M. B. Sturgis, Inc. *and* Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union Local 108, Petitioner *and* Jeffboat Division, American Commercial Marine Service Company and T.T. & O. Enterprises, Inc. *and* General Drivers, Warehousemen & Helpers Local Union 89, affiliated with the International Brotherhood of Teamsters, AFL–CIO, Petitioner. Cases 14–RC–11572 and 9–UC–406

August 25, 2000

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, AND BRAME

These cases involve the representational rights of an important segment of the "contingent work force." Specifically, in these cases, we address the question of whether and under what circumstances employees who are jointly employed by a "user" employer and a "supplier" employer[1] can be included for representational purposes in a bargaining unit with employees who are solely employed by the user employer. Our consideration of this issue has caused us to reexamine two key Board decisions in this area: *Greenhoot, Inc.,* 205 NLRB 250 (1973), and *Lee Hospital,* 300 NLRB 947 (1990). As explained more fully below, *Greenhoot* stands for the proposition that where two or more otherwise separate user employers obtain employees from the same supplier employer, and a union is seeking to represent the employees in a single unit for the purposes of collective bargaining with the user employers, the unit sought is a multiemployer unit and, under established principles of multiemployer bargaining, cannot be found appropriate absent the consent of the affected employers. *Lee Hospital*, decided 17 years after *Greenhoot*, extended the holding of *Greenhoot* to situations where a single user employer obtains employees from one or more supplier employers and a union is seeking to represent both those jointly employed employees and the user's solely employed employees in a single unit. The Board ruled that such units are also multiemployer in nature and therefore also require employer consent.

On careful consideration, we have decided to reaffirm the decision in *Greenhoot* insofar as it requires employer consent for the creation of true multiemployer units involving separate user employers. We have, however, also concluded that the Board erred in treating the unit at issue in *Lee Hospital* as a multiemployer unit. As a consequence of this error, a growing number of employees who are part of what is commonly described as the "contingent work force" are being effectively denied representational rights guaranteed them under the National Labor Relations Act. To restore these rights to them, we are today overruling *Lee Hospital* and its progeny. We are also clarifying the decision in *Greenhoot* to provide better guidance on unit questions to those engaged in future representation proceedings involving contingent workers.

The critical nature of the issue we have reconsidered in these cases is highlighted by ongoing changes in the American work force and workplace and the growth of joint employer arrangements, including the increased use of companies that specialize in supplying "temporary" and "contract workers" to augment the workforces of traditional employers. We note that *Greenhoot* and *Lee Hospital* were decided before the growth of these types of alternative employment arrangements. It was not until 1995 that the U.S. Department of Labor, Bureau of Labor Statistics (BLS), began collecting and analyzing survey data regarding contingent and alternative employment arrangements in the labor force. The results of BLS' most recent surveys indicate that so-called "contingent" and "alternative employment arrangements" accounted for as much as 4.3 percent of all employment in February 1999, or 5.6 million employees. Nearly 1 percent of this nation's workforce, or 1.2 million employees, worked for "temporary help agencies," and another 0.6 percent (nearly 800,000 employees) worked for "contract firms." See Bureau of Labor Statistics, News Release USDL 99-362, Tuesday, December 21, 1999. In addition, a recent General Accounting Office (GAO) study reports a tremendous growth in the "temporary help supply industry" during the past two decades. In *Contingent Workers: Income and Benefits Lag Behind Those of the Rest of Workforce, GAO/HEHS-00-76,* issued July 26, 2000, the GAO reports at page 16 that according to BLS data, from 1982 to 1998 the number of jobs in the temporary help supply industry rose 577 percent, while the total number of jobs in the workforce grew only 41 percent. The GAO report also noted that "certain industries and communities have begun to rely heavily on agency temps." Id.

I. BACKGROUND

On October 20, 1995, the Regional Director for Region 14 issued a Decision and Direction of Election in *M. B. Sturgis, Inc*., Case 14–RC–11572, in which he found appropriate a petitioned-for unit consisting of all employees employed by M. B. Sturgis at its Maryland Heights, Missouri plant, with the exception of 10–15 "temporary" employees used by Sturgis and supplied by Interim, Inc. The Regional Director found that the temporary employees were jointly employed by Sturgis and Interim, but that under *Lee Hospital*, they could not be included in the same unit with employees employed solely by Sturgis absent the consent of both Sturgis and Interim.[2] The Regional Director subsequently denied a motion by Sturgis to reopen the hearing to ascertain

[1] For a definition of these terms, see sec. II (A), "Terminology," infra.

[2] Interim did not participate in the proceedings at the Regional level. It asserts that it was not notified of the hearing. Following the granting of Sturgis' request for review, the Board granted Interim's request for intervenor status.

whether Interim would consent to the inclusion of the temporary employees in the unit. Thereafter, in accordance with Section 102.67 of the Board's Rules, Sturgis filed a timely request for review of the Regional Director's Decision, contending that the Regional Director's exclusion of the temporary employees from the unit raised substantial issues regarding *Greenhoot* and its progeny, and that the Regional Director erred by denying its motion to reopen the hearing.[3] On November 20, 1995, the Board granted Sturgis' request for review.

In the meantime, on November 8, 1995, the Acting Regional Director for Region 9 had issued a Decision and Order in *Jeffboat Division*, Case 9–UC–406, in which he dismissed a unit clarification petition by which the petitioning union, Teamster Local 89, had sought to clarify the bargaining unit of Jeffboat employees covered by its existing collective-bargaining agreement with Jeffboat to include employees supplied by T.T. & O. Enterprises (TT&O) for use by Jeffboat. The Acting Regional Director found that Jeffboat and TT&O are joint employers of the TT&O-supplied employees. Without reaching any other issues presented by the petition, he then further found that under *Greenhoot* and *Lee Hospital* the jointly employed employees could not be included in the existing unit. He reached this conclusion because Jeffboat and TT&O would not consent to joint bargaining. Thereafter, Local 89 filed a request for review of the Acting Regional Director's dismissal of the petition, contending that a substantial issue is raised by the Acting Regional Director's reliance on *Greenhoot* and *Lee Hospital*. Jeffboat filed a conditional request for review, contending that the Regional Director erred by finding that it is a joint employer of the TT&O-supplied employees. Alternatively, Jeffboat argued that the Acting Regional Director erred by failing to reach the Employer's other asserted grounds for dismissing the petition. On May 3, 1996, the Board granted Local 89's request for review and Jeffboat's conditional request for review. The Board held in abeyance Jeffboat's alternative arguments for granting review.

On October 4, 1996, the Board issued a notice that it would hold oral argument in these cases.[4] The notice of hearing requested that the parties address several questions regarding *Greenhoot* and *Lee Hospital*, and the appropriate test for determining joint employer status. The parties in both cases and a number of amici curiae participated in the oral argument held on December 2, 1996. Preargument and/or postargument briefs were filed by oral argument participants and others.[5] In view of the common issues raised by these two cases, we consolidate them for the purpose of decision.[6] After carefully reviewing the record and all the briefs submitted by the parties, the Board[7] affirms the joint employer finding in *Jeffboat* and reverses the dismissal of the petition. The Board remands the petitions in *M. B. Sturgis* and *Jeffboat*. Sturgis' motion to reopen the hearing is granted.

II. FACTS AND CONTENTIONS OF THE PARTIES

A. Terminology

To ensure the use of common terminology, the Board asked the parties and amici in their oral arguments and in their briefs to refer to the company that supplies employees as a "supplier" employer and the company that uses those employees as a "user" employer. This decision will use the same terminology.

B. M. B. Sturgis

The Petitioner (Local 108) filed a petition to represent a unit of "all employees at the company's plant located on Fee Fee Road" in Maryland Heights, Missouri. At this plant, Sturgis produces and sells flexible gas hoses. Sturgis solely employs 34–35 employees and also uses 10–15 so-called "temporary" employees who are supplied to Sturgis by Interim, a national provider of temporary help personnel. The temporaries work side-by-side with Sturgis' employees, perform the same work, and are subject to the same supervision. Interim hires the temporaries, determines their wages and benefits, and pays them. All employees work the same hours, except temporary employees are not permitted to work more than 40 hours per week. It is undisputed that Sturgis and Interim are joint employers of the temporary employees. The Regional Director excluded the temporary employees from the unit because they are not solely employed by Sturgis. The Regional Director reasoned that although Sturgis consented to include the temporary employees in the unit, Interim did not participate in the hearing and the record

[3] No review was sought of the Regional Director's joint employer finding.

[4] The Board also included a third case for oral argument, *Value Recycle, Inc.*, 33–RC–4042. The Board heard oral argument on that case. Subsequently, the petitioner in *Value Recycle* withdrew its petition. The Regional Director approved the withdrawal on January 7, 1998. That case, therefore, is no longer before the Board for decision.

[5] The participants include: the General Counsel; American Federation of Labor and Congress of Industrial Organizations; Associated Builders and Contractors, Inc.; Business Leadership Council; Chamber of Commerce of the United States of America; Council on Labor Law Equality; Driver Employer Council of America; International Union, United Automobile, Aerospace & Agricultural Implement Workers of America-UAW; Labor Policy Association; Master Printers of America; National Association of Temporary and Staffing Services; National Health and Human Service Employees Union, 1199; and Service Employees International Union.

[6] Jeffboat filed a motion for further oral argument that was supported by the National Association of Temporary and Staffing Services, Inc. The motion was opposed by Local 89 and the AFL–CIO. The motion for further oral argument is denied.

[7] Chairman Truesdale and Members Liebman and Brame did not participate in the December 2, 1996 oral argument, but, have considered the transcripts of that oral argument, the record in these cases, and the briefs of the parties and the amici. Member Hurtgen is recused from participating in these cases and he took no part in the consideration or disposition of these cases.

contained no evidence that Interim consented to the inclusion of the temporary employees.

Local 108 contends that a unit including the temporary employees is inappropriate. It argues that the temporary employees should not be included because of the short-term nature of their employment. Local 108 also contends that the temporary employees must be excluded because the employees are jointly employed and, under the *Greenhoot* doctrine as applied in *Lee Hospital*, they cannot be included in the same unit with the 34–35 permanent employees solely employed by Sturgis.

Sturgis argues that consent by Interim should not be required to include these temporary employees in the unit. It contends that the Board should look only to whether the employees share a community of interest with its regular employees. Sturgis argues that *Greenhoot* "does not stand for the principle that everyone has cited it for, and that [*Greenhoot*'s] progeny has improperly expanded its underlying meaning." Sturgis posits that the unit is not appropriate if the temporary employees are not included. Sturgis also argues that the Regional Director erred by denying its motion to reopen the record to permit Interim to be a party to the case. Sturgis contends that it is in the Board's interest to bring as many interested parties as possible into these kinds of proceedings at the outset.

Interim stated at oral argument before the Board that it does not consent to including the temporary employees in the unit. Further, Interim contended that *Greenhoot* and *Lee Hospital* control this case. Interim argued that, under those cases, the Board cannot include the temporary employees without violating the principles of multiemployer bargaining, i.e., that the employers must have expressly consented to joint negotiations or have unequivocally manifested through a course of conduct an intent to be bound by group collective bargaining. *Hughes Aircraft Co.*, 308 NLRB 82 (1992), citing *Greenhoot* and *Lee Hospital.*

C. Jeffboat Division

Jeffboat, an inland river shipbuilder, operates a large shipyard on the Ohio River in Jefferson, Indiana. TT&O, described at oral argument by its counsel as a "temporary supplier firm," supplies to Jeffboat 30 first-class welders and steamfitters. By its petition, Local 89 seeks to accrete these employees to a unit of 600 production and maintenance employees covered by a collective-bargaining agreement between Jeffboat and Local 89.

In concluding that Jeffboat and TT&O are joint employers of the TT&O-supplied employees, the Acting Regional Director found that Jeffboat controls practically all aspects of the daily environment of the TT&O-supplied employees. Jeffboat's supervisors assign, direct, and oversee the daily work of the TT&O-supplied employees. The Acting Regional Director also found that Jeffboat supervisors have authority to discipline the TT&O-supplied employees for unsatisfactory performance or any infraction of Jeffboat's rules and regulations, and are responsible for monitoring the time that TT&O-supplied employees spend on different Jeffboat assignments.

Although the Acting Regional Director concluded that the jointly employed employees "share a strong community of interest" with the bargaining unit employees, he dismissed the petition because Jeffboat and TT&O do not consent to joint bargaining, relying on *Greenhoot* and *Lee Hospital*. The Acting Regional Director, therefore, found it unnecessary to reach Jeffboat's several alternative grounds for dismissing the petition.[8]

Local 89 contends that the Board should cease adhering to the *Greenhoot* "doctrine" as a bar to including the jointly employed employees in the contractual unit. Local 89 argues that a requirement of consent has no basis in this case because the unit is not a "true" multiemployer unit. With respect to the joint employer finding, Local 89 urges that it be affirmed, but also urges the Board to give Jeffboat's reserved control over terms and conditions of employment equal weight to the evidence of actual control over terms and conditions of employment.

Jeffboat and TT&O argue that the Board should adhere to *Greenhoot* and should not retreat from the broad range of cases in which it has been applied. They assert that *Greenhoot* provides the underlying policy reasons for prohibiting any change in this established bargaining unit, absent mutual consent. TT&O contends that requiring employer consent to include the 30 supplied employees in the unit is appropriate because otherwise, TT&O would become bound by a collective-bargaining agreement without ever having the opportunity to bargain over the terms and conditions contained therein. Jeffboat and TT&O also argue that TT&O is the sole employer of the supplied employees. They contend that the evidence is insufficient to support the Acting Regional Director's joint employer finding.

D. Amici Curiae

Amicus AFL–CIO contends that *Greenhoot* must be overruled and the Board must return to the practice that prevailed prior to *Greenhoot*, which it asserts did not require consent for a combined unit of solely employed employees and jointly employed employees. The AFL–CIO argues that by granting employers the power to withhold consent to such units, *Greenhoot* and its progeny bar otherwise appropriate units of employees who share a community of interest. The result of this veto power over such units is to fragment otherwise appropriate units, deprive employees of their right to organize appropriate units, and frustrate mean-

[8] Jeffboat made the following alternative arguments: (1) the jointly employed employees are temporary employees who lack a sufficient community of interest to be included in the unit; (2) the petition is untimely because Local 89 unsuccessfully sought to limit the subcontracting of work during the parties' most recent contract negotiations; and (3) the grievance-arbitration procedure is the only appropriate means for resolving this dispute.

ingful collective bargaining. The AFL–CIO also argues that the Board should clarify the application of its current joint employer standard.

The General Counsel argues that community of interest, not consent, is the appropriate standard for determining whether jointly employed employees should be included in a single unit with employees solely employed by one of the joint employers. The General Counsel contends further that as long as one of the joint employers controls some working conditions of both of the work forces, such a relationship is *not* the legal equivalent of multiemployer bargaining. As for the joint employer standard, the General Counsel argues that the Board should return to a test that examines the direct or indirect right to control employment conditions based on the reality of how separate entities structure their commercial dealings with each other.

The amici representing employer groups urge the Board to retain *Greenhoot* and its progeny. They argue that *Greenhoot* is rooted in the consent requirement for multiemployer bargaining. Permitting such units absent consent will force employers into multiemployer bargaining and thus, they assert, will violate Section 8(b)(4)(A) of the Act. These amici also allege that abandoning *Greenhoot* would, as a practical matter, impede collective bargaining, in that an employer would be forced to bargain at the same table with another employer or employers regarding a unit that includes employees who are under the sole control of the other employers. Amici such as the National Association of Temporary and Staffing Services (NATSS) and the Council on Labor Law Equality (COLLE) note that, while *Greenhoot,* as they construe it, prohibits Board-determined units that encompass employees of different employers, it does not prohibit those employees from being organized into separate units that are appropriate. Finally, these amici urge the Board to make no change in its current joint employer standard.

III. DISCUSSION

A. Joint Employer Status

1. The test for determining joint employer status

As a threshold matter, we must first consider whether Jeffboat and TT&O are joint employers of the TT&O-supplied employees, for without the requisite control necessary to establish the joint employer relationship, the issue presented here will not arise. The question of whether to expand the test for determining joint employer status was presented to the Board in *Value Recycle*, 33–RC–4042, and in *Jeffboat*. This issue was briefed and discussed at oral argument.[9] As noted above, however, the petitioner in *Value Recycle* withdrew its petition.[10] Further, for the reasons discussed below, we agree with the Regional Director that, under extant Board precedent, Jeffboat and TT&O are joint employers. Hence, we need not address the contention in *Jeffboat* that our current joint employer standard should be expanded, and we will forego the opportunity to do so here.

Under current Board precedent, to establish that two or more employers are joint employers, the entities must share or codetermine matters governing essential terms and conditions of employment. *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1123 (3d Cir. 1982); andand *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995). The employers must meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. *Riverdale*, 317 NLRB at 882, citing *TLI, Inc*., 271 NLRB 798 (1984).

2. Jeffboat and TT&O are Joint Employers

As we indicated above, in *Jeffboat*, we must first decide whether the TT&O-supplied employees are solely employed by TT&O. If they are solely employed by TT&O, then they cannot be accreted into the bargaining unit of Jeffboat employees. After carefully reviewing the record and all the briefs of the parties and amici, we agree with the Acting Regional Director that Jeffboat and TT&O are joint employers of the TT&O-supplied employees.

The record fully supports the Acting Regional Director's finding that Jeffboat supervisors assign, direct, and oversee the daily work of the TT&O-supplied employees; that Jeffboat supervisors have authority to discipline TT&O-supplied employees; and that Jeffboat's supervisors are responsible for monitoring the time spent by TT&O-supplied employees on different Jeffboat assignments. In addition, there is no dispute that the contract between Jeffboat and TT&O grants Jeffboat broad authority over the TT&O-supplied employees, as it provides that they "will be subject to direction of [Jeffboat] as to the assignment of [w]ork, including shift hours and overtime, and to the direction of [Jeffboat] managers, supervisors and foremen."

Jeffboat argues that its supervision of the TT&O-supplied employees is routine and insubstantial and, hence, does not support a joint employer finding. We disagree. The shipyard is a massive operation encompassing approximately six acres along the Ohio River, and includes several subassembly shop areas and four separate production lines. Jeffboat supervisors assign TT&O-supplied employees to "strategically located areas of the yard" where employees are needed. Jeffboat supervisors direct the TT&O-supplied employees regarding what work is to be performed at their assigned location. There is no evidence of any assignment or direction by the onsite TT&O representative. While these employees are skilled and some assignments do not require "intensive supervision," other assignments require immediate and "active supervision" by Jeffboat. This is not a case

[9] Joint employer status is undisputed in *M. B. Sturgis*.

[10] See fn. 4, above.

where the employees usually are left to perform work on their own without any supervision or direction.

In addition, Jeffboat supervisors have authority to discipline the TT&O-supplied employees "as they see fit," including issuing written and verbal warnings, and suspending employees by directing that they leave the premises of the shipyard. Jeffboat's argument regarding discipline also is contrary to the undisputed testimony by James Pope, a first class welder, that Jeffboat's supervisors have authority to discipline the TT&O-supplied employees, and the fact that a Jeffboat supervisor and a TT&O representative jointly issued a disciplinary warning to TT&O-supplied employees. We conclude that Jeffboat and TT&O meaningfully affect and codetermine essential terms and conditions of employment, including the supervision, assignment, direction and discipline of the TT&O-supplied employees.[11]

B. Reconsideration of Greenhoot and its Progeny

1. Board decisions Prior to *Greenhoot*

Having found that a joint employer relationship exists in both *M. B. Sturgis* and *Jeffboat*, we now address whether, under the statute and Board policy, employer consent is required in order for the Board to combine in one unit employees who are jointly employed by a supplier employer and a user employer, with employees solely employed by the user employer. We begin with the Board's historical treatment of units combining jointly employed and solely employed employees.

Prior to *Greenhoot*, the Board routinely found units of the employees of a single employer appropriate, regardless of whether some of those employees were jointly employed by other employers. The Board used its traditional community of interest test to decide whether such units were appropriate. Significantly, the Board identified no statutory impediment to such units, and the issue of employer consent was neither raised nor discussed. Until *Lee Hospital*, the Board never held that these units were multiemployer units subject to the consent requirements of multiemployer bargaining.[12]

Early on, the Board included employees who worked for concessionaires in a unit of the employees of the retail department store where the concessions were located. The concessionaires in those cases operated departments within the user's store. Some of these employees were referred to as "employees" of the concessionaire or as being "retained" by the concessionaire to work in the store. See *Louis Pizitz Dry Goods Co.*, 71 NLRB 579 (1946); *Taylor's Oak Ridge Corp.*, 74 NLRB 930 (1947); *Denver Dry Goods*, 74 NLRB 1167, 1176 (1947). Although these concessionaires operated whole departments, the Board included the employees in these departments in the unit with the solely employed department store employees. In these cases the Board found that there was sufficient evidence to conclude that the department store was an employer of the employees, and that the employees shared a community of interest with the store's solely employed employees. The Board excluded employees in the leased department, however, if they were solely employed by the concessionaires. In those cases, the Board noted that they did not share "sufficient interests" with the employees in the other departments to be joined for collective bargaining. See *J. M. High Co.,* 78 NLRB 876, 878 (1948); and *Block & Kuhl Department Store*, 83 NLRB 418, 419 (1949). In the 1950s, the Board continued to include the employees of the leased departments in units with the store's employees. See, e.g., *Stack & Co.*, 97 NLRB 1492 (1952).

In a series of cases in the 1960s, the Board recognized that control over leased employees may be shared between user and supplier employers and, hence, the employees may be jointly employed. See *Frostco Super Save Stores,* 138 NLRB 125 (1962). Notwithstanding this shared employment relationship, the Board continued to sanction units combining solely employed department store employees with jointly employed leased employees, applying the community of interest test to decide whether jointly employed employees should be included in the unit. See id. at 129;[13] *Thriftown, Inc.*,

[11] We also reject as untimely Jeffboat's contention, made for the first time in its post-oral argument brief, that Jeffboat and TT&O have an independent contractor relationship. In any event, whether Jeffboat and TT&O are joint employers is unaffected by whether TT&O is an independent contractor because Jeffboat does not contend that the TT&O-supplied employees are independent contractors. See *NLRB v. Greyhound Corp.*, 368 F.2d 778 (5th Cir. 1966), relying on *Boire v. Greyhound*, 376 U.S. 473, 481 (1964).

[12] "Under established Board rules . . . a [multiemployer] unit is held to exist only where the evidence establishes that that the several employers expressly conferred upon their joint bargaining agent the power to bind them by its negotiations or that the employers have by an established course of conduct unequivocally manifested a desire to be bound in future collective bargaining by group rather than individual action." *Bennett Stone Co.,* 139 NLRB 1422, 1424 (1962).

[13] In *Frostco*, the Board did permit some of the jointly employed employees to decide whether they wished to be included in the overall store unit, or to be separately represented, via a self-determination election. The circumstances in *Frostco* illustrate (1) that the Board found no impediment to combining employees of solely employed/jointly employed employees; and (2) that the Board utilized a community of interest analysis in determining appropriate units in such instances. In *Frostco*, the Retail Clerks sought an overall store unit of all employees of the Sav-Mart store. The Meat Cutters sought a unit of the employees in the grocery and meat department operated by Frostco. The Culinary Workers sought employees operating popcorn concessions, who were also employed by yet another company. The Board found that Sav-Mart was a joint employer with each licensee. Yet the Board found a storewide unit, including the jointly employed employees, was appropriate. In addition, the Board permitted the Frostco employees to decide whether they wished to be represented in the overall unit or separately "in view of all the indicia of separateness" such employees enjoyed. The Board found, however, that the jointly employed employees sought by the culinary employees "do not comprise a group with sufficiently disparate employment interest" and the Board dismissed the petition for a separate unit of these employees. 138 NLRB at 129. Later Board cases clearly found units of solely employed and jointly employed employees appropriate. See, e.g., *Spartan Department Stores*, 140 NLRB 608, 611 fn. 8 (1963).

161 NLRB 603 (1966); and *Jewell Tea Co.*, 162 NLRB 508 (1966). In *Thriftown*, the Board majority included jointly employed employees of leased departments in the same bargaining unit with the solely employed department store employees. Chairman McCulloch and Member Fanning, in dissent, objected to the joint employer finding, but expressed no concern over the inclusion of the jointly employed employees in the unit with the solely employed store employees. 161 NLRB at 608. Compare *United Stores of America*, 138 NLRB 383, 385 (1962), in which a separate unit of jointly employed grocery and meat department employees was found appropriate because of the "indicia of separateness" from solely employed storewide employees.

In 1969, the United States Court of Appeals for the Sixth Circuit rejected an employer's challenge to a storewide unit that included jointly employed employees supplied by several employers in a unit with Kresge's employees. *S. S. Kresge Co.*, 416 F.2d 1225 (6th Cir. 1969), enfg. in relevant part, *S. S. Kresge*, 169 NLRB 442 (1968). The employer contended that "to compel unwilling employers to bargain as joint employers will disrupt the collective-bargaining process because each licensee may have independent ideas about appropriate labor policy." 416 F.2d at 1231. The court specifically rejected this contention, relying on a similar case from the U.S. Court of Appeals for the Ninth Circuit which rejected an employer's contention that a userwide (storewide) unit would have a "highly disruptive effect upon on the store's operation, [and] will prejudice the licensees and not produce sound and stable collective bargaining relationships." See *Gallenkamp Stores Co. v. NLRB*, 402 F.2d 525, 531 (9th Cir. 1968). The *Gallenkamp* court also had rejected the employer's contention that the jointly employed employees of one the licensees "lack[ed] a sufficient community of interest" with the store employees to be included in the unit. Id.

These cases clearly demonstrate that combined units of user and supplier employees are not a novel idea. At the end of the 1960s, no Board or court decision had barred, absent employer consent, units combining solely employed employees and jointly employed employees on the basis that they constituted multiemployer units. To the contrary, the Board and the courts perceived no statutory impediments to such units. Inclusion of the jointly employed employees was subject only to the Board's traditional community of interest standards. In 1970, the United States Court of Appeals for the Fifth Circuit pointed out that the Board "often" had found appropriate units of the user's employees and licensees' employees, especially when the user employer exercised substantial control over the employment practices of the licensees and "was in practical effect a joint-employer." *NLRB v. Zayre Corp*., 424 F. 2d 1159, 1165 (5th Cir. 1970).

2. *Greenhoot*

In early 1973, the Regional Director for Region 5 issued a Decision and Direction of Election for a unit of all licensed and unlicensed engineers, apprentice engineers, and maintenance employees at 14 office buildings managed by Greenhoot in the District of Columbia. Greenhoot contended that the Regional Director erred in finding that Greenhoot was the sole employer of the employees in the unit. The Board agreed and reversed the Regional Director. *Greenhoot, Inc.*, 205 NLRB 250 (1973).

The Board described the unit sought by the petitioner as one consisting of employees in 14 separate office buildings. Greenhoot argued that the respective building owners were the sole employers of the petitioned-for employees, or in the alternative, that Greenhoot was a joint employer with each of the building owners and, therefore, a combined unit was not appropriate. The Board agreed with Greenhoot's alternative contention, finding that "both the individual owner and the management agent, Greenhoot, have significant employer functions." 205 NLRB at 251. The Board concluded that "Greenhoot and each of the Building owners are joint employers at each of the respective buildings." Id.

Without further discussion, the Board then found that:

> In this circumstance, there is no legal basis for establishing a multiemployer unit absent a showing that the several employers have expressly conferred on a joint bargaining agent the power to bind them in negotiations or that they have by an established course of conduct unequivocally manifested a desire to be bound in future collective bargaining by group rather than individual action. Id.

As there was no consent for a multiemployer unit, the Board found "separate units at each location" to be appropriate, rather than the combined unit sought by the petitioner. 205 NLRB at 251. In *Greenhoot*, therefore, the Board essentially found that a unit that combined employees employed by Greenhoot *and* 14 separate employers—the 14 building owners—constituted a multiemployer unit.[14]

3. The *Lee Hospital* extension of *Greenhoot*

Following *Greenhoot*, and before *Lee Hospital*, the Board continued to find appropriate units of solely employed employees and jointly employed employees without suggesting that they implicated any multiemployer bargaining concern. For example, in *Globe Discount City*, 209 NLRB 213 (1974), the Board found that the Regional Director erred in excluding jointly employed employees from a unit of Globe's employees (and other jointly employed employees). The Board found that the jointly employed employees shared "a substantial community of interest" with the solely

[14] As we discuss below, the Board did not explain why the union could not be certified as the representative of all the jointly employed employees for purposes of bargaining solely with *Greenhoot*, without the consent of the building owners.

employed and other jointly employed store employees and that a unit combining them was an appropriate unit. In several unfair labor practice cases, the Board also imposed a bargaining obligation on the joint employers of employees in contractual units that included employees solely employed by one of the joint employers. See, e.g., *Sun-Maid Growers of California*, 239 NLRB 346, 352–353 (1978), enfd. 618 F.2d 56, 59 (9th Cir. 1980); and *U.S. Pipe & Foundry Co.*, 247 NLRB 139, 142 (1980). The Board found that "no policy of the Act" was offended by imposing a bargaining obligation "for that portion of the overall unit." *Sun-Maid Growers*, 239 NLRB at 353.

Similarly, the U.S. Court of Appeals for the Seventh Circuit found no impediment to bargaining in units of these mixed groups of employees absent employer consent. In *Western Temporary Services v. NLRB*, 821 F.2d 1258, 1265 (7th Cir. 1987), the court found that a user employer, Classic, was not prejudiced by the inclusion of jointly employed part-time employees supplied by Western Temporary Services in a unit with Classic's solely employed employees.

In 1990, however, 17 years after *Greenhoot* was decided, the Board in *Lee Hospital—without any rationale—* changed its analytical course and brought units like those here within the ambit of *Greenhoot* and the consent requirement of multiemployer bargaining. *Lee Hospital*, 300 NLRB 947, 948 (1990). In *Lee Hospital*, the petitioner sought a unit of certified registered nurse anesthetists (CRNAs). The Regional Director found that CRNAs did not constitute an appropriate unit separate from other hospital professionals, because under the "disparity of interest" test applied then to health care institutions, the CRNAs possessed no sharper than usual differences from the other professionals. The petitioner sought review of this decision arguing, among other things, that the CRNAs were jointly employed by Lee Hospital and Anesthesiology Associates, Inc. (AAI),[15] and that this joint employer relationship further evidenced a disparity of interest between the CRNAs and the other hospital professionals.

In affirming the Regional Director's dismissal of the petition, the Board examined the joint employer allegation raised by the petitioner. The Board reasoned that, if the CRNAs were jointly employed, a separate CRNA unit would be appropriate because Lee Hospital would not consent to include jointly employed CRNAs in a unit with its solely employed professionals. The Board concluded that the combined unit would run afoul of *Greenhoot*, but notably did not explain or reconcile the factual or legal differences between *Greenhoot* and *Lee Hospital*. It simply cited *Greenhoot* in a footnote following the proposition that "as a general rule, the Board does not include employees in the same unit if they do not have the same employer, absent employer consent." 300 NLRB at 948 fn. 12. The Board ultimately did not apply this rule in *Lee Hospital* because it concluded that Lee Hospital and AAI were not joint employers of the CRNAs.

In later cases, the Board applied the "rule" of *Lee Hospital* to prohibit any unit that would combine jointly employed employees with solely employed employees of one of the joint employers, absent consent of both employers. See, e.g., *International Transfer of Florida*, 305 NLRB 150 (1991); and *Hexacomb Corp.*, 313 NLRB 983 (1994). No case since *Lee Hospital* has discussed, explained, or rationalized this new rule.

4. Analysis and conclusions

a. Lee Hospital incorrectly decided

We find today that *Lee Hospital* was incorrectly decided. Plainly stated, we conclude that *Lee Hospital* did not involve multemployer bargaining and therefore no consent was required. We find that a unit composed of employees who are jointly employed by a user employer and a supplier employer, and employees who are solely employed by the user employer, is permissible under the statute without the consent of the employers.

We begin, as we must, with the statute. Section 9(b) 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.

It is beyond dispute that, under this section of the Act, a unit encompassing all of an employer's employees, or a subgroup of such employees, can constitute an appropriate unit. The Board does not require "consent" of the employer in order for employees to be represented for collective bargaining in an employer-wide unit. Rather, the appropriateness of such units is governed by our traditional community of interest test. See *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985); *Kalamazoo Paper Box*, 136 NLRB 134, 137 (1962); and *Globe Discount City*, 209 NLRB 213 (1974). But where the unit is multiemployer in scope, the Board has consistently held that such units are not appropriate absent the consent of all parties. See, e.g., *Rayonier Inc.,* 52 NLRB 1269 (1943); *Pacific Metals Co.*; 91 NLRB 696, 699 (1950); *Chicago Metropolitan Home Builders Assn.*, 119 NLRB 1184, 1186 (1957); and *Bennett Stone Co.,* 139 NLRB 1422, 1424 (1962). After carefully reviewing our precedent and the policy questions raised, we find that the units at issue—all the employees performing work on behalf of the user employer (e.g., M. B. Sturgis and Jeffboat)—do not constitute multiemployer units requiring consent.

That a unit of all of the user's employees, both those solely employed by the user and those jointly employed by the user and the supplier, is an "employer unit" within the meaning of Section 9(b), is logical and consistent with precedent. The scope of a bargaining unit is delineated by the work being performed for a particular em-

[15] AAI contracted with the hospital for the operation of the anesthesiology department and recovery room.

ployer. In a unit combining the user employer's solely employed employees with those jointly employed by it and a supplier employer, all of the work is being performed for the user employer. Further, all of the employees in the unit are employed, either solely or jointly, by the user employer. Thus, it follows that a unit of employees performing work for one user employer is an "employer unit" for purposes of Section 9(b).

Our view is consistent with well-settled precedent that both precedes and postdates *Greenhoot*. We adhere to these cases with the knowledge that, until *Lee Hospital*, neither the Board nor the courts ever found the inclusion, in a unit of the user's employees, of employees supplied by other employers and jointly employed by the user to involve multiemployer bargaining. Breaking with this historical treatment of such units, the Board's analysis in *Lee Hospital* implicated multiemployer bargaining by in effect treating "the employer" of the jointly employed employees as a completely separate and distinct employer from either the user employer or the supplier employer. Only in this way could the Board conclude that combining the jointly employed employees in a unit with the employees of the user employer could violate the statute's preclusion of units broader than employer-wide. We decline to accept the faulty logic of *Lee Hospital* (and our dissenting colleague) that a user employer and a supplier employer—both of which employ employees who perform work on behalf of the user employer—are equivalent to the completely independent employers in multiemployer bargaining units. No pre-*Lee Hospital* Board conceived of such units as multiemployer units, and neither do we.

In contrast, cases like *Greenhoot* involve multiple user employers whose only relationship to each other is that they obtain employees from a common supplier employer. In such cases, the union seeks to represent a unit that includes employees of all of the users. Thus, it is clear that the unit is a multiemployer unit and therefore consent of the separate user employers would be required before the Board could direct an election.

Our dissenting colleague contends that the units at issue in the cases before us constitute multiemployer units. They do not.[16] The dissent flatly ignores Board precedent permitting such units without consent, before and after *Greenhoot*. It attempts to distinguish *S. S. Kresge v. NLRB*, on the basis that it involved a joint venture, but ignores that the court did not rely on this rationale or otherwise limit its holding in this manner. It is beyond dispute that *S. S. Kresge*, and the numerous similar cases cited above, permitted jointly employed employees to be included in units with employees of one of the *joint* employers without regard to whether the employers consented.

Our colleague also contends that the jointly employed employees and the solely employed employees in each unit do not have the "same" employer as a matter of law and logic. Unlike true multiemployer bargaining, however, all the employees in fact share the same employer, i.e., the user employer. Separating "regular" employees—i.e., the solely employed—from the "temporaries" who may (as in the instant cases) share the same classifications, skills, duties, and supervision, creates an artificial division that is not required by the statute. We therefore overrule *Lee Hospital* and find no statutory requirement of employer consent to a unit combining solely and jointly employed employees of a single user employer. As we noted at the outset of this section, prior to *Lee Hospital* the Board applied the community of interest test to decide whether to include jointly employed employees in units with solely employed employees. See *Globe City Discount*, 209 NLRB 213 (1974). As we find no statutory obstacles to such units today, we will return to the application of this traditional test to determine the appropriateness of these units.

b. Community of interest analysis applies

The community of interest test examines a variety of factors to determine whether a mutuality of interests in wages, hours, and working conditions exists among the employees involved. *Kalamazoo Paper Box*, 136 NLRB 134, 137 (1962); *Swift & Co.*, 129 NLRB 1391 (1961); *Continental Baking Co.*, 99 NLRB 777, 782-783 (1952); and 15 NLRB Ann. Rep. 39 (1950). This test is both well-settled in our case law and accepted by the courts. See, e.g., *NLRB v. Action Automotive*, 469 U.S. at 494. The Supreme Court has stated that our unit determinations applying this standard lie "largely within the discretion of the Board, whose decision, if not final, is rarely to be disturbed." *South Prairie Construction v. Operating Engineers*, 425 U.S. 800, 805 (1976) (per curiam).

Under Section 9(b) of our statute, a group of an employer's employees working side by side at the same facility, under the same supervision, and under common working conditions, is likely to share a sufficient community of interest to constitute *an* appropriate unit. See *Swift & Co*., 129 NLRB 1391 (1961); and *Kalamazoo Paper Box*, 136 NLRB 134 (1962). That some of the employees working for that employer may have some differing terms and conditions of employment from those of their colleagues does not ordinarily mean that those employees cannot be included in the same unit, although it might, in some circumstances, permit them to be represented in a separate unit. See, e.g., *Berea Publishing Co.*, 140 NLRB 516, 518 (1963).

By our decision today, we do not suggest that every unit sought by a petitioner, which combines jointly employed and solely employed employees of a single user

[16] We note that our colleague concedes, as well he must, that where a union seeks to represent in a single unit the employees jointly employed by two employers, such a unit is not a multiemployer unit and no consent of the employers is required. We perceive no legal distinction between such units and those at issue in the cases before us.

employer, will necessarily be found appropriate. As in the Board's pre-*Greenhoot* cases, application of our community of interest test may not always result in jointly employed employees being included in units with solely employed employees. See, e.g., *United Stores of America*, 138 NLRB 383 (1962); and *Franklin Simon & Co.,* 94 NLRB 576 (1951). We do not prejudge the outcome of this analysis in the cases before us. Having decided above that the statute does not require consent of both employers for the establishment of such units, we simply find that their appropriateness will be decided based on their particular circumstances, using the Board's traditional analysis.

In the particular unit issues before us, we note that the Regional Director in *M. B. Sturgis* did not decide whether the jointly employed employees share a community of interest with M. B. Sturgis' employees. Similarly, in dismissing the petition in *Jeffboat*, the Acting Regional Director did not reach the issue whether an accretion of the jointly employed employees to the existing unit is warranted. We therefore do not determine the appropriate units in the cases before us. We remand the proceedings to the Regional Directors to decide those issues consistent with this decision and applicable community of interest and accretion principles.

c. Rejection of arguments opposing the overruling of Lee Hospital

Our dissenting colleague and several of the parties and amici posit a host of concerns about the path we chart today. We reject the contention that finding these units appropriate presents impediments to meaningful bargaining because employers are compelled to bargain at the table over employees with whom they have no employment relationship. To the contrary, in these units each employer is 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.[17]

We also reject the contention that an employer that controls only some aspects of the employment relationship cannot engage in meaningful bargaining. Compare *Management Training*, 317 NLRB 1355 (1995), in which the Board found that in determining whether to assert jurisdiction over an employer with close ties to a government entity, it only would consider whether the employer meets the statutory definition of "employer" under Section 2(2) of the Act. The Board observed in that case that the fact that it has no jurisdiction over governmental entities and thus cannot compel them to sit down at the bargaining table does not destroy the ability of the nonexempt employer to engage in effective bargaining over terms and conditions of employment. 317 NLRB at 1358 fn. 16. It follows here that, despite the absence of an employment relationship between the supplier employer and the solely employed employees of the user employer, the supplier is still able to bargain to the extent that it controls the terms and conditions of employment of the jointly employed employees. Thus, the joint employers must bargain over the terms and conditions of employment of their employees, and the sole employers are obligated to bargain over the terms and conditions of employment of their employees. See also *Western Temporary Services v. NLRB*, 821 F.2d at 1265, in which the court found that a user employer, Classic, and its supplier Western, need only negotiate with the union over their jointly employed employees to the extent that they each control their conditions of employment. We impose no greater requirement here.

The dissent argues that requiring the joint employers to engage in "involuntary" bargaining together "injects into their relationship duties and limitations beyond those established and allocated in their agreement, creating severe conflicts in the underlying business relationship and rendering impossible the productive collective bargaining the majority envisions." Contrary to our colleague, we are confident that bargaining in these units is feasible. Indeed, two courts of appeals have considered and rejected precisely the concerns raised by the dissent. Thus, in *S. S. Kresge v. NLRB*, the Sixth Circuit rejected a similar challenge to a unit combining both jointly employed and solely employed employees, noting that whether such "practical" difficulties will occur is "speculative." 416 F.2d at 1231, quoting from the Ninth Circuit's opinion in *Gallenkamp Stores v. NLRB*, 402 F.2d at 531, in which that court stated that just as the employers there had "worked out their diverse business problems to meet the needs of their joint business enterprise . . . [l]ike efforts should be as effective in their bargaining with the union." Since employers will be obligated to bargain only over those terms and conditions over which they have control, we believe, as did the courts in *S. S. Kresge* and *Gallenkamp*, that employers and unions will be able to formulate appropriate and workable solutions to logistical issues that may arise. The collective-bargaining process inherently depends on the parties' willingness and ability to shape solutions to such problems. Although it is implied by the dissent and amici that bargaining in such units may well be futile because certain terms are set by different employers, such arguments have been rejected by the Board and the Supreme Court as exaggerated. See *Ford Motor Co. v. NLRB*, 441 U.S. 488, 502-503 (1979) (prices of third-party provided vending machine food and beverages, although set by third-party supplier rather than by employer, are mandatory subject of bargaining because employer's right to

[17] Our dissenting colleague also raises various concerns regarding the contractual obligations of the respective employers in the event of an accretion of jointly employed employees to an existing unit of solely employed employees. Those issues are not before us in these cases, and we do not purport to pass on them.

change suppliers gives it leverage over such services and prices).

With respect to our dissenting colleague's concern regarding bargaining conflicts among the solely employed and jointly employed employees, or among the user and supplier employers, we are confident that the collective-bargaining process encouraged by the Act, which covers a wide variety of activity, is capable of meeting the changing conditions and challenges posed by bargaining in these units. See *Ford Motor Co. v NLRB*, 441 U.S. at 496 fn. 9. Even in units composed only of solely employed employees, it is common for groups of employees to have differing, even competing, interests. Unions and employers are routinely called upon to handle such differences, and do so successfully.[18]

Nor do we agree with our dissenting colleague's speculation that, unless jointly employed and solely employed employees are represented in separate bargaining units, suppliers of temporary labor will be enmeshed in labor disputes over which they have no control, contrary to the policy of the secondary boycott laws. *If* supplier employers are in fact neutrals in labor disputes, they will enjoy such protections as the secondary boycott laws afford. See *National Woodwork Manufacturers Assn. v. NLRB*, 386 U.S. 612, 626–627 (1967) (noting that lawful primary picketing may have a severe impact on neutrals). *Whether* supplier employers are neutrals will depend on the particular facts. Cf. *Electrical Workers Local 761 (General Electric) v. NLRB*, 366 U.S. 667 (1961) (whether contractors working on the situs of a primary dispute are neutrals turns, in part, on whether the work performed by the contractor is unrelated to the normal operations of the primary employer); *Television Artists (Baltimore News American Div.),* 185 NLRB 593, 598–601 (1970), enfd. 462 F.2d 887 (D.C. Cir. 1972) (whether a corporate division is a neutral person with respect to a union's dispute with another division at another location turns on the nature of the entities' day-to-day operations and the locus of control over the labor policies at issue). See generally *NLRB v. International Longshoremen's Assn.,* 473 U.S. 61, 81 (1985) (relevant inquiry is "whether the union's efforts are directed at its own employer on a topic affecting employees' wages, hours, or working conditions that the employer can control"). We do not agree with our dissenting colleague's assumption that our decision today appreciably increases the existing difficulty of distinguishing between primary and secondary activity. See *Electrical Workers Local 761 (General Electric) v. NLRB*, 366 U.S. at 673–674 (discussing the difficulty of "drawing lines more nice than obvious"); and *Railway Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 388 (1969) (concluding that the "fuzziness" of the primary-secondary distinction "stems from the overlapping characteristics of the two opposing concepts, and from the vagueness of the concepts themselves").

We also reject our colleague's view that our alleged one-size-fits-all formula overlooks the divergent temporary employment arrangements in our economy and reaches out to decide issues not before us. There is but one set of labor laws in our country, and it is our obligation to respond to developing policy issues that come before the Board. In addition, our return to applying the community of interest test to these units is the antithesis of a one-size-fits-all approach, for it traditionally has been a test that considers all the circumstances. See, e.g., *Kalamazoo Paper Box*, 136 NLRB 134, 137 (1962). While we find no statutory impediment to these units, the employees still must share a community of interest.

The dissent contends that the Board's decisions in *Lee Hospital* and *Greenhoot* "were more protective of employee rights" because they upheld the right of employees to choose their representative and to be represented in a unit of employees of the same employer "with whom they share a community of interest." Contrary to our colleague, it is *Lee Hospital* that has fragmented and splintered appropriate units of employees who would otherwise share a community of interest. From the vantagepoint of the employees, the decision in *Lee Hospital* fragments groups of employees who share common interests and working conditions into smaller groups with diminished bargaining power.

Although we do not decide whether the Interim-supplied employees must be included in the unit with the solely employed Sturgis employees, or whether the TT&O-supplied employees are an accretion to the collective-bargaining unit of Jeffboat employees, issues not reached by the Regional Directors' decisions, both cases are illustrative of this fragmentation of units. In each case, the record contains at least some facts that could support including the Interim-supplied and TT&O-supplied employees in the units with the Sturgis and Jeffboat employees, respectively.[19] But no matter how

[18] See *S. S. Kresge*, 416 F.2d at 1232, in which the court noted:

> There is the possibility that the employees in the departments operated by Kresge will dominate union policy. This, however, is a problem that is germane to all units encompassing different departments with divergent interests. Indeed, the same problem could arise if the appropriate unit consisted solely of Kresge employees, because employees in larger Kresge departments could impose their decisions on employees in smaller departments. Such a result does not mean that the unit is inappropriate, particularly when, as in the present case, there is a sufficient community of interest among the employees in the unit to suggest the problem will not be serious if it does occur.

[19] In *M. B. Sturgis*, the temporaries work side-by-side with regular employees, perform the same work, and are subject to the same supervision. All employees work the same hours, although temporary employees cannot work more than 40 hours per week. The wages and benefits of the temporaries and regular employees differ, however. In *Jeffboat*, the TT&O employees work alongside Jeffboat's employees, share supervision and direction, perform similar work, and are subject to common work and safety rules.

compelling their community of interest may be with the solely employed employees, *Lee Hospital* prohibits their inclusion absent consent of all employers.

For the reasons we have outlined above, we believe the Board's *Lee Hospital* policy regarding these units has the potential for denying numerous affected employees the same Section 7 rights to self-organization accorded other employees under the Act. The Board's mandate under Section 9(b) is to decide appropriate bargaining unit questions so as to "assure to employees the fullest freedom in exercising the rights guaranteed by this Act." In accordance with that mandate, the Board has in the past altered previously-adopted policies where it has found that those policies unfairly prejudice the collective-bargaining rights of employees. Here too, unless we are to jettison important statutory rights for a growing segment of the work force, we should alter our policy. See, e.g., *Metropolitan Life Insurance Co.*, 56 NLRB 1635 (1944); *Quaker City Life Insurance Co.*, 134 NLRB 960 (1961); AND *Metropolitan Life Insurance Co.*, 156 NLRB 1408 (1966) (Board policy allowing only statewide or employer-wide units of insurance agents changed after 17 years because it was apparent to the Board that effect of policy was to frustrate organization and deny insurance company employees the same rights enjoyed by employees in other industries).[20] That the holding of *Lee Hospital* makes it more difficult for employees to obtain union representation, or results in fragmented units if they are successfully organized, raises genuine doubts about the wisdom of its continuation. In our view, it undermines the Board's ability to make collective bargaining reasonably possible for the employees affected by this policy.

d. Clarification of Greenhoot

Having reversed *Lee Hospital*'s mistaken extension of multiemployer principles from *Greenhoot*, we return to *Greenhoot* to clarify its application. As described above, the application of multiemployer principles in *Greenhoot* led to rejection of a unit that would have combined the jointly employed employees of the 14 separate employers (the building owners) because of the absence of employer consent. The Board did not, however, pass on whether consent would have been required had the union sought to be certified only as the employees' representative for purposes of collective bargaining with Greenhoot alone. We find that it would not. If a petitioner seeks to bargain only with the supplier employer, a petitioned-for unit of all the employees of a single supplier is not a multiemployer unit because the petition is seeking to represent the employees vis a vis a single employer. If the petitioner names only the supplier employer in its petition, there is no statutory impediment to a supplier-wide unit under the Act.[21] Hence, while we are today reaffirming *Greenhoot*, we wish to make clear that *Greenhoot*'s requirement of employer consent to the creation of a multiemployer unit has no application when the bargaining relationship sought is only with the supplier employer.[22]

Hence, we limit *Greenhoot*: a petition that names as the employers unrelated employers will be treated as seeking an inappropriate multiemployer unit absent the consent of all the employers; a petition that seeks a unit only of the employees supplied to a single user, or seeks a unit of all the employees of a supplier employer and names only the supplier employer, does not involve a multiemployer unit.

CONCLUSION

We hold today that consent requirements for multiemployer bargaining among separate and independent employers do not apply to units that combine jointly employed and solely employed employees of a single user employer. We will apply traditional community of interest factors to decide if such units are appropriate. For all the reasons set forth in this decision, we overrule *Lee Hospital* to the extent it is inconsistent with our decision today. We also clarify *Greenhoot* to permit units of the employees employed by a supplier employer, such as Greenhoot, provided the units are otherwise appropriate.

We remand these cases to the Regional Directors to decide the unit questions without regard to the restriction imposed by *Lee Hospital*.[23] In *M. B. Sturgis*, the case is

[20] Cf. *NLRB v. Hearst Publications*, 322 U.S. 111, 130 (1944) ("Everyday experience in the administration of the statute gives it [the Board] familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers").

[21] See *Chelmsford Food Discounters*, 143 NLRB 780, 781 (1963), in which the petitioner sought to name only Chelmsford as the employer, and the Board found it unnecessary to reach the intervenor's contention that Chelmsford was a joint employer with another employer, as Chelmsford was an employer of the petitioned-for employees and the requested unit was an appropriate unit.

[22] A unit of the employees of a single supplier employer is appropriate even though some terms and conditions of employment may be controlled by another employer, i.e., by a user employer unnamed in the petition. As we explained above, *Management Training Corp.*, 317 NLRB 1355, teaches that the absence of one of the joint employers at the bargaining table does not destroy the ability of the joint employer who is at the table (here, the supplier) to engage in effective bargaining to the extent that it controls the terms and conditions of employment of its employees. See *Western Temporary Services v. NLRB*, 821 F.2d at 1265. If a petitioner seeks only to bargain with the supplier, the unit is not a multiemployer unit and employer consent is not required.

[23] We note that in *M. B. Sturgis*, Sturgis contended that the Regional Director erred by denying its motion to reopen the hearing to ascertain Interim's consent and to permit Interim to otherwise participate in the proceeding. Although we believe that consent is not necessary should the unit be found appropriate in that case, we will grant Sturgis' request to permit Interim to participate on the remand because it did not receive notice and did not participate in the hearing. It is important in these cases that all interested parties be accorded due process and notice of an opportunity to be heard on these petitions. As the *M. B. Sturgis* case illustrates, parties with an interest, such as potential joint employer temporary agencies or leasing firms, may not be notified of the hearing.

remanded to determine whether the Interim-supplied temporary employees must be included in the unit. In *Jeffboat*, the case is remanded to the Regional Director to determine whether the TT&O-supplied employees are an accretion to the contractual bargaining unit, including the consideration of Jeffboat's other contentions for dismissing the petition, which were held in abeyance for our consideration of the *Lee Hospital* and joint employer issues.

ORDER

The Acting Regional Director's finding that Jeffboat and TT&O are joint employers is affirmed. The Acting Regional Director's dismissal of the petition in *Jeffboat,* is reversed and the petition is reinstated. M. B. Sturgis' motion to reopen the record is granted. The petitions in *M. B. Sturgis* and *Jeffboat* are remanded to Region 14 and Region 9, respectively, for consideration consistent with this Decision.

MEMBER BRAME, dissenting in part.

Contrary to the majority's conclusion, the instant cases provide no basis for disturbing the principle prescribed by the statute, long accepted by the Board and the courts, and properly reflected in *Greenhoot, Inc.,* 205 NLRB 250 (1973), and *Lee Hospital,* 300 NLRB 947 (1990), that employers may not be coerced into participation in multiemployer bargaining. Applying this principle, I would find that the units at issue here, by including employees of more than one employer, effectively require multiemployer bargaining and are therefore impermissible under the Act. Contrary to my colleagues' assertion, compliance with statutory mandates and Board-established principles does not deprive employees of their representational rights. Rather, it simply ensures that they would be represented in appropriate units in accordance with the statute.

Congress recognized that a workable framework for stable collective-bargaining relationships requires that the represented parties—employees and employers—have common, if sometimes conflicting, interests. In order to ensure that bargaining takes place on the basis of such common interests, Section 9(b) of the Act prescribes that collective-bargaining units must be "appropriate," i.e., the unit must conform to certain statutory standards and the employees must share a community of interest. For the same reason, the Act precludes the Board from defining units so as to require employers of separate employee groups to bargain jointly and allows for joint bargaining by employers only when they constitute joint employers of the same unit of employees or when they voluntarily enter into a more inclusive bargaining relationship. In the interest of facilitating union organizing in the modern workplace, however, today's decision sacrifices this fundamental statutory principle of commonality of interest by forcing employers of different employee groups to bargain together despite their differing and often conflicting interests with respect to the bargaining unit employees.

We have two cases before us. In *Jeffboat*, the union seeks to accrete to an existing collective-bargaining unit a separate workforce recruited and paid by a temporary agency. In accordance with the terms of the contract between Jeffboat and the agency, those workers must be recruited at least 150 miles away from the worksite. The agency pays the employees, inter alia, $50 per diem.[1] Jeffboat argues that the temporary employees should not be added to the unit because the employers do not consent to multiemployer bargaining and because the temporary employees lack a community of interest with Jeffboat's permanent employees.

By contrast, *M. B. Sturgis* involves a union organizing campaign in which Sturgis, presumably in an attempt to dilute the union's strength in the petitioned-for unit, argues that the temporary workers must be included in the unit. Unlike in *Jeffboat*, the union in *Sturgis* opposes inclusion of the temporary workers on the grounds that they are short-term employees and because they are jointly employed by both Sturgis and another employer.

Greenhoot and its progeny have been relied on for the principle that jointly employed employees may not be included in a bargaining unit with the employees of one of the joint employers, without the consent of the employers. Using the present two cases, the majority seeks to address a wide range of arrangements involving temporary employment agencies, contract staffing companies, and outsourcing. However, the facts of these cases, which present one basic scenario of temporary workers working side-by-side with the user employer's employees at that employer's facility, are hardly representative of the myriad possible combinations. Nevertheless, the majority attempts to fashion a broad rule to encompass the wide range of situations in which the employees of two or more employers work together and the employers share control over the working conditions of at least some of the employees. The result of this endeavor is both bad law and bad policy.

Although the laudable goal of the majority is to eliminate the "possibility that thousands of employees suffer the effective loss of representation rights guaranteed by the Act," the facts of the present cases contradict this claim. In *Sturgis,* the union opposes the inclusion of the

Since the hearings in these cases, the General Counsel has amended the Casehandling Manual (Part II) (Representation Proceedings) Sec. 11008.1(c), to require notification as interested parties "any other employer which might be a joint employer (for example, a contractor, an employment service, or a supplier of leased or temporary employees) or the operator of a leased department in a case involving a retail store where there are leased departments."

[1] The contract covering the unit into which the Union seeks to accrete these employees provides for hourly pay but no per diem.

temporary workers, and in *Jeffboat* the union seeks the inclusion of the temporary workers without a vote.

In justifying its abrupt departure from the longstanding requirement of consent to multiemployer bargaining in these cases, the majority attempts to argue that bargaining by an employer with respect to its own employees, and by the same employer together with a joint employer with respect to jointly employed employees, is not "true" multiemployer bargaining. Having thus used a verbal formulation to slight the critical importance of employer-based bargaining units under the statutory scheme, the majority ignores statutory mandates and determines that the appropriateness of these units should be considered through the Board's community of interest analysis. The majority, however, again overlooks that such an assessment, designed to determine appropriate units among the employees of the *same* employer, assumes the matters here at issue, i.e., that community among employee *begins* with the key fact that they are employed by the same employer.

Moreover, the majority contemplates bargaining in which the sole employer as well as each employer in the joint employer relationship will bargain concerning the employees and the subjects under its control. Such neatly parsed negotiations, however, are unlikely to materialize. In a more realistic scenario, this forced multiemployer bargaining would produce controversy and confusion as the employers strive to protect their differing interests even as they negotiate jointly with the union. The error of the notion that each employer would negotiate concerning the subjects it controls is particularly highlighted in the accretion context of *Jeffboat*, in which the supplier employer, which hires and pays its employees, would at a minimum be initially bound by a collective-bargaining agreement that was negotiated solely by Jeffboat for Jeffboat's employees. Forcing an employer to abide by a contract that it did not negotiate flatly contradicts the Supreme Court's holding in *H. K. Porter Co. v. NLRB*[2] that the Board lacks the authority to compel an employer to accept even a single contractual provision.

Thus, the majority's decision today runs counter to the statute, sound labor policy, and the reality of collective bargaining.

I. FACTS

A. Sturgis

The facts of these cases are relatively straightforward. Sturgis operates a hose assembly business in Maryland Heights, Missouri, where it employs 34–35 full-time production or assembly employees. At any given time, Sturgis also has approximately 10–15 additional employees working on a temporary basis through an arrangement with Interim, Inc., a temporary employment agency.

The Regional Director found that Interim controls many of the essential terms and conditions of the temporary employees whom it places at Sturgis. Interim is responsible for interviewing and hiring these employees. Interim determines their pay and benefits, and the employees receive their pay directly from Interim. In fact, Sturgis' senior production manager, Stan Wolfman, did not know the wage rates of the temporary employees, but only the flat hourly rate that Sturgis pays Interim for their services. The wages and benefits provided by Sturgis to its own employees differ from those offered by Interim to the temporary employees.

In addition, Interim decides which employees to assign to work at the Sturgis facility each day. In the 7 months between March 1995 and the issuance of the Regional Director's Decision and Direction of Election, Interim placed approximately 50 different employees in the 10-15 temporary positions at Sturgis.

After the temporary employees arrive for work at Sturgis, Sturgis determines their duties and controls many of the conditions under which they perform those duties. These employees thus work alongside Sturgis' own employees and are supervised by Sturgis' supervisors. They perform their duties in the same work area, make the same products, and record their time for each project in the same manner as Sturgis' own employees. Full-time and temporary employees take their breaks in the same place and at the same time. They also work the same hours, although the temporary employees may not work over 40 hours per week. Sturgis reports to Interim the hours worked by the temporary employees. Sturgis'supervisors have authority to discharge temporary employees, and have done so, although the record does not show whether or how such action affects the employees' employment with Interim.

Sturgis hires for full-time positions both employees who have not previously worked at the facility and employees who have worked on a temporary basis through Interim. Between March 1995 and the date of the Regional Director's decision, a period of approximately 8 months, Sturgis hired nine temporary Interim employees for full-time jobs. Sturgis typically does not hire temporary employees who have worked at its facility for less than 90 days, because its contract with Interim requires it to pay a fee when an employee is hired before that time.

Sturgis contends that the bargaining unit should include the temporary Interim employees as well as its full-time employees. Petitioner Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union Local 108 (Local 108), however, objected, arguing that a unit including these employees would be inappropriate. Interim did not participate in the hearing, so the record did not demonstrate any consent by Interim to the inclusion of the temporary employees

[2] 397 U.S. 99 (1970).

in a unit with Sturgis' employees. At oral argument, however, Interim stated that it did not consent to their inclusion.

The Regional Director found that "at most" Sturgis and Interim were the joint employers of the temporary employees. Relying on Board precedent holding that employees of different employers may be included in the same bargaining unit only with the consent of both employers,[3] the Regional Director concluded that the temporary employees must be excluded from the unit.

B. Jeffboat

The Petitioner in Case 9–UC–406, General Drivers, Warehousemen & Helpers Local 89 (Local 89), currently represents the production and maintenance employees at Jeffboat's shipyard in Jefferson, Indiana. In addition to the approximately 608 employees included in the unit, encompassing approximately 31 job classifications, Jeffboat filled an additional 30 first-class welder and steelfitter positions at the shipyard through a contract with TT&O in August 1995. Local 89 seeks to clarify the existing bargaining unit to include the employees provided by TT&O through accretion.

The record shows that Jeffboat entered into its contract with TT&O as a result of its inability to recruit a sufficient number of qualified employees for its production requirements. Under the terms of the contract, TT&O must recruit the employees it assigns to Jeffboat from distances of at least 150 miles from the shipyard, in order to prevent competition with Jeffboat's own hiring efforts. Jeffboat may hire TT&O-assigned employees after they have worked at least 30 days at the shipyard. The record does not reveal how many of these employees, if any, were actually hired.[4]

The welders and steelfitters assigned to the shipyard by TT&O possess the same technical skills as Jeffboat's employees in the same classifications, and work directly with those employees on the second and third shifts. A representative of TT&O is frequently on site at the shipyard, but the record does not specify his responsibilities or his involvement with the employees. The work of the TT&O employees is assigned and monitored by Jeffboat supervisors and they are subject to the same rules as Jeffboat employees.

TT&O pays the employees at the Jeffboat shipyard $10 per hour plus $50 per diem. They receive no fringe benefits. In contrast, the 1995–1998 collective-bargaining agreement covering unit employees prescribes hourly wage rates for first class welders and steelfitters ranging from $10.95 for the first contract year to $11.70 for the third year, and benefits such as paid vacation days and holidays; dental, vision and health insurance; and a pension plan.

The Acting Regional Director determined that Jeffboat and TT&O are joint employers of the TT&O. employees working at the shipyard. Based on *Greenhoot* and *Lee Hospital*, he concluded that, because Jeffboat and TT&O did not consent to the inclusion of the TT&O employees in the unit, the unit clarification petition must be dismissed.

II. THE TEMPORARY EMPLOYMENT INDUSTRY

The temporary employment arrangements at issue in these cases, as discussed more fully below, represent just one of the many ways in which employers obtain additional workers to meet their needs in providing goods or services to their customers. Moreover, reliance on the temporary employment industry to hire and supply these workers is in turn but a single aspect of the broader business trend to outsource by contract many functions that can be carried out efficiently by other business entities.[5]

The decisions of businesses to outsource specific functions are driven by a variety of factors.[6] Some businesses, for example, turn to outsourcing in order to focus on their core functions or to enhance their ability to respond quickly to changing circumstances, while others see outsourcing as a means of improving performance by acquiring expertise in new areas. Financial considerations may also motivate employers to outsource, whether in order to eliminate capital assets required for ancillary functions, to increase their market penetration through the provider's contacts, or to control costs in periods of market fluctuation. Some decisions are also driven by employee considerations. An employer might outsource a noncore function, knowing that it cannot offer the employees performing the function ongoing training and an attractive career path, and that both the employer and the employees benefit from the availability of such long-term opportunities offered by focused staffing firms.[7]

Temporary staffing is the second most commonly outsourced function, surpassed only by building maintenance and cleaning.[8] In a 1996 survey by the American Management Association (AMA), employers that outsource human resource functions, including temporary staffing, most often cited saving time as their purpose, followed by reducing cost and improving quality.[9]

In temporary employment arrangements, the supplier employer serves as a conduit between the labor force and user employers. Thus, supplier employers act as intermediaries in the labor market, matching user employers that need additional worker services, and individuals seeking employment in a variety of occupations and with

[3] The Regional Director cited *Hughes Aircraft,* 308 NLRB 82 (1992), and *International Transfer of Florida*, 305 NLRB 150 (1991).

[4] Jeffboat began using employees assigned by TT&O about August 14, 1995, and the hearing was conducted less than 2 months later, on October 11, 1995.

[5] See Greaver, *Strategic Outsourcing,* 308 (1999).

[6] Id. at 295–296.

[7] Id. at 296; see also "Outsourcing Tech Staff Works Well at Some Firms," *The National Law Journal* C6 (2000).

[8] Greaver, supra, at 308.

[9] Greaver, supra, at 303.

a variety of needs and expectations regarding schedule, tenure, and pay. In this respect, supplier employers are the functional equivalent and thus a market competitor of hiring halls that similarly match employers and available employees.[10]

From the employees' perspective, temporary employment through supplier employers can provide significant benefits. Workers, particularly those new to a job market, receive job-related training as well as access to a wider range of job opportunities and experience. Both new and experienced workers also enjoy the benefits of flexible schedules and the availability of employment without a lengthy job search. In addition, some temporary employees have the opportunity to obtain permanent employment with the employers to which they have been assigned.[11]

A. Forms and Functions of Temporary Employment

Temporary employment and the supplier employers involved in that industry take many forms. Although the two cases at issue in these proceedings share similar factual characteristics, the majority leaps from this common scenario to far-reaching conclusions about employer relationships and appropriate units in the entire temporary employment industry. In fact, my colleagues make sweeping determinations not only about units within the facility of user employers, the question posed here, but also about units of supplier employer employees, a matter not raised and thus inappropriate to decide in these cases.

The two present cases involve a temporary employment agency providing employees to a user employer, with the supplier employer responsible for hiring the employees, setting their pay, paying them, and determining their place of employment. Each supplier employer and user employer have an ongoing business relationship that is reflected in a written document, and each supplier employer fills a significant number of temporary positions at the user employer's facility. The temporary employees work at the user's facility, and are directly supervised by the user employer's supervisors. Although the record does not specify how long individual employees remain in the temporary positions, the record in *Sturgis* shows that 50 employees occupied the 10–15 temporary positions in a 7-month period, indicating an average tenure of 6–10 weeks.

1. Variety of forms. Contrary to the majority's apparent assumption that all temporary employment situations follow the factual model of the instant cases, current business arrangements for the supply of temporary or contingent employees take many diverse forms.[12] In some cases, small employers engage a payroll service company simply to provide certain personnel and payroll functions in order to realize economies of scale in payroll processing, insurance, payroll deductions, recordkeeping, and check writing. Other employers outsource entire departments, or tasks that do not constitute core functions, to a contractor. The contractor then provides management, employees, and sometimes equipment, to perform the work either at the user employer's facilities or offsite. Some common examples of outsourcing involve warehousing, reproduction, and delivery functions.[13]

2. Temporary agencies. In other arrangements, a temporary agency provides employees to fill in when positions are vacant or employees are absent, or to meet a temporary need to add shifts or otherwise increase staffing.[14] The tenure of these jobs therefore may be short or long term. A 1997 Bureau of Labor Statistics (BLS) study showed that the median tenure in a single temporary assignment was 5 months, and the median employee tenure with a temporary agency overall was 6 months.[15]

Temporary agency employees are most commonly engaged in clerical and machine operator occupations, although they also include more highly skilled technical and professional employees. In these temporary staffing arrangements, the user employer obtains the benefit of the supplier employer's ready access to qualified and available employees when needed, without incurring the economic inefficiencies of recruiting new hires or the risks of terminating them when the temporary need diminishes.

3. Temp-to-hire arrangements. Some user employers also utilize employment agencies or other labor suppliers on an intermittent or regular basis to recruit temporary employees who, if they meet performance expectations, will be hired for permanent employment.[16] This "temp-to-hire" arrangement removes some guesswork from the hiring process for the employer, and allows unsettled or first-time workers to gain paid experience in a variety of jobs, as well as the potential for continued employment.

4. Contract companies. Another type of labor supplier, the contract company, provides employees to other businesses, for which the employees work continuously for the contract period. This form of temporary employment, although less common than temporary agency employment, increased by 24 percent between 1995 and

[10] See Lips, *Temps and the Labor Market,* Regulation, spring 1998, 31, 33, 38. To address the related problems of competition with temporary agencies and representation of temporary workers, Communications Workers of America (CWA) negotiated a collective-bargaining agreement with ComStaff Temporary Services that provides for a CWA Employment Center to match employees with small contractors in the Cleveland, Ohio area. Shine, *Can the NLRB Help Cinderella and Little Orphan Annie?* 47 Lab. L. J. 693, 704–705 (1996).

[11] Lips, supra, 34–35.

[12] Irving, *Contingent Workers and the NLRA,* reprinted in Stein, *Contemporary Issues in Labor and Employment Law, Proceedings of N.Y.U. 48th Annual National Conference on Labor* (1996) at 456.

[13] See, e.g., *Dial-A-Mattress Operating Corp*., 326 NLRB 884 (1998).

[14] Lips, supra, at 33.

[15] Cohany, *Workers in Alternative Employment Arrangements: A Second Look,* reprinted in Daily Labor Report, Jan. 14, 1999, E–1, E–9.

[16] Lips, supra, at 35.

1997.[17] Employees who participate in such an employment arrangement are more likely than other temporary workers or employees in traditional work settings to be experienced workers and in professional, technical, service, and precision production occupations.[18] Contract company employees may be hired, for example, to perform specific jobs such as periodic equipment maintenance or installation of software or machinery. The 1997 BLS study found that about 40 percent of contract company employees had worked for their companies for 1 year or less, and that 30 percent had held their positions for 4 years or more.[19] Contract company employees, as a group, enjoy higher median pay than workers in any other temporary arrangement, or in traditional work settings, and approximately 70 percent of these employees are also eligible for employer-provided benefits.[20]

B. Role of Supplier Employers

In order to succeed in the business market, all supplier employers must attract and provide value both to user employers and to the individual employees who participate in the various arrangements. The growth of the temporary employment industry demonstrates that they in fact provide such value.

Temporary agencies and contract companies clearly provide advantages to user employers, as previously noted, by relieving them of the expense and administrative demands of hiring new employees, particularly for staffing needs anticipated to be temporary. In "temp-to-hire" arrangements, the user employer can select permanent employees from among individuals with whom they are already familiar, thus reducing costs involved in filling positions repeatedly when the expectations of either the employee or the employer are not satisfied. Furthermore, although the actual cost of temporary employees, including their pay and the agency fee, is often not lower than that of regular employees, the user employer only pays for the hours of work actually needed and performed.[21]

C. Arrangements Between Supplier Employers and Employees

Contract terms between supplier employers and their employees vary according to the parties' needs and expectations. This variety reflects the characteristics of the diverse temporary labor sources, and depends in part on whether the employment or assignment is long-term, on a daily basis, or from a pool of qualified workers. Various arrangements may also reflect the employee's qualifications and training needs, the labor market for that occupation or locality, and the employee's desires and expectations in seeking temporary employment. For example, a temporary agency may hire employees on a walk-in basis**,** provide basic instruction on promptness and other appropriate conduct in the work environment, and refer them for one or more entry-level positions. Higher level administrative positions, on the other hand, may be filled by a temporary agency from an established pool of experienced workers. Information technology employees more frequently work full time**,** receive ongoing training in new technology, and often work over an extended period of time on projects assigned through contract companies.[22] As in the case of many temporary agencies, the same supplier employer may have different arrangements with different employees, offering, for example, extensive technical training**,** health benefits, and 401(k) plans to longer tenure employees.

As a result of such diversity, a supplier employer assigning a technical worker from a controlled pool, for example**,** would be reluctant to enter into collective-bargaining agreements setting different terms and conditions of employment for the various individuals they employ, or to have individual employees' working conditions, such as pay and benefits**,** change substantially from 1 week or month to the next, depending on their current assignment. The employees, likewise, would object to losing health and benefits coverage provided by the supplier employer and being subject to new waiting periods when assigned to certain organized user employers.

For a supplier employer that assigns a pool of available workers to various user employers on an as-needed basis, for example, the administrative complexity of such an array of agreements at different user employers would be staggering, and the potential for error great. The possibility of such disruptive fragmentation would serve as a powerful incentive for the supplier employer to seek certain consistent terms in collective-bargaining agreements, whereas the user employer**'**s interest might be in keeping the leased employees' rates no higher than the permanent employees', in order to avoid losing the permanent employees to the leasing agency. Again, the preliminary negotiations between the employers could be as critical and complex as those between the employers and the union.

Employees participate in temporary employment arrangements for a variety of reasons and derive significant benefits from them. Temporary employment clearly provides advantages to first-time job seekers and other individuals who ultimately desire full-time employment, by making available paid experience in a variety of fields, as well as valuable contacts and references in the selected occupation.[23] Approximately 72 percent of temporary employees move into full-time jobs; many remain with the user employer.[24] The increase in "temp-

[17] Cohany, supra, at E–17.
[18] Id.
[19] Id.
[20] Id. at E–18.
[21] Lips, supra, at 33.
[22] Cohany, supra, at E–17–18.
[23] Lips, supra, at 33, 35.
[24] Id. at 35.

to-hire" employment has likely contributed to this trend. Temporary employment also offers job opportunities during swings in the economy. By reducing the time and cost of a job search, they allow employees to weather these changes by moving easily among employers as their services are needed. Moreover, temporary agencies frequently provide training to their employees, not only in skills related to particular occupations, but also in the basic life skills and behavior required for success in any type of employment. By increasing the employees' value to user employers, the temporary agency can enhance its own charges as well as the pay of its employees.

Finally, supplier employers are frequently able to provide employees greater opportunities for job progression. For example, small employers cannot provide a small cadre of information technology employees the career advancement through training and increased pay that these employees would receive working for a contract company that employs a large number of such employees. In these circumstances, employment with a labor supplier affords employees the benefits and incentives of career growth, and provides the user employer the advantages of a well-trained and motivated information technology staff.[25]

As the number of supplier employers grows, each such employer must compete more aggressively to attract employees. Competition for temporary employees, among both suppliers and users, requires increasingly attractive arrangements for employees. Thus, agencies frequently offer pay, job opportunities, benefits and other advantages that would not be available if the employees independently obtained a succession of temporary positions with different user employers.

D. Contracts Between Supplier and User Employers

The diverse contractual relationships between supplier employers and user employers undermine the majority's rather limited view of bargaining in temporary joint employment arrangements. The contractual relationship, for example, may or may not be exclusive. Not only do supplier employers often furnish employees to many user employers, but some user employers also obtain employees from a number of suppliers. According to the AMA survey, 58.2 percent of companies that outsource their temporary staffing function use multiple suppliers.[26] Each of these suppliers would likely have different practices, pay rates, and benefits. Therefore, the combined bargaining envisioned by the majority may involve not simply two employers, but several, each with distinct starting points and competing interests. In such cases, each employer would be required to negotiate with the other employers in order to achieve some degree of coordination and cohesion in dealing with the union.

Other contractual matters, such as the duration of the relationship between the supplier and the user and the agreed-upon dispute resolution processes, might also affect the employment of the temporary employees, or even the permanent employees in the unit. The AMA survey found that contracts are typically short-term; 58 percent of employers reported that 1-year contracts were the norm, and only 20 percent reported a standard duration of 3 or more years.[27] Moreover, a survey by Dun & Bradstreet revealed that 20–25 percent of all outsourcing relationships fail in any 2-year period, and 50 percent fail within 5 years.[28] The short duration of contracts and frequent turnover of supplier employers raise additional complex issues, including the current joint employers' obligation to bargain concerning a change in supplier employers and a new supplier employer's position with respect to the existing collective-bargaining agreement, which it did not negotiate. These problems weigh strongly against the inclusion of the temporary employees in the bargaining unit of the user employer's employees.

Also significant is the agreed-upon basis of payment to the supplier employer, whether a lump sum, a fixed hourly rate, or cost plus a fixed fee. Under a lump-sum contract or one that specifies a fixed hourly rate, the supplier employer must absorb any increase in costs for wages and benefits resulting from collective bargaining. Under a cost-plus contract, on the other hand, the user employer bears the risk of such additional costs. Moreover, a single user employer might enter into different types of contracts with different suppliers. In any case, this allocation of risks can determine the relative bargaining position of each employer, even as to the terms and conditions that it nominally controls. A supplier employer that sets the pay of its employees, for example, would be guided by its internal financial considerations in collective bargaining about pay for temporary employees working under a fixed fee contract. For employees working under a cost-plus contract, on the other hand, the supplier, though not financially liable for the increase, would be constrained by contractual limitations and concerned about its prospects for retaining the contract if it agreed to an increase. In both cases, the supplier employer must consider the effect on other employees performing similar work for its other user employers and the nature of those contracts.

The present cases thus represent merely one limited scenario in the diverse and complex landscape of temporary employment arrangements described above. For this reason, the Board should limit its holding in this proceeding to the specific factual and legal issues posed, reserv-

[25] *The National Law Journal,* supra, at C6.
[26] Id.
[27] Id.
[28] "Dun & Bradstreet Survey Finds 50 Percent of Outsourcing Relationships Worldwide Fail Within Five Years; Principal Cause is Poor Planning for New and Evolving Business Process," *Business Wire* (2000).

ing judgment concerning different circumstances until they are directly presented in future cases.

III. LEGAL FRAMEWORK

The General Counsel, through these cases, calls upon the Board to reexamine the appropriateness of a unit that includes the employees of one employer as well as employees who are jointly employed by that and another employer, without the consent of the employers. The majority response, finding that the commonality of one employer is sufficient to overcome the restrictions on multiemployer bargaining and to support a community of interest finding, may appear pragmatic from the perspectives of administrative convenience and ease of union organizing.[29] In reaching this result, however, the majority glosses over statutory safeguards and Board tenets that have long served to protect both employees and employers in the structuring of bargaining units.[30] The majority's approach, built on a precarious legal foundation and faulty premises of labor policy and practice, fails to provide a viable solution to bargaining unit questions involving jointly and solely employed employees. Even worse, the majority creates opportunities for both unions and employers to manipulate unit determinations in representation proceedings.

A. Statutory Language and Legislative History

Section 9(b) of the Act states in relevant part:

> 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.

Section 9(b) thus affords the Board substantial discretion in determining the appropriateness of bargaining units on a case-by-case basis. That section, however, also limits the Board's discretion in unit determinations, i.e., "whether the unit appropriate for collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." The discretion granted to the Board by Section 9(b)[31] must therefore be exercised only within the framework provided by the statute.[32]

The express language of Section 9(b) makes clear that appropriate units are to be drawn along the prescribed groupings of employees or *subdivisions*, not *combinations*, thereof. The majority concedes that units broader than employer-wide are not contemplated by this section.[33] By verbal sleight of hand, however, the majority's unit determinations in these cases combine employees of a sole employer and joint employers to form a unit, abuse the discretion afforded to the Board by the Act, and guarantee uncertainty and frustration in the collective-bargaining process. The majority substitutes its own assessment of what is pragmatic in today's workplace for the clear statement of Congressional intent expressed in Section 9(b).

Furthermore, nothing in the legislative history suggests that Congress intended or authorized the Board to establish units broader than the employees of a particular employer, as provided in Section 9(b).[34] In fact, in deliberations concerning the Taft-Hartley Act, Congress specifically considered whether the term "employer" for purposes of Section 9(b) should include employer associations. Senate amendments expressly excluded "a group of employers except where such employers have voluntarily associated themselves for the purpose of collective bargaining."[35] The conference agreement, however, found this provision unnecessary because it merely restated existing Board practice, "and it is not thought that the Board will or ought to change its practice in this respect."[36] Nor is there any hint that Congress contemplated that a plantwide unit may include employees of more than one employer. Rather, the provision for plantwide units is consistent with the Board's well-established presumption that, where an employer maintains more than one facility, single-location units will be found appropriate.[37]

B. Joint Employers

A notable but narrow variation of the general model of bargaining between one employer and the union representing its employees applies when the employing entity of a particular group of employees is a combination of employers, referred to as joint employers. The Board and courts find joint employer status when separate em-

[29] Union leaders, however, view organizing temporary workers as an important aspect of their agenda for the future. See Hiatt and Jackson, supra, at 172.

[30] Ease of union organizing, moreover, has never been recognized as a Congressional purpose underlying the Act. In fact, Sec. 9(c)(5) of the Act expressly prohibits the Board from considering the extent of union organizing in determining appropriate units for collective bargaining. See *NLRB v. Lundy Packing Co.,* 68 F.3d 1577 (4th Cir. 1995), cert. denied 518 U.S. 1019 (1996).

[31] *South Prairie Construction Co. v. Operating Engineers Local 627,* 425 U.S. 800 (1976).

[32] See *Lundy Packing*, supra (Board erred in establishing standard for unit determination that was inconsistent with statutory prohibition against relying on extent of organization).

[33] See also Hiatt and Jackson, *Union Survival Strategies for the Twenty-First Century,* 12 The Labor Lawyer 165, 172 (1996) ("the NLRA presupposes stable employment relationships. Organizing within the NLRA model takes place among employees of an employer working within a defined bargaining unit.")

[34] The phrase "or subdivision thereof" in Sec. 9(b) was selected to enable the Board to order an election "in a unit not as broad as 'employer unit,' yet not necessarily coincident with the phrases 'craft unit' or 'plant unit'; for example, the 'production and maintenance employees' of a given plant." H.R. Statement on Conf. Rep. S. 1958, 79 Cong. Rec. 10297, 10299 (1935), reprinted in 2 Leg. Hist. 3260, 3263 (NLRA 1935).

[35] H.R. 3020, reprinted in 2 Leg. Hist. 229–230 (LMRA 1947).

[36] House Conf. Rep. No. 510 on H.R. 3020, 2 Leg. Hist. 535-536 (LMRA 1947).

[37] *Kendall Co.,* 184 NLRB 847 (1970).

ployers "share or codetermine those matters governing essential terms and conditions of employment."[38] The joint employers, taken together, are regarded in Board law as the statutory employer of the jointly employed employees. The Board, however, has not previously espoused the view, inescapable in the majority rationale in the present cases, that joint employers are legally indistinguishable from either of the component employers. Such an approach is misguided and contrary to logic.

C. Multiemployer Bargaining

Joint employers, in which two or more employers codetermine the terms and conditions of employment of a single group of employees, are very different from multiemployer bargaining, in which two or more employers group together for bargaining with the union representing their respective employees. The legislative history of the Taft-Hartley Act amply demonstrates that Congress seriously debated the benefits and dangers of nonconsensual multiemployer and industrywide bargaining, and whether the Board should have the authority to certify multiemployer units.[39] A conference committee, considering early in the legislative process a House bill, H.R. 3020, which flatly prohibited such bargaining and a Senate bill, S. 1126, which prohibited it unless it was undertaken voluntarily, elected to follow the more moderate Senate approach.[40] As noted above, the conference committee, in reconciling later versions of the legislation, approved the Board's practice of permitting only voluntary multiemployer bargaining units, and therefore found it unnecessary to include amendments proposed by the Senate reflecting that practice.[41]

Consistent with the Congressional determination that multiemployer bargaining must be strictly voluntary, Congress added Section 8(b)(4) of the Act,[42] prohibiting unions from engaging in strikes or threats with an object of "forcing or requiring any employer or self-employed person to join any labor or employer organization." That provision also prohibits union attempts to coerce an employer to act *as if it were* a member of a multiemployer group.[43]

Thus, Congress directed that multiemployer bargaining represent a voluntary exception to the normal model of one employer bargaining with the representative of an appropriate unit of its employees. This limited exception, moreover, applies only under a highly restrictive set of conditions designed to ensure that the Congressional requirement of voluntariness is satisfied, and the Board and courts have accordingly applied a stringent test in determining whether multiemployer bargaining has been established.

> The test is whether the employer members have indicated from the outset an unequivocal intention to be bound by group action in collective bargaining, and whether the union, being informed of the delegation of bargaining authority to the group, has assented and entered into negotiations with the group representative.[44]

It is clear, therefore, that the consent of an employer or union to multiemployer bargaining will not be inferred. Consent, for example, will not arise from the employer's membership in an employer association. *Rock Springs Retail Merchants Assn., 1*88 NLRB 261 (1971). Even an agreement to engage in multiemployer bargaining is insufficient; actual bargaining must occur before the employer is bound. *NLRB v. 1115 Nursing Home & Service Employees*, 44 F.3d 136, 138 (2d Cir. 1995), enfg. 312 NLRB 409 (1993).

Thus, an obligation to engage in multiemployer bargaining arises only from an employer's history of actually doing so. Even then, a brief or equivocal history of multiemployer bargaining does not demonstrate the necessary agreement to bargain on that basis. Id. at 138-139. The Board does not, and under the statute may not, impose such an obligation through its appropriate unit determinations.

Under the same compelling statutory principle of one-employer bargaining that only permits multiemployer bargaining on a voluntary basis, a party may unilaterally revoke its election to engage in multiemployer bargaining. The Supreme Court has approved the policy, set out by the Board in *Retail Associates,* 120 NLRB 388

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[38] *NLRB v. Greyhound Corp.,* 368 F.2d 778, 780 (5th Cir. 1966), on remand from *Boire v. Greyhound Corp.,* 376 U.S. 473 (1964); *NLRB v. Browning-Ferris Industries of Pennsylvania,* 691 F.2d 1117, 1123 (1982).

[39] See discussion of legislative history in *Mobile Mechanical Contractors Assn. v. Carlough,* 664 F.2d 481, 485 (5th Cir. 1981), cert. denied 456 U.S. 975 (1982).

[40] Id.

[41] See fn. 36, supra.

[42] Sec. 8(b)(4) provides, in relevant part, that it is an unfair labor practice for a labor organization

> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; *Provided,* That nothing in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

[43] *Mechanical Contractors Assn.*, supra, at 483.

[44] *NLRB v. Beckham, Inc.,* 564 F.2d 190, 192 (5th Cir. 1977).

(1958), that any party is permitted to withdraw from multiemployer bargaining before the date set for negotiation of a new collective-bargaining agreement or the date on which negotiations begin, as long as adequate notice is provided. *Bonanno Linen Service v. NLRB*, 454 U.S. 404, 410–411 (1982).

D. Community of Interest

When approaching its task of defining that "appropriate unit" in which an election or collective bargaining is to take place, the Board has limited its certification to that "employer unit, craft unit, plant unit, or subdivision thereof" in which employees share a "community of interest." The basic requirement is that collective bargaining must take place only with respect to a grouping of employees in which bargaining will be effective and protective of those employees' interests.

> A cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining . . . and prevents a minority interest group from being submerged in an overly large unit.[45]

In making this determination the Board has developed a series of presumptions, such as the presumption that a single employer location is appropriate.[46]

In specific situations, the Board considers a number of factors in determining whether a community of interest exists among the employees sought to be represented.

> [A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training, and skills; differences in job functions and amount of working time spent away from the employment or plant situs[;] the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.[47]

Significantly, the reported cases listing or applying community of interest factors do not list the identity of the employer as a factor to consider, because the common employer is a precondition to beginning the community of interest analysis.[48]

Where an accretion to an existing bargaining unit is sought, as in *Jeffboat,* an even more stringent community of interest standard is applied, because the accreted employees are denied the opportunity to select their bargaining representative through an election. The accretion standard thus requires that the employees to be accreted share an overwhelming community of interest with those in the existing unit and have little or no separate group identity, such that they could not constitute a separate appropriate unit. *Compact Video Services*, 284 NLRB 117, 119 (1987).

IV. *GREENHOOT* AND *LEE HOSPITAL*

The Board properly applied the above legal framework in making appropriate unit determinations in *Greenhoot* and *Lee Hospital*.[49]

In *Greenhoot,* the petitioner sought a unit of the employees of a property management company. These employees worked in 14 office buildings managed by the employer. The employer contended that the respective building owners were the employers of the employees or, alternatively, that the management company and the building owners were joint employers of the employees at each location. The Board found that both the building owner and the management company possessed significant employer functions and were joint employers of the employees working in each building. The Board concluded,

> In this circumstance, there is no legal basis for establishing a multiemployer unit absent a showing that the several employers have expressly conferred on a joint bargaining agent the power to bind them in negotiations or that they have by an established course of conduct unequivocally manifested a desire to be bound in future collective bargaining by group rather than individual action.[50]

Finding no consent by the employers, the Board remanded the case for elections in separate units for each building.

In *Lee Hospital*,[51] the Board considered the issues of joint employers and multiemployer bargaining in a context comparable to the present cases. The union filed a petition to represent a separate unit of certified registered nurse anesthetists (CRNAs) at the hospital. The Regional Director applied the Board's "disparity of interests" standard for determining appropriate units in health

[45] *NLRB v. Action Automotive, Inc,.* 469 U.S. 490, 494 (1985), citing *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 165 (1941), and *Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 172–173 (1971).

[46] *Frisch's Big Boy III-Mar*, 147 NLRB 551 (1964).

[47] *Kalamazoo Paper Box Corp*., 136 NLRB 134, 137 (1962).

[48] In multiemployer bargaining, the voluntary action of the parties makes it unnecessary for the Board to determine whether the unit is appropriate through a community of interest analysis. In the same way, employers and unions may agree to include supervisors or guards in bargaining units and negotiate with respect to them, even though these individuals are not employees under the Act and the Board is precluded from ordering an employer to bargain regarding them in the first instance. See, e.g., *Sakrete of Northern California v. NLRB,* 332 F.2d 902, 908 (9th Cir. 1964), cert. denied 379 U.S. 961 (1965).

[49] My colleagues in the majority rely on several pre-*Greenhoot* cases in which the Board found appropriate, on community of interest grounds, units including both employees jointly employed by a department store and a concessionaire operating a particular department in the store, and employees solely employed by the department store or jointly employed by the store and other concessionaires. In none of these cases, however, did the parties raise the issue of consent to multiemployer bargaining. Unlike my colleagues, I do not infer from these cases that, if the issue had been raised, the units would still have been found appropriate.

[50] *Greenhoot*, 205 NLRB at 251.

[51] 300 NLRB 947 (1990).

care institutions,[52] and concluded that the CRNAs did not demonstrate such sharp differences from other hospital employees to warrant representation in a separate unit. In dismissing the petition, the Regional Director found it unnecessary to consider the petitioner's argument that disparity of interests was also supported by the CRNAs' joint employment by the hospital and Anesthesiology Associates, Inc. (AAI), which contracted with the hospital to operate the anesthesia department and the recovery room.

The Board, however, found the joint employer issue critical in view of the policy against establishing multiemployer units without the employers' consent.[53] In accordance with this policy, if the CRNAs were jointly employed, the Board would not find appropriate their inclusion in a unit of professionals solely employed by the hospital.[54] Thus, the Board recognized that, in the absence of consent, commonality of employer is a precondition of unit appropriateness that cannot be overridden by commonality of interests in other regards. The Board ultimately concluded, however, that AAI did not control essential terms and conditions of employment so as to render it a joint employer, and therefore affirmed the Regional Director's determination.

V. DISCUSSION

The facts in the present cases do not differ significantly from those considered in *Lee Hospital*. Unfortunately, the majority here, by overruling *Lee Hospital* and reinterpreting *Greenhoot*, declines to follow the fundamental legal and statutory principles underlying those cases. Thus, in one stroke the majority disrupts the settled principles discussed above regarding joint employers, multiemployer bargaining, and appropriate units, and throws a settled area into turmoil. The majority also fails to acknowledge the conflicting interests between supplier and user employers, who have a buyer-seller relationship with one another, as well as being, in some cases, joint employers of the temporary employees. Finally, in attempting to devise a simplistic formula for cases involving temporary employment arrangements, the majority overlooks both the diversity of such arrangements and the limitations normally observed in resolving issues through case adjudication. Accordingly, the majority approach fails as a matter of both law and policy.

A. Multiemployer Bargaining

1. Different employers. The majority begins with the Board's historic presumption that all of an employer's employees constitute an appropriate unit, and attempts to move to the fallacious corollary that a unit of solely and jointly employed employees is also appropriate. Such a conclusion leaves out of the analysis an essential factor—the existence of one or more joint employers of some of the employees. Thus, some of the employees share joint employers, but those supplier joint employers are entirely strangers to the rest of the unit employees, who are solely employed by the user employer. Moreover, the supplier joint employers have interests separate and distinct from, and often conflicting with, the user employer. In short, having one employer *in common* differs fundamentally from having the *same* employer**,** and saying otherwise does not paper over the contrary reality.

It is illogical to argue, for example, that Sturgis and Interim, as joint employers, are the same together as either is taken alone. As a result of their separate identities, one cannot assume that these parties, which are in entirely different lines of business and which have separate economic interests and demands and face different market forces, will bargain together with their jointly employed employees in precisely the same manner as either would separately with respect to its own employees. Indeed, the basis of a joint employer finding, that the employers determine working conditions together or that each controls some of the terms and conditions of employment for the employees, acknowledges that a new employing entity, different from either component employer, exists.

Analogies to more traditional multiemployer bargaining situations are unavailing. Typically, these arrangements arise in manufacturing, sports, and construction. Such employers are usually competitors, and the effect of joint or industry-wide bargaining is to establish uniform labor rates and practices among the companies and, in effect, remove labor costs from competition, forcing the competitors to focus on other competitive factors, such as internal efficiency or innovation. In such cases, the employers' consent to multiemployer bargaining signals that each employer has made a determination that its interests are adequately aligned with those of the other employers to make group bargaining viable.

2. Statutory requirement of consent. Because the jointly employed employees and the solely employed employees have different employers, it follows that the Board's placement of both groups in the same bargaining unit requires multiemployer bargaining without the consent of the parties, an outcome clearly repugnant to Congressional intent and over 50 years of precedent. Moreover, my colleagues in the majority offer no explanation for this reversal of course. Instead, they purport to leave intact the rules concerning multiemployer bargaining by

[52] Id. at 947–948; *St. Francis Hospital,* 271 NLRB 948 (1984), remanded 814 F.2d 697 (D.C. Cir. 1987), on remand 286 NLRB 1305 (1987). Under the disparity of interests test, a separate unit of health care employees was not found appropriate unless there were sharper than normal differences in terms of the normal community of interest factors between the employees in the smaller proposed unit and those in the overall unit. This test was superseded by the 1989 rulemaking prescribing appropriate units in the health care industry. See 54 Fed. Reg. 16336–16348 (1989) (codified at 29 C.F.R. § 103.30).

[53] Thus, the Board did not consider community of interest factors.

[54] *Lee Hospital,* supra, at 948.

simply declaring that where, as here, the employees share one common employer, the user employer, "true multiemployer bargaining" is not involved. My colleagues essentially rationalize that bargaining by joint employers in this combination is not multiemployer bargaining.

This assertion, however, distorts the nature and limitations of a joint employer relationship. Because joint employers share or codetermine terms and conditions of employment, both must participate in bargaining in order to negotiate concerning the full complement of subjects.[55] Requiring that the joint employers engage in bargaining with another employer, be it one of the parties to the joint employer relationship or an outsider, without their consent, is coerced multiemployer bargaining**,** which is beyond the Board's statutory authority.[56]

The arbitrariness of the majority's approach is highlighted by its conflicting treatment of units including employees of both supplier and user employers based on whether the common employer is the supplier or the user. The majority finds that when the user employer is the common employer, the jointly employed employees of the user and one or more suppliers may be included in the unit, and all of the joint employers may be required to bargain without consent. When the supplier is the common employer, on the other hand, and the union seeks to bargain with the joint employers, i.e., the common supplier and one or more users, the majority would not find the unit appropriate. Thus, the majority agrees that, in this situation, the various joint employers could not be required to participate in what it concedes to be multiemployer bargaining. Neither the statutory language nor the legislative history of Section 9(b) provides any hint that Congress contemplated distinctions among types of employers for the purpose of applying the Act's protection against coerced multiemployer bargaining. Rather, the majority's concession that units including a common supplier and one or more users involve multiemployer bargaining provides the best illustration that the converse is also true.

As a creature of statute, the Board must apply the consent requirements of Section 9(b) and Section 8(b)(4)(A) in all cases, until Congress elects to modify the current statutory requirements. The majority approach enlists the Board as a partner with unions in accomplishing through a representation petition an object that Section 8(b)(4)(A) expressly prohibits—involuntary multiemployer bargaining. Although the majority characterizes its action here as a change in Board policy, it is in reality a revision of clear Congressional policy central to the Act. As such, it clearly exceeds the scope of the Board's authority.

3. Protection of employees' Section 7 rights. My colleagues also assert that their decision to overrule *Lee Hospital* safeguards employee rights. The majority, however, fails to establish that the bargaining units that could result from their approach promote employee rights, which in fact they do not, as the examples before us show. In *Sturgis,* the employer seeks to have the jointly employed employees included over the Petitioner's objection, and in *Jeffboat*, the Petitioner seeks to include the jointly employed employees through accretion, without an election to determine their desires.

In contrast, the Board's decisions in *Lee Hospital* and *Greenhoot***,** as they have been applied until today, were more protective of employee rights, because they upheld the general principles that employees are entitled to choose their collective-bargaining representative and to be represented in a unit of employees of the same employer and with whom they share a community of interest. In *Lee Hospital*, because no joint employer relationship was found, normal standards for unit appropriateness among the employees of the same employer were applied. In *Greenhoot*, the Board rejected the petitioned-for unit of employees jointly employed by *Greenhoot* and the respective owners of 14 buildings. In the absence of consent, the Board concluded that separate units of the employees in each building were appropriate.

B. Community of Interest

Having deemed the bargaining at issue here not to be "true" multiemployer bargaining and thus dispensed with the statutory requirement of consent, my colleagues in the majority adopt the position, urged by the AFL–IO and the General Counsel in their post-argument briefs, that the proper method of determining the appropriateness of the units is through a community of interest analysis. In proposing to apply the community of interest test in these cases, the majority again cavalierly dismisses the point that some of the employees in the proposed units have an additional employer that has *no* employment relationship with the other unit employees, who are employed solely by the user employer. The majority instead finds that a community of interest may exist based on other factors.

That some of the employees in a proposed unit are employed by joint employers, i.e., a different employing entity from the sole employer of the remaining employees, goes beyond "some differing terms and conditions of

[55] The Board created a narrow exception to this rule in *Management Training,* 317 NLRB 1355 (1995), for circumstances in which only one joint employer is a statutory employer and the other is a governmental entity not subject to the Act.

[56] The business relationship that gives rise to joint employer status as to certain employees does not entail consent by the employers to engage in multiemployer bargaining. It is well established that such consent may never be inferred, but must be unequivocally demonstrated by actual participation in bargaining. *1115 Nursing Home & Service Employees, s*upra, 44 F.3d at 138. Moreover, there is no factual basis in these cases for finding consent. The employers before us consented only to do business on a limited basis and for a specific purpose, with the supplier employers providing labor to the user employers in accordance with a contract. In entering into the contract, each employer apparently determined that its individual business interests would be furthered by the arrangement.

employment from their colleagues." In fact, as discussed previously, it is not a community of interest factor at all. Having the same employer (not merely one employer in common, as the majority would have it) is a statutory condition precedent that must be satisfied before the Board may consider a possible community of interest. Adhering to this requirement, moreover, will not thwart organizing. Groups of employees with the same individual employer or the same joint employers are entitled to choose representation by a union, if majority support is demonstrated in accordance with the Board's processes.[57] Thus, organization is only precluded, and properly so, when a majority of employees do not support the union.

The community of interest analysis is a creation of Board policy, devised to apply the Board's Section 9(b) mandate within the statutory framework. Thus, the test must operate within the statutory framework of "the employer unit, craft unit, plant unit, or subdivision thereof."[58] The majority instead uses the Board-developed policy for *applying* the statute as a means of *circumventing* the statute, proposing to rely on community of interest to find bargaining units appropriate even though the employees do not share the same employer, as Section 9(b) requires. By presupposing a condition precedent, the majority's approach puts the cart before the horse, and the majority's desired application of the statute before the statute itself.[59]

C. Bargaining and Related Problems

Bargaining in a unit that combines solely employed permanent employees and jointly employed temporary employees would cause precisely the conflicts of interest and submerging of minority group concerns that the community-of-interest test, for employees of an individual employer, is designed to avoid.[60] Thus, from a practical as well as a legal perspective, the approval of such a bargaining model contradicts and undermines the Board's longstanding policy regarding bargaining units. For example, in order to accommodate the user employer's need for flexibility and the interests of the majority of the unit, i.e., the solely employed employees, a union might agree to less favorable wages and benefits for the minority jointly employed employees. Whether such a trade-off would occur, or had occurred in a particular set of negotiations, is subject to speculation. However, the neatly-parsed bargaining envisioned by the majority is also highly speculative.

1. Conflicting interests of employees. In practice, the majority's bargaining scenario, rather than operating neatly as they contemplate, would cast in high relief the divergent interests of the solely and jointly employed employees. The majority posits that the user employer would bargain regarding the solely employed employees, as well as the terms and conditions that it controls concerning the jointly employed employees, and the supplier employer would bargain regarding remaining terms and conditions of the jointly employed employees. Such a fragmented bargaining framework in itself serves as compelling evidence that the two groups of employees should instead negotiate separately with their respective employers in separate bargaining units.

At the inception of bargaining, for example, the jointly employed employees and their solely employed counterparts would likely receive different benefits from their employers. As has been noted, some supplier employers offer such benefits as 401(k) plans and health insurance coverage, particularly to long-term employees. The temporary employees might have a strong interest in maintaining the continuity of their benefits, especially if a change would have severe consequences such as the exclusion of pre-existing medical conditions from coverage by a new insurer or the loss of unvested 401(k) benefits offered by the supplier employer. In view of the potential for substantially conflicting interests, only separate negotiations for the jointly employed and solely employed employees would ensure a cohesive bargaining agenda.

2. Conflicting interests of employers. In the majority's bargaining construct, the interests of employers will also necessarily conflict. Unlike joint employers that have explicitly or tacitly agreed to a common undertaking,[61] here the employers are buyer and seller, roles that are complementary in some respects and clearly conflicting in others. Each derives some benefit from the other. However, only the user employer derives the ultimate profit from the work of the employees; the supplier is merely one of many resources utilized in the user's en-

[57] Ironically, because the Petitioner in *Jeffboat* seeks to accrete the TT&O. employees, they will be denied the right to decide whether to be represented.

[58] Sec. 9(b); see *Lundy Packing,* supra, 68 F.3d at 1581.

[59] As a factual matter, the existence of a different employer would likely have a determinative effect on community of interest, outweighing other common terms and conditions among these groups. For example, if a supplier generally assigns highly skilled employees from a pool on short-term assignments, the employees would be unlikely to believe that their interests are closely aligned with those of the permanent employees of the user employer. Similarly, if their tenure with the supplier employer affords them a 401(k) program, their interests in maintaining these benefits from the supplier employer would be thwarted by involuntarily becoming employees in an existing bargaining unit with different programs and waiting periods. The facts in *Sturgis* also demonstrate turnover among temporary employees and suggest the potential effect of short tenure on community of interest. In that case, 50 employees filled 10–15 temporary positions during a period of only 7 months. In addition, the accretion context of *Jeffboat* requires an overwhelming community of interest, such that the 30 jointly employed employees could not constitute a separate appropriate unit, because the employees are forced into a bargaining unit regardless of majority support.

[60] See *Action Automotive,* supra, 469 U.S. 490, 494, and cases cited therein. In *Jeffboat*, for example, Local 89 seeks to accrete only 30 jointly employed employees into a unit of 608 solely employed employees.

[61] See *Greyhound,* supra, 368 F.2d 778, 780.

terprise. The structure of the relationship between these employers is voluntary and contractual, and is described in their agreement, which sets out such terms as duration, payment, quantities, direction of work, cancellation, and dispute resolution, among others. Requiring that the employers also engage in involuntary multiemployer bargaining injects into their relationship duties and limitations beyond those established and allocated in their agreement, creating severe conflicts in the underlying business relationship and rendering impossible the productive collective bargaining the majority envisions.

The majority's fragmented approach to negotiations is also inconsistent with the essence of collective bargaining—that employers and unions make concessions in one area in exchange for gains in another. This process demands that the employer operate from a position of unified economic control, or at least, in the case of joint employers, a common base balanced to reflect the respective roles of the joint employers. In the majority's framework, as is common in multiemployer bargaining, neither posture is possible.

Rather, coercing combined bargaining by the joint employers and the sole employer will highlight and exacerbate any conflicting interests between these two employing entities and create new conflicts. The user and supplier employers are engaged in completely different lines of business, e.g., Sturgis and Jeffboat operate a hose assembly plant and a shipyard, respectively, and the supplier employers provide a service involving the hiring and placement of workers. Moreover, the supplier and user employers have a supplier-customer relationship that can give rise to demands and conflicts not involving collective bargaining but which can affect that arena. These employers do not operate from the same context and thus do not necessarily understand or fully appreciate the needs and interests of the other in bargaining. Such problems are further exacerbated by the presence of multiple suppliers and by divergent employee needs and concerns. In addition, the dual role played by the user employer as the sole employer of the majority of the unit could disrupt the complementary and balanced relationship between the joint employers that is necessary for effective joint bargaining as to their jointly employed employees.[62] These risks again demonstrate the wisdom and necessity of the statutory policy requiring consent for multiemployer bargaining.[63]

3. Special problems in accretion context. The conflicts arising from combining solely and jointly employed employees in the same unit are further magnified in the context of accretion, as presented in *Jeffboat.* In this context, the accretion of the jointly employed employees to the unit of solely employed employees could obligate the supplier employer for a period of years to comply with an existing collective-bargaining agreement that it had no hand in negotiating. Contrary to the majority's assurances that each of the employers would negotiate as to the subjects it controlled, in an accretion setting the supplier employer would apparently be bound by the user employer's previous bargaining commitments. The majority fails to suggest how an accretion involving not only new employees but also a new employer could avoid imposing bargaining obligations on that employer beyond those required by the Act.

An employer's bargaining obligation under Section 8(d) of the Act requires only that the employer meet and bargain in good faith with the union, not that it adopt wholesale the agreement that the union has negotiated with another employer. Moreover, the Supreme Court has held that the Board lacks authority to compel a party to agree to any contractual provision.[64] Thus, the Board cannot compel even a successor employer, acquiring a facility with an established bargaining unit and a current collective-bargaining agreement, to adopt the existing agreement; the successor employer must only recognize and bargain with the union.[65] Only in the case of alter egos, in which successive employers are so interrelated that the identity of the employing entity remains essentially unchanged, is the employer legally bound by the agreement negotiated by its predecessor.[66]

Here, Jeffboat's business arrangement with TT&O provides no basis for imposing an obligation so antitheti-

[62] Thus, the employers must simultaneously negotiate with one another as well as the union. Although such inter-employer negotiation is required between joint employers in relation to their jointly employed employees, it occurs only with consent in all other circumstances, and then generally where the employers' interests are parallel with rather than antagonistic to one another.

[63] The cases relied on by the majority do not support their position. *Management Training*, supra, is inapposite. In that case, the Board found that, where one joint employer is an exempt entity under the Act, collective bargaining between a union and the other joint employer may be conducted regarding the terms and conditions controlled by the non-exempt joint employer. That case provided for bargaining between one statutory employer and one group of employees over a necessarily limited range of terms and conditions of employment. It did not address the issue of requiring two statutory employers with conflicting interests to bargain with their jointly employed as well as other employees. Thus, it has no bearing on the appropriateness under the Act of combined units of solely and jointly employed employees. In addition, as the majority acknowledges, in *NLRB v. Western Temporary Services*, 821 F.2d 1258 (7th Cir. 1987), the *Greenhoot* issue was not raised, and a due process argument concerning the joint employer finding was deemed waived. Finally, *S. S. Kresge Co. v. NLRB*, 416 F.2d 1225 (6th Cir. 1969), is distinguishable. In that case, the court found that Kresge and the licensees that operated some of its departments of its store could be required to bargain together with their employees because all of the employers participated in a joint venture in which they had some commonality in interest. As noted previously, the issue of consent to multiemployer bargaining was not raised or considered. Moreover, in *Kresge,* unlike the present cases, the interests of the various employers were closely aligned and together they shared economic risks associated with their joint enterprise. Rather than an alignment or sharing of risks, the employers' interests here conflict because there is no common undertaking.

[64] *H. K. Porter Co. v. NLRB,* 397 U.S. 99 (1970).

[65] *NLRB v. Burns Security Services,* 406 U.S. 272 (1972).

[66] *Crawford Door Sales,* 226 NLRB 1144 (1976).

cal to the basic concept that parties are bound only by their own agreements. The Board's accretion policies implicitly rest on the predicate that the collective-bargaining agreement was negotiated by the employer of the employees to be accreted; negotiation by one common joint employer is an untenable and unlawful substitute. The rules concerning the voluntary nature of multiemployer bargaining, as applied in *Greenhoot* and *Lee Hospital*, afford employers essential legal protection against such an inequitable result.[67]

4. Implications for secondary activity. Of equal importance, the placement of the solely employed and jointly employed employees in the same bargaining unit could undermine the Act's protection against secondary activity under Section 8(b)(4)(ii)(B).[68] As envisioned by the majority, both groups of employees and the employers would bargain together, with the sole employer and the joint employers addressing their respective employees and, for the joint employers, the subjects of bargaining under their respective control. Operating under such a model, it is clear that the terms and conditions of employment negotiated for the two groups of employees may not be identical. It is also clear that conflicts could arise in bargaining between the sole employer and its solely employed employees that are beyond the control of the supplier as a joint employer of the remaining employees.

Section 8(b)(4)(ii)(B) protects employers from becoming enmeshed in economic disputes between a union and another employer. It prohibits a union, inter alia, from taking action against an employer to force it to cease doing business with another employer, or to force the other employer to recognize and bargain with a union not certified as the representative of that employer's employees. This provision was enacted by Congress with two objectives in mind, "preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and . . . shielding unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Bldg. Trades Council*, 341 U.S. 675, 692 (1951).

Application of the statutory prohibition against secondary activity depends on precision in identifying the employer obligated to bargain over, and empowered to remedy disputes concerning, economic issues affecting a particular group of employees. The model adopted by the majority, featuring a comprehensive unit but fragmented bargaining, 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 its solely employed employees. In fact, the agency would have no role in such conflicts and no authority to resolve them. Action by a union against the agency in these circumstances would be purely secondary because the agency, rather than being able to settle the dispute through its own action, could only bring about a resolution by exerting pressure on the user employer. This is, of course, the classic model of secondary pressure prohibited by the Act. Thus, the placement of the two groups of employees in the same unit might deny the supplier employer the protection guaranteed by Section 8(b)(4)(ii)(B).

The nature of the temporary employment industry also raises the potential for serious practical and legal issues regarding the location of union economic activity. Supplier employers such as temporary employment agencies, in addition to maintaining their own offices, typically provide employees to many user employers at many locations. Even disputes directly involving a supplier employer and its jointly employed employees would require careful distinctions between lawful primary activity and impermissible secondary activity drawing unrelated user employers into the dispute. In the absence of such distinctions, a dispute could spill over to involve all of the user employers of the supplier, in clear violation of Section 8(b)(4)(ii)(B).[69] The complexity of the distinctions, on the other hand, would force unions to act at their peril and would discourage employers, both suppliers and users, from engaging in joint employment relationships.

The complexity and potential for confusion in disputes directly involving supplier employers merely hint at the hazards of enmeshing such employers in disputes involving only the user employer and its own employees. In such cases, any economic action against the supplier employer would violate Section 8(b)(4)(ii)(B), regardless of whether the combined unit misled the union to believe that the supplier was a primary employer. Representation of jointly employed and solely employed employees in separate units would avert these problems, as well as the serious general issues entailed in the majority's fractured bargaining model.

D. Inconsistency with Greenhoot

Furthermore, my colleagues' rationale for overruling *Lee Hospital* contradicts their continued acceptance of *Greenhoot*, even under their new interpretation of that case. Here, the majority finds**,** for units of a user employer's employees, that having one employer in common is sufficient to overcome the statutory and Board restrictions on multiemployer bargaining. In *Greenhoot,* however, all of the employees were jointly employed, in part by *Greenhoot*, the supplier employer. Thus, if the majority applied the same test that it applies to units of a user employer's employees today, that test would be sat-

[67] Notably, the imposition of the Jeffboat contract on TT&O would result in TT&O's employees, who must live 150 miles away, losing the $50 per diem paid by TT&O.

[68] See fn. 42, supra.

[69] In some instances, more than one supplier employer provides employees to the same user employer, vastly compounding the possible scope of unlawful secondary activity.

isfied and the unit appropriate, contrary to the holding in that case.

A simple modification of the facts presented in the instant cases would even more closely mirror the *Greenhoot* facts. If the user employers here obtained temporary employees from more than one unrelated temporary agency, would the existence of a common employer be sufficient to compel the two agencies to bargain together, even though they have no greater business relationship with one another than the various building owners in *Greenhoot*? In another setting, would agencies providing employees to different locations of an established multilocation unit, and unaware of one another, also be required by the Board to bargain together as well as with the common component of their separate joint employer relationships? These potential next steps demonstrate that the majority's decision here is a long stride in the wrong direction.

The majority's clarification of *Greenhoot,* however, treats the supplier employer in a joint employer relationship differently from the user employer. For user-employer units, the majority would determine whether the solely employed and jointly employed employees have an employer in common, and, if so, would compel the sole employer and both joint employers to bargain in a combined unit. Such bargaining would cover all of the employees' terms and conditions of employment, with the employers and joint-employer components addressing the issues under their control. For supplier-employer units, on the other hand, the majority would permit bargaining by the supplier employer alone in a single unit and concerning the terms and conditions it controls. The user employers would not be required to bargain concerning the unit. Thus, as long as the union names only the supplier employer on the petition, the majority would disregard the various joint employer relationships that may exist and find an appropriate unit involving only the supplier employer.[70]

The question whether the employees of a supplier employer may constitute an appropriate unit under the Act and the Board's policies is not presented in these cases. Therefore, the Board should not reach out, as do my colleagues, to resolve it here. In resolving this issue in an appropriate case, however, the same fundamental principles pertaining to employers, multiemployer bargaining, and appropriate units that are contained in and derived from the statute and Congressional intent, would necessarily apply. Including the entire employing entity, whether a sole employer or joint employers, in representation proceedings and bargaining regarding a unit of employees is essential. Furthermore, the necessity to include both joint employers, where they exist, must be unaffected by a particular employer's side of the joint employer relationship, much less by the union's choice as to the employer that it names on its petition. Clearly, neither of these facts has any bearing on reality concerning who actually employs the employees.

Similarly, in making unit determinations involving supplier employers, the Board must adhere to the restrictive principles of the Act concerning multiemployer bargaining. There, as here, the Board is obligated to apply Sections 9(b) and 8(b)(4)(A) to ensure that bargaining including separate employers is undertaken only with the express consent of the parties.

CONCLUSION

The majority's overruling of *Lee Hospital* and its reinterpretation of *Greenhoot* carry serious negative implications concerning the ability of employers to manage their businesses in a dynamic economy. Moreover, the majority's decision is contrary not simply to the Board policies that they reject here, but to the express provisions of the Act, which only Congress is empowered to amend. Thus, the Board is obligated to adhere to the statutory requirement of consent to multiemployer bargaining.

The application of the statute and current Board policy does not deny employees the right to be represented by a union, if they so choose. Rather, it simply maintains a manageable framework for structuring bargaining units in accordance with the statute. Jointly employed employees would normally constitute a separate appropriate unit from the solely employed employees of one joint employer. Maintenance of separate units would greatly simplify bargaining relationships and avoid the risks of confusion as to the primary employer in economic disputes. On the other hand, nothing in the Act prevents the employers and the union from voluntarily negotiating on a combined, multiemployer basis. The Act properly leaves this determination to the parties, who can best judge the feasibility of such an arrangement in their own circumstances. The Board should not disturb this well-founded statutory scheme.

[70] The majority relies on *Management Training,* supra, 315 NLRB 1355, in finding that the supplier employer would be required to bargain regarding only those terms and conditions of employment that it controls. It is not clear, under this model, whether another union could petition to represent the same unit as to the other joint employer and thus bargain about the remaining working conditions of the same employees. In any event, the majority's extension of *Management Training* to joint employers in cases where both joint employers are covered by the Act raises serious implications for joint employer law generally by creating a basis for fragmented bargaining in units of jointly employed employees.