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Retro Environmental, Inc./Green Jobworks, LLC *and* Construction and Master Laborers' Local 11, a/w Laborers' International Union of North America (LIUNA) Petitioner. Case 05–RC–153468

August 16, 2016

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On June 26, 2015, the Regional Director for Region 5 issued a Decision and Order, in which he found "a colorable claim of a joint employer relationship" between Retro Environmental, Inc. (Retro) and Green JobWorks, LLC (Green JobWorks), but dismissed the petition based on his finding that the Employers met their burden of proving an imminent cessation of operations. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Petitioner filed a timely request for review. The Petitioner contends that the Regional Director erred by finding an imminent cessation of operations. Green JobWorks filed an opposition.

On November 5, 2015, the Board granted the Petitioner's request for review. Thereafter, the Petitioner and Green JobWorks filed briefs on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record in this proceeding, including the briefs on review, we find that Retro and Green JobWorks are joint employers of the employees in the petitioned-for unit, and contrary to the Regional Director, we find that the Employers failed to meet their burden of proving an imminent cessation of operations. Accordingly, we reinstate the petition and remand this case to the Regional Director for further appropriate action.

I. FACTS

The Petitioner seeks to represent a unit of full-time and regular part-time laborers, including demolition and asbestos workers, jointly employed by Retro and Green JobWorks. Green JobWorks is a temporary staffing agency in Baltimore, Maryland that provides demolition and asbestos abatement laborers to approximately 15 to 20 client construction companies, including Retro. Retro is a construction company engaged in the business of providing demolition and asbestos abatement services to private and government entities in the mid-Atlantic region. Retro engages approximately four temporary labor companies, including Green JobWorks, to provide temporary labor on specific projects.

During the summer of 2015, Green JobWorks provided employees to Retro for work on two projects involving demolition and asbestos abatement at the DC Scholars Charter School and at Powell Elementary School.[1] At the time of the hearing (June 11), Green JobWorks had assigned a total of 33 employees to work at least 1 day at the DC Scholars and Powell sites, and Retro expected the number of employees at the sites to increase to approximately 80–110 total employees between June 20 and June 22 (after the schools closed for the summer). Both projects were expected to cease in mid-July because both sites were scheduled to reopen for classes in August. Once the projects concluded, Retro had no pending requests for additional employees from Green JobWorks, and at the time of the hearing, the parties did not have any pending joint bids for future work. However, Retro had other projects that would continue beyond July and there was no evidence that Green JobWorks would cease doing business in the area.

Over the past 5 years, Green JobWorks has provided labor to Retro on more than 10 projects and possibly more than 20. At the hearing, Retro President Robert Gurecki testified that he was satisfied with Green JobWorks' services, had not experienced any problems with Green JobWorks, and had no reason to believe that he would terminate the relationship. From May 2013 to May 2014, Green JobWorks and Retro operated under a lease of services agreement. Although that agreement has expired, the two companies continue to operate essentially in the same manner, described below.

When Retro needs temporary labor, Gurecki contacts Green JobWorks and requests a certain number of laborers. Green JobWorks recruits and hires employees. Consistent with the parties' expired contract, Green JobWorks prescreens and drug tests each applicant, provides safety training, ensures that asbestos abatement laborers have current EPA AHERA certification and have passed a physical exam, and represents that all employees are qualified to perform the services. Additionally, Green JobWorks performs background checks and administers safety and general knowledge tests to applicants for demolition positions. Green JobWorks maintains a database of employees and assigns employees to project sites based on Retro's need. Green JobWorks determines the rate of pay for each position and issues employee paychecks. Green JobWorks also provides the employees with personal protective equipment.

[1] All dates are in 2015 unless otherwise noted.

At the project site, Retro's superintendent determines the sequence of work, oversees the work, and directs the day-to-day activities of both Retro's solely employed employees and those employees leased to Retro by Green JobWorks. Retro's foreman provides more detailed instructions. Retro determines the start and end times of breaks, and Retro is responsible for keeping track of the employees' hours. Retro also provides the necessary equipment to perform the assigned work on site.

Green JobWorks' field supervisor is on site some days (he visits all project sites). He ensures that employees are present, handles concerns regarding particular employees, communicates with the office, and manages injuries and near misses. Green JobWorks is responsible for disciplining and terminating employees. However, if Retro is unsatisfied with an individual's performance, it can request a replacement, and Green JobWorks President Lazaro Lopez testified that Green JobWorks would acquiesce to Retro's request. (At the time of the hearing, Retro had not exercised this right in the previous 6 months.) Green JobWorks may consult with Retro when reassigning employees to other sites.

II. REGIONAL DIRECTOR'S DECISION

In a decision dated June 26, and relying primarily on the Board's decision in *Davey McKee Corp.*, 308 NLRB 839 (1992), the Regional Director dismissed the petition because he found that Retro and Green JobWorks met their burden of establishing an imminent cessation of operations. The Regional Director observed that the two current projects would be completed by mid-July, and thus all the employees working for the alleged joint-employer entity would be laid off within a month. The Regional Director recognized that both companies would individually remain ongoing businesses, that Retro and Green JobWorks had worked together on more than 10 projects over the past 5 years, that there was no evidence demonstrating a fundamental change in the nature of their operations, and that Retro had other projects that would not cease in July. However, the Regional Director found that the alleged joint entity had no other ongoing projects, that there was no evidence that Retro contemplated using Green JobWorks as a source of temporary labor in the future, that Retro uses the labor services of other leasing companies, and that Retro's and Green JobWorks' agreement had expired. The Regional Director dismissed the petition, finding insufficient evidence to establish that the petitioned-for unit at the alleged joint employer entity would exist beyond mid-July.

Although the Regional Director found it unnecessary to decide whether Retro and Green JobWorks are joint employers because of his finding of an imminent cessation of operations, the Regional Director stated that "[t]he evidence in the record presents a colorable claim of a joint employer relationship" under *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984).[2] The Regional Director explained that Green JobWorks "is responsible for matters such as recruiting, hiring, disciplining, terminating, setting employee wage rates, paying employees' wages, determining which projects employees are assigned to, and transferring employees to different projects." As for Retro, the Regional Director found that it "determines how many of the leased workers from Green JobWorks will work on specific projects, the start and end times of breaks, and when and what work the worker performs." The Regional Director also noted that there was "some record evidence that Retro determines how workers perform their duties" and that both Retro and Green JobWorks provide certain equipment to the employees.

III. THE PARTIES' POSITIONS

The Petitioner asserts that the evidence does not demonstrate an imminent cessation of operations, but rather shows two actively operating companies with a reasonable expectation of future work together based on numerous joint projects over the past 5 years. Additionally, the Petitioner argues that the imminent cessation of operations doctrine has never previously been applied to ongoing businesses that will remain active within the geographic area of the petitioned-for unit. Moreover, the Petitioner contends that representation elections involving leased employees in the construction industry will be virtually impossible if the Regional Director is affirmed because construction projects are of limited duration.[3]

On the other hand, Green JobWorks argues that the Regional Director properly found an imminent cessation of operations. Green JobWorks asserts that the fact that the two Employers had worked together in the past does not negate their showing of an imminent cessation of bargaining-unit work. Green JobWorks urges the Board to "refrain from entertaining such a major change in its longstanding application of *Davey McKee*." Further, Green JobWorks notes that the Petitioner could have sought (and could still seek) to represent a unit of Green JobWorks' employees (rather than a unit of employees jointly employed by Green JobWorks and Retro), and

[2] The Board subsequently overruled these cases in *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 16 (2015).

[3] We find no merit to the Petitioner's remaining assertions. First, the Regional Director did, in fact, place the burden of proof on the Employers. Second, the Regional Director did not rely solely on the Employers' testimony; the Regional Director also relied on the scheduled reopening dates of the schools.

thus its employees will not be stripped of their Section 7 rights if the Regional Director is affirmed.

IV. ANALYSIS

A. Retro and Green Jobworks are Joint Employers of the Employees in the Petitioned-for Unit.

In *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 15 (2015), the Board held that "two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." When applying this standard, the Board "consider[s] the various ways in which joint employers may 'share' control over terms and conditions of employment or 'codetermine' them . . . ." Id. The Board no longer requires that a joint employer exercise the authority to control employees' terms and conditions of employment "and do so, directly, immediately, and not in a 'limited and routine' manner." Id., slip op. at 15–16. Rather, it is sufficient that the joint employer possess the authority. Id. Furthermore, the Board continues to adhere to its inclusive approach in defining essential terms and conditions of employment. Id., slip op. at 15. Thus, a joint employer relationship may be established by showing that the putative joint employer has authority over essential terms such as "hiring, firing, discipline, supervision, [or] direction," as well as "wages and hours." Id. "Other examples of control over mandatory terms and conditions of employment found probative by the Board include dictating the number of workers to be supplied; controlling scheduling, seniority, and overtime; and assigning work and determining the manner and method of work performance." Id. (internal footnotes omitted).

For the reasons set forth below, we find that Retro and Green JobWorks are joint employers of the employees in the petitioned-for unit because they share and codetermine essential terms and conditions of employment for the employees in the petitioned-for unit. See *BFI*, 362 NLRB No. 186, slip op. at 18.[4]

Although Green JobWorks is primarily responsible for hiring, assigning, disciplining, and terminating employees, Retro exercises control over some of these terms and conditions of employment, as well. Regarding hiring, Green JobWorks recruits employees, prescreens them, performs drug tests and background checks, provides safety training, tests demolition employees' knowledge and safety, and ensures that asbestos abatement laborers are EPA AHERA certified and have passed a physical exam. Nonetheless, similar to the user employer in *BFI,* Retro has a role in "codetermining the outcome of the hiring process" by virtue of the parties' expired agreement (as noted above, the parties continue to operate essentially consistent with the agreement). See id. The agreement imposes conditions on whom Green JobWorks can hire, including requirements that employees must be prescreened, drug-tested, and qualified to perform the services; must have completed safety training; and asbestos abatement laborers must have EPA AHERA certification and have passed a physical exam.

Regarding assignment, Green JobWorks assigns employees to project sites, but Green JobWorks may consult with Retro when deciding to reassign an employee to another project site. As for discipline and firing, Green JobWorks can remove an employee from a project site and from its database of workers. However, as in *BFI,* user-employer Retro retains the right to request a replacement if it is unsatisfied with any employee. Although Retro had not exercised this right in the 6 months prior to the hearing, Green JobWorks' president testified that Green JobWorks would acquiesce to Retro's request. See id., slip op. at 18 (finding user employer's unqualified right to "discontinue the use of any personnel" that the supplier employer has assigned supports a finding of joint employer status). Finally, Green JobWorks determines the rate of pay, pays wages, and provides benefits.

Retro is primarily responsible for determining the number of workers to be supplied, determining employee hours and scheduling, and supervising the employees on the job. As in *BFI,* Retro alone determines the number of workers to be supplied by Green JobWorks. See id., slip op. at 19. At the project sites, Retro's superintendent creates the sequence of work and supervises and directs the day-to-day activities of all employees, and Retro's foreman provides instructions. Green JobWorks' field supervisor is onsite only some of the time because he visits all Green JobWorks' sites, and his supervisory role is limited to ensuring that employees are present, handling concerns regarding particular employees, communicating with the office, and managing injuries and near misses. Thus, as in *BFI,* Retro "makes the core staffing and operational decisions that define all employees' work days." See id. Additionally, Retro exercises some control over hours and scheduling because it determines the start and end times for breaks, tracks em-

[4] We apply the standard set forth in *BFI* because the "established presumption in representation cases like this one is to apply a new rule retroactively." *BFI*, 362 NLRB No. 186, slip op. at 2. We also note that Retro and Green JobWorks are employers within the meaning of the common law. In the words of the *Restatement (Second) of Agency*, § 220(1), the petitioned-for employees are "employed to perform services in the affairs" of Green JobWorks and Retro and "with respect to the physical conduct in the performance of the services" are "subject to [Green JobWorks' and Retro's] control or right to control." See id., slip op. at 18, fn. 96.

ployees' hours, and reports them to Green JobWorks.[5] See id., slip op. at 18–19 (noting that break times constitute a fundamental working condition and finding that requirement that employees obtain signature of user employer attesting to hours worked supported a finding of joint employer status).[6]

In sum, as demonstrated above, each employer has its primary areas of responsibility in the joint relationship—Green JobWorks in the hiring, firing, and assigning of employees to project sites, and Retro in the day-to-day supervision of the job—with each of the employers able to influence some of the other's decisions. Between them, they control all of the employees' employment terms. Green JobWorks and Retro thus share or codetermine the employees' essential terms and conditions of employment and we find them to be joint employers.[7]

B. The Employers Failed to Prove that Cessation of Their Joint Operations is Both Imminent and Definite.

The Act directs the Board, upon the filing of a representation petition, to investigate whether a question of representation exists, including by holding an appropriate hearing. 29 U.S.C. § 159(c)(1). It further directs, "If the Board finds . . . that such a question of representation exists, the Board shall direct an election . . . and certify the results thereof." Id. The Board has recognized a narrow exception to this statutory mandate, limited to circumstances in which it is reasonably certain that conducting an election will serve no purpose: it will dismiss an election petition when cessation of the employer's operations is imminent, such as when an employer completely ceases to operate, sells its operations, or fundamentally changes the nature of its business. See, e.g., *Hughes Aircraft Co.*, 308 NLRB 82, 83 (1992); *Martin Marietta Aluminum*, 214 NLRB 646, 646–647 (1974); *Cooper International*, 205 NLRB 1057, 1057 (1973). The party asserting an imminent cessation of operations bears the burden of proving that cessation is both imminent and definite. *Hughes Aircraft Co.*, 308 NLRB at 83; *Martin Marietta Aluminum*, 214 NLRB at 647. The Board requires concrete evidence, such as announcements of business closure to the public and the employees, termination of employees, or other evidence that the employer has definitively determined the sale, cessation, or fundamental change in the nature of its operations. *Hughes Aircraft Co.*, 308 NLRB at 83; *Martin Marietta Aluminum*, 214 NLRB at 646–647. The Board will not dismiss an election petition based on conjecture or uncertainty concerning an employer's future operations, an employer's contention that it intends to cease operations or reduce its workload sometime in the future, or evidence of cessation that is conditional or tentative. See *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976).

Contrary to the Regional Director, we find that the Employers failed to meet their burden of proving an imminent cessation of their joint operations. In dismissing the petition, the Regional Director relied principally on *Davey McKee Corp.*, 308 NLRB 839, 840 (1992). There, the Board found that no useful purpose would be served by holding an election where the employer's two construction projects were scheduled to end within 29 days, the employer had no ongoing projects within the geographic area, and the employer had not bid on future projects. By contrast, in a companion case, *Fish Engineering & Construction Partners, Ltd.*, 308 NLRB 836 (1992), the Board found no imminent cessation of operations where the employer had completed four projects within the past year, was engaged in two projects at the time of the hearing, and had an outstanding bid in the same geographic area, even though the current projects were to end in less than 2 months. 308 NLRB at 836.

The *Fish Engineering* Board distinguished *Davey McKee,* explaining that the uncontradicted findings of the Regional Director in that case indicated that the employer's operations would imminently cease and all employees would be terminated. Id. By contrast, the Board

[5] The project's general contractor determines the overall schedule for each project site.

[6] The fact that Retro and Green JobWorks both provide equipment to the employees also supports a finding that they are joint employers. For example, Retro and Green JobWorks share in the provision of employees' safety gear. Retro provides Tyvek suits, Green JobWorks provides respirators, hard hats, safety vests, safety glasses, gloves, and both employers provide respirator filters.

[7] We reject our dissenting colleague's criticism that we should not determine whether Retro and Green JobWorks are joint employers because their relationship on future projects could change. As our colleague must concede, the Employers' relationship at the time of the hearing was representative of their relationship for at least 2 years prior to the hearing. From May 2013 to May 2014, the Employers' relationship was memorialized in a contract. At the hearing, more than a year after that contract had expired, the presidents of both companies testified that the Employers continued to operate essentially consistent with its terms. Thus, although there may be no contractual "guarantee" that the Employers' future operations will continue in a like manner, neither Employer joins our colleague in suggesting that their relationship will change.

Furthermore, even if the Employers' relationship were altered on future projects, certain key aspects of their relationship will likely remain stable. For example, while Green JobWorks, as the supplier employer, will retain primary responsibility for hiring, assigning employees to project sites, and firing, Retro will assuredly continue to dictate the number of workers to be supplied by Green JobWorks, continue to impose conditions on Green JobWorks' hiring to ensure that the workers supplied are adequately trained and qualified, and continue to retain the right to request a replacement if it is unsatisfied with a Green JobWorks-supplied employee. Therefore, given the distinct functions and areas of responsibility of each of the Employers, it is highly doubtful that the Employers' relationship on future projects could change in such a manner that would render them no longer joint employers of the employees in the petitioned-for unit.

found that a useful purpose would be served by conducting an election in *Fish Engineering* because it was undisputed that the employer had worked on several recent projects in the area and had bid on future work within the scope of the petitioned-for unit. Id. Ultimately, the Board rejected the Regional Director's finding that "it was speculative as to whether the [e]mployer would secure additional work within the geographic boundaries of the petitioned for unit." Id. See also *S. K. Whitty & Co.*, 304 NLRB 776 (1991) (directing election where employer had no commitments for future work, but planned to bid and would remain in the geographic area).[8]

The present case is unlike most cases in which the Board has dismissed a petition based on imminent cessation of operations because Retro and Green JobWorks are not ceasing to operate, nor are they selling their operations, fundamentally changing the nature of their businesses, or moving. See, e.g., *Martin Marietta Aluminum*, 214 NLRB at 646–647; *Hughes Aircraft Co.*, 308 NLRB at 83; *Cooper International*, *Inc.*, 205 NLRB 1057, 1057 (1973). Rather, Retro and Green JobWorks will continue to operate in the geographic area. Retro will continue to perform demolition and asbestos abatement services and Green JobWorks will continue to provide laborers to perform these services. The fact that Retro and Green JobWorks' two projects were, at the time of the hearing, scheduled to end shortly does not outweigh those considerations. Unpredictability and projects of limited duration are typical in the construction industry. See *Clement-Blythe Cos.*, 182 NLRB 502 (1970). Additionally, unlike in *Davey McKee Corp.*, 308 NLRB at 840, where the employer had no ongoing projects within the geographic area, at the time of the hearing in this case, Retro had other projects that would continue beyond July.[9]

Significantly, there is no evidence that the Employers intended to discontinue their working relationship or that they would not continue to work together in the future. Although, at the time of the hearing, Retro and Green JobWorks had no current projects or bids for future projects together, Green JobWorks had provided Retro with laborers on more than 10 projects (possibly more than 20) over 5 years. Moreover, Retro's president testified that he was satisfied with Green JobWorks' services and did not envision terminating the relationship. Given the evidence of a successful working relationship over time, this case is more like *Fish Engineering* than *Davey McKee.* In short, we find that the Employers have failed to meet their burden of proving that a cessation of their joint operations is imminent and definite.

Accordingly, we reverse the Regional Director's finding of an imminent cessation of the employers' joint business operations.

ORDER

The Regional Director's dismissal of the petition is reversed. We reinstate the petition and remand the case to the Regional Director for further appropriate action.

Dated, Washington, D.C. August 16, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

I would affirm the Regional Director's dismissal of the petition based on imminent cessation of operations. The record establishes that the alleged joint-employer projects at which the petitioned-for unit employees worked would end in mid-July 2015, just 2 or 3 weeks after the Regional Director issued his decision on June 26, 2015. No evidence supports a conclusion that Retro Environmental, Inc. (Retro) and Green JobWorks, LLC (Green JobWorks) will work together on future projects at all, let alone that they will do so in a manner that will render them joint employers, which in any event would require a fact-specific inquiry under *BFI Newby Island Recyclery (BFI)*.[1] My colleagues' conclusion to the contrary con-

[8] This aspect of *S. K. Whitty* remains good law despite the Board's subsequent overruling of the case on other grounds in *Steiny & Co., Inc.*, 308 NLRB 1323, 1327 fn. 17 (1992).

[9] Contrary to our dissenting colleague, *Davey McKee*, 308 NLRB at 840, *S. K. Whitty*, 304 NLRB at 777, and *Fish Engineering*, 308 NLRB at 836, do not stand for the proposition that a petition must be dismissed if there is no evidence of a joint bid for additional work. Rather, in each of those cases, the employer's bid or lack thereof was relevant to the question whether the employer would continue to operate in the geographic area. Here, it is undisputed that both Retro and Green JobWorks will continue performing demolition and asbestos abatement work in the Washington, DC area. Furthermore, given the Employers' lengthy history of collaboration, there is sufficient evidence of a likelihood that Retro and Green JobWorks will continue to work together on future projects. The dissent fails to appreciate that the Employers have the burden of proving that cessation of their joint operations is definite and imminent. Here, the Employers have failed to meet that burden. Compare *Martin Marietta Aluminum*, 214 NLRB at 646–647 (dismissing petition where employer was imminently closing its plant); *Hughes Aircraft Co.*, 308 NLRB at 83 (same where employer was fundamentally changing the nature of its business).

[1] 362 NLRB No. 186, slip op. at 15–16 & fn. 81 (2015) (emphasizing the fact-specific nature of joint-employer determinations and the "broad, inclusive approach" to making those determinations). My

stitutes rank speculation. The present record contradicts my colleagues' conclusion that future Retro/ Green JobWorks projects will occur, and it certainly does not permit the Board to predict what form they might take, and whether they will involve sufficient commingled authority to result in joint-employer status using the test established in *BFI*.

The Regional Director found, and my colleagues do not dispute, that the two projects for which Green JobWorks was providing laborers to Retro at the time of the hearing—the DC Scholars Charter School project and the Powell Elementary School project—were scheduled to be completed by mid-July 2015.[2] The Regional Director also found that Retro and Green JobWorks did not have any other ongoing projects and did not contemplate any future work together. After the Charter School and Elementary School projects ended, Retro did not have any pending requests for additional employees from Green JobWorks, nor did Retro and Green JobWorks have any pending joint bids for future work.

Nonetheless, my colleagues find the Employers failed to prove an imminent cessation of operations because (i) Retro and Green JobWorks will each continue to operate in the geographic area, (ii) Retro had other projects that would continue beyond July, (iii) Green JobWorks had provided Retro with laborers on more than 10–20 projects over the past 5 years, and (iv) Retro's president testified he was satisfied with Green JobWorks' services and had no reason not to use Green JobWorks in the future.

I agree that the record shows the *individual* operations of Retro and Green JobWorks would separately continue after mid-July 2015. However, the petition in this case names Retro and Green JobWorks as *joint* employers. Thus, only the two alleged joint-employer operations are relevant when analyzing the question of imminent cessation here. Even assuming that Retro and Green JobWorks might be considered joint employers on the Charter School and Elementary School projects, the Regional Director correctly found that the joint operations of Retro and Green JobWorks would cease in a matter of 2 or 3 weeks following the issuance of his decision when these two projects ended. Although the laborers would remain employees of Green JobWorks, they would no longer be *jointly* employed by Green JobWorks and Retro (assuming, for purposes of this analysis, that they had been jointly employed).

Accordingly, I believe the Regional Director properly dismissed the petition in reliance on *Davey McKee Corp.*, 308 NLRB 839 (1992) (dismissing petition where employer's two construction projects would be completed in approximately 1 month, and employer had no ongoing projects within geographic scope of petitioned-for unit and no projects under bid). While Retro and Green JobWorks had worked together on several recent projects, there is no evidence of any action by either Employer inconsistent with an imminent cessation finding, such as a Retro/Green JobWorks joint bid or an outstanding request by Retro for Green JobWorks employees. On this basis, the cases upon which my colleagues principally rely are distinguishable. See *Fish Engineering & Construction Partners*, *Ltd.*, 308 NLRB 836, 836 (1992) (finding election would serve useful purpose where, although employer's two current projects were scheduled to end in less than 2 months, employer had worked on several recent projects in the geographic area and had bid on another project for the same company with which it was currently under contract); *S. K. Whitty & Co.*, 304 NLRB 776, 777 (1991) (directing election even though employer had no successful bids or commitments for future work, where employer's general manager testified employer was planning to bid on future work and had already prepared bids for some projects).

Additionally, although Retro had other projects that would continue beyond July, and Retro's president testified he did not preclude the possibility of working with Green JobWorks in the future, it is entirely speculative (i) whether Retro would need additional employees for its other projects, and (ii) even if Retro would need additional employees, whether it would select Green JobWorks as opposed to one of the *three* other temporary staffing agencies with which Retro also contracts. See *Davey McKee*, 308 NLRB at 840 (rejecting as conjectural petitioner's contention that employer may secure additional work, even though it appeared employer would bid additional work if opportunity arose); *Martin Marietta Aluminum, Inc.*, 214 NLRB 646, 647 (1974) (dismissing petition where employer was in process of closing plant

colleagues find that Retro and Green JobWorks (the Employers) are joint employers of the employees in the petitioned-for unit. Because I would dismiss the petition based on imminent cessation of operations, I find it unnecessary to reach or pass on the joint-employer issue. Moreover, as explained below, any determination of Retro's and Green JobWorks' joint-employer status on any possible *future* projects they might work on would depend on the specific facts and circumstances of those jobs (if any) and cannot be determined in advance. See id. Thus, I believe my colleagues pile speculation on top of speculation. They speculate that Retro and Green JobWorks will work on future projects together, and they further speculate that on those speculative future jobs, they will also be joint employers of Green JobWorks–supplied employees.

[2] The presidents of Retro and Green JobWorks each testified, consistently and without contradiction that the two projects had to be completed by mid-July because both project sites were schools that were scheduled to reopen for classes in August 2015. This testimony was corroborated by the schools' scheduled opening dates.

and had no plans or prospects for sale of facility as ongoing business).[3]

Moreover, even if Retro and Green JobWorks work together on future projects, it is entirely speculative whether they will constitute a joint employer of employees who might be supplied by Green JobWorks. Here, my colleagues—finding that Retro and Green JobWorks are joint employers of the employees in the petitioned-for unit—rely on the parties' description of how they operated with respect to *the two projects that were about to terminate*.[4] However, the joint employer-analysis is highly fact-specific. See *BFI*, 362 NLRB No. 186, slip op. at 16 ("Issues related to the nature and extent of a putative joint-employer's control over particular terms and conditions of employment . . . are best examined and resolved in the context of specific factual circumstances."). Even if Retro and Green JobWorks engage in future projects together, the "specific factual circumstances" of any future projects are unknown. Id. Indeed, the lease-of-services agreement between Retro and Green JobWorks expired in May 2014, and although the agreement provided that the parties could extend its term by mutual written consent, the agreement had not been renewed as of the date of the hearing. Although the Employers may have handled the Charter School and Elementary School projects in a manner "essentially consistent" with their expired agreement, they were not bound to do so, and there is no guarantee that they will do so in the future.[5] Further, there is no evidence of any joint bid or request by Retro for Green JobWorks employees for future projects. Compare *BFI*, above, slip op. at 18–20 (finding joint employer status based in part on provisions of temporary labor services agreement, which was effective at time of hearing). It is speculative whether Retro and Green JobWorks will ever work together again, and even assuming they do, it is speculative whether they will be joint employers of employees Green JobWorks provides to Retro for work on any future projects. See *Hughes Aircraft Co.*, above at 82.[6]

[3] I do not, as my colleagues suggest, contend that *Davey McKee*, *S. K. Whitty*, or *Fish Engineering* stand for the proposition that a petition must be dismissed if there is no evidence of a joint bid for additional work. Rather, a joint bid or lack thereof is relevant to the question of whether a joint employer will continue to operate as a joint employer. As my colleagues note, in *Davey McKee*, *S. K. Whitty*, and *Fish Engineering*, the *single* employer's bid or lack thereof was relevant to the question of whether that *single* employer would continue to operate in the geographic area. In this case, the petition names Retro and Green JobWorks as *joint* employers. Thus, as explained in the text, the relevant employer when analyzing imminent cessation here is the alleged Retro and Green JobWorks joint-employer entity. Accordingly, the fact that Retro and Green JobWorks each individually will continue their separate operations after the Charter School and Elementary School projects end does not amount to evidence that their alleged joint-employer operations will continue. Nor does the fact that the Employers worked together in the past establish that they will work together in the future, and my colleagues' rank speculation that there is a "likelihood" they will do so is just that—rank speculation. See *Martin Marietta Aluminum*, 214 NLRB at 647 (rejecting Regional Director's finding of some chance of continuity of employment based on plant manager's response to hypothetical questions and finding likelihood of any continuity of employment "purely speculative"); *Hughes Aircraft Co.*, 308 NLRB 82, 82 (1992) (dismissing petition seeking to represent security department employees because of employer's imminent cessation of its guard operations through subcontracting and because of speculativeness of petitioner's contention that subcontractors would become joint employers with employer).

[4] My colleagues apply the standard recently announced in *BFI*, supra. As explained in the *BFI* dissenting opinion jointly authored by former Member Johnson and me, I would adhere to precedent requiring proof that a putative joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction," *Laerco Transportation*, 269 NLRB 324, 325 (1984), and does so directly and immediately, *Airborne Express*, 338 NLRB 597, 597 fn. 1 (2002). Moreover, where joint-employer status is based on a user employer's supervision and direction of employees supplied by a supplier employer, I would adhere to precedent that holds limited and routine supervision and direction insufficient to support a joint-employer finding. See *AM Property Holding Corp.*, 350 NLRB 998, 1001 (2007) (explaining that supervision is "limited and routine where a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work"). Again, I express no views as to whether the petitioned-for employees were jointly employed by Retro and Green JobWorks on the DC Scholars Charter School and Powell Elementary School projects.

[5] Indeed, it appears that Retro and Green JobWorks deviated from the expired agreement in practice. For example, while the agreement provided that Green JobWorks is responsible for supervising and controlling the laborers it leases to Retro (with Retro to provide and coordinate their workload and scheduling of work), the Regional Director found that Retro's superintendent oversaw the work of the Green JobWorks employees at the Charter School project site.

[6] My colleagues reinstate the petition because they say, with virtually no record support, that (i) there is a "likelihood" the Employers will work together again; (ii) "neither Employer . . . suggest[s] that their relationship [would] change" in the event the two entities work together (even though there are no contractual commitments that would preclude such changes in any future relationship); and (iii) "certain key aspects of their relationship will likely remain stable," and therefore they would still be joint employers, even if Retro and Green JobWorks have future combined projects that involve a different relationship than has existed in the past. To state the obvious, my colleagues have no way of knowing whether Retro and Green JobWorks will ever work together again in the first place, let alone *how* they will do so *if* they do so. At the time of the hearing, the Employers had no other joint projects besides the two that were about to end, no joint bids, no plans to submit any joint bid, and no contract binding them to work together again or specifying the terms of any future working relationship.

Although I do not pass on the Employers' joint-employer status on the Charter School and Elementary School projects, I believe that my colleagues here, both of whom participated in the *BFI* majority, are now misapplying or repudiating key aspects of their own decision in that case. In *BFI*, my colleagues stated that "[i]ssues related to the nature and extent of a putative joint-employer's control over particular terms and conditions of employment . . . are best examined and resolved in the context of specific factual circumstances," and that "the

The Board has held that meaningful bargaining is unlikely to occur where an employer's operations will cease shortly after an election. See *Clement-Blythe Cos.*, 182 NLRB 502, 502–503 (1970) (directing election where waiting until full employee complement was achieved "might well result in bargaining for only a very short duration, with the project completed before any meaningful results could ensue"). The evidence in the record indicates the alleged joint operations of Retro and Green JobWorks ceased a year ago, and my colleagues' finding that the joint operations would resume in the future *and* would constitute joint-employer operations when they do so is doubly speculative.[7] If the same parties *might* participate in future projects together, which *might* give rise to joint-employer status as to employees who work in the same or similar positions as those described in the petition, this does not make it appropriate to conduct an election when operations involving the petitioned-for unit were to cease imminently. In these circumstances, it is appropriate to dismiss the petition, especially given that—as the Regional Director indicated here—the petition may be reinstated upon the Petitioner's motion if Retro and Green JobWorks resume working on projects together involving the same petitioned-for unit.

For these reasons, consistent with established Board law, I believe the Regional Director properly concluded it was inappropriate to conduct an election in the petitioned-for unit. I would affirm the Regional Director's finding of an imminent cessation of the Employers' joint business operations and dismiss the petition.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. August 16, 2016

Philip A. Miscimarra, Member

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burden of proving joint-employer status rests with the party asserting that relationship." *BFI*, 362 NLRB No. 186, slip op. at 16, 18. Here, the Petitioner has this burden of proof, and it failed to present any evidence of the Employers' working relationship on future projects (nor could it have, given that at the time of the hearing no future projects had been bid or contracted for or were even contemplated). Instead of finding the Petitioner failed to meet its burden of proof based on an analysis of the record, my colleagues simply assert that "certain key aspects" of the Employers' relationship "will likely remain stable," and they conclude that "it is highly doubtful that the Employers' relationship on future projects could change in such a manner that would render them no longer joint employers of the employees in the petitioned-for unit." In my view, it is irreconcilable with *BFI* and indefensible based on any reading of the record to find that the Petitioner has met its burden to prove (i) that Retro and Green JobWorks will be joint employers on future projects, even though it is impossible to examine the "specific factual circumstances" of their working relationship on those future projects (which may never happen), *BFI*, supra, or (ii) that a "likelihood" exists that Retro and Green JobWorks will work together again and that if and when they do so, "certain key aspects of their relationship will likely remain stable," thereby resulting in joint-employer status.

[7] I agree that projects in the construction industry are often limited in duration. Thus, conducting an election may serve a useful purpose even though the project on which the petitioned-for employees are working is scheduled to be completed shortly where there is persuasive evidence that the employer will obtain additional unit work. However, such evidence is missing from this case.