COLLECTIVE BARGAINING UNDER THE MODEL OF M.B. STURGIS, INC.: INCREASING LEGAL PROTECTIONS FOR THE GROWING CONTINGENT WORKFORCE

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INTRODUCTION

When the National Labor Relations Board (hereinafter “NLRB” or “Board”) decided *M.B. Sturgis, Inc.* in August 2000, it issued a long-awaited, controversial opinion that has the potential to transform the face of temporary employment in the United States. In an economy where employees have been steadily losing union representation as companies increasingly rely on temporary workers and other contingent employment arrangements, the Board’s pronouncement in *Sturgis* has opened a legal avenue for previously-unrepresented employees to bargain with their employers. Throughout most of the 1990s, temporary employees needed the consent of both their temp agency and user employer in order to bargain collectively alongside permanent employees. *Sturgis* returned the Board to its pre-1990 precedent by removing the joint-employer consent barrier that has kept nearly every temporary employee from collective

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2. Four years passed between the oral arguments for *Sturgis* and the issuing of the decision. See id. at *7-8.

3. Id. at *32-33.

4. Although the Board did not historically require joint employer consent before
bargaining in the last decade. As a result of this decision, temps may now be part of their user employer's union as long they share a community of interest with the permanent employees. In the aftermath of Sturgis it should become easier for temps to participate in collective bargaining and possibly secure wages and benefits that are equal to those of permanent employees.

Although Sturgis deals specifically with temporary employees working for joint employers, temporary work arrangements are part of a growing phenomenon known as "contingent work," a practice which has eroded the rights and working conditions of many employees in recent decades. Contingent employees, including temporary workers, are not generally afforded the full protection of labor and employment laws, nor do they share equality of wages and benefits with the permanent employees alongside whom they work. In addition, the majority of these employees would actually prefer permanent employment but are unable to attain it. Sturgis provides a means of legal protection to one segment of this workforce by making it easier for temporary employees to be included in unions.

Sturgis, however, cannot be the end of the road. First, it is not yet entirely clear that NLRB will apply the decision to achieve the fullest legal protection for temporary workers, as evidenced by the Board's application of Sturgis in at least one recent opinion. Second, a huge segment of the contingent workforce will still not get the benefit of Sturgis's legal protections. Although Sturgis helps to protect temporary employees

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7. See Kathleen Christensen, Countervailing Human Resource Trends in Family-Sensitive Firms, in CONTINGENT WORK 103, 121 (Kathleen Baker & Kathleen Christensen eds., 1998).

8. See Kathleen Christensen, Countervailing Human Resource Trends in Family-Sensitive Firms, in CONTINGENT WORK 103, 121 (Kathleen Baker & Kathleen Christensen eds., 1998).


working for joint employers, they are just one class of contingent employees. Many other contingent employment relationships exist that need legal protection but do not fit the Sturgis model. Furthermore, even employment relationships that do fit the Sturgis model will not always fall under NLRB jurisdiction. With unions representing less than fifteen percent of the present workforce,\(^\text{11}\) the likelihood that temps will work at unionized workplaces is low. Thus, inclusion of temporary workers in the collective bargaining units can only be one step toward achieving full legal protection for this growing segment of the working population. Much more is needed in the form of legislation and policy set forth by other government agencies, besides just the NLRB.

Thus, Part I of this Comment exposes the contingent workforce’s demographics and explains the problems it creates for employees. An overview of the contingent workforce shows that contingent employees need greater legal protection and equality with their non-contingent counterparts. This conclusion serves as the premise for the rest of the arguments this Comment raises.

Part II is a discussion of the Sturgis decision and an examination of its application. This section explores the precedent for Sturgis and illustrates that the decision is consistent with the NLRB’s historic stance toward temporary workers. Although the Board left some questions unanswered in Sturgis, it has recently begun applying the opinion. This section also examines how the NLRB is presently interpreting Sturgis and proposes a framework for the decision’s future application to protect temporary workers.

Finally, Part III addresses the inability of the NLRB alone to protect contingent employees. This section is a discussion of contingent worker protection in a broader perspective, outside the realm of collective bargaining. Here, the comment looks at potential legislation designed to protect contingent workers. It also stresses the need for the Internal Revenue Service (hereinafter “IRS”) to join in the effort of generating policy to protect contingent employees and improve the quality of their working conditions.

I. WHO IS THE CONTINGENT WORKFORCE?

Employment relationships created by the use of temp agencies as in Sturgis are just one kind of situation which fall under an umbrella of arrangements referred to as “contingent work.”\(^\text{12}\) The umbrella typically covers a variety of employment forms including part-time, temporary, self-

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employed independent contracting and occasionally home-based work. To get a fuller picture of the background for the Board's decision in Sturgis and to illustrate that protection of contingent workers is important, a closer analysis of the whole contingent workforce is necessary.

Although researchers and legal scholars have not reached a uniform consensus, most definitions of contingent employment emphasize three dominant characteristics of the practice. The first of these factors is the work schedule dimension of contingent employment. The daily schedule of contingent employees is often temporary or unpredictable in nature, and the duration of contingent employment is generally short-term. Wage and benefit adequacy is the second distinguishing factor. Contingent workers are often paid less than non-contingent workers, and they typically receive little or no benefits. The third characteristic concerns the relationship between contingent employees and their employers, which is usually impermanent and detached.

In practice, contingent employment takes many forms. In one use, corporations may directly hire temporary employees. Companies often use these kinds of employees for a number of reasons, including covering permanent employees who are on leave or out sick and staffing high demand periods that are seasonal or cyclical.

Companies can also hire temporary employees through agencies, and those workers technically remain employees of the agency, not the company utilizing their labor. This is precisely the kind of contingent employment relationship to which Sturgis applies. Although the user company often supervises and disciplines these temporary employees, the temporary employment agency is responsible for their payment and

13. Id.
14. Id.
15. Id.
16. Id.
17. Id. at 73.
18. Id.
19. Id.
20. Id.

22. Id.
23. Id.
24. Although Sturgis addresses only temporary employment arrangement, rather than the umbrella of contingent employment arrangements, it still has the potential to affect a large number of people. Temps account for 9% of the present workforce, a percentage which amounts to 1.2 million employees. BUREAU OF LABOR STATISTICS, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS (Feb. 2001), available at http://www.bls.gov/news.release/conemp.nr0.htm.
training.\textsuperscript{25} Thus, the user company actually buys the agency's services through its purchasing department, rather than supervising the employees through its human resource department.\textsuperscript{26}

Hiring employees as independent contractors on a project-by-project basis is another way firms utilize contingent employment.\textsuperscript{27} In this case, the individual is self-employed, and the company pays for the job on a contract basis without putting the independent contractor on the payroll.\textsuperscript{28}

Finally, many organizations are expanding the horizons of contingent employment by outsourcing entire functions, such as data analyses, janitorial, cafeteria, and security services.\textsuperscript{29} In these arrangements a subcontractor company often takes over an entire department of the enterprise.\textsuperscript{30}

Obviously, these kinds of employment relationships are beneficial to employers.\textsuperscript{31} Organizations can cut labor costs by not having to pay higher wages, provide benefits, or contribute to social security and pension plans.\textsuperscript{32} Moreover, outsourcing entire functions and hiring long term temporaries allows employers flexibility and, in some cases, prevents massive lay-offs of its permanent employees when business is slow.\textsuperscript{33}

However, while affording many benefits to employers, contingent employment is often detrimental to employees in many ways. Most contingent employees are involuntarily working on a contingent basis.\textsuperscript{34} In other words, they would prefer to hold permanent, full-time jobs rather than temporary, part-time jobs. Many temporary workers perform the same functions as permanent employees in similar positions but are paid less and afforded no benefits.\textsuperscript{35} Some companies even illegally misclassify employees as independent contractors.\textsuperscript{36} This practice precludes these

\begin{thebibliography}{99}
\bibitem{25} Baker & Christensen, \textit{supra} note 21, at 4.
\bibitem{26} Christensen, \textit{supra} note 8, at 103.
\bibitem{27} Baker & Christensen, \textit{supra} note 21, at 4.
\bibitem{28} \textit{Id.} at 5.
\bibitem{29} \textit{Id.} at 4.
\bibitem{30} \textit{Id.}
\bibitem{31} On the other hand, some critics of contingent employment argue that it can actually be detrimental to companies because workers are less productive. Companies often will not invest in training temporaries because these workers will not be there long term. \textit{See} Stanley D. Nollen & Helen Axel, \textit{Benefits and Costs to Employers, in Contingent Work} 126, 135 (Kathleen Baker & Kathleen Christensen eds., 1998). Although, hiring temps allows companies to cut costs on wages and benefits, the lower productivity associated with many contingent employees often makes the unit labor cost higher. \textit{Id.} at 134. Also, because they lack attachment to the enterprise, contingent employees often do not possess the morale that would make them efficient workers for the company. \textit{Id.} at 135.
\bibitem{32} Summers, \textit{supra} note 5, at 512-13.
\bibitem{33} \textit{See} Nollen & Axel, \textit{supra} note 31, at 128.
\bibitem{34} Appelbaum, \textit{supra} note 10, at 3; Cohany, \textit{supra} note 9, at 50.
\bibitem{35} \textit{See} Cohany, \textit{supra} note 9, at 51.
\bibitem{36} Christensen, \textit{supra} note 8, at 121.
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people from protection under any of the labor and employment laws because they no longer meet the definition of "employee."

Only as recently as 1995, did the Bureau of Labor Statistics (hereinafter "BLS") begin compiling data on the contingent workforce. As of February 2001, the United States' workforce was 4% contingent, according to the BLS. However, other researchers have estimated a much higher percentage, up to 29%. Regardless of which numbers are correct, it is clear that the contingent workforce has been growing in recent years. In fact, some estimate that it is expanding at a greater rate than the permanent workforce. According to one expert, there are "strong grounds for asserting that the contingent workforce is growing considerably faster than the entire labor force... and that a significant number of jobs generated in the 1980s and early 1990s were contingent jobs." A recent survey estimates, in fact, that between 1982 and 1998 the number of jobs in the temporary help supply industry rose 577%, while the total number of jobs in the workforce grew only 41%.

Moreover, this growing use of contingent employment relationships is most likely not determined by worker's needs for alternative work arrangements. Rather, it is a demand-led phenomenon and determined by the needs of individual firms for labor flexibility. In other words, because these relationships benefit companies' bottom lines, their use is becoming more widespread in corporate America.

Admittedly, some contingent employees have the bargaining power to negotiate contingent arrangements that are favorable to them, and

37. Id.
38. BUREAU OF LABOR STATISTICS, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS, supra note 24. In its estimates, the BLS defines contingent work as "all wage and salary workers who do not expect employment to last." Id. The estimate includes some independent contractors as well, qualified by survey participants' answers to questions about the nature of their self-employment. Id.
39. Based on statistics compiled by the U.S. Bureau of the Census's Survey of Income and Program Participation in 1990, one researcher estimates that the percentage of contingent workers in the workforce ranges from 16% at the lowest to possibly 29% at the highest. Spalter-Roth & Hartman, supra note 7, at 76-78. Richard S. Belous, a seasoned scholar in the field of contingent employment and the Vice President and Chief Economist at the National Planning Association in Washington, D.C., contends that BLS has severely undershot its estimate and suggests that the contingent employees make up at least 25% of the workforce. Richard S. Belous, Symposium: The Rise of the Contingent Work Force: The Key Challenges and Opportunities, 52 WASH. & LEE L. REV. 863, 867-68 (1995).
40. Id. at 868.
43. See Chris Tilly, Short Hours, Short Shrift: The Causes and Consequences of Part-
contingent employment can be beneficial to some employees. However, the majority of contingent workers are thrust into this type of employment involuntarily because of their low skill and weak bargaining positions before employers who are leading the demand. In fact, over half of contingent employees would prefer, but are unable to obtain, permanent jobs. On average, contingent workers make at least 20% less than permanent workers per week. Only 20% of contingent employees receive health benefits from their employers, and approximately the same small percentage are eligible to participate in pension plans. Very few contingent employees are unionized.

Other striking characteristics of contingent employees are that women hold approximately 50% of contingent jobs, while men hold approximately 53% of permanent jobs. In addition, Blacks and Hispanics are overrepresented in the contingent workforce, compared to the workforce at large. In 1988, over two thirds of the workers living under the poverty

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_Cohany, supra note 9, at 51. The most recent statistics on the contingent workforce do not compare the median salaries of contingent and non-contingent workers, but the 1999 BLS data showed that the median salary of contingent workers was $218 less than permanent employees. Hipple, supra note 45, at 20.

_BUREAU OF LABOR STATISTICS, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS, supra note 24 (estimating that 52% of workers would prefer non-contingent jobs). The most common reason employees gave for working a contingent job rather than a permanent one was that it was the only job they could find. Steven Hipple, Contingent Work in the Late-1990s, MONTHLY LAB. REV., Mar. 2001, at 3, 17.

46. See Cohany, supra note 9, at 51. The most recent statistics on the contingent workforce do not compare the median salaries of contingent and non-contingent workers, but the 1999 BLS data showed that the median salary of contingent workers was $218 less than permanent employees. Hipple, supra note 45, at 20.

47. BUREAU OF LABOR STATISTICS, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS, supra note 24.

48. Hipple, supra note 45, at 12 (estimating a unionization rate of only 5.9% among contingent employees as of 1999); Spaulter-Roth & Hartman, supra note 7, at 82; see also Virginia L. duRivage, New Policies for the Part-Time and Contingent Workforce, in NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE 89, 116-18 (edited by Virginia L. duRivage, 1992).

49. BUREAU OF LABOR STATISTICS, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS, supra note 24; see also Cohany, supra note 9, at 63 (estimating an even greater percentage for women working in the contingent workforce).

50. BUREAU OF LABOR STATISTICS, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS, supra note 24 (estimating that Blacks and Hispanics make up 13% and 17% respectively of the contingent workforce, compared to 11% and 11% respectively of the non-contingent workforce).
line were working contingent jobs. In fact, some have even said that contingent employment is becoming a mask for America’s underlying unemployment problem. As for independent contractors, it is estimated that 38% of employers dodge payroll taxes by illegally misclassifying employees as independent contractors.

In sum, the contingent workforce is rapidly expanding. Although, contingent employment can sometimes be beneficial to the employees, most of this workforce is involuntarily working on a contingent basis. Contingent employees generally receive lower wages, no benefits, and some receive little protection under labor and employment laws. Companies, on the other hand, continue to have incentive to use temporary workers, and the negative effects of contingent employment on workers are not likely to subside if the situation is left to the corporations alone. For this reason, it necessary that government agencies and the legislature step in to ameliorate the negative effects of the practice. In Sturgis, the NLRB took a step toward achieving this result.

II. M.B. STURGIS: THE DECISION

A. Background

Despite its contradiction of a decade’s worth of precedent, Sturgis is actually a decision in harmony with the Board’s historical treatment of contingent employees. Lee Hospital, the rule of the Board for the last ten years, barred collective bargaining for temps absent the consent of both their temp agency and their user employer. Nonetheless, a closer look beyond Lee Hospital shows that the rule of Sturgis, which permits temps to join their user employer’s union as long as they share a community of interest with the permanent employees, is much more consistent with the Board’s traditional treatment of temporary employees. Since the inception of the National Labor Relations Act ("NLRA" or "Act"), the Board has looked to the community of interest test to decide whether temporary employees should be a part of their user employer’s collective bargaining unit. Lee Hospital, not Sturgis, departed from this standard when it added a consent element. Sturgis brings the determinative inquiry back to the

51. duRivage, supra note 48, at 92.
52. Appelbaum, supra note 10, at 15-16.
question of community of interest, not consent, and thus restores the Board’s policy toward contingent workers to its historical precedent.

Before beginning a full discussion of Sturgis’s holding, a brief outline of the precedent for the decision and the terminology it imparts is warranted. Considering the fact that temporary employment agencies were conceived of in the 1940’s, the concept of user and supplier employers is not a new one. The temp agency has traditionally been considered the “supplier” employer, while the employers to whom the agency assigns its employees have been considered “user” employers. With regard to the employees involved in these arrangements, the user and supplier have generally been considered “joint employers,” as long as they both exercise control over the workers. Whether or not two employers qualify as joint employers may not be perfectly clear in every instance, and these relationships do not always arise from the use of temp agencies. Nonetheless, the user/supplier framework is important for understanding the case law dealing with joint employers.

Under the NLRA, the Board determines the collective bargaining units of an employer. Section 9(b) of the Act provides, “The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” This is the only guidance the NLRA gives for the treatment of employers in defining collective bargaining units, so the Board’s interpretation of “appropriate” units for employees of joint employers has been spelled out through case law.

From the 1940’s through 1960’s, there was little controversy over how the Board should construe the NLRA to deal with joint employers. The cases regarding joint employers that came before it during that period only asked the Board to determine whether user employer units could include employees jointly employed by other employers. In its decisions, the

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60. Leased employees can present a similar relationship with regard to the user employer as do temp agency-supplied employees. Summers, supra note 5, at 514.


63. The early cases involving joint employers arose from department stores’ collective bargaining units that sought to include concessionaire employees, who worked on the premises and were jointly employed by the store and an outside company. See, e.g., S.S. Kresge Co. v. N.L.R.B., 416 F.2d 1225, 1228 (6th Cir. 1969); Jewell Tea Co., 162 N.L.R.B.
Board based its determination of the user's collective bargaining unit exclusively on whether its jointly and solely employed workers shared a community of interest.\textsuperscript{64} Using this test, the Board routinely found units of a single, user-type employer appropriate, regardless of whether some of those workers were jointly employed by other employers.\textsuperscript{65} The relevant inquiry was always whether or not the two classes of employees shared a community of interest.

1. Greenhoot

Then, in 1973, the Board decided \textit{Greenhoot, Inc.} ("\textit{Greenhoot}")\textsuperscript{66}, which introduced a new rule for a new situation. Greenhoot was a property management company in the District of Columbia that operated fourteen buildings, each one owned by separate individuals.\textsuperscript{67} Both Greenhoot and the individual property owners shared responsibility over the employees employed at each of the fourteen sites.\textsuperscript{68} Nonetheless, there was no employee interchange among the buildings.\textsuperscript{69} The engineers and maintenance employees at all of the fourteen properties Greenhoot managed petitioned the Board to certify a single unit for the purposes of bargaining with Greenhoot.\textsuperscript{70} The Board, however, held that the group of employees would constitute a multi-employer unit and thus require Greenhoot's consent as well as the consent of all fourteen individual property owners for certification.\textsuperscript{71} Certification of the unit would not only force Greenhoot to the bargaining table, but it would inherently force the fourteen unrelated property owners to bargain together as well, hence the term "multi-employer unit."

Consequently, \textit{Greenhoot} introduced a question that the Board had never decided up to that point. It was not a case where one employer's jointly and solely employed workers wanted to bargain together. In fact, due to the nature of Greenhoot's business as a management company, it did not solely employ any of the employees seeking union representation,\textsuperscript{72} rendering it a supplier-type employer for purposes of NLRB case law.

\textsuperscript{508, 509 (1966); Thriftown, Inc., 161 N.L.R.B. 603, 604 (1966); Frostco Super Save Stores, Inc., 138 N.L.R.B. 125, 125 (1962); Stack & Co. 97 N.L.R.B. 1492, 1494 (1952); Denver Dry Goods Co., 74 N.L.R.B. 1167, 1168 (1947).}

\textsuperscript{64}. \textit{See NLRB cases cited supra} note 63.

\textsuperscript{65}. \textit{Id.}

\textsuperscript{66}. \textit{205 N.L.R.B. 250 (1973).}

\textsuperscript{67}. \textit{Id.}

\textsuperscript{68}. \textit{See id. at} 250-51.

\textsuperscript{69}. \textit{Id. at} 251.

\textsuperscript{70}. \textit{Id. at} 250.

\textsuperscript{71}. \textit{Id. at} 251.

\textsuperscript{72}. \textit{See id. at} 250.
Instead of a petition for certification of a user-type unit, \textit{Greenhoot} presented a situation where employees, who only had a supplier-type employer in common, were trying to organize across multiple user employers.

To this different question, the NLRB gave a different answer by introducing a consent requirement where multiple user employers are involved. Moreover, \textit{Greenhoot}'s treatment of multi-employer units can be explained through the same logic that prevents employees in a similar craft from forming industry-wide units. It has long been a rule of the NLRB that, but for a few narrow exceptions, industry-wide, craft units are impermissible, absent consent from all employers involved because they could force not just unrelated, but often competing, employers to adopt the same contractual terms and conditions with their labor supply.\textsuperscript{73} A supplier employer unit is analogous to an industry-wide unit in that unrelated, multiple, user employers would have to bargain together with employees without explicitly agreeing to do so.\textsuperscript{74}

Thus, \textit{Greenhoot}'s reasoning flowed from a different premise than the prior decisions of the Board. It addressed the requirements for a unit where the common employer of the workers trying to organize was the supplier employer, not the user employer. Moreover, for nearly thirty years after the decision, the Board distinguished its reasoning in \textit{Greenhoot} from the logic that combines the temporary and permanent employees of a common user employer in the same bargaining unit. In fact, \textit{Greenhoot} itself recognized that the individual property sites could have separate user-type units, which would include each site's jointly employed workers with Greenhoot, without requiring consent from either employer.\textsuperscript{75} Furthermore, the case law after \textit{Greenhoot} indicates that the Board continued to certify user-employer units without requiring consent, as long as the permanent and temporary employees passed the community of interest test.\textsuperscript{76}

2. \textit{Lee Hospital}

Nevertheless, in 1990, the Board abruptly turned the logic of \textit{Greenhoot} on its head when it decided \textit{Lee Hospital}.\textsuperscript{77} This case neglected to follow the established treatment of joint employers. \textit{Lee Hospital} contracted with Anesthesiology Associates, Inc. (hereinafter "AAI") for the

\textsuperscript{74} But see id. at 272-74 (advocating the adoption of industry-wide units).
\textsuperscript{75} \textit{Greenhoot}, Inc., 205 N.L.R.B. at 251.
\textsuperscript{77} 300 N.L.R.B. 947 (1990).
latter to run its Anesthesiology Department.\textsuperscript{78} The hospital employed certified registered nurse anesthetists (hereinafter "CRNAs"), who worked under the supervision of hospital personnel as well as the personnel supplied by AAI.\textsuperscript{79} These CRNAs sought certification of their own unit to bargain with Lee Hospital.\textsuperscript{80} The Board denied certification because the CRNAs did not warrant a separate unit from the rest of the employees in the hospital.\textsuperscript{81} In its reasoning, the Board commented that a threshold question to the analysis was whether or not Lee Hospital and AAI were joint employers.\textsuperscript{82} It decided that the hospital was the sole employer, but then went to deny certification because the CRNAs failed an unrelated "disparity of interests" test, rendering a separate unit for them in the hospital inappropriate.\textsuperscript{83}

Thus, \textit{Lee Hospital} did not actually rule on the question of when the Board should require joint employer consent. It never reached the issue because it decided that AAI and Lee Hospital were not joint employers.\textsuperscript{84} The Board merely mentioned in dicta that had the two been joint employers, \textit{Greenhoot} would have applied, and the unit would require joint employer consent for the Board to certify it.\textsuperscript{85}

Nonetheless, even if the Board had found Lee Hospital and AAI to be joint employers, a CRNA bargaining unit still should not have required employer consent under \textit{Greenhoot}. \textit{Greenhoot} required employer consent where employees of a supplier employer sought to certify a unit across a number of user employers. Conversely, the CRNAs in \textit{Lee Hospital} all worked for the same user employer, Lee Hospital.\textsuperscript{86} They wanted to certify a unit for the purpose of bargaining with their common user employer.\textsuperscript{87} That they might have been jointly employed by AAI should not have mattered. Thus, \textit{Lee Hospital} had nothing to do with \textit{Greenhoot} multi-employer bargaining involving different user employers.\textsuperscript{88}

In the years following \textit{Lee Hospital}, however, the Board adopted the decision's dicta, and began expanding the holding of \textit{Greenhoot}.\textsuperscript{89} It implemented a rule that required joint employer consent, even where the unit in question was for a single user employer's solely and jointly

\textsuperscript{78} \textit{Id.}
\textsuperscript{79} See \textit{id.} at 947, 949-50.
\textsuperscript{80} \textit{Id.} at 947.
\textsuperscript{81} Id.
\textsuperscript{82} \textit{Id.} at 948.
\textsuperscript{83} \textit{Id.} at 948, 950.
\textsuperscript{84} \textit{Id.} at 950.
\textsuperscript{85} \textit{Id.} at 950.
\textsuperscript{86} \textit{Id.} at 947-50.
\textsuperscript{87} \textit{Id.} at 947.
\textsuperscript{88} \textit{M.B. Sturgis, Inc.}, 2000 NLRB LEXIS 546, at *35 (Aug. 25, 2000).
employed employees who passed the community of interest test. By requiring the consent of both employers, the Board created a new barrier that has prevented temporary employees from gaining inclusion in their user employer's bargaining unit.

In the last decade, virtually no temporary employees have succeeded in obtaining the consent of both joint employers, which has effectively barred them from collective bargaining. This fact, in conjunction with the rapid growth of contingent employment practices, has led the Board to reconsider the precedent it established ten years ago in *Lee Hospital*. *Sturgis* represents this reconsideration.

B. The Case

The *Sturgis* decision actually consists of two separate cases. Although the Board handed down a single decision, it is helpful to summarize the facts of each case separately.

1. *M.B. Sturgis, Inc.*

The first employer, M.B. Sturgis, Inc. (hereinafter "Sturgis"), produces and sells flexible gas hoses. Local 108 filed a petition with the NLRB to represent all of the employees at one of Sturgis's local plants. At that time, the plant solely employed thirty-four or thirty-five employees, and it also employed, on a permanent basis, ten to fifteen "temporary" workers, supplied by Interim, Inc. (hereinafter "Interim"), a national corporation providing temporary help personnel. Local 108 sought to represent only those thirty-four or thirty-five permanent employees of Sturgis, but Sturgis wanted to include the temporary workers as well.

The temporary employees and permanent employees worked side by side, performing the same functions and working the same number of hours. Both groups were also subject to the same supervision. The temporary employees were not, however, permitted to work more than
fourty hours a week, whereas the permanent employees could work more than forty hours a week. Interim hired and set the wages and benefits of the temporary employees.

Both Interim and Sturgis agreed that they were joint employers for the purposes of the NLRA. Moreover, Sturgis gave its consent for the temporary employees to organize. Interim, however, did not give consent. Local 108 did not want to include the temporary workers in the union, arguing that Greenhoot and Lee Hospital precluded their inclusion without Interim's approval.

2. Jeffboat Division

The other case making up the Sturgis decision dealt with a similar situation, only in this case, the employer refused to give consent while the union petitioned to represent the temporary employees. The employer, Jeffboat Division (hereinafter "Jeffboat"), is an inland shipbuilder, operating a large shipyard on the Ohio River. At the time of the petition, Jeffboat employed 600 production and maintenance employees, all of whom were represented by Local 89. Jeffboat also employed thirty first-class welders and steamfitters who were supplied by a temporary supplier firm, TT&O Enterprises (hereinafter "TT&O"), and were not represented by the union. Local 89 sought to accrete these employees into the existing collective bargaining unit, but Jeffboat and TT&O both refused to give their consent.

Like the temporary workers of M.B. Sturgis, Jeffboat's temporary steamfitters and welders had much in common with the 600 permanent employees. Jeffboat supervisors assign, direct, and oversee all of the work of the temporary employees. In addition, the supervisors have the authority to discipline temps for poor performance or for breaking any of Jeffboat's rules and regulations, and they are also responsible for monitoring the time that TT&O-supplied workers spend on different assignments at Jeffboat.

99. Id.
100. Id.
101. Id.
102. Id. at *11.
103. Id.
104. Id.
105. Id. at *12-13.
106. Id. at *13.
107. Id.
108. See infra note 140 and accompanying text (defining accretion).
110. Id. at *13.
111. Id.
3. The Board’s Holding and Analysis

With the Sturgis and Jeffboat situations presenting similar material facts, the NLRB faced one glaring issue to decide: “Whether and under what circumstances employees who are jointly employed by a ‘user’ employer and a ‘supplier’ employer can be included for representational purposes in a bargaining unit with employees who are solely employed by the user employer.”112 Following Lee Hospital, the Regional Directors in both Jeffboat and Sturgis had stopped their inquiries and barred the inclusion of temps in the units as soon as they found that there was no joint employer consent.113 The Board, however, found that this was no longer the proper inquiry and went about clarifying that the test for including temps in user employer units is community of interest.114

In its analysis, the Board used the statutory language behind the issue to justify its conclusion. It cited Section 9(b) of the NLRA as giving the Board the power to determine whether the appropriate collective bargaining unit should be “the employer unit, craft unit, plant unit, or subdivision thereof.”115 It then clarified that an appropriate employer unit can be “a unit encompassing all of an employer’s employees, or subgroup of such employees.”116 The Board correctly asserted that a unit of all the user employer’s employees consists of those employees solely and jointly employed by it.117 From this conclusion, the Board then determined that the temporary employees of both Jeffboat and Sturgis could be considered part of the “employer unit” because they were employed alongside the other employees who were solely employed.118 In other words, the fact that the temporary employees were also employed by a supplier employer should have no bearing on whether they constitute part of the user employer’s bargaining unit.

Instead, the decision held that the only question relevant to the supplied employees being part of the user employer’s collective bargaining unit should be whether or not the two sets of employees share a community of interest.119 Reiterating the traditional community of interest test, the Board commented that a proper determination of an employer unit “examines a variety of factors to determine whether a mutuality of interests

112. Id. at *1. Since none of the employers in Sturgis disputed their joint employer status, the Board needed only to determine what the proper test should be for including jointly employed employees in a user employer’s collective bargaining unit.
113. Id. at *43.
114. Id. at *40.
115. Id. at *35 (citing section 9(b) of NLRA).
116. Id.
117. Id. at *36.
118. Id.
119. See id. at *42.
in wages, hours, and working conditions exists among the employees involved."\textsuperscript{120} The Board did not actually do an analysis to determine whether the Sturgis and Jeffboat employees satisfied the community of interest test. It instead remanded the cases to the Regional Directors to determine whether the employees passed this test.\textsuperscript{121}

Although the NLRB did not ultimately rule on the fate of the Jeffboat and Sturgis employees, its holding and the reasoning behind it overturned the test used during the last ten years for determining collective bargaining units of user employers. In fact, the Board explicitly overruled Lee Hospital.\textsuperscript{122} It also narrowed the holding of Greenhoot, which had been used to justify the Lee Hospital decision.\textsuperscript{123} The Board explained that it was not overruling Greenhoot,\textsuperscript{124} but rather limiting the holding to true multi-employer units, bargaining units consisting of the employees from multiple user employers, "whose only relationship to each other is that they obtain employees from a common supplier employer."\textsuperscript{125} Following the Sturgis Board's interpretation, a true multi-employer situation necessitating consent should only exist where a union tries to represent employees of a supplier employer in a unit that spans across user-employers. "Lee Hospital did not involve multiemployer bargaining and therefore no consent was required."\textsuperscript{126}

In sum, the Board's analysis sets out that the first question is whether joint employer status exits.\textsuperscript{127} If no such relationship exists, then the inquiry stops because Sturgis only applies to jointly employed employees.\textsuperscript{128} On the other hand, if the user and supplier employers are joint, then the next step is to determine whether a community of interest exists between the jointly employed and solely employed employees of the user employer.\textsuperscript{129} If the employees satisfy the community of interest test, then the Board will sanction an employer unit consisting of both the

\textsuperscript{120} See id. at *40-41; see, e.g., Kalamazoo Paper Box Corp., 136 N.L.R.B. 134, 137 (1962); Swift & Co., 129 N.L.R.B. 1391, 1394 (1961); Cont'l Baking Co., 99 N.L.R.B. 777, 782-83 (1952).
\textsuperscript{121} Sturgis, 2000 NLRB LEXIS 546, at *57.
\textsuperscript{122} Id. at *3.
\textsuperscript{123} See id. at *37-38.
\textsuperscript{124} See id.
\textsuperscript{125} Id. at *38.
\textsuperscript{126} Id. at *35.
\textsuperscript{127} See id. at *18. The Board commented that it would not decide in Sturgis whether or not the test for joint employers should be expanded. Id. This comment seems to address and dismiss the possibility of moving the joint employer test away from the present "right to control test." See generally, Rahebi, supra note 59 (elaborating on the differences between the "right to control test" and "economic realities test," and advocating a "hybrid test" for joint employer determination).
\textsuperscript{128} Sturgis, 2000 NLRB LEXIS 546, at *18.
\textsuperscript{129} See id. at *41-42.
temporary employees and permanent employees of the user employer. Consent from neither the user nor supplier employer is necessary at any point in the analysis.

III. APPLYING STURGIS TO PROTECT CONTINGENT EMPLOYEES

The reasoning of Sturgis being consistent with precedent, the next question to consider is how the decision can operate to effectuate its purported purpose of protecting contingent workers. After Sturgis, temps have the opportunity to bargain collectively in at least three different scenarios. First, temps of an agency may seek to bargain with the agency as either a unit of a particular class of workers or an agency-wide unit. Second, the temps of a single employer may seek to bargain in a unit composed only of temps for that employer. Third, a union of permanent employees could seek to accrete the employer's temps into the existing collective bargaining agreement. The first possibility actually pre-dated Sturgis, since it requires neither joint nor multi-employer bargaining, as the temps seek only to bargain with the temp agency. The second two scenarios, however, are new possibilities in light of Sturgis, so the following sections will address them more specifically.

A. A Unit Consisting Solely of a User Employer's Temps

A collective bargaining unit consisting only of temps working for a single employer would inevitably require the temp agency and user employer to work together in some fashion. It would, however, be different than the kind of multi-employer bargaining Greenhoot forbids. Sturgis holds that section 9(a) of the NLRA does not preclude a single employer's unit from containing jointly employed employees. Pursuant to that majority opinion, it is legal now for a unit of temps to exist within a user employer and to bargain with that employer.

The Sturgis dissent, however, argues that it is a violation of section

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130. See id. at *42.
131. See id. at *54.
134. Agency-wide units, however, may still be difficult to certify because the employees will not likely share a community of interest. See Robert B. Moberly, Temporary, Part-Time, and Other Atypical Employment Relationships in the United States, 38 LAB. L.J. 689, 693 (1987) ("Although a few temporary help companies have collective bargaining agreements establishing the wages, hours, and conditions of employment of their temporary employees, such bargaining relationships with unions are the exception rather than the rule in the temporary help industry."); see also infra discussion at 38. Classes of similar employees within a temp agency would thus be more likely to gain certification.
9(a) for an employee unit to answer to more than one employer, claiming that "having one employer in common differs fundamentally from having the same employer."136 Even though the dissent was overruled, it is important to note137 that its concerns should nonetheless be alleviated by the fact that it is not even necessary for a unit of temps to bring both user and supplier employer to its bargaining table to effectuate Sturgis. A temp unit could bargain exclusively with the user employer, leaving the temp agency and user employer to deal with each other on a contract basis. In fact, the unit could consist of temps from multiple suppliers as long as it is dealing exclusively with the user employer. In other words, if the union represents a class of employees working for the user employer (i.e., its temps), then it need only bargain with that employer, the same as in any non-joint collective bargaining arrangement. After bargaining with the union as to the terms and conditions of the temps, the user employer would be the one to deal with its various suppliers on a contract basis.138 Under this scenario, the prospect of bargaining between the temp unit and a supplier employer does not have to be an issue. Rather, the employers would deal exclusively with each other through contractual remedies over any problems arising as a result of the collective bargaining agreement between the temp unit and the user employer. Thus, the user employer and supplier employer will have to work together, but not through the collective bargaining process that could potentially violate the Act, according to the Sturgis dissent.

B. Accreting Temps into a Unit of Permanent Employees

When the Board remanded Sturgis to the Regional Directors to apply the community of interest test, it also noted that the Regional Directors should determine whether to accrete the temps into the unions or not.139 Accretion is a process through which the Board adds new employees to an

136. Id. at *107 (Brame, Member, dissenting).
137. The composition of the NLRB has completely changed since Sturgis was decided. President Bush has appointed several pro-management members this year, and none of the members in the Sturgis majority presently sit on the Board. See Sherie Watson & Tom Ichniowski, Labor: Bush Announces NLRB Recess Appointments, WASH. OBSERVER, Feb. 4, 2002, at 9. It is consequently important to examine alternative grounds for supporting the results in Sturgis in light of the fact that the new Board could reconsider its prior holdings.
138. For example, if the temp unit bargained with the user employer for high wages, the user employer would then have to pay the temp agency more money in its purchase agreement. The agency would then pass the additional money on to the temps in the form of higher wages. c.f. Sturgis, 2000 NLRB LEXIS 546, at *46-47 ("Since employers will be obligated to bargain only over those terms and conditions over which they have control, we believe . . . that employers and unions will be able to formulate appropriate and workable solutions to logistical issues that may arise.").
139. Sturgis, 2000 NLRB LEXIS 546, at *43.
existing group without holding an election. It generally should do this where there is an "overwhelming community of interest" between the additional employees and the pre-existing unit. If the terms of an existing collective bargaining agreement provide protection for the unit into which temps are accreted, then the temps will automatically receive those protections as well.

Again, it is important to address the Sturgis dissent's concerns about accretion. Member Brame argues that accreting temps into an existing collective bargaining agreement would illegally bind the supplier employer to an agreement it did not bargain over. The 1982 Supreme Court opinion in Bonanno Linen Services, Inc. v. NLRB, nonetheless, provides overlooked support for why accreting temps into an existing union should be permissible.

The court in Bonanno held an employer to have committed an unfair labor practice under section 8(a)(5) of the NLRA when it withdrew from a contractual multi-employer bargaining association during the negotiation process with a particular union. The New England Linen Supply Association was a group of ten employers in the linen industry that all agreed to bargain together with the union representing their truck drivers. The employers did not have to enter into a multi-employer bargaining situation with the union because, as Greenhoot illustrates, multi-employer bargaining must be consensual. Nonetheless, the court held that where the employers have consented to be a part of a multi-employer association, it is an unfair labor practice for them to withdraw once collective negotiations are underway between that association and a union.

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141. Safeway Stores, Inc. 256 N.L.R.B. 918, 918 (1981). Even if the community of interest between the new employees and the existing unit is not so overwhelming for accretion, the Board can still hold an election in which all of those employees may vote for or against the union. See J.E. Higgins Lumber Co., 2000 NLRB LEXIS 764, at *6 (Oct. 31, 2000) (Hurtgen, Member, concurring). Thus, temps may not always pass the test for accretion, but they could still have the opportunity to vote for a union, which would represent them and the permanent employees.
142. See, e.g., Tree of Life, Inc., 2000 NLRB LEXIS 845, at *17 (Dec. 1, 2000) (in the wake of Sturgis, ordering an employer to "[a]pply the provisions of its collective-bargaining agreement to temporary employees").
144. Sturgis, 2000 NLRB LEXIS 546, at *107 (Brame, Member, dissenting).
146. Bonanno, 454 U.S. at 413.
147. Id. at 407.
148. Id. at 412.
149. Id. at 411. Once negotiations are underway, an employer may only withdraw from a consensual multi-employer association if there are "unusual circumstances," such as extreme financial hardship or fragmentation of the bargaining process. Id. Impasse,
Extrapolating the reasoning of Bonanno, it follows that where a user and supplier employer have contracted together to jointly employ temps, they have essentially agreed to collective bargaining with regard to those temps. Thus, if the temp agency finds itself in the position of having to bargain with the union and/or the user employer because its employees get accreted in the user's collective bargaining unit, it is nothing more than what the two employers bound themselves to through their contractual relationship. Under Bonanno, it is conceivable that the employers would not be entitled to withdraw their consent once the accretion process was underway. Rather, they should have thought of the implications before they entered a contractual relationship to jointly employ temps in the first place. Thus, in light of Bonanno's principles, accretion is a legally sound mechanism for carrying out the aim of Sturgis.

Acretion is also an extremely effective mechanism for temps to gain equality of working conditions with the permanent employees alongside whom they work. Most supplier employers do not provide benefits, so the only opportunity temps will have to get them may be through their user employer's collective bargaining agreement. Moreover, if temps are accreted into existing collective bargaining agreements, then they will automatically gain any protections the permanent employees have under that agreement. Admittedly, employers could seek inclusion of temps in their collective bargaining units in hopes of watering down the union's favor with new, less loyal members. Considering the fact that the majority of contingent employees would prefer permanent employment, however, it will probably be the exception, rather than the rule, for temps to object to any amount of stability a union could afford them. Overall, temps have nothing to lose and everything to gain by getting the immediate benefit of union protection.

Acretion is overwhelmingly beneficial for unions too. The best way to prevent the replacement of full-time employees with a contingent workforce is to represent the contingent employees. Unions have already begun organizing efforts to include temps among their ranks as a result of Sturgis, and the AFL-CIO recently proclaimed that unionizing temps is a priority for the organization now in light of the Sturgis decision.
Although there could be instances where a union may regard the inclusion of temps as presenting a divergent set of interests from its permanent employees,\(^{155}\) this is an easily surmountable problem. Unions can still negotiate favorable terms for temps without having to make them identical to those of permanent employees.\(^{156}\) In fact, unions often have different classes of employees within their ranks and negotiate different terms and conditions suitable to each class. The important point is that the temps can have someone negotiating for them now, instead of no one at all. “[U]nions can be instrumental in improving the job quality and career opportunities of these workers, without jeopardizing the opportunities for full-time employment.”\(^{157}\)

In light of its significant benefits to both temps and unions, it is important for the Board not to overlook accretion as a viable option. Unfortunately, the NLRB’s recent applications of *Sturgis* suggest that future Boards could use the option of having a separate unit of only temps to avoid accretion and defeat the full impact of *Sturgis*. For example, in *Lodgian, Inc.*\(^ {158}\) the Board found inappropriate a unit consisting of permanent and temporary service employees at a hotel, even though the temps worked at the same site, wore the same uniforms and performed the same duties as their permanent counterparts.\(^ {159}\) Applying *Sturgis*, the Board decided that the temps did not share a community of interest with the permanent employees because the supplier employer determined their benefits and pay as well as retained the right to discipline them, although not exclusively.\(^ {160}\) Instead, the Board suggested that the temps could form their own unit for the purpose of bargaining with the user employer.\(^ {161}\) By using factors that are inherent in every joint-employer situation to defeat a community of interest test, as it did in *Lodgian, Inc.*, the Board could prevent temps from ever being included under permanent employees’ collective bargaining agreements.\(^ {162}\) Temps can form their own unit within the user employer, as the Board suggests, but they will still miss out on the significant benefits that come from being included in an existing unit of permanent employees, either through accretion or the election process.

*Sturgis* made clear the background of its decision—the contingent

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156. See *duRivage, supra* note 53, at 117.

157. *Id.*


159. *Id.* at *28-29.*

160. *Id.* at *29-30.*

161. *See id.* at *31.*

162. *But see* Tree of Life, Inc., 2000 NLRB LEXIS 845 (Dec. 1, 2000) (applying *Sturgis* and ordering a user employer to accrete temps into its collective bargaining unit).
workforce has been growing while its legal protections have decreased.\textsuperscript{163} Clearly, the policy behind the decision is to help temporary workers gain the protection of unions. Consequently, while \textit{Sturgis} provided for the possibility that a group of temps working for a user employer could form a separate unit from the permanent employees, future Boards should not forget that \textit{Sturgis} also meant to give temps protection that is equal to permanent employees.

\textbf{C. Striking an Appropriate Balance Between Employers and Temps}

Not surprisingly, employers are generally unhappy about \textit{Sturgis}.\textsuperscript{164} By making it easier for temps to join unions, \textit{Sturgis} will subvert many of the benefits temporary employment arrangements provide for employers who have unions. If unions bargain for temps to receive the similar treatment as permanent employees, then employers will lose the advantage they gain by not having to pay benefits for temporary employees. In addition, an employer who fires a temp for talking about unionizing may now face discrimination charges for taking an adverse employment action against an employee engaged in concerted activities.\textsuperscript{165}

Nonetheless, temporary employees should not have to bear the costs of the benefits that their employers save on the backs of their labor. Many employers have intentionally used temps to dilute their responsibility to bargain with unions.\textsuperscript{166} It is past due that a case similar to \textit{Sturgis} made it more difficult for employers to side step the unions who represent their employees. Moreover, if employers are really using temps for all of the reasons they claim,\textsuperscript{167} then they will not lose every advantage of temporary employment arrangements. Companies will still retain the flexibility that temporary employment can provide.\textsuperscript{168} After all, \textit{Sturgis} has not eviscerated temporary employment practices. The NLRA gave all employees the right to bargain,\textsuperscript{169} and \textit{Sturgis} simply makes it possible for

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\item[165.] Cf Tree of Life, 2000 NLRB LEXIS 845 (holding that a user employer had violated Section 8(a)(1) and (5) of the NLRA when it refused to give the union a list of temporary employees who shared a community of interest with the permanent employees).
\item[166.] duRivage, supra note 53, at 116.
\item[167.] "[A] recent Conference Board survey found that 81 percent of employers who hired contingent workers (usually temporaries) sought labor flexibility, while only 12 percent cited cost reduction as a factor.” Employment Policy Foundation, \textit{Fact & Fallacy: NLRB and Unions’ Concern Over the Contingent Workforce is Misplaced} (Nov. 1996), at http://www.epf.org/research/newsletters/1996/ff2-10.asp.
\item[168.] See Summers, supra note 32, at 512.
temps to finally exercise that right.

IV. A UNIFORM POLICY DESIGNED TO PROTECT CONTINGENT WORKERS CALLS FOR MORE THAN NLRB DECISIONS

The very fact that employers use contingent employment to prevent unionization illustrates that more is needed to protect contingent employees than just an NLRB decision regarding unions. With unions representing under fifteen percent of the present workforce, many employers no longer have collective bargaining units into which temporary employees can accrete. The NLRB’s decisions only deal with an increasingly smaller percentage of the working force that is unionized. Thus, Sturgis, which applies to just a segment of the contingent workforce to begin with, will only affect temporary employees who work for employers that unions have been able to reach. To protect the entire contingent workforce, other facets of the government must get involved.

For example, the IRS is effectively the only agency that can do anything to protect employees who have been misclassified as independent contractors. Because these individuals are not considered employees, none of the labor and employment laws apply to them. Moreover, companies who misclassify employees as independent contractors often do it to avoid these laws and to avoid withholding income tax payments for these employees. The IRS needs to crack down harder on this practice by increasing its effort to go after these companies for tax evasion.

Additionally, Congress and state legislatures should pass legislation aimed specifically at protecting the contingent segment of the workforce. Many contingent workers, for example, are excluded from coverage under the Family and Medical Leave Act because they do not work the minimum number of hours for coverage due to the part-time, temporary and/or intermittent nature of their employment. Contingent employees have family needs the same as permanent employees. Considering the fact that the majority of these employees are working contingently on an involuntary basis, Congress and state legislatures should consider legislation that carves out alternative protection for these employees.

employees have always had Section 7 rights").

170. Unions represent only 9.0% of the private sector labor force. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, UNION MEMBERS IN 2000, supra note 11. Including public sector workers, the total percentage of wage and salary employees represented by unions is 13.5%. Id.

171. Christensen, supra note 8, at 121.


174. Christensen, supra note 8, at 122.

175. See id. at 123.
As for affording contingent employees equality of benefits with permanent workers, Congress should reconsider legislation that would require employers to offer health benefits on a pro-rata basis to part-time workers where the same benefits are offered to full-timers.\textsuperscript{176} It should also consider measures that would allow employees to carry pension credits with them from job to job.\textsuperscript{177}

Contingent employment appears to be here to stay.\textsuperscript{178} Moreover, it is not necessary to eliminate the practice in order to balance out the disadvantages it brings employees with the large amount of benefits it affords employers. Regulating the industry through government agencies and legislation can serve to effectuate this balance.

V. CONCLUSION

Contingent employment is a growing phenomenon in the American economy. The need persists to afford contingent workers reasonable equality with permanent workers as well as the full protection of United States' labor and employment laws. \textit{Sturgis} is a decision aimed at this goal by removing the consent barrier to collective bargaining for many temporary employees. Much of the aftermath remains to be seen, but if future Boards apply the decision in a manner consistent with its goals, \textit{Sturgis} has the ability to provide needed protection and equality for at least some members of the contingent workforce. Many others in the contingent workforce may have to challenge the IRS's practices and lobby Congress and state legislatures in order to improve their lot, but \textit{Sturgis} is at least a step in the right direction down a very long road.

\begin{footnotes}
\item[176] See duRivage, \textit{supra} note 53, at 98.
\item[177] See \textit{id.} at 103.
\item[178] Belous, \textit{supra} note 39, at 876.
\end{footnotes}