical workers. In addition, 987,143, or 30.6%, of contingent workers worked as "operators, fabricators, and laborers" (often referred to as "light industrial" or low-skilled industrial workers). By contrast, "professional specialty" made up 4.9% of the workforce, precision production, craft, and repair, 7.1%, and executive-managerial workers 4.8%. *Accord*, ROBERT E. PARKER, *FLESH PEDDLERS AND WARM BODIES: THE TEMPORARY HELP INDUSTRY AND ITS WORKERS* 31 (1994) (citing telephone interview with Bruce Steinberg, The National Association of Temporary Services spokesperson (Nov. 19, 1993)).

22. *Sturgis' Effect on Temp Organizing Debated*, 165 LAB. REL. REP. (BNA) 289, 291 (Nov. 6, 2000); see also PARKER, *supra* note 21, at 17.

The Bureau of Labor Statistics found that 44.4 percent of supplier-agency contingent workers preferred a "traditional arrangement," 44.3 percent preferred an "indirect or alternative arrangement," and 5.7 surveyed said "it depends" (data was not available for 5.4 percent of those surveyed). Table 11, *Employed Workers With Alternative Work Arrangements By Their Preference For A Traditional Work Arrangement*, February 2001, available at <http://www.bls.gov/news.release/conemp.t11.htm> (last visited Feb. 18, 2002).

For terms and definitions regarding contingent workers, see Anne E. Polivka, *Contingent and Alternative Work Arrangements, Defined*, 119 MONTHLY LAB. REV. 3 (1996).

23. BLS 2001, *supra* note 20, at 3.

24. Schiffer, *supra* note 5, at 168 (citing David Wessel, *Temp Workers Have Lasting Effect*, WALL ST. J., Feb. 1, 2001, at A1). This may be a misleading statistic, however. Supplier

segment whose force extends well beyond its plethora of job descriptions. The use of contingent workers in the job market destabilizes job security for all employees, for where some workers receive lower pay and no benefits, the competition for permanent positions may erode gains made in compensation on permanent jobs.<sup>25</sup>

Women and minorities make up a disproportionate percentage of the population of contingent workers.<sup>26</sup> Thus the rift between historically privileged and historically marginalized populations will widen as certain populations disproportionately hold the insecure, low-wage jobs that characterize the majority of contingent jobs.<sup>27</sup> Since the “welfare reform” or Personal Responsibility Act of 1996,<sup>28</sup>

---

agencies such as Manpower often hire contingent workers for just a few months during a year. The cumulative comings and goings of contingent workers during a year’s time may be quite high while the tenure of each worker may be quite short. Interview with Mindy Marks, Olin Fellow in Economics, Washington University in St. Louis, Mo. (Feb. 9, 2002).

25. See 142 CONG. REC. H14736-03 (daily ed. June 19, 1996) (Statement of Rep. Patricia Schroeder, Extension of Remarks on the Part-Time and Temporary Workers Protection Act); see also Parker, *supra* note 21, at 57.

For an explanation of basic principles of labor market supply and demand, see ARTHUR O’SULLIVAN & STEVEN M. SHEFFRIN, MICROECONOMICS PRINCIPLES AND TOOLS, 277-78 (2d ed. 2001).

26. BLS 2001, *supra* note 20, at 5. For a discussion of the composition of contingent workers and the implications of this phenomenon, see Ann Polivka, *A Profile of Contingent Workers*, 119 MONTHLY LAB. REV. 10 (1996).

For a breakdown of the disparity in wages between contingent workers and core (“noncontingent”) workers, see Steven Hipple & Jay Stewart, *Earnings and Benefits of Contingent and Noncontingent Workers*, 119 MONTHLY LAB. REP. 22 (1996). The differential is very clear: in 1995, the median weekly earnings of contingent workers working full-time was only \$385 to the \$479 earned by their full-time core counterparts. *Id.* at 23. Part-time contingent workers earned \$109 to the core workers’ \$138 per week. *Id.*

27. The other end of the scale from poorly-compensated, unskilled work is the technical worker hired as an independent contractor. There were 8.6 million workers identified as independent contractors in 2001, constituting 6.4 percent of total employment. BLS 2001, *supra* note 20, at 3 (excluding independent contractors working longer-term jobs from the population of contingent workers). White men generally make up most of this population, which is reputed to be more satisfied with the higher earnings that their skills afford them. *Id.* at 4; see also Schiffer, *supra* note 5, at 168. The recent and widely-publicized employment litigation at Microsoft belies the idea that these workers are satisfied with their lot, however. *Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299 (2001). Microsoft classified these workers, whose arrangements resembled core workers in all but compensation, as independent contractors. In a class action suit, these workers won damages and many workers received core worker status. Susan McGolrick, *Benefits: Judge Approves \$27 Million Fee Award for Attorneys In Microsoft Class Action*, DAILY LAB. REP. (BNA) (Apr. 24, 2001).

28. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L.

many people who had been on the welfare rolls were forced to take low-paying jobs, including jobs as contingent workers.<sup>29</sup> Many have had to make permanent careers as contingent workers, because either a lack of skills or other barriers, which put them on the welfare rolls in the first place,<sup>30</sup> may continue to prevent them from obtaining permanent work.<sup>31</sup> A flood of under-skilled workers compels employers to make positions more fungible, require fewer skills, and offer less compensation.<sup>32</sup> As this trend continues, employers may replace core positions with these more fungible, lower-skilled positions.<sup>33</sup>

Contingent workers, from day laborers and garment workers to computer technicians and adjunct professors, have recently devised diverse means of organizing.<sup>34</sup> Some of this organizing has taken

---

No. 104-193, 110 Stat. 2105 (1996).

29. See Craig L. Briskin & Kimberly A. Thomas, Note, *The Waging of Welfare: All Work and No Pay?*, 33 HARV. C.R.-C.L. L. REV. 559, 589 (1998).

30. One should note two qualifications before accepting the premise that “welfare” recipients (generally defined as participants in entitlement programs in which they receive cash grants such as Temporary Aid for Needy Families (TANF) or Social Security Disability, usually combined with medical benefits and/or Food Stamps) are on welfare because they lack skills. One reason is that, according to Federal Reserve policy, “healthy” unemployment is at about 6.2%. To prevent the economy from “overheating,” the Reserve tends to raise interest rates when unemployment dips below this number. Fairness and Accuracy in Reporting (FAIR), *Extra!* (May/June 1995), at <http://www.fair.org/extra/9505/welfare-myths.html> (last visited Jan. 14, 2002). A second reason is that the majority of welfare recipients are on “welfare” (the general term usually used to refer to Temporary Aid for Needy Families (TANF, formerly known as Aid for Families with Dependent Children or AFDC), a cash grant with medical benefits) for relatively short periods of time. *Time on Welfare and Welfare Dependency: Hearings Before the House Committee on Ways and Means, Subcommittee on Human Resources*, 104th Cong. 70-72 (1996) (statement of LaDonna A. Pavetti, Ph.D., Research Associate, The Urban Institute), available at <http://www.urban.org/welfare/pavtes.htm> (last visited Jan. 14, 2002).

Nevertheless, as Dr. Pavetti contends, many welfare recipients in the pre-“welfare reform” era (Pavetti estimates 70%) were returning to the rolls within five years. Sixty percent remained on welfare for more than two years, and two-thirds of the recipients averaged five or more years on welfare. *Id.*

31. For a discussion of former welfare recipients being channeled into insecure jobs, see National Alliance for Fair Employment (NAFFE), *Contingent Work, Low Wage, and Poverty*, at <http://www.fairjobs.org/report/poverty.php> (last visited Feb. 18, 2002).

32. NAFFE, *supra* note 31.

33. E-mail from Catherine Ruckelshaus, Litigation Director, National Employment Law Project (Oct. 5, 2001 16:34 CST) (on file with the Washington University Journal of Law & Policy); see also PARKER, *supra* note 21, at 137-153.

34. See, e.g., National Alliance for Fair Employment (NAFFE), *Workers in Contingent Jobs Are Fighting Back*, at <http://www.fairjobs.org/report/fightback.php> (last visited Feb. 18,

place at a particular user employer site where the contingent workers are solely or jointly employed.<sup>35</sup>

Many of these contingent workers have organized using a hiring hall approach.<sup>36</sup> Experts such as Stephen Rush point out that organizing in a hiring hall fashion has worked well, typically for certain multiemployer jobs such as longshoring and construction.<sup>37</sup> It may be that if the hiring hall model were extended to a wider body of contingent workers who now work out of supplier agencies, then employers, agencies, and contingent workers might benefit.<sup>38</sup> Contingent workers could organize as a unit, moving from job to job, while retaining the benefits of union membership.<sup>39</sup> Employers would enjoy the flexible workforce that they may have lost if contingent workers were to join with core workers in a bargaining unit, thus allowing them to bargain for similar security and compensation as core workers.

However, several problems exist with this model. First, the main

---

2002) (discussing hiring hall organization in Chicago, day laborers' center in Portland, Ore., and skilled workers organization at Microsoft ("WashTech") for benefits & parity pay). See also Schiffer, *supra* note 6, at 169-70, for a discussion of contingent workers who were successful at organizing in a single-employer situation. Schiffer cites Tاملaco, Inc, *Corporate Personnel & Contingent Workers, Inc. and Waste Management Inc.*, 15-RC-2901, where the employers used contingent workers exclusively for jobs in home health care and sanitation services. *Id.*

35. *Id.*

36. ARCHIBALD COX ET AL., *LABOR LAW* 1125-27 (13th ed. 2001). The hiring hall model is one whereby a union sets up a single point of hire for its members. When an employer contacts the hiring hall, the union consults its list of available workers. Employers signing a hiring agreement with one of these halls typically obliges itself to hire exclusively from that hiring hall. Similarly, workers affiliated with the union hiring hall are barred from seeking work outside of union referrals. For examples of such agreements, see *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982); *NLRB v. Int'l Bhd. of Electrical Workers Local 322, AFL-CIO*, 597 F.2d 1326 (1979).

37. COX ET AL., *supra* note 36.

38. Rush contends that in a market with a high turnover, the hiring hall set-up can be a significant advantage to both employer and workers who are looking for each other. *Id.* at 89-90 (citing ROBERT J. FLANAGAN ET AL., *ECONOMICS OF THE EMPLOYMENT RELATIONSHIP* 576-78 (1989)) (discussing frictional employment, where workers are between jobs).

39. For a discussion about the possibility of organizing contingent workers by hiring hall, see DAVID WEIL, *TURNING THE TIDE: STRATEGIC PLANNING FOR LABOR UNIONS* 105-06 (1994). Weil points out that this has some historical precedent, such as when waitresses organized by hiring halls in the 1900s, and again in the 1930s and 1960s. *Id.* at 106 (citing Dorothy Sue Cobble, *Organizing the Postindustrial Work Force: Lessons from the History of Waitress Unionism*, 3 *INDUS. & LAB. REL. REV.* 419, 419-36 (1991); DOROTHY SUE COBBLE, *DISHING IT OUT: WAITRESSES AND THEIR UNIONS IN THE TWENTIETH CENTURY* (1991)).

tool of competition for hiring halls is the ability to provide a locatable, ready store of skilled workers.<sup>40</sup> Employers are generally able to find unskilled workers more easily than skilled workers.<sup>41</sup> If potential users of contingent workers could find skilled workers available through non-unionized supplier agencies, then there is almost no chance that the users would “salt” their ranks with unionized, likely better-compensated, contingent workers.<sup>42</sup> In cases of fierce competition for unskilled work, union contracts may not provide many more advantages than their non-unionized competition—perhaps not even enough to offset the cost of union

---

40. See WEIL, *supra* note 39. In his discussion of waitress hiring halls, Weil concurs: “The basis of the leverage exerted by [the waitresses’] hiring halls stemmed both from their ability to provide restaurant employers a skilled and stable work force and from their potential to act as a source for organizing pressure against employers via picketing, consumer boycotts, and strikes.” *Id.* at 106.

41. Employers’ relative difficulty in finding skilled workers is especially pronounced in areas with a large number of unskilled workers. In the “welfare-to-work” scenario many communities foster employers’ use of unskilled, poorly-paid workers who are desperate for work out of fear of losing their continued health insurance and food-stamp entitlements (which are necessary adjuncts to the below-poverty wages most participants receive as they enter or re-enter the workforce). In this author’s experience working with welfare-to-work participants in depressed Midwestern communities, hiring halls for skilled trades may continue to provide their members with decent, union jobs with benefits alongside a large unskilled workforce. Unskilled workers compete for below-poverty wage jobs while governmental and non-governmental job development programs attempt to provide some of these unskilled workers with work skills and opportunities for employment. Some of these programs even include transportation to the employer’s doorstep. For many of these workers, contingent supplier agencies are the only realistic providers for jobs until the workers have immersed or re-immersed themselves in the work setting and acquired some skills. These job development programs go beyond the typical supplier agency-user arrangements, in that they provide personalized follow-up counseling for workers on the job and job developing services at no cost to the employer. For examples of some of these programs, see the Welfare to Work Partnership’s homepage, *at* <http://www.welfareto-work.org> (last visited Feb. 16, 2002); see also the web page of East-West Gateway Coordinating Council (St. Louis, Missouri’s Metropolitan planning organization), *at* <http://www.ewgateway.org/labormkt/Bridges2000/bridges2000.htm> (last updated June 12, 2001) regarding Bridges 2000 (jobs and transportation program); see also the Oakland Private Industry Council’s program page, *at* <http://www.oaklandpic.org> (last visited Feb. 16, 2002) (listing benefits to potential employers and trainees).

An idea worth investigating, therefore, may be for unions to take over these quasi-governmental programs and provide these same services in an organized setting.

42. “Salting” refers to the practice whereby a union attempts to infiltrate and unionize an employer’s ranks. The International Brotherhood of Electrical Workers (IBEW) introduced this practice in the 1980s. CARRELL & HEAVRIN, *supra* note 3, at 25-26. The United States Supreme Court held in 1995 that employers may not discriminate against applicants who are paid union organizers. *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995).

dues.<sup>43</sup> Further, even among the traditional hiring hall trades, contingent supplier agencies are making great inroads.<sup>44</sup> This model may work well, however, in communities with a great need for unskilled labor and where unions are popular enough to organize a large proportion of the contingent labor force.

### *C. Unions and Contingent Workers: The Mechanisms of Membership*

In a market that includes union jobs, the compensation that even a non-union employer will offer must keep pace with union rates in order to attract quality workers.<sup>45</sup> Hence, the wages tend to increase with the presence of union jobs. With more union jobs available within a job market, wages and conditions will likely improve for contingent workers within that market.

Historically, unions and contingent workers have not consistently been allies.<sup>46</sup> On a practical level, employers sometimes use contingent workers to break a union's organizing activity by using

---

43. Indeed, this author's informal polling of non-union hiring hall construction workers has found that many workers prefer non-union shops to unionized shops because they do not perceive the difference in benefits to offset the costs in union dues.

44. For a recent case involving both a contingent construction supplier and "salting" by union workers, see *W.D.D.W. Commercial Systems & Investments, Inc.*, 335 N.L.R.B. No. 25 (2001).

See also Note, *Organizing Worth Its Salt: The Protected Status of Paid Union Organizers*, 108 HARV. L. REV. 1341 (1995) (general discussion of the practice of salting).

See also WEIL, *supra* note 39 (Case 6-1), for a discussion of how non-union construction contractors are making gains against union hiring halls in Massachusetts. In this group of skilled workers, for whom mobility has been a traditional feature, the ability to supply a large pool of skilled workers to construction contractors is a chief bargaining tool vis-à-vis non-union construction firms. However, the study found that the corner on skilled, readily-available construction workers had begun to erode, and thus non-union firms are increasingly able to compete with union workers. *Id.* at 139-40.

45. TWENTIETH CENTURY FOUNDATION, WHAT'S NEXT FOR ORGANIZED LABOR? 12-17 (Century Foundation Task Force on the Future of Unions ed., 1999); see also O'SULLIVAN & SHEFFRIN, *supra* note 25, at 387 (citing RICHARD B. FREEMAN & JAMES MEDOFF, WHAT DO UNIONS DO? (Basic Books 1985)).

Unions may provide benefits for employers as well, in that they may increase productivity by increasing both job satisfaction and communication between management and workers. See O'SULLIVAN & SHEFFRIN, *supra* note 25, at 388-89.

46. See, e.g., Joyce L. Kornbluh, Ph.D., *Historical Perspectives on Part-Time and Temporary Workers*, in FLEXIBLE WORKSTYLES: A LOOK AT CONTINGENT LABOR 14, 19-20 (WOMEN'S BUREAU, U.S. DEP'T OF LABOR, 1988 CONFERENCE SUMMARY).

contingent workers as replacement workers.<sup>47</sup> The type of relationship that exists between union and contingent workers depends upon the circumstances in which they encounter one another. In some cases, unions have fought hard against racial integration of the workforce, which could have had great implications where the lines between core and contingent workers included racial differences.<sup>48</sup> For example, there are allegations that unions have subverted equal employment placement by using minority contingent workers for the least attractive jobs, while retaining the union work for white union members.<sup>49</sup> In doing so, unions in the pre-*Sturgis* climate could be confident that such racially discriminatory placement practices would not breach any duty of fair representation to their members. A union would not have to consider the needs of the contingent workers, as the contingent workers could not accrete without joint employer consent.<sup>50</sup>

#### *D. User Employers*

User employers may use contingent workers simply to compensate some or all of their workforce at a lower rate than they would have to pay core workers.<sup>51</sup> Unionized users may hire contingent workers to circumvent the conditions that a collective bargaining agreement imposes with respect to its core workers.<sup>52</sup> A user may hire contingent workers so that it may have disparate pay arrangements within its workforce without hurting the morale of core

---

47. See PARKER, *supra* note 21, at 148.

48. See generally WILLIAM B. GOULD, BLACK WORKERS IN WHITE UNIONS 207-08 (1977); see also Stephen A. Plass, *Arbitrating, Waiving, and Deferring Title VII Claims*, 58 BROOK. L. REV. 779, 794-803 (1992) (reviewing the history of how unions overtly discriminated against African Americans and how U.S. labor laws have impeded amelioration of this discrimination); Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157, 165-73 (1982); DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW 589-665 (4th ed. 2000) (1980); MAX GREEN, EPITAPH FOR AMERICAN LABOR: HOW UNION LEADERS LOST TOUCH WITH AMERICA 10 (1996).

49. Interview with Albert Moore, Manager, Pathways to Construction project, East-West Gateway Coordinating Council, in St. Louis, Mo. (Dec. 27, 2001).

50. See *supra* note 5 and accompanying text.

51. Susan N. Houseman, *Why Employers Use Flexible Staffing Arrangements: Evidence from an Establishment Survey*, 47 IND. & LAB. REL. REV. 155 (Oct. 2001).

52. HOUSEMAN, *supra* note 11, at 155.

workers.<sup>53</sup>

As already noted, user employees also place contingent workers in the position of “buffers” between their core workers and the dynamics of the economy.<sup>54</sup> Employers also use contingent workers to drive down the bargaining power of their core work force, and to break organizing campaigns by replacing core workers with contingent workers.<sup>55</sup>

To minimize organizing capabilities, employers—both suppliers and users—isolate contingent workers and avoid extended work assignments.<sup>56</sup> Management-side literature corroborates this practice, advising employers on how to avoid their core workers and contingent workers from organizing into, or joining through accretion, the same bargaining unit.<sup>57</sup> These anti-organizing strategies

---

53. *Id.* at 156.

54. See NOLLEN & AXEL, *supra* note 18.

55. See PARKER, *supra* note 21.

56. *Id.* at 148.

57. In one such article, the author advises employers of traps involved in using contingent workers, and on circumnavigating protections for contingent workers. Brent Giddens, *Terminating the Temporary Employee: A Trap for the Unwary Employer*, 1997 ANDREWS EMP. LIT. REP. 21768 (Feb. 11, 1997). The user, Giddens begins, may wish to require the supplier to assume most of the supervisory and fiscal responsibility for the contingent workers they supply. *Id.*

Prescient of the *Sturgis* decision, Giddens goes on to advise that unionized employers and those users concerned about the possibility that contingent workers will be accreted into an existing bargaining unit, should minimize interaction between temporary employees and full-time employees. Further, employers should clearly alienate core workers from contingent workers by “delineating boundaries,” restricting access to company information, and restricting access to work sites. *Id.* at 31. Employers should pay contingent workers from a source other than the regular employee payroll. The employer should not interfere with a temporary employee’s opportunities for other employment that may arise. *Id.* at 31. In these ways, an employer can avoid a situation where contingent workers share the same community of interest, and thereby avoid the possibility of a core worker/contingent worker bargaining unit.

See also NOLLEN & AXEL, *supra* note 18, at 189 Figure 7.2: “How much control do you have over your contingent workers?,” where Nolen offers employers a checklist for how to avoid control over contingent workers, and thus liability as a joint employer:

1. *Do you control or have the right to control:*

Recruiting and screening policies and procedures?

Titles and job descriptions?

Training?

Assignment or supervision of work, shifts, hours of service, and additional projects?

Payment of compensation?

Benefits and leave policies?

appear to focus on tactics that further isolate contingent workers from core workers, such as the use of finite work assignments to prevent contingent workers from developing expectations of continued co-existence with a site's core workers.<sup>58</sup>

### III. THE *STURGIS* DECISION

#### *A. Background*

Two discrete cases comprised the *Sturgis* ruling. The first case involved a user engaged in light industrial manufacturing: M.B. Sturgis, Inc., of Maryland Heights, Missouri. Its employees, both core workers and contingent workers supplied by Interim, were engaged in the same low-skill, light industrial work.<sup>59</sup> The Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union Local 108 (Local 108) represented the core workers, and the contingent workers were not represented.

The other case in *Sturgis* involved Jeffboat Division, American

---

2. *Do you establish or have the right to establish:*

Pay rates?

Office policies and procedures?

Manner in which work is performed?

Promotions or transfers?

3. *Have you reserved the right to:*

Discipline?

Transfer?

Promote?

Discharge?

Request a replacement worker if you receive unsatisfactory service?

4. *Have you specified in the written agreement with the staffing firm that contingent workers supplied under the agreement are independent contractors?*

Though Giddens does not suggest it, one wonders whether this kind of advice will be a death knell to many contingent workers' hopes of finding a permanent job through contingent work. See Giddens, *supra*, at 32. On the other hand, Nolen and Axel actually recommend that employers offer contingent workers core jobs. NOLLEN & AXEL, *supra* note 18, at 139, 143-44. Hiring into the core has two advantages: the employer gets increased productivity (through greater morale) out of the contingent workers and retains the employer's training investment. *Id.*

58. See Giddens, *supra* note 57. See also Paul H. Derrick, *Unions Now Able to Organize Temporary Workers*, 12 S.C. LAW. 15, 17 (2001).

59. *Sturgis*, 331 N.L.R.B. at 1298-99.

Commercial Marine Service Company and TT&O Enterprises, Inc. (Jeffboat), a shipbuilding operation based in Indiana on the Ohio River.<sup>60</sup> Jeffboat had 600 production and maintenance employees. In addition, there were thirty first-class welders and steamfitters that a supplier agency, TT&O, sent to work at Jeffboat. The Teamsters represented the core workers, and the TT&O contingent workers were not represented.<sup>61</sup>

At first glance, it may seem surprising that the employer/union pairs in the two cases comprising *Sturgis* should be diametrically opposed with regard to their positions on accretion of contingent workers into the bargaining unit. M.B. Sturgis, Inc. fought the Local 108, urging a unit comprised of Sturgis' core employees alongside the contingent workers.<sup>62</sup> Conversely, Jeffboat Division opposed the Teamsters' call for accretion of the core and contingent forces.<sup>63</sup> Jeffboat Division wanted these workers to form separate bargaining units.<sup>64</sup> Hence, both the employers and the unions were respectively opposed on this issue. Reflection upon the reasons why the two sets of employers and unions in these cases were at diametrical odds offers insight into the complexity of the effect of *Sturgis* on workers' rights.

## *B. Sturgis and Organizing Principles*

### 1. Joint Employer versus Multiemployer

The National Labor Relations Act (NLRA) fails to provide an exact definition of "employee,"<sup>65</sup> rather, the NLRB usually examines

---

60. *Id.* at 1300.

61. *Id.* at 1300-01.

62. *Id.* at 1300.

63. *Id.*

64. *Id.*

65. National Labor Relations Act § 2(3), 29 U.S.C. § 159 (1994):

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . . and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an

the circumstances to determine whether an operation is an employer.<sup>66</sup> More than one entity may employ any particular worker. If the NLRB determines that an operation is an employer, it must resolve whether the employer is a joint employer or a multiemployer. The NLRB considers employers joint if they “share or co-determine those matters governing essential terms and conditions of employment”<sup>67</sup>—the “right of control” test.<sup>68</sup> In *Sturgis*, the NLRB began by deciding that the users, M.B. Sturgis and Jeffboat, were joint employers with its suppliers Interim and TT&O, respectively.<sup>69</sup> The NLRB based its determination in *Sturgis* on whether the employers “meaningfully affect[ed] matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.”<sup>70</sup>

In general, a union and an employer must agree on the bargaining unit appropriate to any given workplace. In the event that they are unable to agree, the NLRB has the power under § 9 of the NLRA<sup>71</sup> to

---

independent contractor, or any individual employed as a supervisor . . . or by any other person who is not an employer as herein defined.

66. ARCHIBALD COX ET AL., LABOR LAW 98 (13th ed. 2001).

67. NLRB v. Browning-Ferris Industries, 691 F.2d 1117, 1123 (3d Cir. 1982).

68. For an excellent discussion of the right of control test, the alternative economic realities test, and a hybrid of the two, see Rahebi, *supra* note 11, at 1115-21.

In *Laerco Transp. & Warehouse*, the Board held that “[t]o establish joint employer status, there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.” 269 N.L.R.B. 324 (1984) (cited in Rahebi, *supra* note 11, at 1116).

Rahebi goes on to analyze what factors the courts have considered in determining joint employer status. *Id.* These factors include whether the user retains authority to supervise the workers daily (citing NLRB v. Western Temp. Servs., Inc., 821 F.2d 1258, 1266 (7th Cir. 1987); Browning-Ferris Indus., 691 F.2d at 1122; TLI, Inc., 271 N.L.R.B. 798, 798 (1984); W.W. Grainger, Inc. v. NLRB, 860 F.2d 244, 247 (7th Cir. 1988); Clinton’s Ditch Coop. Co. v. NLRB, 778 F.2d 132, 138-39 (2d Cir. 1985)); hire and fire (citing *W.W. Grainger*, 860 F.2d at 247; *Clinton’s Ditch Coop.*, 778 F.2d at 138; *Ref-Chem Co. v. NLRB*, 418 F.2d 127, 129 (5th Cir. 1969)); discipline (citing *Clinton’s Ditch Coop. Co.*, 778 F.2d at 138); set work rules and conditions (citing *W.W. Grainger*, 860 F.2d at 247); give instructions and assignments (citing *G. Heileman Brewing Co. v. NLRB*, 879 F.2d 1526, 1531 (7th Cir. 1989)); refuse referrals (citing *W.W. Grainger*, 860 F.2d at 247); and determine compensation (citing *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)).

69. 331 N.L.R.B. 1298.

70. *Id.* at 1301 (citing TLI, Inc., 271 N.L.R.B. 798 (1984)). The Board’s analysis corresponded almost wholly with the “right of control” test described by Rahebi. See Rahebi, *supra* note 11, at 1116-18.

71. NLRA § 159(b).

determine an appropriate unit.<sup>72</sup> Significantly, none of the parties involved in the *Sturgis* cases could agree on the appropriate unit.<sup>73</sup>

In *Sturgis*, the NLRB found that a user and supplier did not have to consent in order for the NLRB to form a bargaining unit made up of contingent and core workers because they were, in fact, joint employers. The arrangement did not constitute a multiemployer situation.<sup>74</sup> This conclusion was based on the NLRB's finding that employees of a single employer made an appropriate bargaining unit where the workers shared a community of interest.<sup>75</sup> In doing so, the NLRB overruled its decision in *Lee Hospital*<sup>76</sup> and returned to its prior stance under *Greenhoot*.<sup>77</sup> This odd situation continues to exist, however, under *Greenhoot*; thus, where there are only two workers involved, their consent is not necessary to combine core and contingent workers. Consent is necessary, however, if there are more than two user agencies involved.<sup>78</sup>

## 2. Community of Interest

In determining the proper bargaining unit for workers in *Sturgis*, the NLRB relied on the "community of interest."<sup>79</sup> A community of interest is determined by the similarity of job functions, earnings, schedules, and skills requirements between the groups of workers.<sup>80</sup>

---

72. Under the NLRA, the NLRB has broad discretion to pick an appropriate unit, though the statute does not mandate the selection of any particular one. *See* NLRB v. Target, 547 F.2d 421 (8th Cir. 1977). So long as the Board provides support for its determination and does not act "arbitrarily or capriciously," there is no judicial review of NLRB bargaining unit determinations. *Id.* at 423 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951); *Packard Motor Car. Co. v. NLRB*, 330 U.S. 485, 491-92 (1947); *NLRB v. Hoerner-Waldorf Corp.*, 525 F.2d 805 (8th Cir. 1975); *Stephens Produce Co. v. NLRB*, 515 F.2d 1373, 1378 (8th Cir. 1975)).

See also *Leedom v. Kyne*, 358 U.S. 184 (1958), where the Supreme Court held that the NLRB had overstepped its bounds and contravened § 9 of the NLRA when it included professional employees in a unit with non-professional employees, without giving the former opportunity to vote for inclusion.

73. *Sturgis*, 331 N.L.R.B. at 1302.

74. *Id.*

75. See *infra* Part III for a discussion of community of interest doctrine.

76. 300 N.L.R.B. 947.

77. See *Greenhoot, Inc.*, 205 N.L.R.B. 250 (1973); *Sturgis*, 331 N.L.R.B. at 1304-08.

78. See *Schiffer*, *supra* note 5.

79. *CARRELL & HEAVRIN*, *supra* note 3, at 120.

80. *Sturgis*, 331 N.L.R.B. at 1305 (citing *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134,

As a result of *Sturgis*, the NLRB now views contingent workers who work alongside core workers in a joint-employer setting in the same way that it views two groups of core workers for the purpose of determining whether a community of interest exists.

Accretion of contingent workers into an existing unit of core workers can potentially cause a host of problems.<sup>81</sup> In the first place, contingent workers do not receive the opportunity to vote on representation when they join a bargaining unit via accretion.<sup>82</sup> The NLRB agreed with employer M.B. Sturgis, Inc., that the community of interest doctrine should be the sole determiner of the appropriate bargaining unit in a joint-employer situation.<sup>83</sup> With community of interest as the crucial criterion of adjudging the appropriateness of a unit, the contingent workers' lack of voting privileges upon accretion should be an important factor in adjudging whether a community of interest actually exists between core and contingent workers.

Despite the supposition of commonality inherent in the "community of interest" doctrine, if contingent workers are a minority within a bargaining unit, their interests may suffer if the interests of core workers and contingent workers are not the same, or if the bargaining representative favors core workers.<sup>84</sup>

Experts such as the Communications Workers of America and Catherine Ruckleshaus, of the Employment Law Center, urge for a liberal construction of "community of interest" so as to allow as many contingent workers as possible to join bargaining units with core workers.<sup>85</sup> Ruckleshaus argues that the potential benefits

---

137 (1962); *Swift & Co.*, 129 N.L.R.B. 1391 (1961); *Continental Baking Co.*, 99 N.L.R.B. 777, 782-783 (1952)).

81. The accretion doctrine informs the NLRB's practice of adding new groups of workers to an existing bargaining unit. *CARRELL & HEAVRIN*, *supra* note 3, at 122. According to the established doctrine, workers may be added to a unit if they satisfy a community of interest test, which takes into account bargaining history, interchange of employees, geographic proximity, common supervision, and (though not in the case of *M.B. Sturgis*) the union's desires. *Id.*

82. Steven G. Rush, *New Growth on an Old Vine: Labor-Management Relations and the NLRA*, *BENCH & B. OF MINN.* 29, 31 (Sept. 2001).

83. *Sturgis*, 331 N.L.R.B. at 1305.

84. Rush, *supra* note 82. For instance, where a core unit has a "buffer zone" of contingent workers, a severe divergence of interests would likely exist. The more power a union has in a combined bargaining unit, the less secure a bargaining agreement may be for contingent workers.

85. *See* Ruckleshaus, *supra* note 33.

overcome any disparity of interests, in that accretion is the only way to stop the extensive out-sourcing and subcontracting that employers currently use to undermine core workers' security.<sup>86</sup> Organizing across job sectors, regardless of contingent or core status, these experts argue, is necessary to keep decent jobs.<sup>87</sup>

Yet at the M.B. Sturgis, Inc. facility, Local 108 contended that the accretion of contingent workers into the core workers unit made both groups more difficult to organize.<sup>88</sup> Though contingent workers and core workers at a given workplace may have enough in common to pass the community of interest litmus test, and may thus be combined into one bargaining unit, the differences that do exist between the two groups may put them directly at odds with one another. For instance, if the group of contingent workers is made up of a majority of workers for whom job permanency is not a priority, their inclusion in a combined unit may mean that job security would suffer for all workers in the unit after subsequent bargaining. Thus, in some workplaces, the accretion of a flood of undercompensated, underutilized workers may dilute the bargaining unit's power to bargain. For instance, during this time of economic recession, market volatility, with the increased popularity of using contingent workers, the use of a more liberal reading of community of interest core/contingent disparities may cause a resurgence of two-tiered compensation structures.<sup>89</sup>

---

86. *Id.*

87. *Id.*

88. *Sturgis*, 331 N.L.R.B. at 1300.

89. A two-tiered structure occurs when new members, in this case contingent workers, join a bargaining unit and receive less compensation or generally fewer bargaining concessions on issues such as job security, hours, or benefits than members hired previously. In the case of contingent workers, job insecurity is already a built-in disparity that may resemble such a tiered system.

The duty of fair representation, which is the doctrine whereby minorities (be they numerical, racial, or gender-based) are entitled to representation that is equally zealous to that of the majority, should preclude this from happening. *See Note, Two-Tier Wage Discrimination and the Duty of Fair Representation*, 98 HARV. L. REV. 631 (1985) [hereinafter *Two-Tier Wage Discrimination*]. However, the possibility always exists that an undetected, *de facto* violation could occur because there is no systematic evaluation of whether a union has met its duty. *Id.* at 631-32.

Two-tier compensation structures became extremely effective tools of the union-busting campaigns in the 1980s. The Reagan and Bush administrations were hostile to labor unions and amorous of industry deregulation. Further, a difficult economy and an atmosphere of corporate

A broad construction of community of interest may run counter to the bargaining history between an employer and employee.<sup>90</sup> Considering that before *Sturgis*, core and contingent workers could only form a joint bargaining unit with both employers' consent, few bargaining units created post-*Sturgis* will meet the criterion of a shared bargaining history. This history is bound to define and perhaps reflect the expectations, and possible preferences, of the workers.<sup>91</sup>

#### IV. EFFECTS OF *STURGIS* ON THE LABOR MARKET

##### *A. What Sturgis May Do for the Majority of Contingent Workers*

The NLRB's criteria for bargaining unit inclusion remains a great hurdle for most contingent workers. The community of interest principle assumes that the contingent and core workers have similar duties, shared supervision, and that the contingent workers remain at the user's worksite to share the community of interest. This

---

raiding made the climate quite ripe for such union-busting techniques. *See generally* Charles G. Moerdler, *Deregulation—The United States Experience*, 6 HOFSTRA LAB. L.J. 177 (1989). The effects of the introduction of two-tier compensation systems are still being felt. For example, until the 1980s supermarkets generally paid personnel such as checkers a decent, living wage. When bargaining power decreased for grocers' unions in the 1980s, they were forced to accept two-tier compensation structures as a concession. Before long, management fired the higher-tiered first-hired checkers and replaced them with the lower paid new hires. Since that time, checkers are generally paid wages close to the minimum wage and often do not have full-time status. *See generally* Table 1: "CPS Grocery Store Employees and Operating Measures: Sample Means and Standard Deviations, 1984 and 1994," in John W. Budd & Brian P. McCall, *The Grocery Stores Wage Distribution: A Semi-Parametric Analysis of the Role of Retailing and Labor Market Institutions*, 54 IND. & LAB. REL. REV. 484, 487 (2001) (comparing grocery-store employees between 1984 and 1994, showing a decrease in real wages and a dramatic increase in use of part-time employees (from 32.24% in 1984 to 55.29% in 1994)).

Though two-tier compensation structures became less popular in the 1990s, employers continue to bargain for two-tier bargaining units and such units remain a source of contention between management and labor. *See Two-Tier Pay Structures Still Appeal to Employers*, 154 LAB. REL. REP. 289, 309 (Mar. 23, 1997); *see also FMCS Expanding Mediation Activities*, 154 LAB. REL. REP. 33, 61 (Jan. 20, 1997) (attributing the decline in union membership and collective bargaining to, *inter alia*, two-tier compensation structures); *USW Identifies Future Key Bargaining Elements*, 164 LAB. REL. REP. 513, 539 (2000) (indicating the importance of opposing two-tier compensation agreements to the United Steelworkers' wage security).

90. *See* COX, *supra* note 36, at 98.

91. The employment law firm of Vogel, Weir, Hunke & McCormick advises users to argue that contingent workers should not accrete to a unit because of this lack of shared bargaining history. *Temporary Workers May Now Join Unions with Regular Employees*, N.D. EMP. L. LETTER (BNA), Oct. 2000, at 6.

requirement provides almost no benefit for the contingent worker who is not assigned for a long period, or whose role the supplier or user has carefully prescribed to avoid accretion.<sup>92</sup>

For the contingent worker who is eligible for accretion, the best candidate for success under the current system would less resemble the typical contingent worker, and instead, more like the core worker. This worker would join the ranks of the core workers at some point, or would move along to another job per her desire or need. For the contingent worker who joins the core, *Sturgis* would have only short-term significance. For the latter worker, and for all other contingent workers, the hiring hall or agency-specific bargaining unit is likely the best chance for increasing bargaining power. Hence, *Sturgis* has little impact here, either.

### *B. Unions*

Labor organizations such as the AFL-CIO have hailed the *Sturgis* decision and are now actively organizing contingent workers.<sup>93</sup> For unions, the detriment of having larger, more diverse bargaining units to organize employees such as at M.B. *Sturgis* may be offset by a careful reading of community of interest, and by more sophisticated organizing strategy.<sup>94</sup> The general organizing market may benefit when there is a larger group of potential workers and when there are more bargaining unit configurations available for organizing.

Yet some criticize the expansion of collective bargaining rights to contingent workers as being out of touch with the needs of contingent workers.<sup>95</sup> The job-specific bargaining unit may not suit contingent

---

92. Schiffer points out that, for the contingent worker considered “seasonal” or “casual,” voting membership in a unit remains elusive unless the worker has “a reasonable expectation of continued employment and work[s] sufficient hours to have a substantial and continuing interest in the working conditions of regular employees.” Schiffer, *supra* note 5, at 179 (citing Caribbean Communications Corp., 309 N.L.R.B. 712 (1992); New World Communications, 333 N.L.R.B. No. 83 (1999)).

93. John Sweeney, President of the AFL-CIO called *Sturgis* an “important step” in organizing contingent workers. Derrick, *supra* note 58, at 17.

94. See Ruckelshaus, *supra* note 33.

95. For example, see Stone, *supra* note 16, at 622-24, for recommendations on radical policy changes such as geographically-based “citizen’s unions” rather than unions made up of job-specific, rather than worker-based, bargaining units. Howard Wial, of the U.S. Department of Labor, offers a similar model of geographic and loosely occupational “works councils” for

workers, because contingent workers must switch jobs and follow the market for their services—unlike the core employee whose situation has traditionally been more static.<sup>96</sup> The institution of collective bargaining as we know it may need drastic changes to accommodate the needs of contingent workers.<sup>97</sup> With increasing flexibility built into the labor market, union organizing will have to strategize around this new focus and depend less upon its traditional core-worker organizing paradigm. *Sturgis* does little to inform this process, but merely fashions the contingent worker as a potential participant in the core-worker paradigm.

### *C. Efforts of Employers to Circumvent Organizing*

In considering union membership for contingent workers, a major concern is whether the contingent worker is too vulnerable, or too detached from her fellow workers to maximize her potential bargaining power when she is included in a bargaining unit with core workers. It is a violation of §§ 7 and 8(a)(5) of the NLRA for a user or supplier employer to deliberately interfere with organizing behavior through hiring and scheduling practices.<sup>98</sup> However, the question remains whether employers have too much power available for contravening any bargaining potential resulting from *Sturgis*.

Local 108's vehement opposition to the outcome of the *Sturgis* decision attests to the complexity of understanding *Sturgis*' impact; it is still unclear whether accretion will mean more difficulties for employers or for unions. In any given bargaining situation, employers are likely to use contingent workers as pawns in their struggle for bargaining power.

---

union organizing. Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671 (1993). See also WEIL, *supra* note 39.

For more optimistic accounts of worker/employer relations, see Neal Herrick, *Joint Management & Employee Participation: Labor & Management at the Crossroads* (1990); William N. Cooke, *Labor-Management Cooperation* (Upjohn Inst. for Empl. Res. 1990).

96. Stone, *supra* note 16, at 622-24.

97. See, e.g., JAMES R. GREEN, *THE WORLD OF THE WORKER, LABOR IN TWENTIETH-CENTURY AMERICA* 210-48 (Illini Books 1998) (1980); see also WEIL, *supra* note 39.

98. NLRA, §§ 7, 8(a)(5), 29 U.S.C. § 159 (1994).

The *Sturgis* decision may put an end to some employers' practice of using contingent workers to avoid organizing by core workers.<sup>99</sup> *Sturgis* may not have such an effect, however, if employers maximize their anti-organizing strategic potential. The post-*Sturgis* climate may serve as an incubator for employer-side ideas for strategic personnel policy designed to thwart contingent worker organization. If implemented to its fullest extent, *Sturgis* may have the ironic effect of entrenching further insecurity and alienation for contingent workers by compelling suppliers and users to construct contingent worker arrangements even more carefully. These increased employer efforts may thereby deflate any community of interest or worker expectations. The resultant vulnerability of contingent workers could entice employers to replace more of their core positions with contingent ones.

Further, accretion of contingent workers can weaken organizing efforts.<sup>100</sup> Local 108 reasoned that the contingency workers supplied

---

99. See McGolrick, *supra* note 10, at AA1-2 (quoting Linda Foley, President of the Newspaper Guild, affiliated with the Communications Workers of America, saying that *Sturgis* should "put the brakes" on employers using temps to break organizing).

100. Telephone interview with John Watson, Organizing Director, Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union Local 108 (Sept. 15, 2001).

There may be any number of explanations for this blurring of employer/union positions between the two cases. Comparing the factors that stand out in each case offers some, though not conclusive, explanation. At M.B. *Sturgis*, the factors that stand out are the proportion of core members to contingent workers, the fact that both contingent and core jobs were unskilled, and that the union characterized the contingent workers as bad workers.

It could be that the contingent workers from Interim had made clear that they had no interest in joining a union. This could be because the contingent workers did not see any potential benefit of paying union dues when they had no reasonable expectation of permanent placement. Perhaps Jeffrey Joerres, President and CEO of Manpower, Inc. (one of the largest supplier agencies in the United States and the world) was correct when he claimed that *Sturgis* would have little effect on contingent workers because over ninety percent of contingent workers work only about 300 hours per year (quoted in David Kelly, *Temps Granted Access to Unions*, HR WIRE (Sept. 11, 2000)).

In this case, it may be that the supply of unskilled workers was quite high and the competition for core jobs fierce. Mistrust likely arose when contingent workers competed for core jobs.

Racism may have been a factor as well. The St. Louis area is one of the most segregated areas of the country. Moreover, the nationwide unemployment rate for African Americans is over twice the average for Whites. Bureau of Labor Statistics, Employment Situation Summary, Oct. 2002 (Nov. 1, 2002), available at <http://stats.bls.gov/news.release/empsit.nr0.htm>. It may be inferred that African American workers would be less likely hired for core positions because of racism, and hence they would be available for contingent work. The core workers at M.B.

by Interim Staffing were difficult to organize.<sup>101</sup> This stemmed from the organizers' perceptions of the contingent workers themselves,<sup>102</sup> and from Interim's practice of keeping workers on a particular job for just a few days at a time.<sup>103</sup> This difficulty of organization is the reason why employers, such as M.B. Sturgis, Inc., may sometimes prefer a liberal construction of "community of interest."<sup>104</sup>

Nevertheless, others argue that the *Sturgis* decision is not likely to benefit employers in the long run. Employers who believe otherwise may be "at best, misguided," as labor experts Kenneth Dolin and Scott Rozmus contend.<sup>105</sup> Prior to *Sturgis*, employers who had a good relationship with supplier agencies may have been able to obtain these supplier agencies' consent, if they found such an arrangement would be in their best interests in any given situation. Such a situation was quite clear at the M.B. Sturgis facility. The ratio of workers equaled roughly three contingent workers for every seven core workers.<sup>106</sup> Both groups of workers were working low-skill jobs and were therefore presumably fungible, thus making core workers less secure in the presence of contingent workers.<sup>107</sup> With such a high ratio of contingent to core workers, with similarly fungible groups, the unite-and-conquer strategy would likely pay off for employers.

*Sturgis* will have a greater effect for users such as Jeffboat, who

---

Sturgis may have been mainly white, and the contingent workers mainly African American. Perhaps racial mistrust made the two groups of workers wary of joining the other's bargaining unit. That is, either the whites were racist and exclusionary, or the African Americans were. It is commonly perceived in cities such as St. Louis, where there is a great racial divide, that workers often ignore a commonality of class interest in favor of racial biases.

At Jeffboat, the factors that stand out are the proportion of core to contingent workers (600:30), and that both core and contingent workers were doing skilled work. *Sturgis*, 331 N.L.R.B. at 1300. The Teamsters representing the core workers may have recognized that both groups had a commonality of skills, and were not threatened by the low ratio of core workers to contingent workers.

101. *Id.*

102. The organizers perceived the Interim contingent workers to be uncommitted to working a full-time, permanent position. *Id.* Whether or not this perception was correct, it is telling of some of the hurdles, real or perceived, that unions and contingent workers must overcome in order for both to maximize the potential of the *Sturgis* decision.

103. *Id.* at 1299-1300.

104. *Id.* at 1298.

105. Dolin & Rozmus, *supra* note 7.

106. *Sturgis*, 331 N.L.R.B. at 1299.

107. Watson, *supra* note 100.

do not want to see a bargaining unit combined of two groups of workers artificially segregated by tenure status alone. The similarity of skills, job assignments, and other “community of interest” indicators gave these workers a common interest in organizing as a unified unit. *Sturgis* removed a powerful tool that users and suppliers could previously use at their discretion to prevent these workers from recognizing their common interests; as such, the employers’ mutual consent was no longer relevant to the equation.<sup>108</sup>

For such employers, hiring more contingent workers may seem risky.<sup>109</sup> Yet it is difficult to imagine that most users will overreact to *Sturgis* by eliminating their use of contingent workers when anti-organizing precautions such as those discussed above are easily within the grasp of most employers.

Those users and suppliers who do find themselves as joint employers and who must bargain with a combined core/contingent unit will have many difficulties to overcome. Many of these will stem from the fact that the supplier and user may not have precise ideas about their roles, or how to circumvent their conflicts of interest.<sup>110</sup>

---

108. See Dolin & Rozmus, *supra* note 7.

109. Less flexibility and even greater bargaining power would likely mean that users would reap fewer benefits in using contingent workers. This could present a paradox, as simple economics dictate that as contingent workers become less useful for users, the less they will use or pay them. See O’SULLIVAN & SHEFFRIN, *supra* note 25, at 277-78. David Kelly cites two employment-side sources who decry *Sturgis* as having put a chilling effect on the use of contingent workers. See Kelly, *supra* note 100. One labor lawyer characterized hiring contingent workers to bringing in a “Trojan Horse” from which undercompensated union activists may emerge. *Id.* The Employment Policy Foundation, a pro-employer think tank, says that *Sturgis* could lead the United States down a slippery slope where losses in employment, productivity, and economic growth could result from a new hesitance to hire contingent workers. *Id.*

110. Steven Rush notes:

The relationship of the user and supplier employers at the bargaining table could be problematic. There could be ambiguity over the relative responsibility of each employer as to certain terms and conditions of employment of the temporary workers. The user and supplier employers’ interests may actually conflict, complicating the process of reaching agreement with the union or in conducting potential strike planning.

Rush, *supra* note 82, at 31.

#### *D. Core Workers and Contingent Workers*

The age-old struggle between the core and the peripheral, the greater-skilled and the lesser-skilled, will continue as always in the post-*Sturgis* climate. Contingent workers will likely remain marginalized in situations where their job duties and tenures keep them out of contact with core workers. Core workers, as a result, will not likely see their common interest with workers whose vulnerability may be a frightening reminder of the precariousness of their own situations. Where ethnic, racial, or perceived class boundaries divide the groups, the possibility of accretion will not likely benefit contingent workers. In these cases, as at M.B. Sturgis, Inc., employers will continue to urge accretion in order to unite and conquer by manipulating the interests of core workers against contingent workers. *Sturgis*, however, does afford one more vehicle for contingent and core workers to see their mutual interests. This recognition may be crucial for gaining future bargaining rights for all workers, whether core or contingent.

#### V. CONCLUSION

The advantages that *Sturgis* presents in increased organizing may outweigh the potential conflicts in organizing joint-employer units of core and contingent workers. The net sum of benefits for contingent workers due to an increasingly unionized labor market, and specifically, unionized job assignments, may outweigh the concern that core workers' interests will overwhelm contingent workers' interests within the same bargaining units.

Employers will continue to need flexibility as the economy responds to global economic demands. Our society will have to address this need by considering how to secure adequate employment for its citizens. Labor policy or organizing strategy may inform how this takes place. In the grand scheme of things, *Sturgis* is a timid step in the direction of empowering contingent workers, whose role embodies the risks inherent in flexibility.

Strategies other than those that combine core and contingent workers would better benefit the majority of contingent workers. A worker-based, occupational model such as the hiring hall model,

agency-specific model,<sup>111</sup> or perhaps a geographic, occupational union<sup>112</sup> appear the most conducive to securing the benefits of union membership for these workers who do not fit neatly into the established organizing schemes.

The question of whether *Sturgis* could be overturned by the current Republican ascendance seems less pressing in the final analysis. The future of *Sturgis* and its progeny will depend upon whom the Bush appointees to the NLRB think the decision has most benefited. It seems likely that NLRB decisions in the near future will maximize *Sturgis*' potential in favor of management.

---

111. The success of this model would depend, of course, on contingent workers' ability to organize per agency-specific bargaining units in enough numbers to offset the competitive force of non-union agencies in the same markets.

112. See Wial, *supra* note 95. A geographic "citizens'" union such as Stone proposes may also offer the potential for allowing contingent workers to organize, but this model does not account for the high degree of mobility within a flexible workforce. Additionally, it mentions nothing of a unifying principle of common interest such as shared occupation that would be integral to a meaningful bargaining agenda.