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**CASE NO. 18-1245**

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

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NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*

v.

RETRO ENVIRONMENTAL, INC. and GREEN JOB WORKS, LLC,  
*Respondents,*

CONSTRUCTION AND MASTER LABORERS' LOCAL UNION 11,  
*Intervenor.*

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On a Petition for Enforcement of an Order of the  
National Labor Relations Board

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**INTERVENOR'S BRIEF**

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?  YES  NO  
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/Brian J. Petruska

Date: 3.8.2018

Counsel for: Intervenor

**CERTIFICATE OF SERVICE**

\*\*\*\*\*

I certify that on March 8, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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March 8, 2018  
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## TABLE OF CONTENTS

DISCLOSURE OF CORPORATE AFFILIATIONS.....	i
TABLE OF AUTHORITIES .....	v
JURISDICTIONAL STATEMENT.....	1
STATEMENT REGARDING ORAL ARGUMENT.....	2
STATEMENT OF THE ISSUES .....	3
STATEMENT OF THE CASE .....	4
<b>A. The Parties</b> .....	4
<b>B. The Election Proceeding (Case No. 05-RC-0153468)</b> .....	4
<b>C. The ULP Proceeding (Case No. 05-CA-195809)</b> .....	7
STATEMENT OF FACTS.....	8
A. Retro and GJW’s Relationship .....	8
B. How Retro Utilizes GJW’s Services.....	10
C. Retro’s Supervision of GJW’s Employees Leased to Retro.....	11
D. GJW’s Employees Use of Retro’s Equipment .....	14
STANDARD OF REVIEW.....	15
SUMMARY OF ARGUMENT.....	16
ARGUMENT .....	18
I. THE BOARD PROPERLY APPLIED ITS PRECEDENT THAT THE EMPLOYERS BORE THE BURDEN OF PROVING A DEFINITE AND IMMINENT CESSATION OF THEIR OPERATIONS, AND THAT THEY FAILED TO MEET THEIR BURDEN. ....	18
II. THE CONCLUSION THAT RETRO AND GJW ARE JOINT EMPLOYERS IS SUPPORTED BY SUBSTANTIAL EVIDENCE UNDER THE BOARD’S JOINT-EMPLOYER STANDARDS BOTH BEFORE AND AFTER BROWNING-FERRIS. ....	24
<b>A. The Board Properly Applied <i>Browning-Ferris</i> to this case.</b> .....	24
<b>B. The Board’s Finding That Retro and GJW Are Joint Employers Under the Standard Set Forth in <i>Browning Ferris</i> is Supported by Substantial Evidence.</b> .....	26
<b>C. Even Under the Standard that Preceded <i>Browning-Ferris</i>, Retro.....</b>	31
<b>And GJW Would Be Joint Employers.....</b>	31
<b>D. The Board Reasonably Based Its Joint-Employer Determination on ...</b>	35

**Retro and GJW’s Relationship as It Existed At the Time of the Pre-Election Hearing, Rather Than Attempting to Predict Their Relationship in the Future.....35**

CONCLUSION .....39

CERTIFICATE OF COMPLIANCE .....40

CERTIFICATE OF SERVICE.....41

## TABLE OF AUTHORTIES

### Cases

<i>Airborne Express Co.</i> , 338 NLRB 597 (2002).....	34
<i>Alpo Petfoods, Inc. v. NLRB</i> , 126 F.3d 246, 250 (4th Cir.1997) .....	19
<i>AM Property Holding Corp.</i> , 350 NLRB 998 (2007) .....	34, 35
<i>ARA Servs., Inc. v. N.L.R.B.</i> , 71 F.3d 129, 135 (4th Cir. 1995).....	28
<i>Aramark School Services</i> , 337 NLRB 1063 fn. 1 (2002).....	28
<i>Browning-Ferris</i> .....	34
<i>Browning-Ferris of California, Inc. (BFI Newby Island Recyclery)</i> , 362 NLRB No. 186 (2015).....	passim
<i>Consol. Diesel Co. v. NLRB</i> , 263 F.3d 345, 352 (4th Cir.2001).....	18, 19
<i>Davey McKee Corp.</i> , 308 NLRB 839 (1992).....	8, 24
<i>Deluxe Metal Furniture Co.</i> , 121 NLRB 995, 1006-1007 (1958) .....	28
<i>Fish Engineering &amp; Construction Partners, Ltd.</i> , 308 NLRB 836, 836 (1992) .	24, 26
<i>G Wes Limited Co.</i> , 309 NLRB 225 (1992) .....	34, 35
<i>General Motors Corp.</i> , 88 NLRB 119, 1-120 (1950) .....	23
<i>Holly Farms Corp. v. NLRB</i> , 517 U.S. 392, 409 (1996).....	18
<i>Intertape Polymer Corp. v. NLRB</i> , 801 F.3d 224, 230 (4th Cir. 2015).....	18
<i>Island Creek Coal Co.</i> , 279 NLRB 858, 864 (1986) .....	35
<i>Laerco Transportation</i> .....	34
<i>Laerco Transportation</i> , 269 NLRB 324 (1984).....	34, 35, 36
<i>Larson Plywood Co.</i> , 223 NLRB 1161, 1161 (1976) .....	21, 27
<i>M. B. Kahn Const. Co., Inc.</i> , 210 NLRB 1050 (1974).....	23
<i>March Associates Constr., Inc.</i> , 22-RC-075268, 2012 WL 1496208, at *1 (Apr. 27, 2012) .....	22, 27
<i>Martin Marietta Aluminum, Inc.</i> , 214 NLRB 646, 646 (1974).....	21
<i>N.L.R.B. v. Oakes Mach. Corp.</i> , 897 F.2d 84, 90 (2d Cir. 1990).....	28
<i>NLRB v. Air Contact Transp. Inc.</i> , 403 F.3d 206, 210 (4th Cir. 2005).....	19
<i>NLRB v. Curtin Matheson Scientific, Inc.</i> , 494 U.S. 775, 787, 110 S.Ct. 1542, 108 L.Ed.2d 801 (1990).....	18
<i>NLRB v. Gen. Wood Preserving Co.</i> , 905 F.2d 803, 810 (4th Cir.1990).....	19
<i>Sam's Club v. NLRB</i> , 173 F.3d 233, 239 (4th Cir.1999).....	18
<i>SNE Enterprises, Inc.</i> , 344 NLRB 673 (2005).....	27
<i>TLI, Inc.</i> , 271 NLRB 798 (1984).....	34, 35
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474, 488 (1951) .....	19
<i>Wahi v. Charleston Area Med. Ctr., Inc.</i> , 562 F.3d 599, 607 (4th Cir.2009).....	31
<i>Winston v. Children &amp; Youth Servs. of Del. County</i> , 948 F.2d 1380, 1385 (3d Cir.1991).....	31
<i>Wisniewski v. Johns-Manville Corp.</i> , 812 F.2d 81, 88 (3d Cir.1987).....	31

**Statutes**

29 U.S.C. § 159 .....21  
29 U.S.C. § 160 .....4, 19

**Rules**

F.R.A.P. 28 .....11, 31

## **JURISDICTIONAL STATEMENT**

The Intervenor concurs with the Respondents' Statement of Subject Matter Jurisdiction that this Court has jurisdiction over this petition for enforcement of an order of the National Labor Relations Board (hereinafter, the "NLRB" or the "Board") under 29 U.S.C. § 160(e).

**STATEMENT REGARDING ORAL ARGUMENT**

As this case does not present any issues of first impression and can be decided squarely on this Circuit's and the NLRB's established precedents, the Union does not believe that oral argument is necessary or would be helpful to the Court in resolving this appeal.

### **STATEMENT OF THE ISSUES**

1.) Whether the NLRB, in its Order in Case No. 05-RC-0153468, interpreted the National Labor Relations Act (“NLRA”) reasonably and was supported by substantial evidence in determining that Green JobWorks, LLC (“GJW”) and Retro Environmental, Inc. (“Retro”) failed to meet their burden of showing a definite and imminent cessation of their business relationship such that an election in this matter would serve no useful purpose under the Act?

2.) Whether the NLRB, in its Order in Case No. 05-RC-0153468, interpreted the Act reasonably and was supported by substantial evidence in determining that GJW and Retro jointly employ the employees in the bargaining unit at issue in this case?

## **STATEMENT OF THE CASE**

### **A. The Parties**

The Intervenor, Construction and Master Laborers' Local Union 11, affiliated with the Laborers' International Union of North America, (hereinafter, the "Union" or "Local 11"), is a union based in Washington DC that represents employees working in the demolition and environmental remediation industry. Environmental remediation includes the removal of hazardous building materials, such as asbestos. The Union has as a goal the representation of all laborers in the demolition and environmental remediation industry in the DC metropolitan area, and employees of temporary staffing employees constitutes a significant portion of those workers.

Retro Environmental, Inc. ("Retro") is a demolition and environmental remediation contractor located in Gaithersburg, Maryland, that provides these construction services in Maryland, Washington DC, and Virginia.

Green JobWorks, LLC, (hereinafter "GJW") is a company that leases employees to construction contractors, including to contractors likes Retro who specialize in demolition and environmental remediation.

### **B. The Election Proceeding (Case No. 05-RC-0153468)**

The Union filed the petition commencing the underlying representation case on June 3, 2015. (JA 176). In the petition, the Union sought to represent the following bargaining unit of employees:

All full- and regular part-time laborers, including demolition and asbestos removal workers, that are jointly-employed by the joint-employer, Retro Environmental, Inc./Green JobWorks, Inc. [sic] exclude[ing] office clericals, confidential and management employees, guards, and supervisors under the Act.

(JA 176.)

Region 5 of the NLRB conducted a pre-election hearing held on June 11, 2015. (JA 2.) At the hearing, the following witnesses gave testimony: Robert Gurecki, the President of Retro, Larry Lopez, the President of GJW, and Eric Brooks, an employee of the joint employer, Retro-GJW. (JA 5.)

On June 26, 2016, the Regional Director (hereinafter, “RD”) for Region 5 dismissed the petition upon finding that an election would serve no useful purpose, and citing *Davey McKee Corp.*, 308 NLRB 839 (1992). (JA 225.) The RD based this ruling upon his finding that “uncontroverted testimony in the record demonstrates that neither Retro nor GJW anticipate any joint work in the future.” (JA 226.). The testimony to which the RD referred was not cited, but RD wrote that “there are no other ongoing or anticipated projects by the alleged joint-employer entity.” (JA 226.)

While the RD did not make a formal finding of joint-employer status, he did find “a colorable claim of a joint employer relationship.” (JA 226).

Furthermore, the RD rejected arguments that the petition should be dismissed

because the employees were temporary or because the petition was premature. (JA 226-7).

On July 10, 2015, the Union requested that the NLRB review the RD's Decision and Order. (JA 229.) The NLRB granted the Union's request on November 5, 2015. (R. v. III, Board Order, dated November 5, 2015.) On August 16, 2016, the Board issue a Decision on Review and Order overturning the Regional Director's dismissal of the petition, and ordering that the election sought by the Union be held. (JA257.)The NLRB ruled that Retro and GJW failed to meet their burden of proving a definite and imminent cessation of their joint operations. (JA 261.) The NLRB further ruled that Retro and GJW were joint employers. In ruling on the joint-employer issue, the NLRB applied its precedent in *Browning-Ferris of California, Inc. (Newby Island Recyclery)*, 362 NLRB No. 186 (2015), which the NLRB decided after the Regional Director's underlying decision. (JA 260.)

On September 15, 2016, the Regional Director issued a supplemental decision and Direction of Election directing the parties to hold an election. (JA 265.) The election was conducted by mail ballot. (JA 268.) The Union prevailed in the election, and on December 2, 2016, the Board certified the Union as the exclusive representative of the bargaining unit. (JA 272.)

### **C. The ULP Proceeding (Case No. 05–CA–195809)**

The ULP proceeding commenced following the Union's certification, when the Union served a demand to bargain to the Joint-Employer, Retro and GJW on March 1, 2017.<sup>1</sup> (JA 274-75.) GJW responded by counsel that GJW would not agree to bargain, while Retro failed to respond by the date on which the Union proposed to commence bargaining. (JA 276.) On March 27, 2017, the Union filed an unfair labor practice charge alleging that the Joint Employer failed to bargain with the Union in good faith. Following its investigation, Region 5 of the NLRB issued a Complaint based upon the Union's charge. (JA 227.)

On June 15, 2017, the NLRB issued to Retro and GJW a Notice to Show Cause why the General Counsel's Motion for Summary Judgment with respect the ULP charge should not be granted. (R. vol III, Board Notice to Show Cause, dated June 15, 2017.) Only Retro submitted a response to the Notice to Show Cause, filing its response on June 29, 2017. In its two-page response, Retro's sole argument was that it was not a joint-employer with GJW. *See* R. vol. III, (Retro Response to Notice to Show Cause, June, 27, 2017, at 1-2). Retro's

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<sup>1</sup> Along with the bargaining demand, the Union included a request for information. The Joint-Employers' failure to respond to the Union's information request is subject to a separate ULP proceeding before the NLRB.

response did not mention the imminent cessation doctrine even once, nor did it request an evidentiary hearing to present evidence on whether Retro and GJW has continued to work together since July 2015.<sup>2</sup> *Id.*

On September 21, 2018, the NLRB granted the General Counsel's motion for summary judgment on the allegations contained in the Complaint. (JA 293-97.) The current petition seeks enforcement of that Decision and Order.

### **STATEMENT OF FACTS**

#### A. Retro and GJW's Relationship

Robert Gurecki is the President of Retro. Gurecki testified that Retro is an employer in the building and construction industry. (JA 29:18-22.) Retro performs demolition and environmental remediation work, which mostly means

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<sup>2</sup> On page 11 of the Respondents' brief, Respondents attempt to influence this Court by citing facts outside of the administrative record on review. In their Summary of Argument, Respondents assert that Retro in fact ceased using leased employees from GJW after July 2015, facts that post-date the close of the fact-finding hearing at issue in this petition for enforcement and that are absent from the administrative record. As facts outside the record, the assertion is not, and cannot be, supported by a citation to the record, as required by Federal Rule of Appellate Procedure 28(a)(7). The attempt to persuade the Court through facts not in the record is not proper. This sentence of Respondents' Brief, therefore, should be disregarded or stricken. The Union further asserts that Respondents' allegation is false, and that GJW indeed has leased employees to Retro after July 2015. Respondents' opportunity to raise these issues with the NLRB was in June 2017 in response to the Board's Notice to Show Cause why summary judgment should not be granted. They failed to raise these allegations at that time, however, and now that issue should be deemed waived. This Court certainly is not the proper forum for factual disputes of this kind.

asbestos removal. (JA 30:1-11.) Gurecki testified that a company needs a license to perform asbestos remediation work, and that Retro is a licensed contractor. (JA 30:12-24.)

GJW is a temporary staffing company that supplies Retro with additional demolition and asbestos removal laborers on an as-needed basis. (JA 31:21-32:20.) GJW has provided Retro with employees for about five years. (JA 32:1-2.) GJW has supplied workers to Retro on at least ten projects, and probably more. (JA 32:3-14.) GJW has provided Retro with workers on projects other than school renovations. (JA 71:17-19.) The project ongoing during the pre-election hearing was at DC Scholars School and Powell Elementary. (JA 55:24-56:10.) GJW only provides two classifications of workers to Retro: demolition laborers and asbestos removal laborers. (JA 69:12-21.)

Lopez, the President of GJW, (JA 76:9-10), testified that GJW provides labor to Retro, (JA 76:19-77:4), and also to approximately twenty other construction contractors and subcontractors. (JA 77:5-8.) Lopez testified that GJW is not licensed in Maryland, DC, or Virginia to remove asbestos. (JA 90:17-19.)

Lopez testified that GJW has supplied workers to Retro on at least ten projects, and possibly twenty. (JA 82:14-22.) One other project on which GJW

supplied labor to Retro was a lead removal project at the White House. (JA 81:34-82:8.)

Gurecki testified that Retro is satisfied with GJW, and has no current plans to cease using the company's services. (JA 49:15-50:17.) Gurecki's testimony on this point is worth examining in detail:

Q. You've been working with Green JobWorks for 5 years. That's what you said?

A. Yes.

Q. And do you have any reason to believe that you would terminate that relationship in the foreseeable future?

A. No.

Q. Are there any problems that you currently have experienced or recently experienced with Green JobWorks that's making you think that maybe you don't want to continue operating with them?

A. No.

(JA 49:15-50:3.)

B. How Retro Utilizes GJW's Services

Retro has operated under a lease of services agreement with GJW. (JA 34:15-17.) Although that agreement has expired, the two companies continue to operate essentially in the same manner as described in that agreement. (JA 36:4-22; 79:18-80:6.) Consistent with the parties' expired contract, GJW 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. (JA 178.) Additionally, GJW performs background checks and administers safety and general knowledge tests to applicants for demolition positions. GJW maintains a database of employees and assigns employees to project sites based on Retro's need. (JA 83:16-85:11.) GJW determines the rate of pay for each position and issues employee paychecks. (JA 178.)

When Retro needs temporary labor, Gurecki contacts GJW and requests a certain number of laborers. (JA 36:4-22.) Under the contract between Retro and GJW, Retro agreed to "cooperate with [GJW] to provide and to coordinate the workload and scheduling of the work to be performed by the Leased Employees." (JA 178.)

C. Retro's Supervision of GJW's Employees Leased to Retro

Gurecki testified that supervisors of asbestos removal must be licensed, and the supervisors of Retro who supervise asbestos removal are licensed, including Jose Guerrero and Manuel Alverises, the supervisors assigned to the DC Scholars project. (JA 44:13-45:10.)

Gurecki testified that Retro provides all supervision for employees referred to Retro by GJW. (JA 68: 20.) Gurecki testified that the Retro supervisors supervise the GJW employees in a manner indistinguishable from the Retro

employees. (JA 50:24-51:9.) Retro supervisors also determine when GJW employees get breaks. (JA 70:9-13.)

GJW has a field supervisor named Juan Rodriguez. (JA 85:12-15.) Rodriguez is charged with supervising all of the projects to which GJW has supplied workers. (JA 88:8-11.) Rodriguez usually goes from site to site, and rarely stays at a single site for a whole day. (JA 88:16-17; 105:18-106:2.) Lopez testified that Retro supervisors are responsible for directing GJW employees on a daily basis. (JA 91:4-8.)

Retro is responsible for tracking the hours of GJW employees and reporting those hours to GJW. (JA 94:24-95:3.) If Retro is dissatisfied with the performance of any GJW employees, Retro calls GJW, and GJW immediately contacts the employee to inform him that he or she will be removed from the project. (JA 96:19-97:6.) Lopez added that GJW would want to know why Retro sought the removal. (JA 97:5-7.) If employees accrue a certain amount of no-call/no shows or lateness that is reported by contractors, GJW terminates those employees in its database. (JA 97:24-98:10.)

Lopez also testified that Retro tasked GJW with recruiting DC-resident workers to satisfy hiring requirements on the DC school jobs. Retro gave GJW this task to help Retro satisfy its hiring obligations, and therefore intended to take credit from GJW's hiring. (JA 149:24-151:7.) Lopez also testified he believed,

based upon different jobs he had seen before, that the number of employees at Powel and DC Scholars could rise to 80 to 100 by the end of June 2015. (JA 141:23-142:2;148:17-23.)

Eric Brooks was an employee of GJW for over a year as a general laborer in June 2015. (JA 107:23-108:3.) Brooks testified that his tasks consist of knocking down walls, taking out lights, disposing of trash, and removing tiles. (JA 110:24-111:2.) GJW assigned Brooks to the DC Scholars School site, and at the time of the hearing Brooks had worked there for about two weeks. (JA 110:12-13.) On that project, Brooks received his instruction from Retro supervisors, specifically a supervisor named Jose. (JA 111:3-12.)

Brooks testified that Retro supervisors give him instruction with respect to how he performs his work. (JA 112:13-16.) For instance, at DC Scholars School, the demolition work needed to be performed quietly so as not to disrupt the classes. Retro supervisors instructed Brooks to work quietly to avoid disrupting the students. (JA 112:23-113:9.) The Retro supervisors also instructed Brooks with respect to how they wanted the lights removed. (JA 114:15-24.) Specifically, Brooks was instructed to remove the light bulbs first, and then use bolt cutters to remove the light fixtures from the ceiling. (*Id.*) Brooks also testified that Retro supervisors told him when to take breaks and when breaks are over. (JA 115:17-22.)

Brooks also testified about an example of how a supervisor for a contractor directly disciplined him as an employee of GJW. Brooks understood that he was not supposed to use his cell phone while working on a project, except for in emergencies. On one occasion, he received an important call regarding one of his children, and he answered the phone. (JA 117:1-16.) The supervisor was not in the vicinity when Brooks received the call, but later appeared while Brooks was on the call. (JA 119:23-120:21.) The supervisor sent Brooks home immediately, so he did not finish working that day. (JA 120:17-21.) Brooks then received a call the following day from GJW notifying him not to return to the project. Brooks remained unemployed for a period after that. (*Id.*)<sup>3</sup>

D. GJW's Employees Use of Retro's Equipment

Gurecki testified that Retro provides nearly all equipment that the GJW employees require, such as sledgehammers, wire cutters, disposal filters for respirators, microtraps, and Tyvek suits. (JA 40:16-:42:17.) Gurecki confirmed that Retro does not charge GJW in any manner for the use of this equipment by its employees. (JA 42:18-43:2.) GJW does not provide GJW employees with

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<sup>3</sup> Brooks testified that this incident occurred while he was leased to another of GJW's clients other than Retro. (JA at 125:17-24.) Nevertheless, the incident is illustrative of how GJW's employees are subject to the discipline of the supervisors of GJW's clients. Furthermore, this disciplinary power is consistent with the testimony from Lopez that GJW would remove any of its employees from Retro jobs sites upon request. (JA 96:19-97:6.)

equipment for removing asbestos, such as Tyvek suits, microtraps, or glove bags.

(JA 88:18-90:9.)

### **STANDARD OF REVIEW**

In their opening brief, the Respondents Retro and GJW badly misinform the Court regarding the applicable standard of review in this case. Respondents state that the Court's review of the NLRB's interpretations of the NLRA is "de novo." (Resp. Br. at 13.) In fact, long-established Fourth Circuit and Supreme Court precedent make clear that this Court reviews the NLRB's interpretation of the NLRA under a deferential standard.

Under those precedents, the Board's legal interpretations of the NLRA are entitled to deference so long as they are "rational and consistent" with the Act. *Intertape Polymer Corp. v. NLRB*, 801 F.3d 224, 230 (4th Cir. 2015); *Consol. Diesel Co. v. NLRB*, 263 F.3d 345, 352 (4th Cir.2001) (quoting *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787, 110 S.Ct. 1542, 108 L.Ed.2d 801 (1990)); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (stating that the NLRB's interpretations of the Act are entitled to deference if they are reasonable, even if the NLRB's reading of the Act is not "the best way to read the statute."); *Sam's Club v. NLRB*, 173 F.3d 233, 239 (4th Cir.1999) ("If the NLRB's legal interpretations are rational and consistent with the Act, they will be upheld by reviewing courts.").

By statute, the Fourth Circuit must review the Board's factual findings to verify that they are “supported by substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e); *Consol. Diesel*, 263 F.3d at 351. Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *NLRB v. Air Contact Transp. Inc.*, 403 F.3d 206, 210 (4th Cir. 2005) (quoting *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246, 250 (4th Cir.1997)). “If such evidence exists, we must uphold the Board's decision ‘even though we might have reached a different result had we heard the evidence in the first instance.’” *Id.* (quoting *NLRB v. Gen. Wood Preserving Co.*, 905 F.2d 803, 810 (4th Cir.1990)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (a reviewing court engaged in substantial evidence review may not “displace the NLRB's choice between two fairly conflicting views” of the evidence, “even though the court would justifiably have made a different choice had the matter been before it *de novo*.”).

### **SUMMARY OF ARGUMENT**

An absence of future plans to collaborate is not the same as future plans to cease collaborating. This distinction cuts to the heart of Retro and GJW’s arguments because it identifies precisely why they fell short of meeting the burden of proof necessary to invoke the imminent cessation doctrine. Under the NLRB’s precedents, Retro and GJW had the burden of proof to demonstrate that

their operations *definitely* would cease *imminently*. The evidence upon which Retro and GJW rely, however, proves at most that, at the time of the hearing conducted in June 2015, they had not specifically identified projects in the future where they would work together. (JA 49:15-50:17.) This is evidence only of an absence of plans to collaborate in the future. Retro and GJW failed to present evidence at the hearing they actually planned to cease working together in the future. The Board, therefore, acted reasonably and was supported by substantial evidence in deciding that Retro and GJW had failed to provide proof sufficient to demonstrate that they definitely and certainly would cease to operate together in the future.

The Board's determination that Retro and GJW jointly employed the employees in the bargaining unit is supported by substantial evidence whether the issue is analyzed under the Board's standard in *Browning-Ferris of California, Inc. (BFI Newby Island Recyclery)*, 362 NLRB No. 186 (2015), or under the standards that pre-dated that decision. The result will be the same under either standard because the evidence demonstrated that Retro exercised direct supervisory control over GJW's employees by instructing them on how to work. Because direct control is shown by the evidence, this case does not raise the issue of whether a joint-employer determination can be based solely upon evidence of indirect control or reserved but unexercised powers.

## ARGUMENT

### **I. THE BOARD PROPERLY APPLIED ITS PRECEDENT THAT THE EMPLOYERS BORE THE BURDEN OF PROVING A DEFINITE AND IMMINENT CESSATION OF THEIR OPERATIONS, AND THAT THEY FAILED TO MEET THEIR BURDEN.**

When presented with a question concerning representation, the NLRB commands that “the Board shall direct an election . . . and certify the results thereof.” 29 U.S.C. § 159(c)(1). The NLRB has created a narrow exception to this general command for circumstances where the 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.

Under long-standing Board precedent, the party alleging the imminent cessation bears the burden of proving that the cessation is: 1.) imminent, and 2.) definite. *See Hughes Aircraft Co.*, 308 NLRB 82, 83 (1992) (“The Board has consistently held that it will not conduct an election at a time when a permanent layoff is *imminent and certain*.”) (emphasis added); *Larson Plywood Co.*, 223 NLRB 1161, 1161 (1976) (requiring that an operation’s cessation be “sufficiently certain”).

Moreover, to meet this burden, the Board has required highly reliable evidence, usually documentary, evidencing the imminence and certainty of the termination or fundamental change in the business. For instance, in *Martin Marietta Aluminum, Inc.*, 214 NLRB 646, 646 (1974), the employer had issued a

public release announcing the closure of a plant, held meetings with employees, notified utilities of a termination of services for the plant, stopped taking new orders, transferred work to other facilities, and started scheduling layoffs. In *Larson Plywood Co.*, 223 NLRB at 1161, the employer's Board of Directors proved their case with a corporate resolution directing company officers to liquidate the company within 90 days. In *Hughes Aircraft*, 308 NLRB at 82-83, the employer notified employees of a decision to subcontract their jobs and formally entered into a contract with subcontractors, with terms specifying the dates on which the subcontracts would commence. *See also March Associates Constr., Inc.*, 22-RC-075268, 2012 WL 1496208, at \*1 (Apr. 27, 2012) (ruling that attempting to establish an imminent cessation of operations on mere testimony was "decidedly inadequate"). As a matter of policy, the Board's allocation of the burden of proof and persuasion upon the employer is sensible because it is the employer who possesses all of the evidence on its future business prospects, not the union or employees.

In the present case, evidence of the type customarily required by the Board to establish a definite cessation of operations is wholly lacking. There is no evidence in the record of a decision by Retro or GJW to cease operating, to sell their business, or to fundamentally change their business. Furthermore, there is no

evidence that Retro or GJW intended to terminate their business relationship. (JA 49:15-50:17.)

The only evidence presented by Retro and GJW was that they had not identified any projects where they would work together beyond those on which they were working at the time of the hearing. (JA 135:23-25.) Although Retro and GJW attempt to shoe-horn this situation into the narrow parameters of imminent cessation, the Board rightly noted this evidence showed only a *possible* cessation, but not one that was definite or imminent.

Although Retro and GJW attempt to argue that the Board failed to apply its past precedents rationally to the underlying case, none of the Board's prior precedents remotely resemble the present case. *M. B. Kahn Const. Co., Inc.*, 210 NLRB 1050 (1974), involved a construction company based in South Carolina that had a single project located in Winchester, Virginia that was due to be completed within months of the filing of the petition. The Board held that "the Employer d[id] not have any work, other than this project, in the area, and ... d[id] not contemplate any in the future." *Id.*

Similarly, in *General Motors Corp.*, 88 NLRB 119, 1-120 (1950), the petitioner sought an election for employees of General Motors who were hired to fix buses operated by the New York City Department of Transportation where both parties agreed that "the employment of the mechanics would be at an end

when the project was completed” because it was a special and temporary project for GM. In both *General Motors Corporation*, and in *M.B. Kahn Construction*, the definiteness of the cessation of business was established by the fact that both employers were performing a single project in a geographic area where they were not performing any other work and did not anticipate doing so in the future. Here, by contrast, the bargaining unit is located within Retro’s and GJW’s primary service areas.

Although Retro and GJW attempt to compare the present case to *Davey McKee Corp.*, 308 NLRB 839 (1992), Retro and GJW misread the case. In *Davey McKee*, the employer submitted evidence that it was finishing up its current projects imminently and had no active bids submitted for future projects. In *Fish Engineering & Construction Partners, Ltd.*, 308 NLRB 836, 836 (1992), which was issued along with *Davey McKee*, the Board refused to find an imminent cessation of operations based upon evidence that the employer had submitted bids for work, even if the work had not yet been awarded and might not be awarded to the employer. *See id.* (“Based on this undisputed evidence of the Employer's past and current work, and its bidding on future work within the unit sought by the Joint Petitioner, the Board finds that it would serve a useful purpose to conduct an immediate election after resolving the remaining unit issues.”).

Reading these cases together, Retro and GJW argue that these cases stand for the proposition that the existence of bids for new work is the key evidence for finding an imminent cessation.<sup>4</sup> In making this argument, Retro and GJW seek to narrow the burden of proof required to trigger the Board's imminent cessation doctrine. But this is not a valid reading of these cases because it conflicts with the Board's prior decisions on imminent cessation. (JA 261 n. 9 (“*Davey McKee* and *Fish Engineering* do not stand for the proposition that a petition must be dismissed if there is no evidence of a joint bid for additional work.”) (citations omitted); *see also S.K. Whitty Co.*, 304 NLRB 776 (1991) (directing an election where employer had no commitments for future work, but planned to bid and would remain in the area), overturned on other grounds, *Steiny & Co., Inc.*, 308 NLRB 1323, 1327 n. 17 (1992).

Reading these cases in the context of the Board's prior cases, it is clear that, properly read, the difference between *Davey McKee* and *Fish Engineering* was

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<sup>4</sup> In trying to reduce the imminent cessation doctrine's proof model to the question of the existence of bids for future work, Retro and GJW are seeking to elevate form over substance. The record here shows that GJW did not submit bids to Retro to obtain future work, but instead received phone calls from Retro whenever its services were required. (JA 36:6-10.) Bids were important in *Fish Engineering* only because they evidenced the prospect of future work. As long as prospects of future work exist, that is sufficient to preclude a finding that an imminent cessation of operations is definite.

that, in *Davey McKee*, the employer *definitely* was winding up its business, while in *Fish Engineering* the termination of the employer's business was *not definite*.

In the case below, the Board consistently applied its past precedents by finding that Retro and GJW failed to meet their burden of showing that their business relationship definitely would end in the near future. In support of the Board's decision, the Board relied on record evidence showing that Retro and GJW had a five-year relationship working together on at least more than ten projects and possibly on more than twenty projects, and Retro's President Gurecki's testified that there was no reason that the two companies would not work together. (JA 49:15-50:17.) Specifically, Gurecki testified as follows:

Q. You've been working with Green JobWorks for 5 years. That's what you said?

A. Yes.

Q. And do you have any reason to believe that you would terminate that relationship in the foreseeable future?

A. No.

Q. Are there any problems that you currently have experienced or recently experienced with Green JobWorks that's making you think that maybe you don't want to continue operating with them?

A. No.

(JA 49:15-50:3.)

The record contains no evidence that Retro and GJW had any intention or formal plans to stop working together, nor that either company planned any fundamental changes to their business that might cause them to operate differently in the future. This evidence is sufficient to justify the Board's conclusion that Retro and GJW failed to demonstrate a definite plan to stop collaborating in the future. *See Fish Engineering*, 308 NLRB at 836; *Hughes Aircraft Co.*, 308 NLRB at 83; *Larson Plywood*, 223 NLRB at 1161; *see also March Associates Constr.*, 22-RC-075268, 2012 WL 1496208, at \*1.

**II. THE CONCLUSION THAT RETRO AND GJW ARE JOINT EMPLOYERS IS SUPPORTED BY SUBSTANTIAL EVIDENCE UNDER THE BOARD'S JOINT-EMPLOYER STANDARDS BOTH BEFORE AND AFTER *BROWNING-FERRIS*.**

**A. The Board Properly Applied *Browning-Ferris* to this case.**

In between the date on which the Regional Director dismissed the Union's petition and the date on which the Board reversed that decision, the Board issued its decision in *Browning-Ferris of California, Inc. (BFI Newby Island Recyclery)*, 362 NLRB No. 186 (2015) (hereinafter, "*Browning-Ferris*"). *Browning-Ferris* broadened the standard under which the Board will find that two separate entities are joint employers by ruling that evidence of indirect or mediated control or of the existence of reserved but unexercised powers by the putative joint employer over the relevant employees would be considered probative in determining that a joint-employer relationship exists. *Id.*, slip-op at 15-16. As will be argued below, this

change in the law should not affect the outcome of this case because the record contains evidence of *direct* supervisory control instructing employees how to work, which would have sustained a joint-employer determination even prior to *Browning-Ferris*. That said, the Board acted properly in this case by following its longstanding practice of applying new policies and standards retroactively “to all pending cases in whatever stage.” See *SNE Enterprises, Inc.*, 344 NLRB 673 (2005) (citing *Aramark School Services*, 337 NLRB 1063 fn. 1 (2002); *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-1007 (1958)).

Retro and GJW’s argument that their due process rights were violated by the application of *Browning-Ferris* to the underlying case has two critical flaws. First, Retro and GJW failed to cite any authority whatsoever supporting the proposition that the Board’s half-century practice of applying new rules to pending cases is unconstitutional or violates due process.

Second, Retro and GJW fail to articulate, much less demonstrate, any injury they suffered from the application of *Browning-Ferris* to the underlying case.<sup>5</sup> A party protesting the retroactive application of an arguably new rule must demonstrate manifest injustice to defeat the application of that rule. See *ARA Servs., Inc. v. N.L.R.B.*, 71 F.3d 129, 135 (4th Cir. 1995); *N.L.R.B. v. Oakes Mach.*

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<sup>5</sup> Retro and GJW’s opportunity to proffer evidence of injury or injustice from the application of *Browning-Ferris* to this case was in response to the Board’s Notice to Show Cause why summary judgment should not be entered in June 2017. They failed to raise the issue at that time, however.

*Corp.*, 897 F.2d 84, 90 (2d Cir. 1990) (“Absent manifest injustice, we defer to the board's determination.”).

Here, Retro and GJW fail to demonstrate manifest injustice due to the application of *Browning-Ferris* because they do not argue that they would have prevailed under the NLRB’s prior precedents, but not under *Browning-Ferris*. They do not articulate any manner in which they detrimentally relied upon the NLRB’s case law prior to *Browning-Ferris*. Retro and GJW’s argument that the Board acted arbitrarily and capriciously in applying *Brown-Ferris* to the underlying case, therefore, is unsupported.

Indeed, as argued below, the new *Browning-Ferris* precedent was not pivotal to the finding that Retro and GJW are joint employers. This is not a case in which the Union relied upon reserved but unexercised powers to show joint-employer status, or where the Union relied primarily upon evidence of indirect or mediated control of the employees and their terms and conditions of employment. *Browning-Ferris*, therefore, was just a different path to the same destination.

**B. The Board’s Finding That Retro and GJW Are Joint Employers Under the Standard Set Forth in *Browning Ferris* is Supported by Substantial Evidence.**

In *Browning-Ferris*, 362 NLRB No. 186, slip op. at 15 (2015), the Board began their analysis with the customary and undisputed definition of joint-employment from case law, namely 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.” The Board broadened the definition of a joint-employer to no longer require that a joint employer exercise the authority to control employees’ terms and conditions of employment “directly, immediately, and not in a ‘limited and routine’ manner.” *Id.*, slip op. at 15–16. The Board also ruled that it would be sufficient that the joint employer possess the authority, even if the authority was not exercised. *Id.*

Furthermore, the Board held that the 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.* The relevant right-of-control is “in the common law sense ... the actual exercise of control, whether direct or indirect.” *Id.* at 16. The touchstone under the *Browning-Ferris* standard is whether “the putative joint employer’s control ... permit[s] meaningful collective bargaining.” *Id.* at 16.

In holding that Retro and GJW are joint-employers under *Browning-Ferris*, the Board found that each employer had primary areas of responsibility in the joint relationship— GJW 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. (JA 260.) Between them, the Board found, they control all of the employees’ employment terms. (*Id.*)The Board’s conclusion are supported by substantial evidence.<sup>6</sup>

The record evidence showed that although GJW is primarily responsible for hiring, assigning, disciplining, and terminating employees (JA 178), Retro exercises control over some of these terms and conditions of employment, as well. Regarding hiring, GJW recruits employees, prescreens them, performs drug tests

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<sup>6</sup> In the only attack that Retro and GJW make on whether *Browning-Ferris* is based upon a reasonable interpretation of the Act, they attempt to incorporate by reference all arguments raised in the direct appeal of the NLRB’s decision in *Browning-Ferris* pending before the Court of Appeals for the DC Circuit. See Resp. Br. at 26 n.8. Their attempt to smuggle in a whole other litigation’s set of arguments by footnote should be rejected because it is not consistent with F.R.A.P. 28(a)(9)(A), which requires that an argument contain “appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.” Because the argument is improperly presented, the arguments should be considered waived and disregarded. See *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 607 (4th Cir.2009) (holding that an issue raised only in a footnote and addressed with only declarative sentences is waived); *Winston v. Children & Youth Servs. of Del. County*, 948 F.2d 1380, 1385 (3d Cir.1991) (noting that “[a]n issue that is not addressed [in compliance with Rule 28] in an appellant’s brief is deemed waived on appeal’ ”) (first alteration in original) (quoting *Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81, 88 (3d Cir.1987)).

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. (JA 178.) Nonetheless, Retro had a role in codetermining the outcome of the hiring process by virtue of the parties' expired agreement (JA 178), whose terms the parties continued to follow following expiration. (JA 36:4-22; 79:18-80:6.) The agreement imposed conditions on whom GJW 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. (JA 178.)

Regarding assignment, the record showed that GJW assigned employees to project sites, but GJW may consult with Retro when deciding to reassign an employee to another project site. (JA 101:13-25.) As for discipline and firing, GJW can remove an employee from a project site and from its database of workers. However, Retro retained the right to request a replacement if it is unsatisfied with any employee. (JA 96:19-97:6.) Although Retro had not exercised this right in the 6 months prior to the hearing, GJW's president testified that GJW would acquiesce to Retro's request. (*Id.*) Finally, GJW determines the rate of pay, pays wages, and provides benefits. (JA 178.) 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. (JA 36:6-10; 70: 12-13; 72:12-17.) As in *Browning-Ferris*, Retro alone determines the number of workers to be supplied by GJW. (JA 36:4-10.) *See Browning-Ferris*, slip op. at 19.

Regarding supervision, the record showed that 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. (JA 45:11-47:13.) GJW's field supervisor is onsite only some of the time because he visits all GJW's 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. (JA 88:8-17; 105:18-106:2.) Thus, as in *Browning-Ferris*, 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 employees' hours, and reports them to GJW. (JA 70: 12-13; 72:12-17.) *See Browning-Ferris*, slip op. at 18–19 (noting that break times constitute a fundamental working condition and finding the requirement that employees obtain signature of user employer attesting to hours worked supported a finding of joint employer status).

Based on the above evidence, the Board was justified in determining that both Retro and GJW play a role in determining the terms and conditions of

employment for the employees that GJW leases to Retro. Based upon this evidence, it is clear that Retro is necessary for the Union to engage in meaningful collective bargaining with respect to GJW's employees.

In particular, the Union will need to obtain Retro's assent to just-cause standards governing the discipline and removal of employees from jobsites for the infraction of rules because Retro is responsible for identifying worksite infractions and can remove employees from the job sites on those grounds. The Union also will need Retro's assent to the agreement's dispute resolution procedures so that Retro can be compelled to reinstate an employee who is found to have been improperly removed. Retro also will be critical for negotiating over the hours of work, break times, and overtime provisions, since Retro sets the work schedule and the sequencing of the work. Lastly, Retro will be important for setting wages and benefits, because Retro ultimately must pay for wage or benefit increases for GJW workers. In all, because Retro's degree of "control ... permit[s] meaningful collective bargaining," the Board properly found that Retro is joint-employer with GJW and its ruling should be upheld. *Browning-Ferris*, slip op. at 16.

**C. Even Under the Standard that Preceded *Browning-Ferris*, Retro And GJW Would Be Joint Employers.**

In *Browning-Ferris*, the Board overruled the following precedents on joint-employment: *Laerco Transportation*, 269 NLRB 324 (1984); *TLI, Inc.*, 271 NLRB 798, (1984); *G Wes Limited Co.*, 309 NLRB 225 (1992); *Airborne Express Co.*,

338 NLRB 597 (2002); and *AM Property Holding Corp.*, 350 NLRB 998 (2007). Because these cases were overruled by *Browning-Ferris*, they best represent the standard that *Browning-Ferris* supplanted.

In *Laerco Transportation*, 269 NLRB at 324, the Board held that an entity that only conducted minimal day-to-day supervision, along with voluntary efforts to resolve minor problems of employees, did not exert “meaningful control” over the employees sufficient to be deemed a joint employer. In *TLI*, 271 NLRB at 799, the Board repeated the formulation in *Laerco Transportation* that a party attempting to prove joint employment must establish that the putative joint employer “meaningfully affected the employment relationship” in addition to merely sharing or co-determining the essential terms and conditions of employment. In *TLI*, the Board ruled that extensive, even exclusive, day-to-day supervision will not constitute “sufficient control to support a joint employer finding” if that supervision can be characterized as “limited and routine.” 271 NLRB at 799.

In *G Wes*, 309 NLRB at 226, the Board continued to apply the “meaningfully affect” standard originating in *Laerco*, but the Board added the following clarification of when supervision rises to the level of control sufficient to find joint employment: “[M]erely routine directions of where to do a job *rather than how* to do the job and the manner in which to perform the work” are

insufficient to support a joint employer finding.” *G. Wes*, 309 NLRB at 226 (citing *Island Creek Coal Co.*, 279 NLRB 858, 864 (1986)). In *G. Wes*, the Board also announced the view that powers reserved in contracts but not exercised would not be considered probative of joint-employer status. 309 NLRB at 226.

In *AM Properties*, 350 NLRB at 1001, the Board repeated the principle that supervision that was merely “limited and routine” did not evidence sufficient control to cause a separate company to be deemed a joint employer. The Board defined limited and routine supervision as “supervision .... 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.” *See Am Prop. Holding Corp.*, 350 NLRB at 1001 (emphasis added).

Each of these pre-*Browning-Ferris* precedents recognize that the codetermination of supervision will warrant a finding that two entities are joint employers. *See, e.g., Laerco Transportation*, 269 NLRB at 325 (defining joint employment as when two or more companies meaningfully affect “hiring, firing, discipline, *supervision*, and direction”) (emphasis added). Each case defines the level of supervision necessary to make a joint-employer finding as instructing employees on not just what work to perform, or where or when to perform work, but also *how* to perform work.

In the underlying case, in addition to the factors addressed under the *Browning-Ferris* standard, the evidence demonstrate that Retro supervisors instructed employees on *how* to perform their work, i.e. supervision that extends beyond mere “limited and routine.” Here there is evidence that Retro supervisors instructed GJW employees with respect to how to perform their work. GJW employee Brooks testified that at the DC Scholars School, he was instructed to take down walls quietly to avoid disturbing the classes that were in progress. Brooks further testified that he was given explicit instruction on how to remove lights from the ceiling. He was told to remove the light bulb first and then use bolt cutters to remove the light fixture from the ceiling. (JA 114:14-24.)

In addition, the record evidence shows that Retro holds authority to have GJW employees removed from the job site. Both Gurecki and Lopez agreed that GJW would remove a GJW employee essentially automatically upon a request from a contractor that an employee was performing badly. (JA 96:19-97:6.)

Brooks provided a concrete example of how this worked. He testified of an example where he believes he did not violate project rules by answering his cell phone due to the emergency nature of the call. (JA 119:23-120:21.) But the supervisor working for the contractor nevertheless sent him home immediately and caused him to be permanently removed from the site. (*Id.*) Brooks remained unemployed for a period of time following that incident.

Brooks testified that this incident occurred while he was leased to another of GJW's clients other than Retro. (JA at 125:17-24.) Nevertheless, the incident is illustrative of how GJW's employees are subject to the discipline of the supervisors of GJW's clients. Furthermore, this disciplinary power is consistent with the testimony from Lopez that GJW would remove any of its employees from Retro jobs sites upon request. (JA 96:19-97:6.)

The presence of evidence of meaningful supervision makes this case distinct from the cases that were overruled by *Browning-Ferris*. Because the underlying case included evidence of meaningful supervision by Retro supervisors over GJW employees, Retro and GJW would be deemed to be joint-employers even under the standard that existed prior to *Browning-Ferris*.

**D. The Board Reasonably Based Its Joint-Employer Determination on Retro and GJW's Relationship as It Existed At the Time of the Pre-Election Hearing, Rather Than Speculating on Their Relationship in the Future.**

Retro and GJW's second attack on the Board's joint-employer determination really is a repeat of its imminent cessation argument – Retro and GJW essentially argue that, before finding a joint-employer relationship, the Board needed to prove that Retro and GJW's relationship would not change in the future.<sup>7</sup> Three responses adequately answer this argument.

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<sup>7</sup> Retro and GJW make the second paragraph of footnote 7 of the Board's decision the focus of their argument that the Board's joint-employer finding was speculative. In the paragraph, the Board expresses doubt that the relationship

First, Retro and GJW can point to no authority supporting the proposition that the Board, in analyzing whether two companies are joint-employers, must take into account the possibility of future changes to the relationship between the companies. The Board's consistent practice when analyzing joint-employer claims, under *Browning-Ferris* and prior case law, is to analyze the facts that are available for inclusion in the record at the time of the pre-election hearing. In this case, the Board based its joint-employer decision on aspects of Retro and GJW's relationship as it existed for at least two years prior to the hearing. (JA 260 at n. 7.)

The only authority for the Respondents' argument appears to be former-Board Member Miscimarra's dissent from the underlying Board decision, which contains an identical argument that the Union should have been required to show that the Respondents' joint-employer relationship would not change in the future. (JA 263.) Member Miscimarra's dissent similarly lacked any authority supporting

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between Retro and GJW would cease having the attributes of a joint employer in the future. (JA 260 n. 7.) In so arguing, the Board Majority was making an alternative argument responding to arguments of dissenting Board Member Miscimarra. Respondents ignore the first paragraph of the footnote which makes the more decisive point that speculation regarding future developments between joint-employer entities is not, and never has been, relevant to finding that two entities are joint-employers based upon currently available evidence. (JA 260 n. 7.) That said, Respondents' nevertheless misread the Board in interpreting its alternative argument as engaging in speculation. The more fair reading is that the Board is offering its observation that it would be very *difficult* for Retro and GJW to re-arrange their relationship to eliminate all joint-employment characteristics. As such, the Board was making an assessment of the present, rather than a prediction about the future.

his novel view that existence-in-perpetuity should be added as an element of a joint-employer analysis. Miscimarra's only support for his view was that the joint-employer analysis is "highly fact specific" and facts can change in the future. (JA 263) Fact-specific standards are common in the law, however, and that ordinarily is not a basis for requiring that parties speculate regarding the probability that those specific facts will change in the future. Fortunately, this is not the Board's law, so the argument is irrelevant, in addition to being illogical.

Second, predicting the future is inherently speculative, so it is difficult to imagine how the Board validly could make factual findings about future possibilities. The argument that a joint-employer determination must involve a prediction that a relationship between two entities will not significantly change in the future, therefore, would effectively make joint-employer determinations impossible, especially in the construction industry.<sup>8</sup>

Change is ever-present in modern life, which is one of the core reasons that the NLRA exists. *See* 29 U.S.C. § 151 (identifying as a goal of the NLRA to "stabiliz[e] ... working conditions within and between industries"). The Act has as a central purpose to "encourage the practice and procedure of collective

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<sup>8</sup> As the Board noted, "[u]npredictability and projects of limited duration are typical in the construction industry." (JA 261 n. 8.) If the Board did require parties to show that a joint-employer relationship definitely would not change in the foreseeable future, the requirement effectively would preclude joint-employer relationships in the construction industry.

bargaining,” 29 U.S.C. § 151, to provide workers with a sense of agency in managing that change. The presence of constant industrial change, therefore, is an important justification *for* collective bargaining, not a reason to preclude it.

Here, the result of the Board’s joint-employer finding was that the Board ordered an election that could provide workers with a meaningful opportunity to influence the future developments in the relationship between Retro and GJW, whatever those may be. The Board directly advanced the purposes of the Act by affording employees the opportunity to take an active role in their employers’ future development. This Court now should complete the process of providing Retro and GJW’s employees the opportunity to participate in their employers’ future relationship by enforcing the Board’s Order in this case.

## CONCLUSION

Based upon the foregoing, the Union respectfully requests that this Court enforce the Board's Decision and Order, dated September 21, 2017, in NLRB Case No. Case 05-CA-195809. (JA 293-97).

June 5, 2018

Respectfully submitted,

*/s/Brian J. Petruska* \_\_\_\_\_

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