UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

Employer

and

Case 32-RC-109684

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

Employer

and

SANITARY TRUCK DRIVERS AND
HELPERS LOCAL 350,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Petitioner.

BRIEF OF *AMICUS CURIAE* COUNCIL ON LABOR LAW EQUALITY

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INTRODUCTION

The Council on Labor Law Equality ("COLLE") submits this *amicus curiae* brief in response to the National Labor Relations Board's ("NLRB" or "Board") May 12, 2014 Notice and Invitation to File Briefs. The Board's invitation presents the following issues for consideration:

1. Under the Board's current joint-employer standard as articulated in *TLI, Inc.*, 271 NLRB 798 (1984), *enf'd mem.* 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984), is Leadpoint Business Services the sole employer of the petitioned-for employees?
2. Should the Board adhere to its existing joint-employer standard or adopt a new standard? What considerations should influence the Board's decision in this regard?
3. If the Board adopts a new standard for determining joint-employer status, what should that standard be? If it involves the application of a multifactor test, what factors should be examined? What should be the basis or rationale for such a standard?

The Board should decline this opportunity to revisit the joint employer standard as articulated in *TLI* and *Laerco*. Instead, COLLE urges the Board to adhere to its current joint employer standard, which has governed such relationships for the last 30 years.

The importance of consistency in the law cannot be overstated. Specifically, here, the Board's long-standing and consistent application of its joint employer analysis has created a workable and predictable standard that many companies, including COLLE's members, have applied in structuring their relationships with their suppliers and contractors. Reversing precedent, on the other hand, creates instability, unpredictably, and uncertainty. The Board should not change its well-established standard absent a compelling reason to do so.

This case presents no new or compelling reason for modifying the Board's joint employer standard. The reasons advanced in support of a change in the law have been considered and rejected by the Board, on at least three occasions, as insufficient to warrant a reversal of longstanding Board precedent. These reasons include the argument that a change in the law is

necessary because the current standard allows a company to use its contractor as a conduit to exert control over the essential terms and conditions of the contractor's employees, while at the same time avoiding any obligation to bargain with the representative of such employees.

The Board's current standard strikes an appropriate balance between a company's right to manage its relationships with its contractors and suppliers, and the right of employees to organize a union and to have an employer at the bargaining table that is able to engage in meaningful collective bargaining. The Board's current standard ensures that a company will be at the bargaining table if it exercises *actual control* over the terms and conditions of employment of its contractor's employees, as opposed to *indirect control* through the terms of the business agreement between the company and its contractor.

An arm's length business agreement between a company and a supplier or contractor should not give rise to a joint employer relationship simply because the company has established production, safety or other standards that the contractor is expected to meet. Nor should a joint employer relationship be found if the company seeks to control its costs by setting a maximum reimbursement rate for the contractor's labor costs associated with the work performed under the contract. Companies have legitimate business reasons for including these types of terms in their agreements with suppliers and contractors. Agreements such as these should not give rise to a joint employer relationship unless the company exerts *actual, direct control* over the contractor's employees.

If the Board were to expand the joint employer standard to cover these types of relationships, companies may be exposed to liability for unfair labor practices committed by their suppliers and contractors, even if the company exerts no control over the labor relations of the contractor and does not have knowledge of, or authorize, the contractor's unlawful conduct. A

standard which imputes liability in these circumstances, formerly employed by the Board, was condemned by Congress over 50 years ago, when Congress amended the definition of "employer" under the Labor Management Relations Act of 1947 ("LMRA").

Furthermore, a change in the joint employer standard could have the unintended consequence of discouraging companies from adopting responsible contracting policies or supplier codes of conduct. A change in the standard would expose companies to joint employer liability if they require their contractors and suppliers to meet certain safety and/or minimum labor standards. Companies would be discouraged from requiring their contractors and suppliers to meet these standards, which are intended not to establish control over the contractor's employees but, instead, to promote safety and compliance with the law.

A change in the law also could disrupt relationships with suppliers and contractors, which could result in substantial job losses in an era when job creation is of utmost importance. Temporary jobs are projected to account for 3.3 million of the 21 million jobs that must be created in the next six years in order to reach pre-recession employment levels. Thus, the Board's decision in this case could have an impact far beyond the relationship between the parties to this case. The Board should carefully weigh the potential costs of a change in the law.

STATEMENT OF COLLE'S MEMBERSHIP AND INTEREST

COLLE is a national association of employers that was formed to comment on, and assist in, the interpretation of the law under the National Labor Relations Act ("Act" or "NLRA"). COLLE's single purpose is to follow the activities of the Board and the courts as they relate to the Act. Through the filing of *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach – in the formulation and interpretation of national labor policy – to issues that affect a broad cross-

section of industry. COLLE has participated as *amicus curiae* in numerous cases before the NLRB.

With respect to this case, COLLE's members are large, national employers, many of whom rely on a variety of suppliers and contractors to operate their businesses. The General Counsel's proposed deviation from its current joint employer standard is of special importance and significance to COLLE's members. The Board's decision could disrupt existing relationships between COLLE's members and their suppliers and contractors, by fundamentally altering the legal underpinnings of those relationships. The relationships are arm's length business relationships, which are not intended to create a joint employer relationship and the corresponding liabilities. A change in the Board's joint employer standard could force companies to restructure these relationships or to terminate them entirely, which could have substantial, adverse consequences on many contractors and suppliers and the workers they employ.

SUMMARY OF THE CASE

This case involves an election petition filed by Teamsters Local 350 ("Union"), seeking to represent a unit of 240 sorters, housekeepers, and screen cleaners employed by FPR-II, LLC d/b/a Leadpoint Business Services ("Leadpoint") at a recycling facility located in Milpitas, California (the "Facility"). Acting Regional Director's Decision and Direction of Election, Case 32-RC-109684 (Aug. 16, 2013), at 1-2.[1] The Facility is owned and operated by Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery ("BFI"). *Id.* at 1. Leadpoint has a contract with BFI to perform the sorting and housekeeping work at the Facility. *Id.* at 4.

[1] The Acting Regional Director's decision indicates first that there are 120 members in the petitioned-for unit and, later, that there are 240 members. *Id.* at 2 (120 members), 4 (240 members), 20 (240 members).

There are 60 other employees who work at the Facility, including loader operators, equipment operators, forklift operators, sort line equipment operators, spotters and a single sorter. *Id.* at 3. They are employed directly by BFI and many of them work exclusively on the exterior of the Facility, moving and preparing materials to be sorted inside the Facility. *Id.* at 3. All of these 60 employees comprise a separate, existing bargaining unit represented by the Union. *Id.*

Through its current petition, the Union seeks to represent the employees employed by Leadpoint in a unit employed solely by Leadpoint or, alternatively, in a unit jointly employed by BFI and Leadpoint. *Id.* at 2.

On August 16, 2013, after a hearing on the issues, the Acting Regional Director issued his Decision and Direction of Election ("DDE"), relying on, *inter alia*, the Board's decisions in *TLI, Inc.* and *Laerco Transportation* to conclude that BFI and Leadpoint were not joint employers. *Id.* at 12. The Acting Regional Director found that BFI did not exercise direct and immediate control over the terms and conditions of employment for Leadpoint's employees. *Id.* at 15-19. Specifically, the Acting Regional Director found that BFI did not have the authority to supervise, direct, hire, fire, discipline or schedule the Leadpoint employees. Instead, the Acting Regional Director found that sole control over all terms and conditions of employment for the members of the petitioned-for unit rested with Leadpoint. *Id.* Therefore, the Acting Regional Director concluded that Leadpoint was the sole employer of the employees in the petitioned-for unit.

On September 3, 2013, the Union filed a request for review of the Acting Regional Director's DDE. *See* Petitioner's Request for Review of the Regional Director's Decision and Direction of Election, Case No. 32-RC-109684 (Sept. 3, 2013). The Union argued that the

Acting Regional Director ignored relevant evidence which established that BFI exercised substantial direct control over unit employees' terms and conditions of employment and, therefore, erred in concluding that BFI and Leadpoint were not joint employers of Leadpoint's employees. *Id.* at 13-35. Alternatively, the Union urged the Board to adopt a broader joint employer standard. *Id.* at 35. Based on this broader joint employer standard, the Union argued, the Board should conclude that BFI's minimal and indirect control over the terms and conditions of Leadpoint's employees rendered BFI a necessary party to collective bargaining with the representative of the Leadpoint employees and, therefore, a joint employer with Leadpoint. *Id.* at 35-37.

On April 30, 2014, the Board granted the Union's Request for Review, and on May 12, 2014 the Board issued a Notice and Invitation to File Briefs regarding the various issues discussed herein.

ARGUMENT

I. THE BOARD SHOULD ADHERE TO THE LONG-STANDING JOINT EMPLOYER STANDARD ARTICULATED IN *TLI* AND *LAERCO TRANSPORTATION.*

A. The Board Should Not Overrule Decades of Established Law That Companies Have Relied Upon in Structuring Their Contractor and Supplier Relationships.

For the last 30 years, since the early 1980s, the Board, with court approval, has consistently applied the joint employer analysis set forth in *TLI* and *Laerco Transportation* to determine whether a particular group of employees is solely or jointly employed by one or more employers. *See NLRB v. Browning Ferris Indus. of Pa.*, 691 F.2d 1117 (3d Cir. 1982), *enf'g* 259 NLRB 148 (1981); *TLI, Inc.* 271 NLRB 798 (1984), *enf'd mem.*, 772 F.2d 894 (3d Cir. 1985).

The Board's decisions in *TLI* and *Laerco* quietly overruled its earlier and broader joint employer standard. *See Laerco Transportation and Warehouse*, 269 NLRB 324 (1984) (very

short Board decision with no explicit acknowledgment of the fact that it was overruling long-standing precedent); *TLI,* 271 NLRB at 798-99 (same); *In re Airborne Express*, 338 NLRB 597, 597 n.1 (2002) (generally describing *TLI* and *Laerco*'s role in overruling the Board's earlier joint employer standard). Prior to *TLI* and *Laerco*, the Board's joint employer analysis focused on the contracting employer's *indirect* control over matters relating to the employment of its supplier's employees. *Id.* In those pre-1980s cases, the Board had broadly construed the type of "indirect control" that would demonstrate joint employer status, finding such status where the contracting employer:

> exercised "indirect control" over the contractor's wages and discipline; in cases where the respondent had contractual authority to control some employment conditions, even if that authority was not exercised; in cases where the "industrial realities" made one company a necessary party to meaningful collective bargaining, even though it played no role in hiring, firing or directing employees; and in cases where the respondent "was the ultimate source of any wage increases for the contractor's employees that might be negotiated with a union."

Airborne Express, 338 NLRB at 598 (internal citations omitted); *Floyd Epperson*, 202 NLRB 23, 23 (1973) (joint employer status found where contracting employer had indirect control over wages and discipline), *Jewell Smokeless Coal Corp.*, 170 NLRB 392 (1968) (joint employer status found where contracting employer required contractor to perform work in the place and manner prescribed by the employer, consistent with its business needs and production techniques). The Board's early joint employer standard was far-reaching and liberally applied. *Airborne Express*, 338 NLRB at 597.

In the early 1980s, beginning with *TLI* and *Laerco*, the Board abandoned this traditional "indirect control" test for the modern analysis. In *TLI* and *Laerco*, the Board rejected the notion that indirect, minimal or hypothetical control should establish a joint employer relationship. *TLI*,

271 NLRB at 799 ("[the putative employer] may have exercised some control over the drivers, [but it] did not affect the terms and conditions of employment to such a degree that it may be deemed a joint employer[ ]"); *Laerco*, 269 NLRB at 325 ("Laerco does not possess sufficient indicia of control over CTL employees to support a joint employer finding."). Instead, the Board decided that joint employer status would require proof of a significant degree of direct and immediate control over the contractor's employees. *TLI*, 271 NLRB at 798-99. A contracting employer must be found to "share or codetermine those matters governing the essential terms and conditions of employment" for supplier employees; and must "meaningfully [affect] matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction." *TLI*, 271 NLRB at 798-99; *Laerco*, 269 NLRB at 325; *Airborne Express*, 338 NLRB at 597 n.1; *AM Property Holding Corp.*, 350 NLRB 998, 999-1000 (2007).

In the 30 years since *TLI* and *Laerco* were issued, the Board has rejected several calls to revisit the analysis. The first major push for the Board to revisit the joint employer standard came in 1996 in *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000). In that case, on October 10, 1996, the Board called for oral argument on, *inter alia*, whether the Board should reconsider its joint employer standard. *M.B. Sturgis*, 331 NLRB at 1299.

In an *amicus curiae* brief submitted to the Board in *M.B. Sturgis*, the General Counsel argued that the existing joint employer standard frustrated employees' rights to organize. General Counsel Brief, Case Nos. 9-UC-406, 14-RC-11572, 33-RC-4042, at 6 (Nov. 15, 1996). The General Counsel advocated for a return to the broader joint employer standard applied by the Board prior to *TLI* and *Laerco*, and he pointed to the recent and significant increase in the use of temporary employees as a sufficiently compelling reason to justify a wholesale change in joint employer jurisprudence. *Id.* The General Counsel was correct that, in 1996, the use of

contingent workers was rapidly growing. In fact, the use of workers from temporary agencies had doubled since 1982, and in 1996 more than 2.3 million workers were employed by temporary agencies. U.S. Dep't of Labor, *Contingent and Alternative Employment Arrangements*, Report 900 (Aug. 1995).

The Board considered these arguments presented by the General Counsel, and recognized the "critical nature of the issue" in light of 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." *M.B. Sturgis*, 331 NLRB at 1298. Yet, the Board ultimately did not find either the increase in the use of temporary employment or the increase in joint employer relationships to be a sufficiently compelling reason to revisit the joint employer analysis and declined the opportunity to change the standard. *M.B. Sturgis*, 331 NLRB at 1301 ("we need not address the contention . . . that our current joint employer standard should be expanded, and we will forgo the opportunity to do so here.").

A second call to overrule the Board's joint employer standard came just two years after the Board's decision in *M.B. Sturgis*, as articulated by Member Liebman in her concurring opinion in *Airborne Express*. *See Airborne Express*, 338 NLRB at 597-99. Member Liebman urged the Board to revisit the joint employer standard based not only on the continuing rise in the use of contingent workers, temporary agencies, and joint employer relationships, but also on the alleged increase of contracting employers exerting more indirect control over labor contractors, which Member Liebman argued resulted in "pervasive domination of the [contractor's] operations." *Id.* at 597. Member Liebman argued that this "domination," although unaccompanied by any direct control, made the putative joint employer a necessary party to collective bargaining between the contractor and the representative of the contractor's

employees. *Id.* at 598-99. Member Liebman urged the Board to expand its joint employer standard to treat these contracting employers as joint employers under the Act. *Id.*

The Board in *Airborne Express* considered Member Liebman's arguments, but again declined to change the standard. The Board reaffirmed the existing joint employer as "settled law" that should not be revisited:

> [The Board] reject[s] Member Liebman's suggestion that the Board should revisit its standard for determining joint employer status. Simply put, the Board's test for determining whether two separate entities should be considered to be joint employers with respect to a specific group of employees has been a matter of settled law for approximately 20 years.

338 NLRB at 597 n.1.

More recently, in 2007, the Board in *AM Property Holding* again rejected Member Liebman's call to revisit the joint employer standard. In her partial concurrence and partial dissent, Member Liebman reiterated her *Airborne Express* argument, asserting that the current joint employer standard allows the "dominant economic actor" to be absent from the bargaining table. 350 NLRB at 1012. Again the Board declined to reconsider the standard and reaffirmed the existing joint employer analysis. *Id.* at 999-1000.

In the instant case, the Board should once again adhere to the existing joint employer standard. The Board's long-standing and consistent application of precedent since *TLI* and *Laerco* has established a workable, consistent, and predictable standard that companies have applied in structuring their relationships with their suppliers and contractors. The importance of consistency cannot be overstated. When introducing the bill that would become the Act, Senator Wagner expressed the importance of predictability in the law: "[E]mployers are tremendously handicapped when it is impossible to determine exactly what their rights are. Everybody needs a

law that is precise and certain." 79 CONG. REC. 2371 (daily ed. Feb. 21, 1935) (statement of Sen. Robert F. Wagner).

Reversing precedent creates instability, unpredictably and uncertainty. In this case, an overhaul of the joint employer standard would disrupt existing relationships between companies and their suppliers and contractors, which have been structured, at least in part, based on existing law. This could have a significant impact not only on the parties to these relationships, but on the economy as a whole. Because of the significant disruptions that are caused by a reversal of precedent, the Board should do so only in cases in which there are substantial empirical data or academic studies showing that a change in existing precedent is necessary. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due."); *SEIU Local 32BJ v. NLRB,* 647 F.3d 435, 442 (2d Cir. 2011) ("Where the Board 'departs from prior interpretation of the Act without explaining why that departure is necessary or appropriate,' the Board will have exceeded the bounds of its discretion"); Harold J. Datz, *When One Board Reverses Another: A Chief Counsel's Perspective*, 1 AM. U. LAB & EMP. L.F. 67, 71, 82-83 (2011) (warning of the dangers of reversing Board precedent and recommending that it only be done in compelling circumstances).

In this case, there is no new or compelling reason to change the joint employer standard. The arguments advanced by the Union and others in this case are the same arguments that have been raised, considered and rejected by the Board on at least three occasions in the past. The increase in the number of temporary and contract workers is not a new fact; the Board has been aware of this trend, which started in the 1980s, since at least 1996. That companies have included production, safety and labor standards in their contracts with suppliers and labor contractors is a fact that was cited by Member Liebman in 2002. No new circumstances or

empirical data exists that would compel the Board to engage in a wholesale reversal of its long-standing precedent. The same facts and circumstances have been considered by the Board on multiple occasions, and were found to be insufficiently compelling to warrant a change in the joint employer standard.

B. The Current Joint Employer Standard Assures Employees the Right to Bargain with an Employer That Is Able To Engage in Meaningful Bargaining.

The current joint employer standard appropriately balances a company's right to manage its suppliers and contractors with the right of employees to be represented by a union and have a party at the bargaining table that is able to engage in meaningful bargaining with their chosen representative. Although those urging the Board to reconsider its joint employer analysis will claim, as Member Liebman did in *Airborne Express*, that the standard is too narrow and precludes employees from bargaining with a company that, as a practical matter, determines their terms and conditions of employment, this fear is unfounded. The current standard brings the putative joint employer to the bargaining table if it exercises direct control over matters governing the essential terms and conditions of employment of the contractor's employees. If, for example, the putative joint employer disciplines and directs the work of its contractor's employees, a joint employer relationship will be found and the joint employer will have an obligation to participate in collective bargaining. *See, e.g., In re Aldworth Co.*, 338 NLRB 137, 140 (2002) (finding joint employer status where the contracting employer disciplined the contractor's employees and assigned them work); *Quantum Resources Corp.*, 305 NLRB 759, 760 (1991) (finding joint employer status based on the putative employer's close and routine

supervision of unit employees).[2]

But where, as here, the putative joint employer does not exercise direct and immediate control over the terms and conditions of employment of its contractor's employees, the putative joint employer is not necessary for meaningful bargaining to occur. The facts of this case illustrate this point. As found by the Acting Regional Director, BFI did not control the supervision, daily direction, scheduling, the speed or manner of work, job assignments, recruiting, hiring, counseling, discipline or termination of Leadpoint's employees. *See* Decision and Direction of Election, at 15-19. All of those terms and conditions of employment were determined solely by Leadpoint. *Id.* Surely, then, as the Acting Regional Director found, BFI cannot be necessary for meaningful collective bargaining to occur. Leadpoint has the authority to make decisions as to all of those terms and conditions of employment and, therefore, to effectively negotiate them.

The Union argues that BFI is a necessary party to collective bargaining with Leadpoint's employees because BFI exercises *indirect* control over the contractor's employees through operational, production, and safety guidelines and standards. *See* Union's Request for Review, at 34-37. Setting production, operational and safety standards does not, however, make BFI indispensible to collective bargaining. For example, although BFI decides at what speed to operate the line on which the sorters work, it is Leadpoint, not BFI, that determines how the speed of the line will affect the employees. *See* Decision and Direction of Election, at 17. To this end, Leadpoint determines the number of employees who work on the line, the speed at

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[2] Under current Board law, there may be situations in which the contractor is not an employer or a joint employer and, instead, the customer is the sole employer and therefore the party that would have the bargaining obligation. *See, e.g., Flagstaff Medical Center*, 357 NLRB No. 57, slip op. at 8-9 (2011). This depends on the nature of the work performed by the contractor and how its relationship with the customer is structured. If the relationship is structured in a way in which the customer retains authority to hire, fire, and otherwise determine the terms and conditions of employment for the employees at issue, then the customer in those cases should be the party who is at the bargaining table, rather than the contractor.

which they work, where they stand on the line, and how they pick materials off of the line. *Id.* Thus, Leadpoint makes the decisions that directly affect its employees and Leadpoint can engage in meaningful collective bargaining over those decisions.

II. THE BOARD SHOULD NOT ADOPT AN INDIRECT CONTROL STANDARD FOR JOINT EMPLOYER STATUS.

A. The Indirect Control Standard Is Not Necessary to Ensure Effective Collective Bargaining.

The Union and others urge the Board to adopt an indirect control standard for joint employer status because, as Member Liebman argued in *Airborne Express*, they claim that a broader standard is necessary to enable the employees of a contractor to engage in meaningful collective bargaining. In *Airborne Express*, the putative joint employer, *inter alia*, required employees' compliance with its lengthy handbook of operational procedures, taught the employees to perform their work the "Airborne Way," imposed its own sorting, processing and delivery procedures, and constantly monitored, audited and required highly specific operational modifications that affected conditions of employment for the supplier's employees. *Airborne Express*, 338 NLRB at 598-99. Member Liebman argued, that based on this level of indirect control, Airborne Express "as a practical matter, determine[d] the terms and conditions of [the contractor's employees'] employment[,]" amounting to a "pervasive domination of the local carrier's operations." *Airborne Express*, 338 NLRB at 597-98. Therefore, Member Liebman believed that it was necessary for Airborne to be treated as joint employer in order to enable the contractor's employees to engage in meaningful collective bargaining:

> Under these circumstances, it would seem highly difficult for the local carriers and their employees to engage in meaningful collective bargaining without Airborne's participation. Airborne's operational requirements effectively determine conditions of employment that are subject to the Act's bargaining requirements: for example, the speed and frequency with which an employee is

> required to perform a task, the equipment he uses, and the way he uses it.

Airborne Express, 338 NLRB at 599 (citations omitted).

Member Liebman's view was rejected, however. The Board noted that the direct control standard had been, at that time, "settled law for approximately 20 years." *Airborne Express*, 338 NLRB at 597 n.1. The Board recognized that "approximately 20 years ago, the Board, with court approval, abandoned its previous test in this area, which had focused on a putative joint employer's *indirect* control over matters relating to the employment relationship." *Id.* Thus, the Board rejected the argument that Airborne, by virtue of establishing operational procedures and standards for its contractors, should be deemed to be a joint employer.

Several Board cases decided prior to the 1980s under an indirect control standard, as advocated by Member Liebman and others, illustrate the dangers of reverting to the indirect control test. In *Jewell Smokeless Coal Corp.*, 170 NLRB at 392, and *Clayton B. Metcalf*, 223 NLRB 642 (1976), the Board made joint employer findings based solely on the contracting employers' ownership of the facility where the contractor and its employees worked, the fact that all parties worked side-by-side, and that contracting employer maintained operational and production standards that required the contractors to perform their work in the place and manner they prescribed, consistent with business needs and production techniques. *Jewell Smokeless Coal*, 170 NLRB at 393; *Clayton B. Metcalf*, 223 NLRB at 642-43.

Similarly, in the instant case, the Union and others argue that the Board should find that BFI and Leadpoint are joint employers because BFI (1) owned the Facility; (2) maintained certain production and operational policies that resulted in decisions by BFI as to when the lines would start and stop and if the lines would run after hours; (3) required that Leadpoint perform background checks and drug testing on all employees; and (4) provided BFI with the right to

reject or discontinue use of any personnel by Leadpoint. The Board should reject any standard, whether it is an indirect control or other standard, that would result in a finding of joint employer status based on such operational, production and safety standards.

Companies have sound business reasons for establishing operational, production and safety standards in their agreements with suppliers and contractors. The purpose of such standards is not to exert control over the working conditions of contractor's employees. Instead, they are intended to establish and maintain a safe working environment, minimize operational disruptions, ensure that the contractor is performing the job for which it was hired and to provide the level of quality or service required by the business.

For instance, if an aircraft manufacturer contracts with a supplier to produce component parts for an engine, the manufacturer must ensure that the part is produced on time and according to detailed specifications. The time frame for production established by the manufacturer (*i.e.*, the supplier's customer) should not be evidence of joint employer status. The manufacturer also may want the supplier to certify that it has a drug and alcohol testing program in place, to ensure that the workers who are producing the aircraft engine parts are not under the influence of drugs or alcohol while they are performing that work. By requiring that the supplier have a drug and alcohol testing program, the aircraft manufacturer is not seeking to co-determine the terms and conditions of employment of the supplier's employees. The manufacturer is protecting its own legitimate business interests. This requirement should not give rise to a joint employer relationship. The supplier is able to bargain with a representative of its employees about how these requirements will affect them and their work, but the manufacturer should not be forced to engage in collective bargaining over these business requirements. *See New York New York Hotel & Casino*, 356 NLRB No. 19, slip op. at 11 (Mar. 25, 2011) (finding that rules requiring a

contractor's employees to undergo drug testing and prohibiting them from wearing their uniform off-duty and entering the bars inside the employer's hotel were legitimate operational policies designed to ensure that the contractor's employees did not do anything to interfere with the operations of the hotel); *Hychem Constructors, Inc.*, 169 NLRB 274, 276 (1968) ("[t]he 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").

Companies likewise have legitimate business reasons for limiting the costs that they are willing to reimburse under a contract with a supplier or contractor. If the contract is entered into on a cost-plus basis, the business may cap the hourly rate that they are willing to reimburse under that arrangement. For sound and obvious reasons, the business would not want to agree to reimburse the contractor for any and all labor costs associated with performing the contract, regardless of what hourly rate the contractor decides to pay its employees. Such limitations on the labor costs the business is willing to pay do not prevent the contractor from engaging in meaningful collective bargaining. *See Management Training Corp.*, 317 NLRB 1355, 1356 (1995) (finding that meaningful bargaining may occur between a government contractor and a union representing its employees where the government sets the wage rates of its employees); *Cabot Corp.*, 223 NLRB 1388, 1388 (1976) (refusing to find joint employer liability where the cost-plus contract specified wage rates at which the putative employer would reimburse the subcontractor for the wages of its employees).

The Board has, in numerous cases, held that reimbursement rates in cost-plus and government contracts do not preclude the contractor from negotiating higher wages and benefits than are provided for in the contract. *See Management Training*, 317 NLRB at 1357; *Ebon Research Systems*, 302 NLRB 762, 765 (1991); *Dynaelectron Corp., Aerospace Operations Div.*,

286 NLRB 302, 304 (1987); *Chesapeake Foods*, 287 NLRB 405, 407 (1987). As the Board observed in *Management Training*, the contractor may agree in collective bargaining to pay a rate that is higher than what will be reimbursed and absorb those additional costs or reduce its profit margin on the contract:

> Even if the Government rejects a negotiated wage increase and the employer has to fund the increase out of its own profits, as the Board stated in *Dynaelectron*, 286 NLRB at 304, that burden is no greater than that carried by any contractor operating under a cost-plus-fixed-fee contract. Nor does the fact that the employer has limited economic resources with which to grant the union's requests mean that there is not sufficient room for give and take in the bargaining process; profit margins are frequently narrow.

Management Training, 317 NLRB at 1357.[3]

Thus, according to longstanding and well-established precedent, reimbursement rates and other standards set forth in an agreement with a contractor do not give rise to a joint employer relationship. The contractor still has the ability to engage in collective bargaining over all terms and conditions of employment, including how the standards imposed by the customer will affect the contractor's employees.

B. The Indirect Control Standard Would Discourage Responsible Contracting Policies and Supplier Codes of Conduct.

Some companies impose standards on its contractors and suppliers for reasons of public policy and corporate social responsibility. Labor unions, human rights groups and the international labor community have urged companies to adopt responsible contracting policies or supplier codes of conduct in order to ensure that the company's suppliers and contractors, both

[3] Of course, if the customer is a government entity, then the Board will not have jurisdiction over the customer in those cases and cannot compel the customer to participate in bargaining. *Management Training*, 317 NLRB at 1358 n.16. Yet, as the Board held in *Management Training*, it is possible for meaningful collective bargaining to occur with the contractor in those cases, even though the Board has no authority to compel the customer to participate in bargaining. *Id.* ("Whether the private employer and the exempt entity are joint employers is irrelevant. The fact that we have no jurisdiction over governmental entities and thus cannot compel them to sit at the bargaining table does not destroy the ability of private employers to engage in effective bargaining over terms and conditions of employment within their control.").

domestically and internationally, adhere to minimum labor standards, provide safe working conditions for their employees and adopt environmentally friendly practices. *See generally* Eduardo Porter, *Dividends Emerge In Pressing Apple Over Working Conditions in China*, N.Y. Times, Mar. 6, 2012. For instance, the policies may require that suppliers and contractors pay a living wage, accurately pay and report employees' overtime, provide health insurance or other welfare benefits, implement a fire safety plan, prohibit certain materials that are deemed to be harmful to the environment, require updates to facilities, and mandate the use of certain types of safety equipment.

If the Board were to adopt an indirect control standard for joint employer status, companies would run the risk of being found to be a joint employer of their suppliers and contractors if they maintain responsible contractor policies or supplier codes of conduct. Policies such as these certainly affect the working conditions of the supplier's employees, but not because the company wants to become a joint employer of the supplier's employees or play any direct role in the management of their workforce. These policies are adopted for reasons of public policy and corporate social responsibility. The Board should not create a disincentive for companies to adopt policies such as these by reversing longstanding precedent and holding that indirect control is sufficient to establish joint employer status.

C. Changing the Joint Employer Standard Would Expose Companies to Liability for the Unfair Labor Practices of Their Contractors and Suppliers.

If the Board were to adopt the indirect control standard for joint employer status, companies would be exposed to greater liability for unfair labor practices committed by their contractors and suppliers. Joint employers are generally liable for unfair labor practices committed by the other employer, except where anti-union motivation is an element of the unfair labor practice. *Whitewood Maintenance Co.*, 292 NLRB 1159, 1162 (1989), *enf'd sub nom.*

World Serv. Co. v. NLRB, 928 F.2d 1426 (5th Cir. 1991).[4] This is true even when the company has little or no control over the contractor or its employees, is not in a position to investigate and remedy unlawful actions by the contractor, is not aware of the contractor's actions, and may even affirmatively require that the contractor comply with the law (*e.g.*, through a supplier code of conduct). In *Whitewood*, for example, the Board found that a joint employer was liable for an unlawful interrogation, based solely on its status as a joint employer, without regard to whether the joint employer had knowledge of or participated in the unlawful interrogation. *Whitewood Maintenance*, 292 NLRB at 1164.

There is a serious danger that the application of an indirect control standard would expand a company's potential liability for unfair labor practices committed by a contractor, based not on any act or omission by the company. Such liability could be imposed solely by virtue of an arm's length contractual relationship with a contractor or supplier. This would be directly contrary to the intent of Congress in amending the definition of "employer" under the LMRA in 1947. At that time, the Board had developed a practice of imputing liability to employers that did not cause, participate in, or know of the commission of certain unfair labor practices. I Leg. Hist. of the LMRA of 1947, 302 (House Report No. 245 at 11). Congress disapproved of the Board's practice and, in 1947, amended the LMRA's definition of "employer" from "any person acting *in the interest* of an employer," to "any person acting as an *agent* of the employer." *Id.* In doing so, Congress specifically stated that its purpose was to end the Board's practice of imputing to employers, statements and actions that the employer "did not do, did not authorize, and had tried to prevent." *Id.*

The Board's current joint employer standard imputes liability only when a joint employer

[4] In these situations, a non-acting joint employer would be liable for the discriminatory conduct of the other employer only if the non-acting party knew of the conduct or acquiesced to it. *See Capital EMI Music*, 311 NLRB 997, 1000 (1993), *enf'd* 23 F.3d 399 (4th Cir. 1994).

has *direct control* over the working conditions of its contractor's employees. The Board has held that the imputation of liability under this standard is "particularly reasonable" because "each employer is in a position to investigate and remedy unlawful actions." *Capital EMI Music*, 311 NLRB at 1000. Indeed, under current Board law, the Board may impute liability even in the absence of a joint employer finding, if a company *causes* another employer to commit an unfair labor practice. *See Dews Construction Corp.*, 231 NLRB 182 (1977), *enf'd mem.* 578 F.2d 1374 (3d Cir. 1978).

The Board should not expand the scope of liability even further by broadening the joint employer standard. The Board should adhere to its current, and well-established, direct control standard.

D. Changing the Joint Employer Standard Would Disrupt Existing Contractor and Supplier Relationships, with Adverse Consequences for Workers at Those Companies.

If the Board were to adopt an indirect control standard for joint employer status, companies may choose to terminate relationships with their suppliers and contractors rather than risk being found to be a joint employer. This would have an adverse impact on the employees of those suppliers and contractors, and could affect the economy as a whole.

Temporary or contingent jobs are important to the American economy and, as the Board has recognized, have grown substantially in recent decades. Between 1970 and 1992, voluntary part-time employment increased by 53%. *Bureau Of Labor Statistics, U.S. Dep't Of Labor, Employment & Earnings*, at 211 (Jan. 1993). Significantly, since 1982, temporary employment has grown 10 times faster than overall employment. *Bureau of Labor Statistics, U.S. Dep't of Labor, Employment & Earnings,* at 17 (Mar. 1993) (work force as a whole grew by 21% while employment in "help supply services" grew by 246%).

Temporary work is one area of the job market that expects continued growth and the steady addition of new jobs into the future. In the year 2010, 26.2% of all jobs added by private sector employers were temporary positions. Motoko Rich, *Weighing Costs, Companies Favor Temporary Help*, N.Y. Times (Dec. 19, 2010). The creation of jobs, even temporary jobs, is necessary to the nation's recovery from the recent economic crisis. By one estimate, the U.S. economy must create 21 million new jobs by the end of the decade to reach pre-recession employment levels. *An Economy That Works: Job Creation and America's Future*, McKinsey Global Institute, McKinsey & Company (June 2011). A recent Bureau of Labor Statistics study forecasts that, going forward, the temporary employment industry will add 631,000 temporary jobs each year until reaching 3.3 million jobs by the year 2020. *Bureau of Labor Statistics, U.S. Dep't of Labor, Monthly Labor Review*, at 74 (Jan. 2012). In fact, the report placed the temporary employment industry among those with the "largest projected employment growth." *Id.*

Proponents of a change in the joint employer standard may argue that the loss of temporary or contingent jobs could benefit employees because it may force companies to hire regular, full-time or part-time employees rather than relying on a contractor or temporary agency to supply labor. However, there is no empirical data to support such prediction. The use of contractors and temporary agencies generates efficiencies that a business may not be able to replicate if it hires employees on a regular full-time or part-time basis. For instance, companies may rely on contractors and temporary agencies in order to manage unpredictable fluctuations in the business cycle or levels of demand. Companies may not, however, be willing to hire additional employees to meet surges in demand or production, only to lay them off again when demand recedes. Instead, a business may require that its existing employees work additional

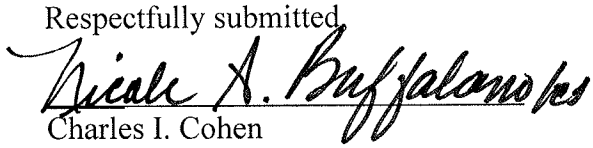
overtime, perhaps on an involuntary basis, or take other measures to adapt to fluctuations in demand, which could include outsourcing the work to other employers, whether domestically or overseas.

Thus, the consequences of the Board's decision in this case are significant. The Board should carefully weigh the potential effect of a change in the joint employer standard on the business community, temporary and contingent workers, and the economy as a whole.

CONCLUSION

COLLE urges the Board to adhere to its longstanding joint employer standard, as set forth in *TLI* and *Laerco Transportation.*

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on June 26, 2014, a true and accurate copy of the foregoing Brief of *Amicus Curiae* Council on Labor Law Equality was served through the Board's electronic filing system on the Board, and by electronic mail on the following:

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