

No. 18-1245

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

RETRO ENVIRONMENTAL, INC.; GREEN JOBWORKS, LLC

Respondents

CONSTRUCTION AND MASTER LABORERS' LOCAL UNION 11

Intervenor

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

USHA DHEENAN
Supervisory Attorney

JOEL HELLER
Attorney

National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2948
(202) 273-1042

PETER B. ROBB
General Counsel

JOHN W. KYLE
Deputy General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

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STATEMENT OF JURISDICTION

The National Labor Relations Board applies to this Court for enforcement of its Order (365 NLRB No. 133) finding that Retro Environmental, Inc. and Green JobWorks, LLC unlawfully refused to bargain with the union representing their employees. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 160(a), and the Court has jurisdiction over this proceeding pursuant to Section 10(e), 29

U.S.C. § 160(e). The application is timely, as the Act provides no time limits for such filings. Construction and Master Laborers' Local Union 11 ("Local 11") intervened in support of the Board. Venue is proper because the unfair labor practices occurred in Maryland.

Because the Board's Order is based partly on findings made in an underlying representation-election proceeding, the record in that case is also before the Court pursuant to Section 9(d) of the Act. 29 U.S.C. § 159(d). Section 9(d) authorizes judicial review of Board actions in a representation proceeding solely for the purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair-labor-practice] order of the Board." *Id.* The Board retains authority under Section 9(c), 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the Court's ruling in the unfair-labor-practice case. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT OF ISSUES

Whether Retro's and Green JobWorks's refusal to bargain violated the Act turns on the following issues:

- I. Does substantial evidence support the Board's finding that Retro and Green JobWorks are joint employers of the employees in the bargaining unit?
- II. Does substantial evidence support the Board's finding that Retro and Green JobWorks have not shown an imminent cessation of operations?

STATEMENT OF THE CASE

In a representation-election proceeding, the Board found that Retro and Green JobWorks were joint employers and that they had not shown an imminent cessation of operations that would warrant declining to hold an election. Because Board decisions in representation proceedings are not judicially reviewable final orders, Retro and Green JobWorks refused to bargain in order to seek review of those findings. *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77 (1964). The Board found in a subsequent unfair-labor-practice case that Retro's and Green JobWorks's refusal violated the Act. The order in that case is before the Court. Retro and Green JobWorks admit that they refused to bargain, but continue to challenge the joint-employer and cessation-of-operations findings.

I. THE BOARD'S FINDINGS OF FACT

A. Retro and Green JobWorks Have a Longstanding Relationship, Spanning Several Years and Multiple Projects

Retro is a contractor based in Sykesville, Maryland that provides demolition and asbestos-abatement services for construction projects in the mid-Atlantic region. Green JobWorks is a Baltimore-based temporary staffing agency that supplies workers to construction contractors in the same area. In the 5 years preceding the hearing in this case, Green JobWorks provided workers for more

than 10 Retro projects, and possibly more than 20. (JA 257; JA 29-32, 82.)¹ Retro has been satisfied with Green JobWorks’s performance over the years, and has not experienced any problems. (JA 257; JA 49-50.)

In May 2013, Retro and Green JobWorks signed a one-year lease-of-services agreement that set forth the terms by which Green JobWorks would supply labor to Retro. Retro and Green JobWorks continued to conduct business in the same manner set forth in the contract after its expiration. They have not signed a new agreement, but continue to have an informal arrangement by which Green JobWorks supplies workers to Retro upon request. (JA 257; JA 33-36, 79-80, 177-83.) In May 2015, for example, Retro and Green JobWorks began demolition and asbestos-removal work on renovation projects at DC Scholars Charter School and Powell Elementary School in Washington, DC. (JA 257; JA 133-34.)

B. Green JobWorks Hires and Pays Employees and Retro Supervises and Instructs Them in Day-to-Day Operations; Both Companies Supply Equipment

When Retro needs labor for a project, it contacts Green JobWorks and asks for a certain number of employees. Green JobWorks recruits and hires the employees, and provides safety training. As described in the lease-of-services agreement, Green JobWorks will hire only those employees who are pre-screened,

¹ “JA” citations are to the Joint Appendix. References preceding a semicolon are to the Board’s findings; cites following a semicolon are to supporting evidence. “Br.” cites are to Retro and Green JobWorks’s opening brief to the Court.

pass a drug test, and have current EPA certifications, and will use “commercially reasonable efforts” to find employees who are qualified to perform Retro’s work. (JA 257; JA 38, 104, 178.) Green JobWorks sets wage rates and benefits. Retro pays Green JobWorks, and Green JobWorks pays the employees. (JA 259; JA 39, 104.)

Retro can reject an employee that Green JobWorks assigns to it. In such circumstances, Retro requests a replacement, and Green JobWorks complies with the request. (JA 258; JA 43-44, 96-97.) Green JobWorks might consider feedback from Retro when determining where or whether to reassign an employee after that employee leaves a Retro project. (JA 258; JA 101.) Otherwise, Green JobWorks is in charge of discipline, including termination. (JA 258; JA 104.)

Once on the jobsite, Retro personnel supervise and instruct employees in the day-to-day operations of their work. A Retro superintendent or foreman assigns tasks and directs the employees’ daily activities. They tell employees what needs to be done each day, and how to perform the work. Retro supervisors also determine matters like the sequence for demolition and the plan for asbestos removal, such as where to set up a containment area. Retro supervises Green JobWorks-provided workers, and does so in the same manner as workers solely employed by Retro. The two types of employees work side-by-side on Retro projects. Retro also communicates general workplace rules, such as the cell-phone

policy. (JA 258; JA 44-47, 50-51, 91, 109-16, 119-20.) Retro determines when employees' breaks begin and end. It also tracks the hours that each employee works and produces timesheets. (JA 258; JA 70, 95, 115, 119.)

Green JobWorks does not always have a representative on site. Its field supervisor oversees all jobsites where Green JobWorks has supplied workers (13 sites at the time of the hearing), and generally travels from site to site during the day. On some occasions, the supervisor may spend the entire day at only one jobsite and not reach the others. The Green JobWorks supervisor makes sure that employees have reported to work, interacts with client companies on problems with specific employees, communicates messages from the office, and responds to workplace injuries. (JA 258; JA 85-88, 99.)

Both Retro and Green JobWorks provide employees with equipment. Retro generally provides the equipment necessary to perform the work, such as sledgehammers or wire cutters, as well as some safety gear, and Green JobWorks generally provides personal protective equipment like hardhats or respirators. Other equipment is a shared responsibility—both companies provide respirator filters, for example. (JA 258, 260 n.6; JA 40-42, 89, 111-12, 178.)

C. Retro and Green JobWorks's Current Projects End; Retro Does Not Foresee Terminating the Relationship

Retro and Green JobWorks's work on the DC Scholars and Powell projects was estimated to end by mid-July 2015; the demolition and asbestos-related

aspects of school-renovation projects typically last 3-4 weeks. At that point, Retro and Green JobWorks had no further projects together scheduled. (JA 257; JA 59, 135.) Retro and Green JobWorks each had other ongoing projects besides DC Scholars and Powell, and some of Retro's projects were set to continue past July. For its upcoming work, Retro would contract for employees on an as-needed basis. (JA 257; JA 59, 142-43.)

According to Retro's president, he has no reason to believe Retro will terminate its relationship with Green JobWorks in the foreseeable future. He also sees no point at which it plans to stop working with Green JobWorks. (JA 257; JA 49-50.)

II. PROCEDURAL HISTORY

A. The Representation Case: Employees Choose Local 11 as Their Bargaining Representative

In June 2015, Local 11 petitioned to represent a unit of all full-time and regular part-time laborers jointly employed by Retro and Green JobWorks. (JA 176.) After a hearing, the Board's Regional Director for Region 5 observed that there was a "colorable claim" that Retro and Green JobWorks were joint employers (JA 226), but ultimately dismissed the election petition on the grounds that there was an imminent cessation of operations.

Local 11 requested review, which the Board granted. On review, the Board (Chairman Pearce and Member Hirozawa; Member Miscimarra, dissenting) found

that Retro and Green JobWorks were joint employers and that they had not met their burden of showing an imminent cessation of operations. The Board therefore remanded the case to the Regional Director, who scheduled an election. In a mail-ballot election conducted in September and October 2016, employees in the petitioned-for unit voted for union representation. (JA 294; JA 272.)

B. The Unfair-Labor-Practice Case: Retro and Green JobWorks Refuse To Bargain

After the election, Local 11 wrote to Retro and Green JobWorks requesting bargaining, but both Retro and Green JobWorks refused. (JA 294; JA 274-76.) The Board's General Counsel thereafter issued a complaint alleging that Retro's and Green JobWorks's refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). Retro and Green JobWorks admitted refusing to bargain, but argued that they did not violate the Act because they were not joint employers and there was an imminent cessation of operations.

III. THE BOARD'S CONCLUSIONS AND ORDER

On September 21, 2017, the Board (Chairman Miscimarra and Members Pearce and McFerran) issued a Decision and Order finding that Retro and Green JobWorks violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Local 11. The Order directs Retro and Green JobWorks to cease and desist from that unfair labor practice. Affirmatively, the Order requires Retro and Green

JobWorks to bargain with Local 11 on request, embody any understanding the parties reach in a written agreement, and post a remedial notice.

STANDARD OF REVIEW

The Board’s factual findings “shall be conclusive” if they are “supported by substantial evidence on the record considered as a whole,” 29 U.S.C. § 160(e)—that is, “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” *Pac Tell Group, Inc. v. NLRB*, 817 F.3d 85, 90 (4th Cir. 2015) (internal quotations omitted). The Court will “likewise examine the Board’s application of the law to the facts to determine whether it is supported by substantial evidence.” *WXGI, Inc. v. NLRB*, 243 F.3d 833, 840 (4th Cir. 2001) (internal quotations omitted). And it “accord[s] due deference to the reasonable inferences that the Board draws from the evidence.” *Grinnell Fire Protection Sys. Co. v. NLRB*, 236 F.3d 187, 195 (4th Cir. 2000). The Court will “uphold the Board’s legal interpretations if they are rational and consistent with the Act.” *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 273 (4th Cir. 2003) (internal quotations omitted).

Specific to the issues in this case, the Board’s determination as to whether a joint-employer relationship exists, which is “essentially a factual issue,” *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964), is reviewed for substantial evidence. *Mingo Logan Coal Co. v. NLRB*, 67 F. App’x 178, 186 (4th Cir. 2003); *NLRB v.*

Jewell Smokeless Coal Corp., 435 F.2d 1270, 1271 (4th Cir. 1970). As to the imminent-cessation issue, the Board ultimately has ““a wide degree of discretion”” in overseeing the election process, and ““in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.”” *NLRB v. Maryland Ambulance Servs., Inc.*, 192 F.3d 430, 433 (4th Cir. 1999) (quoting *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946)); *see also NLRB v. AAA Alternator Rebuilders, Inc.*, 980 F.2d 1395, 1397 (11th Cir. 1993) (courts “review for abuse of discretion the Board’s determination of whether ... an election should be held”); *NLRB v. Engineers Constructors, Inc.*, 756 F.2d 464, 467 (6th Cir. 1985) (same).

SUMMARY OF ARGUMENT

The Board’s findings that Retro and Green JobWorks are joint employers and did not show an imminent cessation of operations are supported by substantial evidence and further the Act’s underlying policies of promoting meaningful collective bargaining and employee choice. Retro’s and Green JobWorks’s admitted refusal to bargain thus violates the Act.

Retro and Green JobWorks are joint employers because they share control over and co-determine terms and conditions of employment for bargaining-unit employees at each stage of the employment relationship. Green JobWorks recruits and hires employees, but does so pursuant to conditions set forth in an agreement

with Retro. And Retro can reject any employee Green JobWorks hires and ask for a replacement. On the job, Retro personnel instruct and supervise employees as to the day-to-day performance of their work—both what to do and how to do it. By contrast, Green JobWorks does not always have a representative on site. Green JobWorks sets wages and benefits, and Retro tracks hours and controls break times. Both employers provide necessary equipment.

Retro and Green JobWorks present an incomplete version of the evidence, but do not otherwise contest any of those factual findings, or the analysis underlying the Board’s conclusion that they were joint employers at the time of the hearing. And the Board reasonably rejected the suggestion that it should refrain from making a joint-employer finding because their long established relationship might change on future projects. Their belated challenge to the Board’s joint-employer standard is not properly before the Court, because they did not raise the issue before the Board and thus cannot do so for the first time on appeal.

Substantial evidence also supports the Board’s finding that Retro and Green JobWorks failed to show an imminent cessation of operations that would warrant not holding an election. Evidence of imminent cessation must be certain or definite, given that the consequence of such a finding is that employees will not have the chance to decide for themselves whether to select union representation. Especially in the construction industry, where work is often short-term and

intermittent, the lack of current projects at one particular point in time is not enough. Here, it is undisputed that Retro and Green JobWorks each will continue to operate. The record also contains uncontested evidence that the two employers have a longstanding, successful relationship that extends beyond any particular project or formal agreement, and that they have no plans to stop working together. In light of that evidence and the construction context, Retro and Green JobWorks's argument that they soon would not have current joint projects does not provide the requisite degree of certainty to forego an election. Their position would unnecessarily deprive employees in the petitioned-for bargaining unit of their rights under the Act.

ARGUMENT

The Board’s finding that Retro and Green JobWorks are joint employers ensures that the parties that control terms and conditions of employment will be at the bargaining table, and its conclusion that they had not shown an imminent cessation of operations ensures that their employees have a chance to vote on union representation. The Board’s decision thus promotes meaningful collective bargaining and employee choice, two foundational principles of the Act. Retro and Green JobWorks’s contrary position would obstruct both goals, by either removing an important bargaining partner or cutting short the democratic exercise entirely. Because the Board’s findings as to both issues are supported by substantial evidence, Retro’s and Green JobWorks’s failure to bargain violates the Act’s prohibition on an employer “refus[ing] to bargain collectively with the representatives of [its] employees.” 29 U.S.C. § 158(a)(5).²

I. Retro and Green JobWorks Are Joint Employers of the Employees in the Bargaining Unit

A. The Act’s Bargaining Obligation Extends to Joint Employers

Employers have an obligation under the Act to bargain with the representative of their employees. 29 U.S.C. § 158(a)(5), (d). Courts and the Board long have recognized that two legally distinct entities that each “possess[]

² A refusal to bargain in violation of Section 8(a)(5) also derivatively violates Section 8(a)(1). *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 747 n.4 (4th Cir. 1998).

sufficient control over the work of the employees” will constitute joint employers of those employees for purposes of the Act’s bargaining obligation. *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964); *NLRB v. Jewell Smokeless Coal Corp.*, 435 F.2d 1270, 1271 (4th Cir. 1970). The joint-employer doctrine thus ensures that control over employees in the workplace carries with it responsibility to them under the Act. It operates to avoid a situation in which employees are “deprived of their statutory right to bargain effectively over wages, hours, and working conditions, solely because they work pursuant to an arrangement involving two or more employing firms, rather than one.” *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186, 2015 WL 5047768, at *19 (2015), *petition for review pending*, D.C. Cir. No. 16-1028.

Two entities are joint employers under the Act if they “share or codetermine those matters governing the essential terms and conditions of employment.” *Browning-Ferris*, 2015 WL 5047768, at *19; *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982); *Greyhound Corp.*, 153 NLRB 1488, 1495 (1965), *enforced*, 368 F.2d 778 (5th Cir. 1966). As part of that analysis, the Board looks to whether “there is a common-law employment relationship with the employees in question.” *Browning-Ferris*, 2015 WL 5047768, at *2. The touchstone for the Board’s inquiry is “the existence, extent, and object of the putative joint employer’s control” over employees’ work and terms of

employment. *Id.* Each joint employer’s bargaining obligation is limited to the terms and conditions over which it possesses the authority to control. *Id.* at *20. The burden of proving joint-employer status rests on the party asserting it. *Id.* at *22.

In its joint-employer analysis, the Board considers both whether an employer possesses the right to control and whether it has exercised such control. *Browning-Ferris*, 2015 WL 5047768, at *2; *accord N. Am. Soccer League v. NLRB*, 613 F.2d 1379, 1382 (5th Cir. 1980) (looking to “the control which one employer exercises, or potentially exercises”). As to the latter, the employer’s control may be either direct or indirect, such as through the other employer as an intermediary. *Browning-Ferris*, 2015 WL 5047768, at *2; *see also Int’l Trailer Co.*, 133 NLRB 1527, 1529 (1961) (joint employer “did not directly supervise the employees,” but “issued orders ... through the [other employer’s] plant manager”), *enforced sub nom. NLRB v. Gibraltar Indus., Inc.*, 307 F.2d 428 (4th Cir. 1962). Such an approach is consistent with the common-law definition of an employment relationship, which looks to whether a putative employer “controls or has the right to control” employees and recognizes that such control “may be very attenuated.” Restatement (Second) of Agency §§ 2(1), 220, cmt. d.³

³ In *Browning-Ferris*, the Board restored consideration of reserved and indirect control to the analysis, overruling prior cases that had limited the scope of the inquiry by imposing requirements that a joint employer actually exercise direct

Applying those principles, courts and the Board have found evidence of a joint-employer relationship where, for example, both employers have a role in shaping the workforce. A factor “particularly support[ive]” of joint-employer status is one employer’s “authority to reject” or to “direct [the other employer] to remove” employees provided by the other employer. *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985); accord *Ace-Alkire Freight Lines, Inc. v. NLRB*, 431 F.2d 280, 282 (8th Cir. 1970) (same). In *Browning-Ferris*, for example, a company that contracted with a staffing agency to provide employees had the “right to reject any worker” by reporting dissatisfaction to the agency and “request[ing] their immediate dismissal.” 2015 WL 5047768, at *22. Similarly, two employers co-determine the outcome of the hiring process where one selects the individual employees, but does so pursuant to criteria set forth in an agreement with the other employer. *Id.* at *22-23; see also *Hamburg Indus., Inc.*, 193 NLRB 67, 67 (1971) (one employer dictated “number of [employees]” needed); *K-Mart*,

control. 2015 WL 5047768, at *1-2, 19. As the Board explained, such limits were not required by the Act or the common law, and the Board had never provided an explanation for adopting them. *Id.* at *1-2. Nor did they serve the Act’s goal of promoting meaningful collective bargaining. *Id.* at *2, 15. At the same time, the Board “reaffirm[ed]” the longstanding share-or-codetermine standard articulated in prior court and Board decisions. *Id.* at *2.

The Board overruled *Browning-Ferris* in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017), but subsequently vacated the latter decision. 366 NLRB No. 26 (Feb. 26, 2018). In its order vacating *Hy-Brand*, the Board explained that “the overruling of the *Browning-Ferris* decision is of no force or effect.”

159 NLRB 256, 258 (1966) (employer that did “all hiring” agreed not to hire former employees of the other). In those situations, the two employers share control over the makeup of the workforce and employees’ tenure.

Other evidence of joint-employer status relates to work performance. One consideration is whether an employer possesses control over “the determination of tasks to be performed,” *Mingo Logan Coal Co. v. NLRB*, 67 F. App’x 178, 181 (4th Cir. 2003), and “how the employees should perform their duties,” *Int’l Trailer Co.*, 133 NLRB 1527, 1529 (1961), *enforced sub nom. NLRB v. Gibraltar Indus., Inc.*, 307 F.2d 428 (4th Cir. 1962). Such control is shown where, for example, one employer supervises and assigns work to employees provided by the other employer and instructs them in the “means or manner” of their work. *Browning-Ferris*, 2015 WL 5047768, at *19 & n.80, 21; *see also Mingo Logan Coal*, 67 F. App’x at 186 (employees supplied by one employer “were often directly supervised by [the other employer’s] supervisors”). Employers who possess or exercise such control over employees’ work performance determine terms and conditions of employment by shaping employees’ day-to-day experience.

B. Retro and Green JobWorks Are Joint Employers

Substantial evidence supports the Board’s finding that Retro and Green JobWorks are joint employers of the employees in the bargaining unit. As the Board detailed, the two companies “share and codetermine essential terms and

conditions of employment” (JA 259) for the demolition and asbestos-abatement laborers at each stage of the employment relationship. Indeed, while Retro and Green JobWorks present an incomplete picture of their relationship, they do not challenge the Board’s factual findings or analysis underlying its conclusion that they were joint employers at the time of the hearing. (Such a challenge would be unavailing in any event, given the ample record evidence.) Their only factual argument is that their relationship might change in the future (Br. 28-30), but the plentiful evidence of joint-employer status undermines that claim as well.⁴

At the outset, Retro and Green JobWorks codetermine the outcome of the hiring process. The Board detailed (JA 259) how, although Green JobWorks hires employees and determines their compensation, it abides by the conditions set forth in its agreement with Retro—it can hire only those applicants who are pre-screened and drug tested, and must use “commercially reasonable efforts” (JA 178) to find applicants who are qualified for the work. And Retro has sole control over how many employees Green JobWorks sends to a particular jobsite. *Cf. Browning-Ferris*, 2015 WL 5047768, at *22-23; *Hamburg Indus.*, 193 NLRB at 67; *K-Mart*, 159 NLRB at 258. Although the contract setting forth those conditions has

⁴ Even that challenge seems limited to “the Board’s conclusion that Retro was a joint employer” (Br. 28); Retro and Green JobWorks do not appear to contest that Green JobWorks is an employer of the bargaining-unit employees.

expired, the presidents of both Retro and Green JobWorks agreed that their business relationship continues to operate as it did during the contract's term.

Further, even when those initial qualifications are met, Retro holds ultimate veto power over Green JobWorks's hiring and assignment decisions. It can reject any employee and ask for a replacement—evidence that is “particularly support[ive]” of a joint-employer relationship. *Carrier Corp.*, 768 F.2d at 781. Moreover, Green JobWorks has complied with such requests. Retro's role in employee placement extends even further, however, because Green JobWorks will consult with Retro on whether or where to reassign employees after they leave a Retro project.

Once employees arrive on the job, Retro exercises direct control over both what work the employees do and how they do it. As the Board explained (JA 258-59), Retro supervisors establish the order of tasks for a given day and assign particular employees to perform those tasks. They also give instructions on how the work should be done and what methods to use. *Cf. Browning-Ferris*, 2015 WL 5047768, at *19, 23; *Int'l Trailer*, 133 NLRB at 1529. And they supervise employees in the performance of those tasks. *Cf. Mingo Logan Coal*, 67 F. App'x at 180, 186. Indeed, Retro makes no distinction in supervision between employees supplied by Green JobWorks and those it employs solely. Retro further shapes the workday by determining when breaks begin and end, and tracking the hours that

employees work. As the Board’s findings make clear, Retro has both big-picture and detail-oriented control over employees’ day-to-day work—it “makes the core staffing and operational decisions that define all employees’ work days,”

Browning-Ferris, 2015 WL 5047768, at *23.

Moreover, Retro officials are sometimes the only on-site supervision for the employees. They are present and active every day. By contrast, Green JobWorks does not always have a representative at the jobsite. Its field supervisor oversees all jobsites where Green JobWorks has assigned employees and can, of course, only be present at one at a time. Further, because he might need to spend the entire day at one location, Green JobWorks’s supervisor might not be present on a Retro jobsite at all on a given day. And as the Board noted (JA 259), Green JobWorks’s supervisor serves only a limited role even when present, performing a few specific tasks.

As further support, and symbolic of their joint role, is Retro and Green JobWorks’s shared provision of the equipment necessary to do the job. (JA 260 n.6.) Both the personal protective gear provided by Green JobWorks (such as hard hats and respirators) and the tools provided by Retro (such as sledgehammers and wire cutters) are essential components of the employees’ work. Each employer

contributes to the whole of the employees' employment. In that area, as elsewhere, both employers serve an essential role in the employment relationship.⁵

Given the extent of Retro's and Green JobWorks's control or right to control over employees' terms and conditions of employment, recognizing each of them as a joint employer with a duty to bargain under the Act would promote meaningful collective bargaining. If employees had a dispute about breaks or supervision, for example, Retro's presence at the bargaining table would enable them to present such issues in that forum. A joint-employer finding in this case thus would further the Act's goal of channeling workplace disputes through the "mediatory influence of negotiation." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964). Because of its lack of control in those areas, by contrast, Green JobWorks alone would not be able to address such issues; the bargaining process would not provide an avenue of redress if Green JobWorks were the only employer at the table. The Board's decision is thus consistent with the principle that the joint-employer doctrine promotes employees' "statutory right to bargain effectively over ... working conditions." *Browning-Ferris*, 2015 WL 5047768, at *19.

⁵ As the Board found (JA 259 n.4), the evidence also shows that a common-law employment relationship exists between Retro and Green JobWorks and the employees in the bargaining unit. The demolition and asbestos-abatement laborers "perform services in the affairs of" Retro and Green JobWorks, and "with respect to the physical conduct in the performance of the services [are] subject to the ... control or right to control" of those companies. Restatement (Second) of Agency § 220(1). Retro and Green JobWorks do not contend otherwise.

In the face of that uncontested evidence of joint-employer status at the time of the hearing, Retro and Green JobWorks’s only factual argument is that their relationship might change in the future. (Br. 28-30.) But the Board reasonably rejected (JA 260 n.7) the suggestion that it should refrain from making a joint-employer finding because the relationship could change. And, indeed, it is undisputed that the contours of Retro and Green JobWorks’s business relationship had remained steady for at least two years prior to the hearing, a period that covered multiple projects and outlasted their formal lease-of-services agreement. As the Board further explained (JA 260 n.7), the distinct function that each company plays in their relationship likewise suggests that much of the current structure will continue. As a labor supplier, Green JobWorks likely will continue to do the direct hiring and firing. As the client company, Retro will demand a particular number of employees and retain the right to request a replacement.

The Board’s conclusion that “key aspects of their relationship will likely remain stable” (JA 260 n.7) is thus a reasonable inference from the record evidence regarding an employment relationship—exactly the kind of determination for which the Board receives deference. *Grinnell Fire Protection Sys.*, 236 F.3d at 195. It was not, as Retro and Green JobWorks claim (Br. 28), based on “speculation.” The Board made the fact-specific inquiry into joint-employer status described above, and concluded that those specific factual circumstances would

continue on future projects. At the least, “reasonable mind[s]” could have reached that conclusion, which is sufficient for a finding of substantial evidence. *Pac Tell Group*, 817 F.3d at 90.

For the first time on appeal, Retro and Green JobWorks also belatedly seek to challenge the Board’s joint-employer standard as articulated in *Browning-Ferris*. (Br. 26-28.) They forfeited that argument by failing to raise it before the Board, however. Under Section 10(e) of the Act, “[n]o objection that has not been urged before the Board ... shall be considered by the court” absent “extraordinary circumstances.” 29 U.S.C. § 160(e). Section 10(e) “represents a jurisdictional bar against judicial review of issues not raised before the Board.” *NLRB v. HQM of Bayside, LLC*, 518 F.3d 256, 262 (4th Cir. 2008) (citing *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982)). Accordingly, “a party’s failure to urge an objection before the Board precludes appellate consideration,” such that the Court is “foreclosed from reaching th[e] issue.” *NLRB v. Daniel Construction Co.*, 731 F.2d 191, 198 (4th Cir. 1984). Retro and Green JobWorks did not challenge the joint-employer standard below, and proffer no extraordinary circumstances that would excuse their failure to do so.

The fact that *Browning-Ferris* issued after the hearing in this case does not change the forfeiture analysis. Where an issue arises for the first time in the Board’s decision, rather than earlier in the process, a party must file a motion for

reconsideration with the Board in order to preserve the issue for appellate review. As the Supreme Court has explained, where a party “could have objected to the Board’s decision in a petition for reconsideration or rehearing[, t]he failure to do so prevents consideration of the question by the courts.” *Woelke & Romero*, 456 U.S. at 666; *see also PB&S Chem., Inc. v. NLRB*, 121 F.3d 699 (4th Cir. 1997) (table) (finding Section 10(e) barred challenge because “it was possible, even if this finding did first appear in the Board’s decision, for objection to have been made by a motion for reconsideration”). That principle extends to objections sounding in due process, such as that the Board’s decision was based on a new theory of liability. *Int’l Ladies’ Garment Workers’ Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). Retro and Green JobWorks never filed a motion for reconsideration. Nor did they otherwise request remand to the Regional Director or a reopening of the record, as they now suggest the Board could have done (Br. 27-28). The propriety of the Board’s joint-employer standard thus is not properly before the Court, and the Court is therefore “foreclosed from reaching this issue.” *Daniel Construction*, 731 F.2d at 198.⁶

⁶ In support of their forfeited argument, Retro and Green JobWorks purport to “adopt and incorporate herein by reference” (Br. 26 n.8) a brief filed by a different party in an unrelated case in a different circuit. But the Federal Rules provide that the argument section of a brief “must contain [the party’s] contentions and the reasons for them.” Fed. R. App. Proc. 28(a)(8)(A). Under that rule, “it is ‘not sufficient merely to incorporate arguments’ that were made elsewhere.” *Park Hill School Dist. v. Dass*, 655 F.3d 762, 768 (8th Cir. 2011) (quoting 16AA Charles

Finally, to the extent Retro and Green JobWorks are arguing that *Browning-Ferris* should not apply retroactively to this case (Br. 26-28), that issue also is not properly before the Court because it was not raised before the Board. 29 U.S.C. § 160(e). In any event, Retro and Green JobWorks have not shown any “ill effect” of applying the decision retroactively that would outweigh “the mischief of producing a result which is contrary to a statutory design” by failing to do so. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Although they impliedly advert to reliance interests in pre-*Browning-Ferris* law by stating that their dealings “by existing standards ... were not those of a joint employer” (Br. 27), there has never been such a finding. By contrast, the Regional Director found a “colorable claim of a joint employer relationship” under then-existing law. (JA 225-26.) Indeed, the core of the joint-employer standard remains the same—whether two employers “share or codetermine” terms and conditions of employment. Moreover, as detailed above, the Board’s analysis was based largely on evidence of direct control, which always has been a relevant factor. Retro’s indirect control of asking Green JobWorks to replace unsatisfactory employees likewise also supported joint-employer status pre-*Browning-Ferris*. By contrast to the lack of ill effects from retroactive application, the mischief of failing to apply *Browning-Ferris* to this

Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3974.1 (4th ed. 2008)).

case is the risk of an ineffective collective-bargaining relationship for the demolition and asbestos-abatement laborers who voted for union representation, contrary to the fundamental goals and principles of the Act.

II. Retro and Green JobWorks Have Not Shown an Imminent Cessation of Operations

A. Cessation of Operations Must Be Imminent and Certain To Warrant Not Holding a Representation Election

Congress has charged the Board with protecting employees' freedom of choice in selecting a bargaining representative. 29 U.S.C. § 151. The Board thus "shall direct an election" upon receiving a petition from a union or employee that presents a question of representation. 29 U.S.C. § 159(c)(1). In a "narrow exception" (JA 260) to that statutory mandate, the Board will decline to hold an election where the employer of the employees in the petitioned-for bargaining unit shows that it faces an "imminent cessation of ... operations." *Hughes Aircraft Co.*, 308 NLRB 82, 82 (1992). In such circumstances, "no useful purpose would be served by conducting an election." *Martin Marietta Aluminum, Inc.*, 214 NLRB 646, 647 (1974). The situations where the Board will find an imminent cessation are limited, however, because the consequence of such a finding is to cut off the democratic process by which employees choose for themselves whether to have union representation.

Cessation of operations must be both "imminent and certain" to warrant not holding an election. *Hughes Aircraft*, 308 NLRB at 83; *see also Martin Marietta*,

214 NLRB at 646-47 (dismissing election petition where plant closure was “definite and imminent”). Speculation, or even a tentative intent to cease operating, is not enough. *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309, 309 (1976). The Board thus has found evidence sufficient to dismiss an election petition on imminent-cessation grounds where the employer took some affirmative and irrevocable (or nearly so) step, such as permanently laying off all employees in the petitioned-for bargaining unit, *Hughes Aircraft*, 308 NLRB at 83, or ordering total liquidation of assets by a date certain, *Larson Plywood Co.*, 223 NLRB 1161, 1161 (1976). Or in *Martin Marietta*, the employer had announced to the public and employees that it was closing, stopped taking orders, and terminated its contracts. 214 NLRB at 646. Other times, the employer is undergoing a “fundamental change in the nature of [its] business,” such as a shift from production to distribution. *Douglas Motors Corp.*, 128 NLRB 307, 308-09 (1960).

Moreover, when the issue arises in the construction context, the analysis takes into account the nature of work in that industry. As the Board has recognized, construction work is often short-term and intermittent. *S.K. Whitty & Co.*, 304 NLRB 776, 777 (1991). Too swiftly declaring a cessation of operations by a construction employer thus could serve to prevent employees in that industry from ever having a say on the issue of representation. Therefore, “because projects continually begin and end in the construction industry, the Board is reluctant to

dismiss a petition unless there is evidence of an almost complete cessation of an employer's construction work in the foreseeable future.” *Building Contractors Ass’n, Inc.*, 364 NLRB No. 74, 2016 WL 4376616 (2016). Accordingly, the cessation-of-operations analysis requires more than a snapshot as to the state of operations at a particular moment. The lack of current projects at one specific time thus is not enough to dismiss an election petition. *Cf. S.K. Whitty*, 304 NLRB at 776-77 (holding election where employer had “no successful bids or committed work for the immediate future”). A broader view of whether operations had ceased would risk disenfranchising employees simply because they work in the construction industry.

The Board declined to conduct an election in *Davey McKee Corp.*, for example, where all of the construction employer's projects would end within a month, it had no other ongoing work in the area and no projects under bid, and the only evidence of possible future work was “wholly uncorroborated hearsay.” 308 NLRB 839, 840 (1992); *see also M.B. Kahn Construction Co.*, 210 NLRB 1050, 1050 (1974) (employer “does not have any work [and] ... does not contemplate any in the future”). By contrast, the Board held an election in *Fish Engineering & Construction Partners, Ltd.* even though the employer's two current projects would end in 3-5 weeks because the employer previously had worked two other projects in the area and had bid on a future project. 308 NLRB 836, 836-37

(1992). That evidence was not outweighed by the fact that the employer faced competition for the bid and was not on the soliciting company's list of preferred contractors. *Id.* at 837. And in *Brown & Root, Inc.*, the bulk of the employer's work would end in 30-45 days, but there was "no evidence indicating that ... the Employer will refrain from accepting such contracting work" in the future. 314 NLRB 19, 28 (1994).

That caution accords with the general approach of courts and the Board, which have "recognized the need ... to accommodate to the fluctuating nature and unpredictable duration of construction activities" when evaluating matters related to representation elections in that industry. *Clement-Blythe Cos.*, 182 NLRB 502, 502 (1970), *enforced*, 1971 WL 2966 (4th Cir. 1971); *see generally Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 265 (1983) (noting that labor law recognizes "the uniquely temporary, transitory and sometimes seasonal nature of much of the employment in the construction industry"). For example, construction employees can be eligible to vote in a representation election even where their work for the employer of the bargaining unit is intermittent, they are "employed for short periods on different projects," and they also work for different employers. *MEC Construction, Inc. v. NLRB*, 161 F. App'x 316, 320 (4th Cir. 2006) (quoting *Steiny & Co.*, 308 NLRB 1323, 1324 (1992)). And an election can include employers that do not currently employ any unit employees, so long as "there is no indication

that [they] have permanently ceased ... work or will not accept such work in the future.” *Building Contractors Ass’n*, 2016 WL 4376616, at *2. That approach ensures that construction employees have an opportunity to exercise their rights under the Act to have a say on matters of representation.

B. Retro and Green JobWorks Have Not Met Their Burden of Showing an Imminent and Certain Cessation of Operations

Substantial evidence supports the Board’s finding that Retro and Green JobWorks failed to meet their burden of showing an imminent cessation of operations. In the face of uncontested evidence of both employers’ ongoing operations, longstanding history of joint projects, and lack of intent to end the relationship, Retro and Green JobWorks’s arguments fail to provide the requisite certainty to warrant not holding an election. They also ignore the burden of proof and the construction context, and would unnecessarily deprive employees in the petitioned-for unit of their rights under the Act.

As an initial matter, it is undisputed that both Retro and Green JobWorks will continue to operate, and will do so in the mid-Atlantic region. Both will continue to perform the same type of work as they do now—Retro will provide demolition and asbestos-abatement services and contract for employees to do that work, and Green JobWorks will supply temporary labor to construction contractors. Indeed, at the time of the hearing, both companies had work that would continue past the end of the DC Scholars and Powell projects.

Not only will both employers continue operating individually, but, as the Board concluded, “there is no evidence that [they] intended to discontinue their working relationship or that they would not continue to work together.” (JA 261.) Retro and Green JobWorks stress that they had no current joint projects or bids after completion of the DC Scholars and Powell projects (Br. 17, 21), but, given the short-term and periodic nature of work in the construction industry, they cannot show imminent cessation merely by pointing to a lack of joint projects at one particular point in time.⁷

Indeed, Retro and Green JobWorks share, as the Board emphasized, a “lengthy history of collaboration.” (JA 261 n.9.) They have a longstanding, successful relationship spanning over 5 years. As the Board found in *Fish Engineering*, an employer’s past work in the area weighs against a finding of imminent cessation even if a current project is ending. 308 NLRB at 836. Retro and Green JobWorks have worked at least 10-20 jobs together in the past, far more than the 2 previous jobs found sufficient to reject a finding of imminent cessation in *Fish Engineering, id.* at 836-37. And just as the specter of competition from other bidders did not support finding imminent cessation in that case, *id.* at 837, the

⁷ The completion of the DC Scholars and Powell projects (Br. 21) is of no greater moment. The bargaining unit was not, as Retro and Green JobWorks erroneously describe it, limited to “employees working on the DC Schools projects” (Br. 16), but included “all full- and regular part-time laborers ... jointly-employed by” Retro and Green JobWorks (JA 176).

fact that Retro has also worked with other staffing agencies (Br. 17) does not prove that it will have no future work with Green JobWorks. Indeed, their successful history of joint projects makes Green JobWorks and Retro even better positioned for future work than was the employer in *Fish Engineering*, which was not on the soliciting company's list of preferred contractors. *Id.*

In addition, Retro's president testified expressly that he had no reason to believe he would terminate the relationship with Green JobWorks in the foreseeable future, and that there was no point at which he planned to stop working with them. He was satisfied with their work, and had experienced no problems. Thus, unlike an employer that "does not contemplate any [work] in the future," *M.B. Kahn Construction*, 210 NLRB at 1050, Retro does not contemplate *not* working with Green JobWorks in the future. Likewise, there is no evidence that Green JobWorks would not accept work from Retro. *Cf. Brown & Root*, 314 NLRB at 28. Consistent with that evidence, there has never been, unlike in *Martin Marietta* or *Hughes Aircraft*, any announcement to the public or to employees that the two companies would cease working together.

Both Retro and Green JobWorks officials also explained that the two companies have an "informal arrangement" and an "understanding" for working together (JA 35-36, 79-80), which is neither time-bound nor tied to any particular contract or project. Even if a specific project ends, therefore, the arrangement is

still in place. Indeed, the fact that their lease-of-services agreement expired actually undermines the case for imminent cessation, because it shows that Retro and Green JobWorks have worked together even outside the bounds of a formal agreement. Although Retro and Green JobWorks stress that they have “no contract or agreement requiring them to work on further projects” (Br. 17), the same was true prior to the DC Scholars and Powell renovations, and did not stop them from working those jobs together. The same situation now thus is not definite evidence that they will have no future collaborations.

Retro and Green JobWorks’s imminent-cessation argument relies almost exclusively on *Davey McKee*, but the employer in that case had no work of any kind after its current project ended. 308 NLRB at 840. Here, both Retro and Green JobWorks had future work, and nothing suggests—let alone shows with certainty—that the work will not be together. Moreover, unlike here or in *Fish Engineering*, there was no evidence in *Davey McKee* of an established history of work by the employer in the area. And the direct testimony from Retro’s president that he had no plans to stop working with Green JobWorks far outweighs the “wholly uncorroborated hearsay evidence” of potential future work that the Board rejected in that case. *Id.*

Retro and Green JobWorks therefore fail to show that, notwithstanding all the evidence pointing towards an ongoing relationship, it is nonetheless “certain,”

Hughes Aircraft, 308 NLRB at 83, and “definite,” *Martin Marietta*, 214 NLRB at 647, that they would soon stop working together. In characterizing the Board’s decision to the contrary as based on “speculation ... that they would work together again” (Br. 21), Retro and Green JobWorks ignore the burden of proof, which they do not dispute that they bear. The burden is on them to show definitively that they will not work together, not on the Board to show that they will.⁸

Finally, Retro and Green JobWorks’s question as to whether meaningful bargaining could occur (Br. 22) assumes that they have met their burden of showing an imminent cessation of operations. Because they have not, their doubt about the benefits of bargaining is misplaced. Bargaining with Local 11 would set terms and conditions of employment for future projects. Indeed, in industries with short-term projects (like construction or entertainment), an employer can have a duty to bargain even if it does not have current work. *See, e.g., Building Contractors Ass’n*, 2016 WL 4376616, at *2 (multi-employer bargaining unit included employers “who currently do not employ employees within the election unit”). Based on its experience overseeing such matters, the Board has found that employers and employees in those industries often “engage in stable and successful

⁸ Because the record closed in June 2015, nothing supports Retro and Green JobWorks’s assertion (Br. 11) that Retro “has not leased employees from Green JobWorks since mid-July 2015.” Any reliance on extra-record sources for such a claim would be improper, as the question for the Court is whether substantial evidence “on the record” supports the Board’s findings. 29 U.S.C. § 160(e).

collective bargaining.” *Kansas City Repertory Theatre, Inc.*, 356 NLRB 147, 147 (2010). By voting for representation, moreover, employees in the unit decided for themselves that bargaining could be beneficial, in line with the Act’s underlying goal of fostering employee choice. Retro and Green JobWorks’s position would have deprived them of that opportunity.

Ultimately, Retro and Green JobWorks did not meet their burden of showing an imminent cessation of operations that warranted depriving their employees of the choice whether to select union representation. An election was proper, and Retro and Green JobWorks violated the Act by refusing to bargain with the union its employees chose in that election.

CONCLUSION

The Board respectfully requests that the Court enforce the Board's Order in full.

s/ Usha Dheenan

USHA DHEENAN

Supervisory Attorney

s/ Joel A. Heller

JOEL A. HELLER

Attorney

National Labor Relations Board

1015 Half Street SE

Washington, DC 20570

(202) 273-2948

(202) 273-1042

PETER B. ROBB

General Counsel

JOHN W. KYLE

Deputy General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

June 2018

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. _____ **Caption:** _____

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**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	
)	
v.)	No. 18-1245
)	
RETRO ENVIRONMENTAL, INC.; GREEN JOBWORKS, LLC)	
)	
Respondent)	Board Case No. 5-CA-195809
)	
CONSTRUCTION AND MASTER LABORERS' LOCAL UNION 11)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2018, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 5th day of June, 2018