

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32¹**

**BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC., D/B/A BFI
NEWBY ISLAND RECYCLERY,**

Employer

and

FPR-II, LLC, D/B/A LEADPOINT BUSINESS SERVICES²

Employer,

and

Case 32-RC-109684

**SANITARY TRUCK DRIVERS AND HELPERS LOCAL 350, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS³**

Petitioner

**REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION**

Browning-Ferris Industries of California, Inc., D/B/A BFI Newby Island Recyclery, herein called BFI, operates a facility in Milpitas, California, herein called the Facility, where it is engaged in the business of recycling. FPR-II, LLC, D/B/A Leadpoint Business Services, herein called Leadpoint, an Arizona Company, provides subcontracted employees to BFI's Facility, where they sort recyclable items from waste and clean the Facility. The Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, herein called Petitioner, filed a petition on July 22, 2013, under Section

¹ Herein called the Board.

² The name of each Employer appears as stipulated at the hearing.

³ The name of the Union appears as stipulated at the hearing.

9(c) of the National Labor Relations Act⁴ seeking to represent a unit of approximately 120 employees, which is comprised of sorters, housekeepers, and screen cleaners. As discussed more fully below, and stipulated by the parties, should I find that Leadpoint and BFI are joint employers, Petitioner is seeking to represent a unit consisting of

All full time and regular part-time employees employed by FPR-II, LLC, d/b/a Leadpoint Business Services and Browning-Ferris Industries of California, Inc., d/b/a Newby Island Recyclery, joint employers, at the facility located at 1601 Dixon Landing Rd., Milpitas, California; excluding employees currently covered by collective bargaining agreements, office clerical employees, guards, and supervisors as defined by the Act.⁵

In the alternative, should I find that Leadpoint is the sole employer in question, Petitioner is seeking to represent a unit consisting of

All full time and regular part-time employees employed by FPR-II, LLC, d/b/a Leadpoint Business Services at the facility located at 1601 Dixon Landing Rd., Milpitas California; excluding employees currently covered by collective bargaining agreements, office clerical employees, guards, and supervisors as defined in the Act.⁶

As evidenced at the hearing and on brief, the sole issue before me is whether, as contended by Petitioner, Leadpoint and BFI are joint employers, or as asserted by Leadpoint and BFI, whether Leadpoint is the sole employer of the employees in question.

The parties further stipulated at the hearing that regardless of whether Leadpoint and BFI are found to be joint employers, the seven leads employed by Leadpoint are statutory supervisors within the meaning of Section 2(11) of the Act and will be excluded from either appropriate unit.

⁴ Herein called the Act.

⁵ The unit description, herein called the Joint Unit, appears as stipulated at the hearing

⁶ The unit description, herein called the Leadpoint Unit, appears as stipulated at the hearing.

A hearing officer of the Board held a hearing in this matter on August 5, 2013. Petitioner, Leadpoint, and BFI appeared at the hearing, and the parties filed post-hearing briefs with me, which I have duly considered.

I have carefully considered the evidence and the arguments presented by the parties on this issue. For the reasons set forth below, I find, contrary to Petitioner, that Leadpoint is the sole employer of the employees at issue and the Leadpoint Unit is an appropriate unit for the purposes of collective bargaining. Accordingly, I am directing an election in the Leadpoint Unit.

I. Background

BFI is engaged in the business of recycling at the Facility. BFI receives approximately 1,200 tons per day of mixed materials, mixed waste, and mixed recyclables that must be sorted into separate commodities that are later sold to outside businesses at the end of the recycling process. To do this, BFI employs approximately 60 employees, including loader operators, equipment operators, forklift operators, sort line equipment operators, spotters, and one sorter.⁷ Most of these 60 employees work on the exterior portion of the Facility, moving bailed materials and preparing materials to be sorted inside the facility. These 60 BFI employees comprise a separate existing bargaining unit that is already represented by Petitioner.

Inside the facility there are four conveyor belts, called material streams, which bring distinct materials into the facility: residential mixed recyclables, commercial mixed

⁷ BFI employs one sorter, Virginia Pimentel, who works in the quality control area along with nine other Leadpoint sorters. Pimentel is supervised by BFI Shift Supervisor John Sutter and she earns approximately \$5 per hour more than similarly situated Leadpoint sorters. Pimentel was employed by BFI as a heavy equipment operator, but when the predecessor to BFI lost business and had to reduce its staff, her position was eliminated. Instead of laying off Pimentel, she was retained to work in the sorting operation. Pimentel is currently part of a separate bargaining unit already represented by Petitioner.

recyclables, dry waste process, and wet waste process. Each of these materials are loaded from a separate entry to the material streams where they are sorted by sorters.

Leadpoint and BFI are parties to a Temporary Labor Services Agreement, herein called the Agreement, which went into effect on October 22, 2009, and runs indefinitely until terminated by either party. Pursuant to the Agreement, Leadpoint provides employees to do the work of sorting and housekeeping at the Facility. Section 4 of the Agreement states,

[Leadpoint] is the sole employer of the Personnel supplied by [Leadpoint] Nothing in this Agreement shall be construed as creating an employment relationship between [BFI] . . . and any of [Leadpoint's] Personnel.

Leadpoint employs approximately 240 full-time, part-time, and on-call sorters, screen cleaners, and housekeepers who work at the Facility. The sorters remove contaminants from the material stream so the materials may be recycled; the screen cleaners clear jams in the material stream; and the housekeepers clean the areas around the material streams.

II. Hierarchy At The Facility

BFI and Leadpoint maintain their own separate supervisors and leads at the Milpitas plant. According to Leadpoint President and CEO Frank Ramirez, at the Facility Leadpoint employs Acting On-Site Manager Vincent Haas (who is also a shift supervisor), Shift Supervisors Arturo Pena and Haas,⁸ and seven line leads who work with the Leadpoint sorters. The Acting On-Site Manager is responsible for Leadpoint operations (i.e. sorting) and reports to the Leadpoint corporate office in Arizona. Directly under Acting On-Site Manager Haas are the shift supervisors who create sorters'

⁸ Ramirez testified that there is one additional shift supervisor, but he could not remember that person's name.

schedules, oversee the material streams, and coach the line leads. The line leads work on the floor with the sorters and are Leadpoints' lowest level supervisors.

For its part, BFI employs Operations Manager Paul Keck, who oversees the material recovery facility and the organic operation and supervises BFI drivers, heavy equipment operators, forklift operators, control room operators, and a single sorter. Directly under Keck is BFI Division Manager Carl Mennie who oversees the recycle lead and compost operations. BFI Shift Supervisors Augustine Ortiz and John Sutter then supervise the BFI employees who bring the material to the stream lines for sorting, including the control-room operator who controls the speed of the stream lines.

It is further undisputed that Leadpoint and BFI maintain their own human resources departments, with BFI's human resources department located inside the Facility and Leadpoint's located in a trailer outside the Facility.⁹

III. Day-To-Day Control Over Leadpoint Employees Terms And Conditions Of Employment

A. Leadpoint Employees' Wages And Benefits

Pursuant to Section 3 and 4 of the Agreement, Leadpoint has the sole authority to set the wage rates for the employees it provides to BFI. However, Section 3 also states that Leadpoint cannot raise its employees' wage rates in excess of the wages paid by BFI to full-time BFI employees who perform the same work without first obtaining BFI's consent.

Leadpoint independently pays all of its employees and provides them with the option to enroll in certain healthcare and insurance plans, which are solely administered by Leadpoint. Leadpoint does this without consulting with BFI and BFI does not have

⁹ BFI further maintains a separate employee handbook that only applies to BFI employees.

the authority to change Leadpoint wages save for the proviso of Section 3 of the Agreement. Leadpoint wages and benefits, including deductions and remittances, are administered solely by Leadpoint's human resources department.

Based on the number of hours worked by Leadpoint employees, Leadpoint sends BFI an invoice, which details the Leadpoint employees' names, positions, and wage rates. BFI then pays Leadpoint the amount owed pursuant to the Agreement.

BFI and Leadpoint maintain that BFI has no authority to offer Leadpoint employees a wage increase or decrease. Petitioner attempted to refute this contention by offering the testimony of Leadpoint Housekeeper Clarence Harlin, who testified that he received a raise, which was later taken away at the request of BFI Operations Manager Paul Keck. However, Harlin then admitted that at the same time he lost his raise, he transferred from the night shift to the day shift and went from the front of the material stream to the middle of the material stream. According to Keck, Harlin received a differential in pay for his position on the night shift, and after he left that position, Leadpoint continued to bill BFI for that differential. Keck became aware of this when he reviewed the invoice and noticed Harlin's higher rate of pay for the lower classification of work. Keck then notified Leadpoint Acting On-Site Manager Haas who made the change to payroll. Thus, it is apparent that Keck simply informed Leadpoint of this incorrect differential pay because BFI was being billed the incorrect amount.

B. Recruitment, Hiring, Discipline, And Termination of Leadpoint Employees

Section 4 of the Agreement states that Leadpoint has the sole responsibility to counsel, discipline, review, evaluate, and terminate employees assigned to BFI pursuant to the Agreement; however, BFI "maintains the right to reject or discontinue the use of

Personnel.” BFI Operations Manager Keck, BFI Division Manager Carl Mennie, and BFI Shift Supervisors Augustine Ortiz and John Sutter all testified that they do not possess the authority to hire, terminate, discipline, transfer, counsel, promote, or demote Leadpoint employees. They further do not possess the ability to effectively recommend any of these actions.

The record reflects that Leadpoint is solely responsible for recruiting and hiring its own employees, which is done by Leadpoint Acting On-Site Manager Vincent Haas in conjunction with Leadpoint’s human resources department. When a prospective Leadpoint employee is brought in, after filling out paperwork with Leadpoint’s human resources department, Haas takes the applicant to the material stream and discusses what is done and Leadpoint’s expectations. The prospective employee is then assigned to work the material stream while either Haas or a Leadpoint lead observes them to ensure that they are doing the work correctly. If successful, the prospective employee goes back with Haas to Leadpoint’s human resources department where they continue to fill out paperwork and review Leadpoint’s employment policies. According to Haas, BFI Operations Manager Paul Keck, and BFI Division Manager Carl Mennie, Leadpoint is solely in charge of this testing process and no one from BFI is present or plays any role in it. Similarly, no one from BFI is present for the interview process and the final decision regarding hiring is made by Leadpoint’s Human Resources Administrator Anthony Chavez. Leadpoint’s human resources department then conducts a background check and drug testing of each applicant. While the Agreement mandates these tests in general, the manner in which they are administered, and the provider chosen to administer the testing, is decided solely by Leadpoint.

Petitioner asserts that BFI has effectively recommended the termination of employees in the past. In support of its contention, Petitioner proffered evidence that on June 5, 2013, BFI Operations Manager Keck emailed Leadpoint President Ramirez to inform him of two separate incidents. First, Keck witnessed two Leadpoint employees passing around a bottle of whiskey while on duty. Accordingly, Keck then contacted Leadpoint Acting On-Site Manager Haas who “immediately responded . . . and swiftly secured the two employees.” According to his June 5 email, Keck “request[ed] their immediate dismissal.” Instead, upon receiving this report, Leadpoint removed the two employees from the jobsite and sent them for blood-alcohol testing. Later, one employee was dismissed and the other was transferred.

Second, Keck found damage to numerous pieces of BFI property including the wall mounted paperwork drop box. Keck reviewed security footage, which showed a Leadpoint employee as he punched the box. Keck then showed the video to Haas. In Keck’s June 5 email to Leadpoint he wrote, “I hope you’ll agree – this Leadpoint employee should be immediately dismissed.” Haas testified that after receiving this report from Keck, he conducted an independent investigation by reviewing the video and talking with the involved Leadpoint employee who admitted to destroying BFI property. No one from BFI was present for this investigation or questioning. Haas then independently decided to suspend the employee while he consulted with Paul Russo from Leadpoint’s corporate office in Arizona. Russo then made the decision to terminate the employee, based on Leadpoint’s investigation, without consulting with anyone from BFI.

Keck testified that while he requested the Leadpoint employees’ dismissals, it was only dismissals from employment at the BFI facility and not from Leadpoint. Leadpoint

and BFI further assert that regardless of Keck's requests, Leadpoint conducted its own independent investigations into the matter without BFI's input and Leadpoint retained the authority to make the final decisions. In contrast, Petitioner argues that this evidence demonstrates that Keck effectively possessed the authority to terminate Leadpoint employees.

C. Daily Work Instruction And Training Of Leadpoint Employees

BFI Operations Manager Paul Keck, BFI Division Manager Carl Mennie, and BFI Shift Supervisors Augustine Ortiz and John Sutter all testified that they do not instruct or give daily work directions to Leadpoint employees regarding their job duties. Further, BFI has no authority over the particular employees who work on the material streams or the authority to decide where a Leadpoint employee is assigned.

BFI does, however, maintain productivity standards for the stream lines. According to BFI Division Manager Mennie, these standards are based on how much time the equipment is down versus running and by tracking the tonnage per hour that is processed on the individual lines. The productivity standard, which changes for each shift, is determined by BFI's shift supervisors on duty at the time. The BFI shift supervisors both testified that they have changed the speed of the material stream based on the volume of the incoming lines. When this occurs, the BFI shift supervisors contact the Leadpoint leads and instruct them of the change. However, BFI neither controls nor enforces the speed at which the individual Leadpoint employees work in response to these speed changes on the streamline. Instead, BFI contends that it is up to Leadpoint to figure out how to respond to these line speed changes, such as by transferring additional Leadpoint employees to assist when necessary. By contrast, Petitioner contends that

BFI's ability to stop and start the stream line, and change its pace, demonstrates that BFI has direct control over the Leadpoint employees' work.

According to BFI Shift Supervisors Ortiz and Sutter and Leadpoint management, if a problem arises with a Leadpoint employee, the BFI manager will contact a Leadpoint lead or supervisor and inform them of the issue. They do not, however, tell Leadpoint how to fix the problem—only that an issue has arisen. Leadpoint Acting On-Site Manager Vincent Haas further testified that if employees need to be moved from one stream line to another, the Leadpoint leads or managers communicate this to the Leadpoint employees.

BFI Shift Supervisors Augustine Ortiz and John Sutter testified that at the beginning of each shift, they review the material in the facility and meet with Leadpoint supervisors to coordinate and come up with a plan. This planning meeting only includes the supervisors and not the sorters, screen cleaners, or housekeepers. The plan includes discussion of the materials that day, but BFI does not instruct Leadpoint on how to staff the lines or how to complete the work.

Leadpoint Housekeeper Clarence Harlin testified that he has received instruction from BFI managers in the past. On unknown dates, approximately weekly, BFI Shift Supervisor John Sutter instructed Harlin to clean under the carriage of an 18-wheel truck. Notably, Harlin admittedly ignored these instructions and never received discipline for his failure to follow Sutter's instructions.

The only time BFI trained Leadpoint rank and file employees, according to BFI Shift Supervisor Sutter, is when the facility first opened in 2009. Because at the time, "no one knew anything," for the approximate first month of the contract with Leadpoint,

Sutter trained Leadpoint employees by informing them of what materials to pull off the material stream and how to handle a jam in the machinery.

D. Leadpoint Employees' Scheduling And Overtime

BFI controls the Facility's hours of operations, which consists of three shifts: 4:00 AM to 1:00 PM, 2:00 PM to 11:30 PM, and 10:30 PM to 7:00 AM. The Petitioner argues that since BFI sets the hours of the three shifts, BFI effectively controls Leadpoint employees' schedules. Although BFI sets the Facility work hours, Leadpoint's employees' individual work schedules are created by Leadpoint Acting On-Site Manager Vincent Haas without the input or directive from BFI. As such, BFI contends that while it sets the hours of operation for the Facility, it is Leadpoint that assigns its employees to work the required shifts.

According to Leadpoint President Frank Ramirez, in general, staffing needs are determined by the customers' requirements, which are based on the tonnage of material that the customer receives in addition to the equipment manufacturer's suggested guidelines. As such, Leadpoint determines how many employees are needed at BFI's plant based on BFI's tonnage intake in addition to the machinery BFI uses at the Facility. BFI does not specifically request a certain number of employees, Leadpoint comes up with the number of employees, but adjusts it accordingly as needed.

BFI further determines whether there is a need to keep the material streams operating such that employees must work overtime. BFI determines this based on the amount of product that arrives at the facility daily. While BFI solely decides to continue running the streams, Leadpoint managers, without input from BFI, select which Leadpoint employees will work the overtime. However, Petitioner argues that since BFI

controls whether overtime is necessary, BFI therefore controls whether Leadpoint employees work overtime.

As regards requests for time off, the record reflects that Leadpoint employees fill out request forms that are kept in the Leadpoint human resources trailer and the decision to grant the request rests solely with Leadpoint. Should a Leadpoint employee need to call in sick, Leadpoint maintains a phone line for each shift where employees call in and notify their Leadpoint manager that they will not be in. Their position is then backfilled by another part-time or on-call Leadpoint employee selected by a Leadpoint supervisor. It is undisputed that BFI plays no role in this process.

IV. ANALYSIS

A. The Relevant Case Authority

In *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985), the Board adopted the United States Court of Appeals for the Third Circuit's¹⁰ analysis as to when a joint employer relationship exists. To determine whether two separate entities should be considered joint employers, the Board analyzes whether alleged joint employers share the ability to control or co-determine essential terms and conditions of employment. *See Oakdale Care Center*, 343 NLRB 659, 662 (2004); *see also In re Airborne Freight Co.*, 338 NLRB 597, 597 (2002); *TLI, Inc.*, 271 NLRB at 798-99. Essential terms and conditions of employment are those involving such matters as hiring, firing, discipline, supervision, and direction of employees. *See, e.g., Laerco Transportation*, 269 NLRB 324 (1984). However, the putative joint employers' control over these employment matters must be direct and immediate. *See TLI, Inc.*, 271 NLRB at 798-799. The authority to make routine directions of where to do a job, rather than the

¹⁰ *See NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3rd Cir. 1982).

manner in which to perform the work, is insufficient to support a joint employer finding. See *Island Creek Coal Co.*, 279 NLRB 858, 864 (1986).

In *Southern California Gas Co.*, 302 NLRB 456 (1991), the Board affirmed the administrative law judge's finding that a joint employer relationship did not exist where a master entity contracted with a janitorial subcontractor to clean its facility. In his decision, the judge reasoned:

An employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for. It follows that the existence of such control, is not in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor's employees. Generally a joint employer finding is justified where it has been demonstrated that the employer-customer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.

Id. at 461 (citations omitted). Notably, the Board found no joint employer relationship even though the parties' contract: required the subcontracted employees to do certain delineated tasks (sweeping, mopping, and emptying trash); included a chart showing how often the assignments were to be performed; and required the subcontractor to employ an adequate number of trained personnel. See *id.* at 461-62. Nor did the Board consider it determinative that the contracting employer witnessed a subcontracted employee's misconduct and the employee was subsequently terminated by the subcontractor at the request of the contracting employer. Instead, the Board affirmed the judge's finding that the contractor did not terminate the employee in question, but rather at most indicated that it no longer wanted the employee at its facility and it was the subcontractor who

chose to terminate the employee rather than transfer the employee to another job location. *See id.* at 462. As such, the actions of the contractor were merely those of an owner exercising their right to protect its own premises. *See id.* (citing *Hychem Constructors*, 169 NLRB 274, 276 (1968) (a joint employer relationship did not exist even though the master employer required the subcontracted employees to observe plant safety and other plant rules including the master's yet unexercised prerogative to remove undesirable subcontracted employees because "the promulgation of such rules, which seek to insure safety and security, is a natural concomitant of the right of any property owner or occupant to protect his premises.")).

Similarly in *G. Wes Ltd. Co.*, 309 NLRB 225, 226 (1992), the Board overturned the judge's finding of a joint employer relationship based on the absence of evidence establishing that hiring, firing, processing of grievances, administration and negotiation of contracts, granting of vacations or leaves of absence, or discipline were determined jointly by both the employers in question. Instead, the *G. Wes Ltd. Co.* Board found that the General Counsel failed to establish that the employers shared or codetermined the essential terms and conditions of employment of the employees. *See id.* Similarly, in *Teamsters Local 776*, 313 NLRB 1148, 1162 (1994), the judge, in an opinion adopted by the Board, held that two companies were not joint employers where the alleged joint employer exercised only minimal and routine supervision of the other employer's employees, and had only limited dispute resolution authority due to the routine nature of work assignments it made. By contrast, the Board found that a joint employer relationship existed in *Continental Winding Co.*, 305 NLRB 122, 123 (1991), because even though a supplier employer alone hired employees supplied to a user employer and

it set and paid their wages, the user employer exercised sole authority to assign, schedule, and supervise the workplace conditions, and the supervision was more than “routine.”

B. Application Of The Case Law To The Case At Bar

Based on the facts as elicited at the hearing and the case law cited above, I find that BFI and Leadpoint are not joint employers of the employees in question because BFI does not “share, or co-determine [with Leadpoint] those matters governing the essential terms and employment” of Leadpoint’s housekeepers, sorters, or screen cleaners at BFI’s Facility. *TLI, Inc.*, 271 NLRB at 798.

As regards the Leadpoint employees’ wages and benefits, the record is clear that Leadpoint sets their pay scale and is the sole provider of their benefits. Nevertheless, Petitioner argues that the limitation to Leadpoint’s authority, as set forth in the Agreement—that Leadpoint cannot pay its employees more than BFI pays its employees who do comparable work—mandates a finding that BFI retains control over Leadpoint’s wage rates. I find this argument unpersuasive. In this regard, Section 3 of the Agreement limits only one aspect of the wage rates paid to Leadpoint employees—a cap on their maximum wage rate. Moreover, this limitation only applies to the Leadpoint sorters since BFI does not employ any housekeepers or screen cleaners. Notably, Section 4 of the Agreement states that Leadpoint retains the sole responsibility to pay its employees. As such, nothing in the Agreement would forbid Leadpoint from either lowering its employees’ wages or increasing the benefits offered to its employees. Therefore, based on the record evidence, I find that Petitioner has presented insufficient evidence to establish that BFI controls or co-determines Leadpoint employees’ wages and benefits.

Similarly, I find that the authority to control the recruitment, hiring, counseling, discipline, and termination of Leadpoint employees is vested solely with Leadpoint. In this regard, it is undisputed that Leadpoint maintains its own human resources department in a trailer outside the Facility where recruiting and hiring, termination, and disciplinary decisions are made exclusively by Leadpoint's supervisory staff. There is no evidence to suggest that BFI participates in any way in these decisions. To the contrary, all testimony indicates that Leadpoint makes the sole decision to hire employees, after it finishes its recruitment phase, without any input from BFI, as well as its decisions regarding termination and discipline.

With regard to termination, however, Petitioner points to BFI Operations Manager Paul Keck's June 5 email in which he reported misconduct of employees and requested their termination as evidence that BFI has the authority to terminate, or effectively recommend termination, of Leadpoint employees. I reject this contention. As noted above, the very language of the June 5 email to Leadpoint President Frank Ramirez is evidence that BFI does not have the authority to terminate Leadpoint employees. Thus, Keck, who is the highest ranking BFI official at the Facility, wrote, "I **request** their immediate dismissal" and "I **hope** you'll agree—this Leadpoint employee should be immediately terminated." (Emphasis added). The language is clear and unambiguous. Keck merely requested that the employees be terminated for creating an unsafe environment in BFI's plant. He did not order or direct Leadpoint to terminate the employees. Surely if BFI had the authority to terminate Leadpoint employees, Keck would have done this without having to email Leadpoint's President, located in Arizona, to do so. As such, I find that BFI does not possess the authority to terminate Leadpoint

employees. In further support of this conclusion, I note that it is well established that the enforcement of rules to insure safety and security is a natural outflow of the right of any property owner to protect their premises and does not indicate the authority to terminate or discipline the employees of a subcontractor. *See Southern California Gas Co.*, 302 NLRB at 462; *see also Hychem Constructors*, 169 NLRB at 276.

I also find that BFI does not control or co-determine Leadpoint employees' daily work. In this regard, the record is clear that Leadpoint sorters, housekeepers, and screen cleaners are supervised solely by Leadpoint leads and Leadpoint Acting On-Site Manager Vincent Haas. Nothing in the record supports Petitioner's argument that BFI controls Leadpoint's employees' daily work functions. While Petitioner correctly asserts that BFI operates the speed of the material stream, BFI does not mandate how many Leadpoint employees work on the line, the speed in which the Leadpoint employees work, where they stand on the material stream, or even how they pick material and contaminates off of the material stream. BFI's mere ability to change the speed of the material stream, which is based on the quantity of the material alone, does not create a level of control that is sufficiently direct or immediate to warrant a finding of joint control. *See TLI, Inc.*, 271 NLRB at 798-799. As such, I find that BFI's control of the speed of the material stream is routine in nature and is not based on individualized assessments of Leadpoint's employees or evidence of control in the manner in which the Leadpoint employees perform their work.¹¹ *See Island Creek Coal Co.*, 279 NLRB at 864; *see also Southern California Gas Co.*, 302 NLRB at 461-62.

¹¹ Petitioner further argues that BFI management instructed Leadpoint employees, including housekeeper Clarence Harlin. However, the record evidence revealed that these instructions from BFI were either routine or routinely ignored. Specifically, Harlin testified that BFI Shift Supervisor John Sutter instructed him, on a weekly basis, to clean under an 18-wheel trailer. Harlin further stated that he routinely

In its brief, Petitioner relies on *Quantum Resources Corp.*, 305 NLRB 759, 760 (1991), and *Heilman Brewing Co.*, 290 NLRB 991, 999 (1980), for the proposition that the Board will find a joint employer relationship exists where the alleged joint employers closely and routinely supervises and directs the unit employees' work. I find these cases distinguishable from this matter, as enumerated above, because the record establishes that Leadpoint solely supervises its own employees. In this regard, to the extent that BFI has a problem with a Leadpoint employee, BFI complains to a Leadpoint supervisor who takes care of the matter using their own discretion. I further note that to the extent that any BFI employee instructed a Leadpoint employee, the instruction was merely routine in nature and insufficient to warrant a finding that BFI jointly controls Leadpoint employees' daily work.

In contrast to Petitioner's arguments, the testimony at the hearing clearly establishes that Leadpoint is solely in control of scheduling its own employees' shifts, scheduling its own employees for overtime, running the Leadpoint employee sick line, and approving or rejecting Leadpoint employees' requests for vacation. While Petitioner correctly points out that BFI sets the times of the shifts and hours of the Facility's operation, I find that authority alone to be insufficient to warrant a finding that BFI actually control Leadpoint employees' schedules given Leadpoint's sole control of all other aspects of its employees' schedules within that limited parameter. I also note that the Board has previously held that the authority to mandate staffing requirements in a contract with a subcontractor is insufficient by itself to support a finding of joint employer status. *See Southern California Gas Co.*, 302 NLRB 461-62. Finally, Petitioner

ignored the order and never received discipline for his inaction. Accordingly, I cannot conclude that BFI instructed Leadpoint employees.

argues on brief that BFI controls whether Leadpoint employees will work overtime; however, this assignment is not entirely accurate. Rather, the record reflects that BFI determines whether overtime is necessary based on the material intake that day and Leadpoint has the sole discretion to assign or grant individual employees' overtime work.

In summary, I find that Leadpoint is the sole employer of the employees in question at BFI's Facility and that Petitioner's arguments for joint employer status between BFI and Leadpoint are unconvincing.¹² Accordingly, I find that the Leadpoint Unit is the appropriate unit, and I am therefore directing an election in the Leadpoint Unit.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The parties stipulated, and I find, that Leadpoint is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of Leadpoint, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

¹² On brief, Petitioner argues that current Board law should change to reflect the views expressed in former Board Member Liebman's various dissents and concurring opinions, it is undisputed established Board precedent has not been reversed by the Supreme Court. *See Waco, Inc.*, 273 NLRB 746, 749 fn.14 (1984) (citing *Iowa Beef Packers*, 144 NLRB 615, 616 (1963)).

4. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees of Leadpoint constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part-time employees employed by FPR-II, LLC, d/b/a Leadpoint Business Services at the facility located at 1601 Dixon Landing Rd., Milpitas California; excluding employees currently covered by collective bargaining agreements, office clerical employees, guards, and supervisors as defined in the Act.¹³

There are approximately 240 employees in the unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective-bargaining by the Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Eligibility

Eligible to vote in the election are those in the Leadpoint Unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12

¹³ The parties stipulated that the seven Leadpoint leads are supervisors within the meaning of Section 2(11) of the Act and consequently will not be eligible to vote in the instant election.

months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Leadpoint Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Leadpoint to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, Leadpoint must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by the Region to assist in determining an adequate showing of interest. The Region shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5224, on or before **August 23, 2013**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional office by electronic filing through the Agency's website, www.nlr.gov,¹⁴ by mail, by hand or courier delivery, or by facsimile transmission at (510) 637-3315. The burden of establishing the timely filing and receipt of this list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **three** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, Leadpoint must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349

¹⁴ To file the eligibility list electronically, go to www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

