Labor Law BULLETIN
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To: Human Resource Practices Committee
Open Shop Committee
Union Contractors Committee
Chapter Executives, Branch Managers, and Labor Relations Directors

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Subject: **NLRB Decides Temps Can be Organized with Regular Employees**

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BOTTOM LINE

The NLRB has made it easier for unions to organize temporary workers by allowing

INTRODUCTION

The National Labor Relations Board (NLRB) has issued a long-awaited decision in two consolidated cases concerning workers supplied by a personnel staffing firm (a "supplier" employer). (See Labor Law Bulletin No. 1-97.) The cases address whether such workers can be combined with the "user" employer's own employees in a single bargaining unit without both employers' consent. The Board held that they can, thereby making it easier for unions to organize supplied employees.

FACTS

One of the cases involves a shipbuilder called Jeffboat. Jeffboat employs about 600 production and maintenance employees under a collective bargaining agreement with Teamsters Local 89. Jeffboat also contracts with TT&O Enterprises, a temporary staffing firm, to supply it with about 30 first-class welders and steamfitters. The dispute arose when Local 89 sought to include the TT&O-supplied employees in the existing bargaining unit of Jeffboat employees.

The other case involves M.B. Sturgis, a manufacturer and seller of flexible gas hoses. It employs about 35 regular employees and 10-15 employees supplied by Interim, a temporary staffing company. The regular employees and temporary employees work side by side and perform the same work. Local 108 of the Textile Processors and Service Trades Union filed a petition with the Board seeking to represent "all employees" at the plant. A dispute arose as to whether the temporary employees should be included in the election unit.

DECISION

Joint Employer Status

The Board first determined whether the user and supplier companies were joint employers of the supplied employees. The Board will find joint employer status when two (or more) employers codetermine essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. Both employers must "meaningfully affect" such employee relations matters. The Board concluded that Jeffboat and TT&O are joint employers because Jeffboat supervisors assign, direct, and oversee the daily work of the TT&O employees, have authority to discipline them, and monitor the time they spend on different Jeffboat assignments. Joint employer status was undisputed in the Sturgis case.

Employer Consent Requirement

Next, the Board reviewed precedent to determine whether employer consent is required in the type of joint employer situations at hand. In particular, the Board reconsidered its 1973 *Greenhoot* and its 1990 *Lee Hospital* decisions. In *Greenhoot*, the Board held that a union seeking a bargaining unit combining the employees supplied by a single supplier to two or more separate user employers for the purpose of bargaining

conditions. Since these factors were not considered in the prior proceedings, the Board remanded the cases to the NLRB regional directors to apply the community-of-interest test to the Sturgis and Jeffboat circumstances.

SIGNIFICANCE

The Board's decision could have far-reaching implications for contractors who hire temporary workers through a temporary agency, lease permanent employees, or otherwise utilize the services of a personnel staffing firm.

Organizing

"It certainly seems [the board decision] will be an aid to organizing….There's a lot of potential for organizing," said Laurence Cohen, general counsel of the AFL-CIO's Building and Construction Trades Department. (Quoted in BNA's Human Resources Report, September 11, 2000, p. 957.) Indeed, the ruling seems to come at an opportune time for the BCTD, which in April announced a multi-craft campaign targeting temporary employment agencies and the contractors that use them.

In the construction industry, however, union employers are less likely to be affected. This is because most union contractors (1) rely primarily or exclusively on union hiring halls rather than outside staffing firms for their labor supply (and may have contractually agreed to do so), and (2) have special "8(f)" relationships with unions allowed only for employers engaged primarily in construction. Section 8(f) of the National Labor Relations Act permits only employers "engaged primarily in the building and construction industry" to enter into labor agreements with unions that have not established majority support. Since personnel staffing firms probably do not qualify as employers engaged primarily in the building and construction industry, unions may be unable to simply accrete supplied employees into a bargaining unit of a contractor with an 8(f) agreement.

Collective Bargaining

For those contractors who may be affected, the effect on collective bargaining could be profound. The Board envisions tripartite bargaining among both employers and the union. Each employer "will be obligated to bargain only over the employees with whom it has an employment relationship and only to the extent it controls or affects their terms and conditions of employment." The user and supplier, as joint employers, will jointly bargain with the union over the jointly employed employees, and the user employer will bargain alone with the union over the solely employed employees.

However, as Member Brame points out, the employers have conflicting interests. The employers here are not merely joint employers; they also have a buyer-seller, supplier-customer relationship. That relationship can give rise to demands and conflicts that do not directly involve but can affect the collective bargaining arena. Furthermore, the two employers are engaged in completely different lines of business and will not likely understand or fully appreciate the needs and interests of the other in bargaining. In addition, the user employer's dual role – as both the sole employer of its own employees and the joint employer of the supplied employees – could upset the balance between joint employers that is necessary for effective bargaining over their jointly employed employees. The problems become exacerbated in situations where a user employer uses more than one supplier.

The two sets of employees also have conflicting interests. They will probably be receiving different benefits and be subject to different terms and conditions from one another when bargaining begins. Will the union might make concessions favoring the majority of the majority employees (the user's solely-employed employees) at the expense of the minority (the jointly-employed supplied employees)? How will seniority be determined? At the very least, the ruling could severely complicate bargaining and leaves many questions unanswered.

Secondary Activity

The ruling could also undermine statutory protections against secondary activity (i.e., provisions that protect employers from becoming enmeshed in disputes between a union and another employer). As Member Brame explained, the model adopted by the majority could "unnecessarily complicate the identification of the primary employer in

disputes by creating the mistaken impression that a supplier employer such as a temporary agency is a primary employer in controversies between the user employer and

In addition, open shop contractors who find themselves facing union organizing activity are cautioned to consult legal counsel before canceling any contracts with outside staffing firms. Although the agreement may allow the contractor to cancel at will, such an action could subject the contractor to an unfair labor practice charge if taken during the course of an organizing drive.

Union contractors and their bargaining agents are cautioned once again to be wary of union bargaining proposals with language indicating that the union has established that it is the representative of a majority of the contractor's employees or referencing § 9(a). Such language has been deemed by the Board and some courts as proof of a 9(a) relationship. In addition to involving greater collective bargaining duties than 8(f) relationships, 9(a) relationships might render the contractor more vulnerable to accretion petitions.