UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 32

In the Matter of:

Case 32-RC-109684

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

Alleged Employer,

LEADPOINT BUSINESS SERVICES,

Employer,

and

TEAMSTERS LOCAL 350,

Petitioner.

$\frac{EMPLOYER\ LEADPOINT\ BUSINESS\ SERVICES'S\ OPPOSITION\ TO\ PETITIONER'S}{REQUEST\ FOR\ REVIEW}$

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I. INTRODUCTION

Leadpoint Business Services ("Leadpoint," "the Employer," or "the Company") hereby opposes Petitioner Teamsters Local 350's ("the Union") Request for Review of the Regional Director's Decision and Direction of Election. The Regional Director's Decision and Direction of Election is supported by the facts set forth in the record and consistent with well-established Board precedent. There is simply no basis whatsoever for review of the Regional Director's Decision and Direction of Election. Accordingly, the Union's Request for Review should be denied.

II. STATEMENT OF FACTS

A. The Parties.

1. Leadpoint.

Leadpoint is located in Phoenix, Arizona. (Tr. 165:20-21.) Leadpoint provides labor management programs for companies that operate Material Recovery Facilities ("MRFs") in the United States. MRF operators retain Leadpoint as an independent contractor to employ and direct on-site managers, supervisors, leads, sorters, screen cleaners, and housekeepers. Leadpoint employs approximately 1,000 employees in various locations across the country. (Tr. 156:24-25.) At the Newby Island Recyclery alone, Leadpoint employs approximately 245 employees alone, including casual employees. (Tr. 188:12-189:11.)

2. Browning-Ferris Industries.

Browning-Ferris Industries of California ("BFI") operates the Newby Island Recyclery in Milpitas. Each day, BFI receives approximately 1,200 tons of mixed materials, mixed waste, mixed recyclables that gets sorted out into commodities that BFI sells at the end of the process. (Tr. 13:2-9.) BFI employs drivers who haul the mixed materials, loader operators, equipment

operators, forklift operators, sort line equipment operators, spotters, and one sorter.¹ (Tr. 14:2-5, 14:12-17.) In total, BFI employs approximately sixty employees at the Newby Island Recyclery. (Tr. 14:18-20.)

B. The Contract Between Leadpoint And BFI.

In 2009, Leadpoint and BFI entered into a "Temporary Labor Services Agreement" in which Leadpoint agreed to furnish BFI with personnel to assist at the Newby Island Recyclery.² (Jt. Exh. 1, Tr. 17:2-4.) Prior to the Temporary Labor Services Agreement, BFI had retained several other independent contractors to provide the services that Leadpoint now provides. (Tr. 17:8-12, 123:25-124:5.)

The Temporary Labor Services Agreement provides, "[Leadpoint] is the sole employer of the Personnel supplied by [Leadpoint] pursuant to the terms of this Agreement." (Jt. Exh. 1, p. 1.) The Agreement further provides, among other things, the following:

- "[Leadpoint] will recruit, interview, test, select, hire, and train the Personnel to be assigned to perform work for [BFI] as agreed to herein at no cost to [BFI]." (Jt. Exh. 1, p. 3.)
- "[Leadpoint] has the sole responsibility to counsel, discipline, review, evaluate, determine pay rates, and terminate the Personnel assigned pursuant to this Agreement." (*Id.*)
- "[Leadpoint] shall maintain all necessary payroll and personnel records." (Id.)

¹ BFI's only sorter, Virginia Pimentel, was a BFI heavy equipment operator, who BFI chose to retain as a sorter after BFI implemented a reduction-in-force approximately seven years ago. The existing collective bargaining agreement between BFI and the Union specifically covers Pimentel and otherwise excludes all other sorters from the collective bargaining agreement and the bargaining unit. (Tr. 124:6-126:4.)

² The Temporary Labor Services Agreement provides that Leadpoint will not employ any drivers, spotters, or operators at the site. (Jt. Exh. 1, \P 1.)

- "[Leadpoint] is fully responsible for all payments whatsoever required to be made to or with respect to Personnel including, without limitation, all wages and salaries (including overtime and bonuses), all benefits (including health insurance, medical payments, life insurance, and/or retirement benefits), all federal, state, and local payroll taxes, and all workers' compensation insurance and unemployment insurance coverage and payments." (Id.)
- "[Leadpoint's] personnel shall not be eligible to participate in any employee benefit plans, programs, or arrangements offered by [BFI] to its employees." (*Id.*)

BFI pays Leadpoint on a weekly basis based on the number of hours worked by Leadpoint's employees at the Newby Island Recyclery. (Tr. 39:1-40:7.)

C. Leadpoint's Employees At The Newby Island Recyclery.

Since Leadpoint and BFI consummated the Temporary Labor Services Agreement, Leadpoint has employed sorters, screen cleaners, and housekeepers at the Newby Island Recyclery. Sorters work along conveyor belts and are responsible for sorting out recyclables and prohibited materials that have been placed on the conveyor belts. (Tr. 15:17-17:1.) Screen cleaners are responsible for cleaning the machines at the facility. (Tr. 186:8-16, 250:14-19.) Housekeepers are responsible for keeping work areas clean. (Tr. 216:4-6.)

Leadpoint manages its operations at the Newby Island Recyclery with its own on-site management and supervisory team. (Tr. 23:11-22.) Specifically, Leadpoint has an on-site manager, who is responsible for overseeing all of the Leadpoint operations at the site. (Tr. 157:16-23, 196:5-24; Jt. Exh. 2(d).) Leadpoint also has three shift supervisors, who report to the on-site manager and are responsible for overseeing and providing direction on each of the three shifts in which the Leadpoint employees work. (Tr. 157:16-23, 193:24-194:23; Jt. Exh. 2(b).) Leadpoint also has seven line leads, who report to the shift supervisors, and provide personal direction to the Leadpoint employees at the facility. (Tr. 157:16-23, 192:20-193:23; L.P. Exh.

2(a).) Leadpoint also has a Human Resources Generalist on-site to provide support regarding personnel matters. (Tr. 158:17-159:4; 194:24-196:4; Jt. Exh. 2(c).) Leadpoint's supervisory employees work out of a mobile trailer office, which has Leadpoint signage and is not shared with any BFI employees. (Tr. 158:17-159:14.)

D. Leadpoint's Sole And Exclusive Direction Of Its Employees.

Since November 2009, Leadpoint has controlled all of the terms and conditions of its employees' employment. It is undisputed that Leadpoint is solely responsible for setting and determining the employees' wages, work schedules, holidays, work rules, job duties, benefits, paid time off, and vacations. (Tr. 20:11-21:3, 25:5-28:5, 77:3-22, 78:14-79:5 80:16-81:2, 93:22-96:25, 98:2-16, 99:11-25, 126:9-127:15, 129:12-130:3, 159:21-160:21, 164:24-165:6, 167:8-20, 191:10-21, 192:14-197:19; LP Exhs. 2(a), 2(b), 2(c), 2(d); Jt. Exh 1, Exh. B.) There is no dispute that Leadpoint alone is responsible for its employees' orientation, including safety training, and that Leadpoint alone disseminates and enforces personnel policies with respect to its own employees. (Tr. 160:25-162:16; 171:13-173:14, 192:14-197:19, 215:22-24, 300:23-301:2; LP Exhs. 1, 2(a), 2(b), 2(c), 2(d).) Nor is it disputed that Leadpoint is exclusively responsible for recruiting, screening, supervising, hiring, firing, promoting, and disciplining employees. (Tr. 18:25-20:10, 23:25-28:5, 30:16-24, 76:7-80:6, 80:16-81:2, 93:22-96:25, 98:2-16, 99:11-25, 126:9-127:15, 129:12-130:3, 158:17-159:1, 159:20-23, 161:22-24, 163:17-164:23; 192:14-197:19, 200:17-202:11, 214:25-215:4; LP Exhs. 2(a), 2(b), 2(c), 2(d).)

Also undisputed is the fact that Leadpoint alone provides the employees' paychecks and withholds all appropriate taxes from those paychecks. (Tr. 20:25-23:10, 23:25-28:5, 77:8-77:2, 78:20-22, 80:16-18, 165:7-11, 165:15-166:22.) Furthermore, Leadpoint maintains personnel records and pay records for each of its employees. (Tr. 28:20-29:12, 73:17-74:16, 77:14-22, 78:7-9, 80:16-81:2, 165:15-166:7.) Leadpoint also provides its employees with personal

protective equipment ("PPE").³ (Tr. 20:25-22:11, 23:25-28:5, 162:17-163:1, 190:12-19.) Leadpoint also enforces its own dress code. (Tr. 21:4-19, 22:3-11, 163:2-16.) Beyond that, on its own initiative, Leadpoint has its own safety manual and conducts daily tailgate meetings and stretching sessions with its employees. (Tr. 190:6-11, 213:20-214:18, 214:25-215:4, 286:12-16.)

To the extent that BFI wishes to instruct Leadpoint regarding how BFI wishes to have a task performed, a BFI representative will communicate directly with Leadpoint supervisors - and not with Leadpoint sorters, housekeepers, or screen cleaners. (Tr. 23:25-24:3, 79:6-80:2, 82:8-22, 89:13-15, 103:10-13, 103:19-104:19, 111:5-24, 112:9-12, 119:19-22, 127:23-129:3.) Leadpoint's supervisors and leads will then communicate directly with Leadpoint's employees regarding any instructions or directions. (Tr. 80:3-6, 89:16-10.) BFI allows Leadpoint's supervisors to determine what and how to communicate with the sorters, housekeepers, and screen cleaners. (Tr. 117:10-17, 129:4-11.) It is undisputed that nobody at BFI has the authority to hire, fire, discipline, promote, demote, transfer, suspend, lay off, or recall any Leadpoint employee; address a Leadpoint employee's grievance; determine a Leadpoint employee's benefits; set the Leadpoint employees' wage rates; or direct the Leadpoint employees in performance of their duties. (Tr. 18:25-20:10, 20:25-23:10, 23:25-28:5, 30:16-24, 76:7-80:6, 80:16-81:2, 93:22-96:25, 98:2-16, 99:11-25, 126:9-127:15, 129:12-130:3, 158:17-159:1, 159:20-23, 161:22-24, 163:17-164:23; 192:14-197:19, 200:17-202:11, 214:25-215:4; LP Exhs. 2(a), 2(b), 2(c), 2(d).) Nobody at BFI makes recommendations to Leadpoint with regard to any of

³ In its Request for Review, the Union refers to an isolated occasion in or around 2012 in which Leadpoint employees were asked to temporarily wear BFI PPE as part of a two-day photo shoot. (Tr. 49:19-51:6, 114:5-7.) The uncontroverted evidence establishes that this was an innocuous occurrence relating specifically to the photo shoot. There is no evidence of any Leadpoint employee being reasonably confused as to the identity of his or her employment based on the PPE the employees wore during the two days of the photo shoot. If anything, the fact that the Leadpoint employees had to return the PPE to BFI further should have confirmed their understanding that they had no employment relationship with BFI.

those personnel actions. (Tr. 18:25-20:10, 20:25-23:10, 23:25-28:5, 29:21-30:9, 30:16-24, 73:17-74:16, 76:7-80:6, 126:9-127:15, 129:12-130:3.) BFI refers to Leadpoint all issues involving employees' scheduling; job placement; and discipline. (Tr. 30:16-24, 75:20-76:3, 93:22-96:25. 98:2-16, 99:11-25, 126:9-127:15, 129:12-130:3.)

III. ARGUMENT

A. The Regional Director's Decision Is Supported By The Record Evidence And Well-Established Board Law.

The Union contends that the Regional Director "ignored significant evidence presented by the Union and credited contradicted evidence without explanation." There is no basis for the Union's contention. The Regional Director's Decision and Direction of Election is supported by the record, well-reasoned, and consistent with Board precedent.

- 1. The Union's Evidence Is Insufficient To Establish A Joint Employer Relationship Between Leadpoint And BFI.
 - a. Leadpoint Solely Supervises And Directs Its Employees.

The Union claims that it presented sufficient evidence to establish that BFI supervise and direct Leadpoint employees, and thus, the Regional Director should have found that a joint employment relationship exists. However, the Union's evidence is insufficient to establish any joint employer relationship. In support of its argument, the Union relies on the testimony of four Leadpoint employees who claim that on occasion, they have received instruction from BFI employees. Specifically, the witnesses testified as follows:

• Clarence Harlin, an employee in the putative bargaining unit, testified that "at least a couple of times" per week, he receives directions from someone at BFI. (Tr. 218:3-11.) However, some of these directions came from non-supervisory BFI employees, who are members of the Union. (Tr. 228:7-16.) Beyond that, Harlin admitted that he chose not to follow directions that he received from John Sutter, a BFI supervisor, which he claims Sutter provided

to him "maybe once a week," thereby demonstrating that Harlin did not believe he was obligated to follow Sutter's instructions. (Tr. 229:14-21, 236:14-24.) In fact, Harlin was not aware of any circumstance in which a Leadpoint employee was disciplined for choosing not to follow any instruction provided by Sutter. (Tr. 236:25-237:2.)

- Harlin also testified about an isolated incident in which Sutter asked Harlin and other Leadpoint employees to come into the BFI control room at the MRF to discuss the issue of sorters stopping the line. (Tr. 221:14-223:14, 230:22-24.) It is undisputed that Leadpoint leads were present during this one meeting; the Leadpoint leads discussed the issue with Sutter during the meeting; and the leads asked Harlin to share his opinion regarding the issues. (Tr. 229:22-230:15.) Harlin was not disciplined based on the events or the meeting. (Tr. 230:16-18.) He continued to do his job in the same manner afterward, and he never received any instruction from Leadpoint leads afterward to operate in the manner suggested by Sutter. (Tr. 230:19-231:6.)
- Another employee in the petitioned-for bargaining unit, Travis Stevens, testified that during a brief three or four-day period in which he worked as a "maintenance helper," he received some instructions from BFI employees named Pablo Salinas and Chris (who last name was not identified on the record). (Tr. 242:1-22, 243:6-16, 249:20-22.) However, it is undisputed that both Salinas and Chris are non-supervisory BFI employees who are in a bargaining unit represented by the Union. (Tr. 290:15-292:8.)
- Stevens also testified that BFI supervisor Augustine Ortiz occasionally gave direction to Leadpoint employees. (Tr. 244:22-245:21.) However, Stevens admitted that he did not always follow Ortiz's instruction. (Tr. 257:4-8.) He also admitted that BFI never threatened

⁴ Harlin subsequently elected on his own to move from a sorter position to a housekeeper position. (Tr. 238:19-25, 239:6-20.) Harlin worked with Leadpoint to facilitate the change; nobody at BFI had any role, input, or responsibility with respect to the change in his position. (Tr. 239:13-20.)

him or anyone else with disciplinary action for not following instructions from BFI; he admitted that only Leadpoint leads threatened discipline. (Tr. 257:9-15.)

- Stevens also testified that he attended a meeting with Paul Keck (BFI's Operations Manager at the Newby Island Recyclery), Ortiz, and a Leadpoint lead, and other Leadpoint employees. (Tr. 257:22-258:15.) He admitted that no discipline arose out of the meeting, and that only Leadpoint leads made any representations regarding potentially imposing any disciplinary action in the aftermath of the meeting.⁵ (Tr. 258:18-259:8.)
- Andrew Mendez, another employee in the putative unit, testified that he <u>once</u> received an instruction from Ortiz to clean up a work area when the line was down. (Tr. 270:2-271:3.) Mendez also testified that he heard about one isolated occasion in which Ortiz took Leadpoint employees, including a Leadpoint lead, on a tour of the facility. (Tr. 271:12-19, 272:7-24.) He also referred to attending: (1) a single meeting in which Keck spoke about safety; and (2) another separate meeting in which Keck asked employees to clean up their work areas before going on a break.⁶ (Tr. 272:25-273:18.)
- Mendez testified that he overhears his leads talking with Ortiz regarding how long specific lines will run, which has an impact on his overtime pay. However, Mendez admits that nobody from BFI has ever told him that he would work overtime. (Tr. 276:8-17.) Moreover, he

⁵ Stevens testified that Keck advised Leadpoint employees, including Stevens, that BFI might not have the budget in the future to keep those employees employed. Keck rebutted Stevens's testimony on the subject. Specifically, Keck testified that he told the employees that the material that was being run on the line was not in the budgeted headcount and that BFI could cover the cost of running the particular line with those materials if it was able to generate revenue selling the material at issue. (Tr. 289:14-290:4.) At no time did Keck make any statement suggesting or implying that BFI did not have the budget to keep those employees employed or that the employees would lose their jobs if they did not meet particular production requirements. (Tr. 291:8-14)

Mendez testified that he believed Keck's request to clean up the work area cut into his break time. However, Mendez admitted that he never raised the issue of his belief that his breaks had been shortened with anyone at Leadpoint. (Tr. 277:15-278:9.)

admits that nobody from BFI advises Leadpoint employees when their shifts end. (Tr. 276:18-277:2.) Instead, he acknowledged that only Leadpoint supervisors have instructed him that he should not leave a line or end his shift until the line stops running. (Tr. 279:11-280:15.)

• An additional employee in the petitioned-for bargaining unit, Marivel Mendoza, testified that Sutter "sometimes" instructs her how much plastic to remove from the line. (Tr. 281:22-282:19.) She also claims that David Martinez, a non-supervisory BFI employee, and Sutter have moved her to a different line "a couple of times." (Tr. 117:20-118:3, 283:2-284:16.) She also claims "a couple of times," Martinez directed Leadpoint employees to sweep their areas. (Tr. 284:22-285:3, 286:15-19.) She admits that Sutter has never disciplined her. (Tr. 286:1-16.)

The Union also relies on testimony from BFI supervisors Ortiz, Sutter, and Keck regarding infrequent and irregular interactions that Keck and Ortiz had with Leadpoint employees in the petitioned-for bargaining unit. Keck stated that he met with some Leadpoint sorters two or three times to educate them on what items should be removed from the line, as well as some other non-descript matters. (Tr. 145:7-147:3.) Keck also stated that he once asked Leadpoint employees to clean up their work areas before they left their work areas to go on break because he felt that the message had not been properly conveyed to Leadpoint employees. (Tr. 296:2-297:5.) Ortiz also stated that he held two meetings with Leadpoint supervisors, with Leadpoint employees present, in which he brought to Leadpoint's attention some quality concerns he had and issues concerning emergency evacuation. (Tr. 83:1-85:5.)

The above testimony does not establish any joint employer relationship. Even if BFI employees on occasion ensured that Leadpoint employees performed their jobs correctly and

⁷ Sutter recalled Keck having a single meeting in which he educated some Leadpoint sorters on the technique for removing plastic off the wet line. (Tr. 112:17-113:2.)

held safety meetings in which Leadpoint employees were present, such minor and infrequent interactions are not sufficient to establish a joint employer relationship.8 See AM Property Holding Corp., 350 NLRB 998, 1001 (2007) (finding that alleged joint employer's occasional direction of employees and requests that employees redo their work was not sufficient to establish joint employer relationship); C.T. Taylor Company, Inc., 342 NLRB 997, 998 (2004) (finding that alleged joint employer's project manager's occasional interaction with employees was not sufficient to joint employer relationship); TLI, Inc., 271 NLRB 798, 798 (1984) (finding no joint employer relationship even though employer's truck drivers reported daily to alleged joint employer's facility for instructions on deliveries); Pitney Bowes, Inc., 312 NLRB 386, 386-87 (1993) (finding no joint employer relationship even though alleged joint employer (1) provided training to the truck drivers; (2) assigned several tasks for the truck drivers to perform in the joint employer's warehouse; (3) routinely contacted the truck drivers on their routes to relay instructions and alert the drivers to potential problems on the road; (4) kept files on the truck drivers; and (5) provided verbal warnings to the truck drivers). At most, the directions provided by BFI's interaction with the employees in the petitioned-for bargaining unit "limited and routine," and thus, the Union cannot rely on these allegations to establish any joint employer relationship. See TLI, Inc., 271 NLRB at 798. Accordingly, the Regional Director's conclusion that BFI does not jointly employ Leadpoint's employees was correct.

⁸ Salinas, Chris, and Martinez are not supervisors, and thus, they lack the ability to supervise Leadpoint employees in any manner.

b. Leadpoint Is Solely Responsible For Personnel Decisions Impacting The Employees In The Petitioned-For Bargaining Unit.

The Union's claim that BFI sets and enforces workplace rules with respect to Leadpoint's employees is not supported by the record evidence. The record establishes Leadpoint has exclusive authority with respect to personnel matters involving the petitioned-for bargaining unit. The incidents identified by the Union in its Request for Review do not demonstrate otherwise.

On one occasion, Keck alerted Leadpoint of an incident in which he believed he saw two Leadpoint employees pass a bottle of whiskey at the job site and thus, he requested those employees' "immediate dismissal." (Un. Exh. 2.) However, it is undisputed that after Keck brought this issue to Leadpoint's attention, Leadpoint – through its Human Resources Manager, Paul Russo, and site supervisor, Vincent Haas – conducted an investigation into the matter on its own and decided, without any input from BFI, what action to take with respect to the two employees. (Tr. 132:17-135:3, 167:21-170:24, 171:4-5, 202:12-205:1.) After requiring the two employees to submit to drug and alcohol screenings, Leadpoint, on its own volition, opted to terminate one employee's employment and reassign the other employee to another work location. (*Id.*)

It is also undisputed that Keck alerted Leadpoint to another incident in which he believed that he saw a Leadpoint employee damaging BFI property, and for that reason, he requested Leadpoint's "immediate dismissal" of that employee. (Un. Exh. 2.) The uncontroverted evidence establishes that upon being notified of the incident by Keck, Leadpoint supervisors Haas and Fatima Bailon immediately investigated the incident. (Tr. 197:21-200:13.) Haas decided on his own to immediately suspend the employee. (Tr. 199:19-20.) Russo later decided to terminate the employee's employment. (Tr. 199:24-200:1). Leadpoint did not consult with anyone at BFI during the investigation; nor did Leadpoint consult with BFI regarding what, if

any, disciplinary action Leadpoint would take against the employee. (Tr. 199:5-12, 199:21-23, 200:7-13.) In fact, as of the date of the hearing in this matter, Keck did not know whether Leadpoint had decided to take any action against the employee at issue. (Tr. 144:22-24.)

These incidents demonstrate that Leadpoint alone makes all decisions regarding disciplinary actions involving employees in the petitioned-for unit. Leadpoint exclusively determined whether it wished to take action against the employees at issue. The issue of the affected employees' statuses as Leadpoint employees was decided by Leadpoint alone. Accordingly, these incidents do not support the Union's contention that BFI and Leadpoint are joint employers. See AM Property Holding Corp., 350 NLRB at 1000-01 (finding that no joint employer relationship existed even though alleged joint employer removed employee in the bargaining unit from his position); C.T. Taylor Company, Inc., 342 NLRB at 998 (finding no joint employer relationship existed even though alleged joint employer occasionally requested that an employee be removed from a job); TLI, Inc., 271 NLRB at 799 (finding that alleged joint employer's submission of "incident reports" to employer was not sufficient to establish joint employer relationship. Keck's mere request that the employees be dismissed is not sufficient to establish a joint employer relationship. See Flav-O-Rich, Inc., 309 NLRB 262, 265 (1992) (alleged employer's statement to temporary employee that employment was going to end was not evidence of a joint employer relationship where employee was reassigned by an employment agency).

c. BFI Does Not Control The Wages Paid To Leadpoint Employees.

The Union claims that BFI meaningfully controls the wage rates for the employees in the petitioned-for bargaining unit. In support of this assertion, the Union claims that BFI intervened

to take away a raise from an employee in the petitioned-for bargaining unit. The record establishes that is not the case.

Leadpoint employee Clarence Harlin testified that his supervisor Vincent Haas told him that Keck "took away" a wage increase that Harlin received. Harlin's testimony was rebutted by both Keck and Haas. As Keck and Haas explained, Keck and Haas noticed on Leadpoint's invoice to BFI during the period in question that Harlin had improperly received a monetary enhancement even though he moved to a position for which was not entitled to the monetary enhancement. (Tr. 293:6-296:1, 299:9-23.) After spotting the inadvertent error, Leadpoint corrected the situation by compensating Harlin at the proper lower rate. (Tr. 299:9-20.) Accordingly, there is no evidence that Keck – or anyone at BFI – took away Harlin's wage rate. Thus, the Union's contention that BFI controls the specific wage rates of each of Leadpoint's employees is incorrect.

B. The Regional Director Correctly Concluded That Leadpoint Is The Sole Employer Of The Employees In The Petitioned-For Unit.

The Regional Director's Decision and Direction of Election is consistent with wellestablished Board precedent, and thus the Regional Director's Decision should be upheld.

In *TLI*, *Inc.*, 271 NLRB 798, a case similar to that at issue here, the Board declined to find a joint employer relationship. In *TLI*, the Board ruled that Crown Zellerbach ("Crown") was not a joint employer even though: (1) Crown and the employer, TLI, signed a lease agreement providing that Crown "will solely and exclusively be responsible for maintaining operational control, direction, and supervision" over the truck drivers leased from TLI to Crown; (2) TLI's truck drivers reported daily to Crown's facility for instructions on deliveries, and returned the trucks to Crown's facility after completing their routes; (3) TLI's truck drivers reported all mechanical problems to Crown, rather than TLI; (4) the truck driver's logs and records were kept

by Crown; and (5) the drivers only worked for Crown, and not for any other company that TLI had contracts with. *Id.* at 798. The Board found that a joint employment relationship did not exist because Crown did not hire, fire, or discipline employees, and Crown's direction and supervision of the truck driver's actions were "limited and routine." *Id.* at 799. Whenever a truck driver engaged in conduct adverse to Crown, Crown would report the matter to TLI rather discipline the employee. *Id.*

In the present case, there is even less evidence to support the Union's contention that BFI is a joint employer. Here, the contract between Leadpoint and BFI does not in any manner provide that BFI is solely responsible for the control, direction, and supervision of Leadpoint's employees. (Jt. Exh. 1.) Nor has the Union provided any facts to suggest that anyone at BFI meaningfully controls, directs, or supervises Leadpoint's employees. The employees in the petitioned-for bargaining unit primarily receive their work instructions from their leads at Leadpoint, and BFI employees report all Leadpoint job performance problems to Leadpoint. (Tr. 23:25-24:3, 39:12-17, 75:20-76:3, 79:6-80:2, 82:8-22, 89:13-15, 103:10-13, 103:19-104:19, 111:5-24, 112:9-12, 119:19-22, 127:23-129:11.) As was the case in *TLI*, the degree of supervision provided by BFI supervisors can only be categorized as "limited and routine" at most.

In another similar case, *Pitney Bowes, Inc.*, 312 NLRB 386, the Board declined to find that Pitney Bowes was a joint employer of truck drivers even though Pitney Bowes: (1) provided training to the truck drivers; (2) assigned several tasks for the truck drivers to perform in Pitney Bowes's warehouse; (3) routinely contacted the truck drivers on their routes to relay instructions and alert the drivers to potential problems on the road; (4) kept files on the truck drivers; and (5) provided verbal warnings to the truck drivers. *Id.* at 386-87. The Board made this determination

because the truck driver's employer, TLI, maintained control of hiring, wages, benefits, work rules, assignment of tasks, and terminations. *Id.* at 387.

In this case, there is even less evidence than there was in Pitney Bowes to suggest that a joint employment relationship exists. It is undisputed that Leadpoint alone controls hiring, wages, benefits, work rules, assignments, and terminations. (Tr. 18:25-20:10, 20:25-23:10, 23:25-28:5, 30:16-24, 76:7-80:6, 80:16-81:2, 93:22-96:25, 98:2-16, 99:11-25, 126:9-127:15, 129:12-130:3, 158:17-159:1, 159:20-23, 161:22-24, 163:17-164:23; 192:14-197:19, 200:17-202:11, 214:25-215:4; LP Exhs. 2(a), 2(b), 2(c), 2(d).) As noted, the Union attempts to rely on BFI employees' interactions with Leadpoint employees. However, no employee at BFI has any direct or indirect control of the terms and conditions of Leadpoint employees' employment. BFI management does not hire, fire, discipline, promote, demote, suspend, lay off, or recall Leadpoint employees; adjust Leadpoint employees' grievances; determine the Leadpoint employees' benefits; set the Leadpoint employees' wage rates; direct the Leadpoint employees in performance of their duties; or make any recommendations to Leadpoint with regard to any of the aforementioned personnel decision. (Tr. 18:25-20:10, 20:25-23:10, 23:25-28:5, 30:16-24, 39:12-17, 75:20-76:3, 76:7-80:6, 80:16-81:2, 93:22-96:25, 98:2-16, 99:11-25, 126:9-127:15, 128:9-130:3, 158:17-159:1, 159:20-23, 161:22-24, 163:17-164:23; 192:14-197:19, 200:17-202:11, 214:25-215:4; LP Exhs. 2(a), 2(b), 2(c), 2(d).) Accordingly, the Union cannot establish any joint employment relationship between Leadpoint and BFI.

A similar controversy arose in *The Southland Corp.*, 170 NLRB 1332 (1968). The petitioning union in *Southland* argued that Southland, a franchisor, was a joint employer with the franchisee. However, the Board found that no joint employment relationship existed notwithstanding the Board's findings that (1) Southland's Policy Manual described "in

meticulous detail virtually every action taken by the franchisee in the conduct of his store;"
(2) Southland provided the franchisee periodic price recommendations; (3) Southland had the right to terminate the agreement with the franchisee without cause upon thirty days' notice, and thus pressure the franchisee to accede to its demands by threatening to cease its obligations under the contract; and (4) Southland made out the paychecks to the franchisee's employees. *Id.* at 1333-34. The Board determined that in spite of these findings, Southland did not exercise any control over the franchisee's labor policies. *Id.* at 1334.

The present controversy provides even less convincing evidence of a joint employer relationship. While in *Southland*, the alleged joint employer actually made out the employee's paychecks, BFI has no such responsibility. Leadpoint alone is responsible for recording its employees; work time, maintaining its employees' pay records, and issuing paychecks to its employees. (Tr. 20:25-23:10, 23:25-28:5, 28:20-29:12, 76:7-80:6, 80:16-81:2, 162:17-163:1, 165:7-11, 165:15-166:22, 190:12-19.) Leadpoint maintains its own personnel policies and procedures. (Tr. 161:15-24, 163:2-16, 167:8-20, 214:22-24, 214:25-215:4; LP Exhs. 1, 2(a), 2(b), 2(c), 2(d); Jt. Exh. 1, Exh. B.) BFI does not impose its personnel policies on Leadpoint's employees. (Tr. 20:11-21:3.) BFI does not impose any requirements on Leadpoint other than that it comply with the parties' contract. Thus, it is clear that BFI lacks the ability to directly or indirectly influence Leadpoint's labor relations policies. Accordingly, the Regional Director's Decision was correct.

IV. CONCLUSION

For the foregoing reasons, the Union's Request for Review should be denied. Leadpoint solely employs the employees in the petitioned-for bargaining unit. Accordingly, the Regional Director's Decision and Direction of Election should be upheld.

Dated: September 10, 2013

Respectfully submitted,

LITTLER MENDELSON A Professional Corporation

By

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Attorneys for Employer

LEADPOINT BUSINESS SERVICES

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 650 California Street, 20th Floor, San Francisco, California 94108.2693. On September 10, 2013, I served the within document(s):

EMPLOYER LEADPOINT BUSINESS SERVICES'S OPPOSITION TO PETITIONER'S REQUEST FOR REVIEW

\boxtimes	By United States mail. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses indicated below and (specify one):
	deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
	placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
\boxtimes	By e-mail or electronic transmission, I caused the documents to be sent to the person(s) at the e-mail address(es) listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

To the following:

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **September 10, 2013**, at Sap Francisco, California.

Linda K. Camanio

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