



Electronic Dispatch

Labor and Employment Law Information Memo

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THE NATIONAL LABOR RELATIONS BOARD HOLDS THAT EMPLOYEES SUPPLIED BY A STAFFING AGENCY CANNOT BE INCLUDED IN A BARGAINING UNIT WITH REGULAR EMPLOYEES WITHOUT EMPLOYER CONSENT

On November 19, 2004, in *Oakwood Care Center*, the National Labor Relations Board held (by a 3 to 2 margin) that employees who are supplied to an employer by a staffing agency cannot be included in a bargaining unit with regular employees of the employer without the consent of both the employer and the staffing agency. In so holding, the Board overruled its 2000 *M.B. Sturgis* decision.

The Facts

Oakwood operated a long-term residential care facility in Oakdale, New York. Some of Oakwood's employees were hired directly by Oakwood and were regular employees of Oakwood. Other employees were supplied to Oakwood (the user employer) by a personnel staffing agency called N&W Agency, Inc. (the supplier employer). Oakwood and N&W jointly determined the pay and benefits for the employees supplied by N&W, and Oakwood alone determined the pay and benefits for its regular employees. The employees supplied by N&W and Oakwood's regular employees performed essentially the same types of job duties, and were supervised by the same Oakwood supervisors. In addition, the employees supplied by N&W and Oakwood's regular employees wore the same types of identification tags issued by Oakwood identifying them as employees of Oakwood who worked at the Oakdale long-term residential care facility.

The Service Employees International Union, 1199, AFL-CIO, filed a petition to represent a single bargaining unit consisting of a combination of employees supplied by N&W and Oakwood's regular employees. The Union argued that its proposed bargaining unit was appropriate under the Board's 2000 decision in *M.B. Sturgis*. Oakwood and N&W argued that the *M.B. Sturgis* case was incorrectly decided and should be overruled.

The Board's Holding

In *M.B. Sturgis*, the Board held that bargaining units combining employees who are supplied by a supplier employer and regular employees of a user employer are permissible without the consent of the user employer or the supplier employer. In *Oakwood Care Center*, the Board majority overruled its *M.B. Sturgis* decision, stating that it was "misguided both as a matter of statutory interpretation and sound national labor policy."

The Board held that the broadest bargaining unit permissible under the National Labor Relations Act is a single-employer unit, and that any multi-employer bargaining unit is impermissible absent the consent of all employers involved. Although the Board had found in *M.B. Sturgis* that a bargaining unit combining employees supplied by a supplier employer and regular employees of a user employer was a permissible single-employer unit, the Board majority in *Oakwood Care Center* found that such a bargaining unit was actually an impermissible multi-employer bargaining unit. The Board based this finding on the fact that the employees supplied by the supplier employer to the user employer were actually jointly employed by both employers, whereas the regular employees of the user employer were employed only by the user employer. The Board held that the existence of a second employer for some, but not all, of the employees rendered the proposed unit an impermissible multi-employer bargaining unit.



The Board majority held that the collective bargaining process could be undermined by allowing such a bargaining unit without the consent of the supplier and user employer. The Board pointed out that the wages paid to the jointly-employed employees are frequently controlled, at least in part, by the supplier employer, while the wages paid to the solely-employed employees are controlled only by the user employer. Under such circumstances, the two employers are placed in a position of having to negotiate wage issues with each other, as well as with the union. In addition, the union's ability to represent all employees within the bargaining unit fairly may be compromised, as it may sometimes be necessary for the union to trade away the wages of the supplied employees for the sake of the regular employees, or vice-versa.

For these reasons, the Board majority held that national labor policy requires that employees within a bargaining unit be grouped together not only by common interests, but also by a single common employer.

If you have any questions regarding the Board's *Oakwood Care Center* decision or need assistance responding to a union organizing campaign, please contact:

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