UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of: BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC., D/B/A BFI NEWBY ISLAND RECYCLERY, Alleged Employer, LEADPOINT BUSINESS SERVICES, Employer, and TEAMSTERS LOCAL 350, Petitioner.	Case 32-RC-109684

REPLY BRIEF OF EMPLOYER LEADPOINT BUSINESS SERVICES

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I. INTRODUCTION

As Leadpoint Business Services ("Leadpoint") demonstrated in its Opening Brief, Leadpoint is the sole employer of the employees in the putative bargaining unit. The Regional Director in this matter thoroughly reviewed the record and correctly applied Board precedent that has been consistently applied over the course of thirty years. There is simply no basis to impose a bargaining obligation on BFI as BFI does not employ the employees in the petitioned-for bargaining unit in any manner.

Once again, the NLRB should reject the efforts to eliminate the Board's well-established joint employer standard set forth in *TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transportation*, 269 NLRB 324 (1984). The Union and the *amici curiae* supporting the Union's position advocate for an overhaul of the joint employer standard. However, they have failed to identify any manner in which the Board's existing joint employer standards prevent employees from organizing or bargaining collectively through representatives of their own choosing. More specific to the case at issue, they have not provided any meaningful explanation for their assertion that the Union cannot effectively bargain with Leadpoint over the terms and conditions of employment of the employees in the petitioned-for unit, without BFI being involved at the bargaining table.

For the reasons set forth below and in Leadpoint's Opening Brief, the Board should reject the efforts to revise its joint employer standard. Put simply, the Board's application of the joint employer standard has remained steady, predictable, and true to the language and intent of the National Labor Relations Act for decades.

II. ARGUMENT

A. Pursuant to Longstanding Board Authority, Leadpoint Is The Sole Employer Of The Employees In The Petitioned-For Bargaining Unit.

Leadpoint is the only employer of the employees in the putative bargaining unit. The

Union's astounding contention that BFI provides "minute-by-minute control over the unit employees' work and the control exercised over the manner that work is performed" is not supported in any manner by the record evidence. The Union and several *amici curiae* deliberately ignore Leadpoint's control over the terms and conditions of the employees' employment.

As explained in Leadpoint's and BFI's Opening Briefs and the Regional Director's Decision and Direction of Election, Leadpoint is solely responsible for deciding all material aspects of its employees' terms and conditions of employment. Contrary to the assertions raised in the Union's Brief and the briefs submitted by *amici curiae*, Leadpoint is not a "staffing agency" or a "Professional Employer Organization." Leadpoint provides a full range of outsourced services to its clients, including full and exclusive oversight of all employment-related matters. This is achieved by a local team of Leadpoint management, supervisors, and Human Resources personnel. Those individuals are solely responsible for direct and immediate oversight of all major aspects of Leadpoint's employees' employment, including recruiting, applicant screening, hiring, employee orientation, training, scheduling, supervising, counseling, promoting, discipline, 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).) The Union's Brief completely disregards these facts. The Union effectively takes the position that Leadpoint's on-site managerial and supervisory team – which more than doubles the size of BFI's management team at the Newby Island Recyclery – exercises minimal authority over the employees at issue. However, as explained in Leadpoint's and BFI's Opening Briefs, the record does not support this outlandish assertion.[1] There is simply

[1] The *Amicus* Brief submitted by "Professors of Labor and Employment Law" refers to Leadpoint as a "temporary staffing agency," a "temporary placement agency," and a "temporary help agency." Leadpoint is in no sense a "temporary agency" for the reasons set forth in the prior briefing. Leadpoint does not merely provide labor for other entities to supervise; Leadpoint provides full worksite teams responsible for complete and total oversight of Leadpoint

no basis for the Union's contention that "it is nearly impossible to identify a term or condition of employment over which Leadpoint exercises exclusive or independent control."

The Union's hyperbole and mischaracterizations notwithstanding,[2] the Regional Director correctly concluded that Leadpoint is the sole employer. The *TLI* and *Laerco* cases are instructive. There is less evidence of a joint employer relationship in the present matter than there was in the *TLI* decision. In *TLI*, the alleged joint employer, Crown Zellerbach ("Crown"): (1) directly instructed the employees as to which deliveries needed to be made on a particular day; (2) supplied incident reports when it observed a driver engage in conduct adverse to Crown's operation; (3) received reports of accidents involving the drivers at issue; (4) was "solely and exclusively . . . responsible for maintaining operational control, direction, and supervision" of the drivers; (5) owned the facility at which the drivers reported daily and returned their trucks upon the completion of a route; (6) received reports of mechanical or other problems on the road experienced by the drivers; (7) kept all drivers' logs and records; and (8) attended two bargaining sessions with TLI, in which Crown outlined its economic position and its need to cut labor costs substantially in order to remain in its business. *TLI*, 271 NLRB at 798-99. Despite this evidence, the NLRB found that such control exercised by Crown was insufficient to establish that Crown jointly employed the workers.

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employees. The Professors' mistaken references in their Brief demonstrate a failure to review the record in this case. Given their mischaracterized representation of Leadpoint's functions and purposes, the Professors' Brief – and its attempt to apply law to the Professors' misstated facts – is entitled to no weight whatsoever.

[2] The Union's Brief is replete with hyperbole and mischaracterizations regarding the extent to which BFI interacts with Leadpoint and Leadpoint employees. For example, the Union states that BFI "directs *how* the unit work is performed" and provides "initial training" to Leadpoint employees. (Union Brief, pp. 14-15) (emphasis in original). However, the record reveals that BFI simply provided some initial training to the Line Leads at Newby Island Recyclery who were employed when the expanded site first opened. (Tr. 102:6-103:1, 115:4-116:11.) In other words, this training was a *one-time event* for Leadpoint supervisors who were employed at that time. In fact, the record demonstrates that Leadpoint employees receive training exclusively from Leadpoint supervisors. (Tr. 158:17-159:1, 161:25-162:16, 171:14-172:8, 301:2; L.P. Exh 1.)

In the present case, with the exception of the record evidence demonstrating that Paul Keck of BFI twice alerted Leadpoint of instances in which he believed he observed misconduct committed by Leadpoint employees, there is no evidence of BFI exercising any degree of "control" at all similar to the control exercised by Crown in the *TLI* case. Indeed, seven of the eight factors at issue in the *TLI* case, identified above, are not an issue in this matter. Applying *TLI* to the facts of this case, Leadpoint should be deemed the sole employer.

The *Laerco* case is also informative to the present case. In *Laerco*, the customer and alleged joint employer, Laerco: (1) supplied the vehicles used by the drivers employed by CTL; (2) provided direction to CTL's driver on their routes; (3) maintained the right to impose safety requirements for the driver; (4) determined driver qualifications; (5) reserved the right to reject drivers provided by CTL who did not meet Laerco's qualifications; (6) required CTL to furnish reports, records, and data as may be necessary to enable Laerco to comply with government regulations; (7) requested the removal of a CTL employee assigned to it; (8) entered into a cost-plus contract with CTL for CTL's services; (9) reserved the right to inform the drivers of their job duties; (10) provided all supervision to the drivers at the Laerco facility; and (11) attempted to resolve any problems that arose concerning a CTL driver. *Laerco*, 269 NLRB at 324-25. Taking all of these factors into consideration, the Board still ultimately concluded that Laerco did not jointly employ the drivers at issue.

In the instant matter, there is less evidence that BFI provides any meaningful control over Leadpoint's employees. Unlike Laerco, Leadpoint maintains its own management and operational supervision at the site. Leadpoint exclusively resolves all issues relating to its employees. Furthermore, Leadpoint provides the training and orientation for all newly-hired employees. Moreover, Leadpoint maintains its own personnel policies and safety standards. Accordingly, *Laerco* supports the Regional Director's conclusion that Leadpoint is the sole employer.

B. The Board Should Maintain Its Well-Established Joint Employer Standard.

1. The Board Has Consistently Applied Its Joint Employer Criterion Over The Past Thirty Years.

Contrary to the assertions made by the Union and some *amici*, the Board has consistently applied its joint employer standards over the past thirty years. Nevertheless, the Union and certain *amici*, including the AFL-CIO, contend that the Board has narrowed the joint employer standard since it issued *TLI* and *Laerco* thirty years ago by purportedly adding a "new" requirement that a joint employer maintain "direct and immediate control" over the employees at issue. This contention is mistaken.

The AFL-CIO points to *Airborne Freight*, 338 NLRB 597 (2002) as a purported seminal case giving rise to a narrower standard for determining a joint employer relationship exists. However, *Airborne Freight* simply applied *TLI* and correctly summarized *TLI* to note that "[t]he essential element in [joint employer] analysis is whether a putative joint employer's control over employment matters is direct and immediate." *Airborne Freight*, 338 NLRB at 597. This statement did not reflect any meaningful transformation in the Board's analysis. Even in her concurring opinion in which she criticized the Board's joint employer standard, Member Wilma Liebman recognized that under *TLI* and *Laerco*, "[t]he Board's decisions . . . have required that the joint employer's control over [matters relating to the employment relationship] be direct and immediate." *Id.* citing *TLI*. Indeed, post-*Airborne Freight* cases confirm that the "direct and immediate control" factor is not a novel standard that is distinct from what the Board applied in *TLI* and *Laerco*. *See AM Property Holding Corp.*, 350 NLRB 998, 999-1003 (2007) (finding no joint employer relationship and making no reference to any "direct and immediate control" standard); *Summit Express, Inc.*, 350 NLRB 592, at n. 3 (2007) (simply noting that the contract terms between the putative joint employers did not establish direct and immediate control by one of the alleged joint employers). Thus, there is no basis for the assertion that the Board's standard has narrowed since the Board decided *TLI* and *Laerco*.

2. There Is No Reason To Abandon The Board's Longstanding Joint Employer Standards.

Despite numerous changes in Board law over the past thirty years, the NLRB has been consistent with respect to the joint employer standard – and with good reason. As explained in Leadpoint's Opening Brief, the standard is clear, understandable, and faithful to the objectives of the National Labor Relations Act. None of the parties' submitted Briefs has demonstrated how the existing standard prevents employees from exercising their rights under the Act. Indeed, nobody has identified any instance in which the Board's existing standards have prevented employees from exercising their Section 7 rights.

The instant case is illustrative. The Union and the *amici* supporting the Union's position have not provided any persuasive explanation as to why Leadpoint and the Union cannot effectively bargain over the terms and conditions of the Leadpoint employees' employment without BFI at the bargaining table.[3] Leadpoint maintains all material control over the employees' terms and conditions of employment. Admittedly, BFI, as a customer, has indirect influence over certain aspects of those terms and conditions – such as the times the sorting lines run and how long those lines will run. However, in any service industry profession, customer needs or desires will influence the employer's decisions regarding its employees' working conditions. For example, a restaurant will set its hours to comply with customer demand and a construction subcontractor will perform the tasks requested of it by the general contractor. The fact that an employer makes decisions in accordance with customer demands does not require the customer to sit at the bargaining table in the event that the employer and its employees collectively bargain over the employees' terms and conditions of employment. The Union has failed to demonstrate that bargaining with Leadpoint alone would be futile.

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[3] Of course, the Union can only bargain on the employees' behalf in the event that Leadpoint employees decide (or have decided based on the ballots they cast in April 2014) that they wish to be represented by the Union.

3. The Union's Proposed Standard Is Ambiguous, Overbroad, And Unworkable.

In the event that the Board chooses to revise its joint employer standard (which it should not), the Board should reject the Union's proposed joint employer standard. The Union proposes that a party be considered a joint employer if it "possesses sufficient authority over the employees or their employer such that its participation is a request [*sic*] to meaningful collective bargaining" and that "such authority can be either direct or indirect." (Union Brief, p. 47) (emphasis added). The proposed standard provides no clarity regarding what type of authority is "sufficient." Moreover, the term "meaningful bargaining" is susceptible to multiple interpretations. Even assuming that these terms can be defined in a uniform and understandable manner, the proffered standard improperly expands the definition of joint employer to include an entity that possesses "indirect authority" over the employees or their employer.[4] As explained by Leadpoint in its Opening Brief, the Board has wisely required direct control for a person or entity to be deemed a joint employer. Imposing bargaining obligations on those that do not have direct control over the employees or the employer will only stifle bargaining and create obstacles for resolving employee grievances with the employer that has direct control over the employees' terms and conditions of employment.

The "preliminary criteria" identified by the Union to apply its proposed standard do not provide sufficient guidance and are otherwise overbroad. The criteria essentially requires resolution of two key issues: (1) whether the user-employer either exercises or retains control or direction over the supplier-employer with respect to its operations; and (2) whether the user-employer's exercise or retention of control over the supplier-employer implicates terms and conditions of the supplier-employee's employment.[5] This standard imposes a far-reaching and

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[4] The term "indirect authority" is also susceptible to numerous interpretations.

[5] The other two criteria proposed by the Union – whether the supplier-employer's workers are employees under the Act and whether the supplier-employer and user-employer are "persons" under the Act – are the other basic requirements.

virtually limitless expansion of the joint employer standard. Under this standard, any "person" as defined under the Act who retains a subcontractor (or who outsources any labor) and imposes *any* condition on the subcontractor that at all implicates the terms and conditions of the subcontractors' employees' employment (*e.g.*, the hours in which the work will be performed, security obligations or rules applicable to the property at issue, etc.) will be deemed a joint employer of the subcontractor's employees. This would be the case even if the customer had no involvement whatsoever in determining the subcontractors' employees' wages or benefits and lacked the ability to discipline or fire any of the subcontractors' employees. The Board has never considered such common arrangements to constitute a joint employer relationship. The NLRB should refrain from imposing such a broad, unworkable standard.

III. CONCLUSION

For the foregoing reasons, Leadpoint respectfully requests that the Board continue to apply its well-established joint employer standard. Applying this standard to the present case, the Board should conclude that Leadpoint is the sole employer of the employees in the petitioned-for bargaining unit.

Dated: July 10, 2014

Respectfully submitted,

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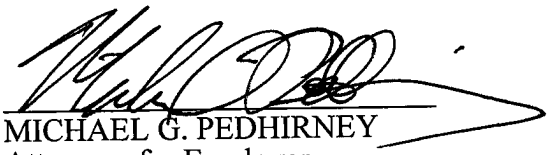
By: 
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 10th day of July, 2014, the foregoing **REPLY BRIEF OF EMPLOYER LEADPOINT BUSINESS SERVICES** was filed using the National Labor Relations Board's E-Filing Program. The foregoing brief was also served by e-mail and U.S. Mail upon the following:

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