

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**BROWNING FERRIS INDUSTRIES OF
CALIFORNIA, INC. d/b/a BFI NEWBY ISLAND
RECYCLERY AND FPR-II, LLC d/b/a
LEADPOINT BUSINESS SERVICES,
A JOINT EMPLOYER**

and

Case 32-CA-160759

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

**COUNSEL FOR THE GENERAL COUNSEL'S STATEMENT OF POSITION
IN RESPONSE TO THE REMAND OF THE D.C. CIRCUIT**

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**I. INTRODUCTION AND
STATEMENT OF THE ISSUES**

This statement of position is submitted in response to the remand of the D.C. Circuit in this case. *See Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195, 1219-22 (D.C. Cir. 2018). The D.C. Circuit expressed two concerns warranting remand: (1) the court concluded that the Board's novel joint-employer standard failed to differentiate between those aspects of indirect employer control that are relevant to joint-employer status, and those that are not relevant to the joint-employer inquiry because they are the types of control that are typical of company-to-company contracting and not control of employment terms, 911 F.3d at 1219-21; and (2) the court questioned the Board's application of the second prong of the Board's novel standard in *BFI* -- *i.e.*, whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of

employment to permit meaningful collective bargaining -- and then concluded that the Board had not clarified what terms are essential to make collective bargaining “meaningful” or what “meaningful collective bargaining” entails in this context, *id.* at 1221-22. These concerns expressed by the D.C. Circuit, as discussed below, exemplify the problems with the new *BFI* joint employer standard.

In answering the D.C. Circuit’s concerns, as discussed below, the Board should use the court’s remand as an opportunity to correct the significant errors made in the underlying representation case (“R-case decision”) here, 362 NLRB 1599 (2015). Thus, the Board should return to its long-standing previous standard for a joint employer finding even though the pending rulemaking may further clarify its joint-employer standard. As to the particulars of the instant case, the Board should find that the evidence does **not** demonstrate sufficient control by BFI over essential terms and conditions of employment of the Leadpoint employees, but instead demonstrates only indirect control that is intrinsic to ordinary third-party contracting relationships. The Board should clarify which terms are essential terms and conditions of employment. The Board should reconsider its previous ruling in this case and hold that indirect or unexercised potential control alone cannot support a joint employer finding. The Board also should find that, in any event, no meaningful bargaining could be accomplished with both BFI and Leadpoint at the table. Therefore, the Board should affirm the Regional Director’s initial finding that BFI is not a joint employer of Leadpoint’s employees.

II. ARGUMENT

A. The D.C. Circuit Decision Did Not Address the New Joint Employer Standard in the R-case Decision and Permits the Board to Reconsider That Standard Now

Before addressing the specific issues with the Board majority's opinion in the underlying R-case decision, it is important to highlight what the D.C. Circuit majority did *not* hold. Indeed, even more significant than the two concerns that ostensibly triggered the remand is another, more central issue in this case – an issue the D.C. Circuit did not address -- the quantum of indirect or potential control of employment terms required by the Board in *BFI* for a joint employer finding. The Board should now reconsider this issue.

The D.C. Circuit majority recognized that, as an evidentiary matter, the Board is permitted to *consider* potential control and/or indirect control as factors in its joint-employer analysis. 911 F.3d at 1213 (“the Board’s conclusion that an employer’s authorized or reserved right to control is relevant evidence of a joint-employer relationship wholly accords with traditional common-law principles of agency”); *id.* at 1216 (“indirect control can be a relevant factor in the joint-employer inquiry”). The principle that such evidence may be, and traditionally has been, *considered* by the Board, however, was never seriously in dispute, and this principle was expressly acknowledged by even the dissenting Board members in the R-case decision. 362 NLRB at 1630-31. The critical question in the R-case decision, however, was whether joint-employer status could be found on evidence of *only* indirect control and/or unexercised potential control – and the D.C. Circuit

expressly stated that it was *not* addressing this most important question. 911 F.3d at 1218 (“whether indirect control can be ‘dispositive’ is not at issue in this case”); *id.* at 1213 (“this case does not present the question whether the reserved right to control, divorced from any actual exercise of that authority, could alone establish a joint-employer relationship”). Put simply, the Board’s decision to *consider* indirect and potential control was not a change from prior law.

Rather, the significant change made by the Board in the R-case was to say that joint employer status can be found even where there is *no* substantial direct and immediate control. *See* 362 NLRB at 1613-14. On this question, the D.C. Circuit expressly was silent. This is of the utmost importance here, because it means that the Board can, and should, now reverse the error made in the R-case decision without running afoul of, or being in any way inconsistent with, the D.C. Circuit majority’s opinion. Accordingly, the Board should now hold that an entity should not be found to be a joint employer based *solely* on indirect or unexercised potential control of employment terms. Such a conclusion would also be consistent with the Board’s current proposed joint employer rule-making.

Although it ignored this critical issue of overriding importance, the D.C. Circuit majority did conclude that the Board’s novel joint-employer standard failed to differentiate between those aspects of indirect employer control that are relevant to joint-employer status, and those that are not relevant to the joint-employer inquiry because they are the types of control that are typical of company-to-company contracting and not control of employment terms. 911 F.3d at 1219-21. In

addition, the D.C. Circuit majority addressed the second prong of the standard, *i.e.*, whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. The D.C. Circuit majority stated that the Board had not "meaningfully appl[ied]" this prong and had not clarified what terms are essential to make collective bargaining "meaningful" or what "meaningful collective bargaining" entails in this context. *Id.* at 1221-22.¹

These concerns expressed by the D.C. Circuit are substantial and more than amply justified. Indeed, the same concerns have been raised repeatedly in response to the Board's efforts to radically alter the traditional joint-employer standard. Thus, even in the underlying R-case decision, the dissenting Board members underscored the majority's flawed analysis in these areas by noting that a customer's control over a contractor at its facility to prevent disruption of its own operations "is not in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor's employees." 362 NLRB at 1623 (quoting *Southern California Gas Co.*, 302 NLRB 456, 461 (1991)). The dissent further emphasized that "the majority fails to provide any guidance as to what control, under what circumstances, would be insufficient to [permit

¹ The D.C. Circuit majority also concluded that the common law independent contractor/employee analysis is inapplicable in determining joint-employer status. *Id.* at 1214-16. The General Counsel agrees with this conclusion and recommends that such analysis should not be imported into any Board analysis of joint employer status.

meaningful collective bargaining and] establish joint-employer status,” *id.*, and added that:

[u]nder the majority’s test, it is possible to find that “meaningful bargaining” cannot take place with a supplier employer alone if it lacks meaningful control over even a single “essential” facet of employment. Such a definition of meaningful bargaining has never been the law, and it cannot be reconciled with business practices that have been in existence since before the Act.

Id. at 1641.

These same issues were again addressed by the Board majority in the vacated opinion in *Hy-Brand Industrial Contractors, Ltd, and Brandt Construction Co.*, 365 NLRB No. 156, slip op. at 19 (Dec. 14, 2017),² which temporarily set aside the standard in the R-case here, by reiterating that the evidence relied on by the *Browning-Ferris* majority amounted to a collection of general contract terms and business practices common to most contracting entities, plus a few actions by BFI that had some routine impact on Leadpoint employees, and observing that it would be difficult to find any two entities engaged in an arm’s length contractual relationship involving work performed on the client’s premises that lack this type of interaction. The *Hy-Brand* majority similarly noted other flaws in the new standard by emphasizing that the *Browning-Ferris* majority failed to provide any guidance as to what degree of control, under what circumstances, would be insufficient to establish joint employer status. 365 NLRB No. 156, slip op. at 7.

² Vacated by 366 NLRB No. 26 (Feb. 26, 2018).

Indeed, even before the D.C. Circuit’s remand order in this case, the General Counsel addressed these concerns in our December 10, 2018 Comment on the Board’s proposed joint-employer rule by noting that “the almost limitless indirect control/right-to-control standard in *BFI* . . . creates joint employer relationships in nearly every contractual business relationship,” and that it “has subjected countless entities to previously unknown joint bargaining obligations, to potential joint liability for discriminatory actions of their putative joint employers or for breaches of collective-bargaining.” Comment at 2-3. The Comment also highlighted that the new *BFI* standard had “expanded the objective of collective bargaining far beyond what Congress intended” and, as a result, “fosters substantial bargaining *instability* by requiring the nonconsensual inclusion of entities with diverse and conflicting interests on the ‘employer’ side of the bargaining table.” *Id.* Based on the recognized analytical flaws listed above, although the D.C. Circuit’s decision remanding this case did not squarely address the new standard, the Board should use this opportunity to return to its long-standing prior standard for a joint employer finding, and state that it will further clarify its joint-employer standard in the pending rulemaking.³

³ We note that, while the General Counsel strongly believes that the D.C. Circuit may have inappropriately overstepped its role when, in dictum, it seemed to require the Board to establish a joint-employer *rule* that conforms to the D.C. Circuit’s interpretation of common law, 911 F.3d at 1208, nothing in the D.C. Circuit’s opinion should be read as interfering with the Board’s discretion to return to its traditional joint-employer standard requiring evidence of actual “substantial direct and immediate control” of employees’ terms and conditions of employment. Indeed, the dissenting Board members in the R-case decision and the majority in the

B. The Board Should Make Clear That Only a Joint Employer Standard Based on Substantial Direct and Immediate Control Is Workable

The R-case decision underlying the current case set forth a standard that was flawed as a matter of labor law and misguided as a matter of labor policy. The Board should thus reconsider its joint employer standard and make clear that only a joint employer standard based on substantial direct and immediate control of employment terms is practically workable.

The *BFI* R-case decision abandoned a long-standing test that had provided a significant measure of certainty and predictability and replaced it with a vague and ambiguous standard that allows the possibility of imposing unworkable bargaining obligations on multiple entities in a wide variety of business relationships. This change has also subjected countless entities to previously unknown joint bargaining obligations, to potential joint liability for discriminatory actions of their putative joint employers or for breaches of collective-bargaining agreements to which they do not know they were bound, and to primary strikes, boycotts, and picketing that would previously have been unlawful secondary activity. Under the novel rule set forth in the R-case, virtually all user employers, franchisors, subsidiaries, etc., would meet the joint-employer test simply because their contracts with the entities that actually employ the employees at issue almost always reserve for them the *potential* to control the employees' working conditions -- even if only because the

Board's vacated *Hy-Brand* opinion both set forth analyses of the common law that were at least as persuasive as those relied upon by the majority in the R-case and the dissent in *Hy-Brand*.

user employer or franchisor can always simply cancel the contract if it is not satisfied with the supplier employer's or franchisee's terms and conditions of employment. Under the current standard, parties to such contracts can never know if they will ultimately be considered joint employers at some time in the future. Thus, a return to the long-standing traditional test that focuses on the presence of actual "substantial direct and immediate control" is much needed to avoid the almost limitless indirect control/right-to-control standard that creates joint-employer relationships in nearly every contractual business relationship.

The R-case decision here has had the effect of disrupting thousands, if not hundreds of thousands, of business relationships, contractual relationships, and, ultimately, bargaining relationships because the new joint-employer standard now extends its reach to decades-old business relationships, as well as business partners that have never before been thrust into their customers' or vendors' labor disputes and whose presence in them can only serve to impede the likelihood of their resolution. The majority in the R-case purported to revisit the Board's joint-employer standard because of the supposed great expansion in use of temporary help services agencies starting in the 1990s and the increasing number of individuals who work for such agencies, even though the majority could point to no pressing labor problem in need of correction that had arisen from either the supposed expansion of this type of workforce or the application of the traditional joint-employer standard to this workforce situation. 362 NLRB at 1609. Nevertheless, the resulting joint-employer standard applies expansively well

beyond the claimed increased temporary help services agencies and their clients to multiple well-settled business and contractual relationships with stable labor relationships – the stability of these relationships is now being destabilized by these new legal obligations that did not exist when the relationships were established.

Further, the legal standard adopted in the R-case not only expands the scope of putative joint-employer entities in the NLRA context, but also creates potential conflicts with other federal and state statutory schemes, by extending joint-employer status to entities with only “indirect” or “potential” control. To the extent that this joint-employer standard diverges from such other regulatory schemes, such divergence will inevitably create inconsistencies and conflicts for businesses in their attempts to comply with the various federal and state employment and related laws. This is especially true here where courts have looked to the NLRA for guidance in fashioning standards for analysis under Title VII and other federal employment laws. *In re Enterprise Rent-A-Car Wage & Hour Emp’t Practices Litig.*, 683 F.3d 462, 469-70 (3d Cir. 2012) (discussing the standards used in FLSA, ADEA, and Title VII cases).

In contrast to such instability and conflict with other laws, the long-standing prior Board criteria for determining joint-employer status provided employers with substantial stability and predictability in entering into labor supply arrangements in response to fluctuating market needs, served to reduce the scope of labor disputes, and limited the circumstances in which non-employing entities could be responsible for participating in bargaining. In this regard, we emphasize that,

while the Act encourages collective bargaining, it does so only as to an actual “employer” in direct relation to its represented employees. The Board majority in the R-case expanded the objective of collective bargaining far beyond what Congress intended, and far beyond what promotes industrial stability. Rather, that test fosters substantial bargaining *instability* by requiring the nonconsensual inclusion of entities with diverse and conflicting interests on the “employer” side of the bargaining table. Indeed, the very commencement of good-faith bargaining may often be delayed by disputes over whether the correct “employer” parties are present, the respective legal and bargaining obligations of the various “employer” parties, and the bargaining proposals to be offered at the table. The outcome of this unpredictability is irreconcilable with the Act’s overriding policy to “eliminate the causes of certain substantial obstructions to the free flow of commerce.” 29 U.S.C. § 151.

Returning to the Board’s previous long-standing rule would also resolve another primary drawback presented by the Board’s R-case decision, specifically, the lack of any meaningful limit on who can be deemed a joint employer of another’s workers. It eliminated the appropriate emphasis on whether a putative joint employer has actual direct and immediate control of essential terms of employment, which establishes a discernible and rational line between what does and does not constitute an employer-employee relationship under the Act. The Agency discretion when examining factors like indirect or potential control afforded by this change means that no contracting business entity can ever be certain that it will not be

faced with some future Board determination that it is a joint employer based on the incomprehensible view that bargaining would somehow be more effective if more parties are forced to be at the table.

As a result, the new standard provides minimal, if any, guidance as to what factors are significant for evaluating joint-employer status. For example, a user employer receiving employees from a supplier employer always exercises ultimate control over the supplier's employees at its facility, if only to retain the potential to take action to prevent disruption of its own operations, to prevent unlawful conduct, or to ensure that it is obtaining the level and quality of services it has contracted for, at the cost for which it contracted. *See, e.g., Southern California Gas*, 302 NLRB at 461. Efforts by a user employer to monitor, evaluate, and improve the performance of supplied employees, as opposed to controlling the manner and means of their performance (and especially the details of that performance), are typical of the relationship between a company and its supplier and should not make the supplier's workers employees of the user employer. The Board should make clear that the existence of this kind of oversight, therefore, cannot be an appropriate basis for finding that the user employer is a joint employer of its supplier's employees.

Absent such clarification and adoption of a clear standard by which companies can structure their relationships, countless entities are potentially subject to significant financial liabilities for merely ensuring that they are receiving the services for which they contracted. Collective bargaining also appears to be

required wherever there is some modicum of interdependence between or among employers. This requirement is much more likely to obstruct the free flow of commerce, rather than promote it. Such outcomes are likely because of the virtually limitless discretion given in this area under the new standard to after-the-fact decision makers, even though the deciders may have no grounding in the realities of business contracting or the logistical necessities of efficient, effective, and productive collective bargaining.

The new standard adopted by the Board majority in the R-case decision relies on an after-the-fact assessment of every aspect of a business relationship between two entities. Because of this, the uncertainty created by that decision's vague standard created an unreasonable risk that parties may only discover subsequently, following years of costly litigation, that they have been unlawfully absent from negotiations in which they were legally required to participate, or conversely that they unlawfully injected themselves into collective bargaining between another employer and its union(s) based on a relationship that ultimately turned out to be insufficient to result in a joint-employer finding. As the dissenters in the R-case decision put it, the Board owed a "greater duty to the public than to launch some massive ship of new design into unsettled waters and tell the nervous passengers only that 'we'll see how it floats.'" 362 NLRB at 1646 (Members Miscimarra and Johnson, dissenting). The lack of concern for the real-world consequences of these changes does a disservice to the parties that have to operate their businesses under the Board's decision.

The clarity and predictability of the Board's prior standard also better served the Congressional objective, embodied in the Act, of having collective bargaining be a process that could conceivably produce labor agreements. One of the key analytical problems in potentially widening the net of who must bargain is that, at some point, agreements will *not* be achievable because the different parties involuntarily thrown together as negotiators by this test predictably have widely divergent interests. For example, a company that contracts with another to supply labor at a fixed price per hour may be considered a joint employer and have an obligation to bargain over wages, even though the supplier employer is the actual employer of the employees and payer of the wages. Should the user company be compelled to bargain over wages of the supplier's employees, the joint employers may have irreconcilable differences over wage rates since any wage increase will not affect the user employer but will affect the supplier's costs of performing the contract. Injecting an additional party into the collective bargaining process with interests that do not align with the co-employer's concerning a critical element of collective bargaining, such as wages, will make achieving agreement much less likely. Not surprisingly, the majority in the R-case never addressed the critical problem of how differences in the bargaining positions of the employers could be resolved. Thus, the expansion of bargaining obligations to additional business entities has the effect of destabilizing existing bargaining relationships as well as complicating new ones.

Further, this expansion of a joint-employer finding to require additional

business entities to be at the bargaining table, or potentially face liability for violation of Section 8(a)(5) and 8(d) of the Act, conflicts with 80 years of prior Board precedent. By requiring a joint employer to be at the bargaining table along with the co-employer, the NLRB for the first time has, in effect, dictated who must sit at the bargaining table. The Board has not required this of international unions that control their locals' bargaining authority; nor should the Board require bargaining by a joint employer even if it may control certain terms and conditions of employment. Such applications of the current joint-employer standard yield legal obligations that are a gross departure from Board precedent and practicality.

Not only did this novel test impermissibly expand and confuse bargaining obligations under Section 8(a)(5) and 8(d), it also did violence to other provisions of the Act that depend on a determination of who is, and who is not, the “employer.” Chief among them is Section 8(b)(4)(ii)(B), which prohibits secondary economic protest activity, such as strikes, boycotts, and picketing. That section of the Act “prohibits labor organizations from threatening, coercing, or restraining a neutral employer with the object of forcing a cessation of business between the neutral employer and the employer with whom a union has a dispute,” *Teamsters Local 560 (County Concrete Corp.)*, 360 NLRB 1067, 1067 (2014), but does not prohibit striking or picketing the primary employer, i.e., the employer with whom the union does have a dispute, *Steelworkers v. NLRB (Carrier Corp.)*, 376 U.S. 492, 499 (1964). An entity that is a joint employer with the employer involved in a labor dispute is equally subject to union economic protest activities. *See, e.g., Teamsters*

Local 688 (Fair Mercantile), 211 NLRB 496, 496-97 (1974) (union's picketing of a retailer did not violate Section 8(b)(4)(ii)(B) because retailer was the joint employer of employees of a delivery contractor with which the union had a labor dispute). To put this in practical terms, previously, a union in a labor dispute with a supplier employer typically could not picket a user entity to urge that entity's customers to cease doing business with the user, with the object of forcing the user employer to cease doing business with the supplier employer, unless the supplier was on site. The Board's expansion of the joint-employer doctrine swept many more entities into primary-employer status as to labor disputes that are not directly their own. As a result, unions may be permitted to lawfully picket or apply other coercive pressure to either or both joint employers as they chose, even though the targeted joint employer may not have direct control or even *any* control over the particular terms or conditions of employment that are the subject of the labor dispute. This result is clearly contrary to the Act's object of limiting the spread of economic coercion beyond the entities actually involved in a labor dispute. For all these reasons, along with its reconsideration of the case in light of the D.C. Circuit's remand, the Board should return to its long-standing previous standard for a finding of joint employment, and further clarify its joint-employer standard in the pending rulemaking.

C. The Board Should Define Essential Terms and Conditions of Employment and the Degree and Type of Control Required for a Joint-Employer Finding

Consistent with the D.C. Circuit's remand, the Board should provide guidance, subject to further elaboration in its rulemaking, on the essential employment terms and the requisite degree of control over those terms necessary for a joint employer finding. As a starting point, the Board stated in its seminal *Laerco* and *TLI* decisions that the focus of "essential" terms is whether an alleged joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." *Laerco*, 269 NLRB 324, 325 (1984); *TLI*, 271 NLRB 798, 798 (1984), *enforced sub nom.*, *Teamsters Local 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985). Notably, employees' wages and benefits are not expressly on this list, even though these particular terms are the most significant and essential subjects of employees' terms and conditions of employment and, typically, the most central subjects of collective bargaining. Indeed, the Board looks primarily at who provides wages and benefits in determining employer status in other contexts. *See, e.g., Management Training Corp.*, 317 NLRB 1355, 1360 (1995) (in determining whether to assert jurisdiction over a private employer who is arguably controlled by an exempt entity, the Board looks to whether the employer "lacks control over essential terms and conditions of employment, e.g., wages and benefits"), *reconsideration denied*, 320 NLRB 131 (1995). Thus, the Board should clarify on remand that wages and benefits also are essential terms for this analysis. *See, e.g., TLI*, 271 NLRB at 799 (finding no joint-

employer status because, among other reasons, the putative joint employer had input in, but did not control, the “economics of the relationship” such as wages and other economic benefits). Indeed, under other federal statutes, factors normally used in determining whether an entity is a joint employer include (1) authority to hire and fire employee, (2) authority to promulgate work rules and assignments and set conditions of employment such as compensation and benefits, and (3) possession of day-to-day supervision of employees, including employee discipline. *In re Enterprise Rent-A-Car Wage & Hour Emp’t Practices Litig.*, 683 F.3d at 469-70 (discussing the standards used in FLSA, ADEA, and Title VII cases). Consistent with that approach, the Board should expressly list the “essential terms and conditions of employment” factors necessary to determine whether a joint-employer relationship exists, including control over (1) the determination of wages and benefits, (2) hiring and firing of employees, and (3) discipline, supervision and direction of employees. Such a list will better guide all parties as to what their obligations are.

The Board should also provide guidance as to what constitutes the requisite level of control over employees’ terms and conditions of employment to support a joint employer finding. In this regard, the Board should reiterate that even actual supervision and direction of employees is insufficient to establish joint-employer status if that supervision/direction is “limited and routine.” *See, e.g., Laerco*, 269 NLRB at 326; *TLI*, 271 NLRB at 799; *Flagstaff Medical Center, Inc.*, 357 NLRB 659, 667 (2011) (daily supervision of housekeeping employees was “limited and routine”),

enforcement denied on other grounds, 715 F.3d 928 (D.C. Cir. 2013); *Teamsters Local 776 (Pennsylvania Supply)*, 313 NLRB 1148, 1154 (1994) (assignment of drivers' loads and destinations and, in some instances, requiring drivers to follow specified routes and dealing with permit problems was "limited and routine"). Thus, no joint-employer relationship should be found 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." *AM Property Holding Corp.*, 350 NLRB 998, 1001 (2007), *enforced in pertinent part*, 647 F.3d 435 (2d Cir. 2011).

In addition, the Board should explicitly state that provisions in a contractual agreement between two business entities that provide for employment terms of one of the entities' employees do not in and of themselves indicate the joint possession of control over such terms and conditions of employment. The mere inclusion of an employment term in the parties' contract (e.g., a wage rate for a supplier's employees) could simply be a statement of what the supplier employer itself was planning to do (or pay) on its own and does not demonstrate, absent other evidence, that a user employer required or "possess[ed] and actually exercise[d]" control over that term of employment.

Moreover, the Board should make it clear that, for an entity to be deemed a joint employer subject to a bargaining obligation or for vicarious liability for a co-employer's violation of a bargaining obligation, that entity must control *all* essential terms and conditions of employment factors. Basing a determination of joint

employer on control of a single term and condition of employment would certainly be inconsistent with the weight of authority and prior Board law. *See, e.g., NLRB v. Browning-Ferris Indus. of Pa.*, 691 F.2d 1117, 1123 (3d Cir. 1982); *TLI*, 271 NLRB at 799 (no joint employer finding based on lack of sufficient control over a combination of terms and conditions of employment). But, even beyond that, given the grave concerns about subjecting an arm's-length business partner to a bargaining obligation with a labor organization representing another employer's employees', the threshold for finding a joint-employer relationship in this context should be high and such findings of joint-employer status should be rare. It makes no sense for an entity that, for example, codetermines even most terms of employment, but not wages and benefits to be compelled to appear at the bargaining table. For the reasons discussed above, requiring such an entity to bargain would be an exercise in futility with respect to achieving, let alone quickly achieving, a collective-bargaining agreement.

On the other hand, control of only some essential employment terms may be sufficient to establish joint-employer liability for different types of unfair labor practices, such as unlawful discipline or discharge for protected activity, committed by a co-employer that takes no part in the daily direction or oversight of the relevant employees. The reduced showing is justified because the Board and courts generally do not impose liability on a joint employer unless: (1) the non-acting, supplier-joint employer knew or should have known that the user-joint employer acted against the employee for unlawful reasons, and (2) the non-acting, supplier-

joint employer acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it may have possessed to resist the action. *See Capitol EMI Music*, 311 NLRB 997, 1000 (1993), *enforced*, 23 F.3d 399 (4th Cir. 1994); *America's Best Quality Coatings Corp.*, 313 NLRB 470, 471 (1993), *enforced*, 44 F.3d 516 (7th Cir. 1995).

D. The Board Should Now Make Clear That There Can Never Be “Meaningful Collective-Bargaining” By Forcing Multiple Employers to Bargain for the Same Unit of Employees

The Board should make clear that requiring multiple employers to bargain with the same unit of employees is inconsistent with “meaningful collective bargaining.” The D.C. Circuit’s opinion in this case concluded that the Board had not clarified what “meaningful collective bargaining” entails in this context. In that regard the Court was being charitable -- there can never be meaningful collective bargaining that requires multiple employers to have the same bargaining obligation with respect to the same unit of employees. As discussed above, absent agreement such as a multi-employer association, bargaining with two or more employers at the table is unworkable because the employers necessarily have different business interests. The Board should not dictate to employers, even where there is a joint-employer relationship, which entity must sit at the bargaining table with a union. The Board has never before dictated who should serve as the bargaining representative for employers or unions, and it should not do so now under the guise of joint employment. As noted above, even where international unions have had control over the bargaining strategy and proposals of local unions and dictated the

terms to which the local unions can agree or not accept, the Board has never required that the international union sit at the bargaining table or otherwise act as a bargaining representative in a collective bargaining negotiation. In such situations, the international union is in the same position as a corporate parent company or alleged joint employer that can control some of the terms and conditions of employment of bargaining unit employees. As the Board does not require an international union or a corporate parent or a Board of Directors or an apprenticeship training program to be a party to collective bargaining merely because it may possess de facto control of the union's proposals as to certain terms of employment, it also should not force a putative joint employer to bargain collectively. Thus, to promote productive and effective collective bargaining, it is to the advantage of unions as well as employers to avoid dictating the specific representatives of the parties at the table even where a joint-employer finding may be warranted. Under such circumstances, the joint-employer entity that is involved in bargaining must try to agree with the other joint-employer entity on issues raised in bargaining that the other entity is primarily responsible for establishing.

As the foregoing demonstrates, the concept set out for the first time in the Board majority opinion in the R-case decision, *i.e.*, that each employer must somehow bargain over only the terms it directly controls, is simply unworkable and doesn't practically fit with the kind of give-and-take and trade-offs among employment terms that are an essential element of actual collective bargaining. *Compare Central Transport*, 306 NLRB 166, 166 (1992) (“[t]he parties having

stipulated that [user] is a joint employer with [supplier], it follows under well-established Board law that [user's] bargaining duty is equal to that of [supplier]”), *enforcement denied on other grounds*, 997 F.2d 1180 (7th Cir. 1993), *with BFI*, 362 NLRB at 1600 n.7, 1614 (“a joint employer will be required to bargain only with respect to those terms and conditions over which it possesses sufficient control for bargaining to be meaningful”). The only way bargaining can be effective is for there to be *one* employer at the table bargaining over *all* terms and conditions. And current law reinforces this approach because it permits one joint employer to designate the other as its representative in bargaining, which is likely to occur. *See, e.g., General Electric Co. v. NLRB*, 412 F.2d 512, 516-17 (2d Cir. 1969) (noting that the “right of employees and the corresponding right of employers . . . to choose whomever they wish to represent them in formal labor negotiations is fundamental to the statutory scheme”). For this reason, the statement in the underlying R-case decision here that both employers are subject to a “bargaining obligation” makes no sense both as a practical matter and under Board law. Therefore, the Board should return to well-established prior law and expressly recognize that a joint employer does not have a formal “bargaining obligation.”

That is not to say that a joint-employer finding should be meaningless as to collective bargaining. Once there has been a finding of joint employer status, each of the joint employers is fully responsible for employees’ terms and conditions of employment. Thus, for example, both joint employers are prohibited from unilaterally changing terms and conditions for bargaining unit employees in the

absence of an impasse or on some other lawful basis. Likewise, joint employers may also be responsible for remedying unfair labor practices committed in negotiations. But this kind of joint responsibility and liability for conduct that violates Section 8(a)(5) is wholly distinguishable from a requirement that both employers actively participate in bargaining with the union.

E. BFI Is Not a Joint Employer of Leadpoint's Employees

The evidence in the R-case did not demonstrate that BFI possessed sufficient control over the essential terms and conditions of employment of Leadpoint's employees, but instead only indirect control that is intrinsic to ordinary third-party contracting relationships. Moreover, as discussed above, it is clear that there can be no meaningful bargaining with both BFI and Leadpoint at the table. Indeed, the majority in the R-case decision essentially conceded that the Regional Director was correct in finding no joint-employer status under the long-standing previous legal standard to which the Board should return. In finding joint-employer status, the Board majority in the R-case decision primarily relied upon the following three points of evidence, summarized below (see 362 NLRB at 1616-18, 1634):

- (1) The agreement between BFI and Leadpoint: (A) gives BFI the right to require that Leadpoint meet or exceed BFI's standard employee selection procedures and to reject or discontinue a worker referred or employed by Leadpoint; (B) requires that all applicants comply with BFI's safety standards and pass drug tests; (C) limits Leadpoint employees to six months

of work at BFI; and (D) prohibits the hiring of workers deemed by BFI to be ineligible for rehire.

However, Leadpoint runs its own day-to-day hiring process. Without BFI's involvement or interference, and on the only two occasions on which BFI has ever attempted to have any employees dismissed from its facility, a BFI official merely reported the two employees' misconduct to Leadpoint and requested that they no longer be assigned to work at BFI. Leadpoint then discharged the employees only after conducting its own investigation. Thus, the provisions referred to above, both on paper and in practice, merely constitute common contractual and operational requirements intended to ensure a safe and efficient workplace for the temporary supplemental workforce, while limiting to routine matters BFI's intrusion into the employment relationship between Leadpoint and its employees.

(2) BFI: (A) controls the speed of the streams and specific productivity standards for sorting and employees' use of line stop switches; (B) specifies the number of Leadpoint workers it requires, the timing of employees' shifts, and when overtime is necessary; and (C) assigns the specific tasks that need to be completed by Leadpoint employees and where workers are to be positioned, and oversees employees' work performance, including signing off on the "hours of services rendered" by Leadpoint employees.

Nevertheless, Leadpoint is solely responsible for selecting the specific employees who will work during a particular shift and which employees work overtime, and many of the directives listed above are given to Leadpoint employees solely by

Leadpoint supervisors. Thus, in general, BFI directly controls its own work processes and monitors its use of Leadpoint's services and personnel, which may also indirectly have limited and routine impact on Leadpoint's employees, while Leadpoint itself generally selects, schedules, and directs its own employees.

(3) Leadpoint is prohibited from paying employees more than BFI employees performing comparable work, and there is an apparent requirement of BFI approval for any employee pay increases under the Employers' cost-plus contract.

But Leadpoint itself determines employees' pay rates, administers all payments, retains payroll records, and is solely responsible for providing and administering benefits. Thus, in this area as well, while BFI and Leadpoint may jointly determine the relationship between the two companies, including reducing competition between them as to compensation, it is Leadpoint alone that directly controls and administers the wages and benefits given to its own employees.

As the dissent in the R-case emphasized, the sum total of this evidence amounts to a collection of general contract terms or business practices that are common to most contracting employers, plus a few limited and routine BFI actions that had only minor impact on Leadpoint employees. It would be difficult to find any two entities engaged in an arm's-length contractual relationship involving work performed on the client's premises that lack this type of interaction, and it is not sufficient to establish joint-employer status. *See* 362 NLRB at 1634.

For these reasons, the Decision and Direction of Election (“D&DE”) in this case, applying the then-applicable proper legal standard, found that “BFI and Leadpoint are not joint employers of the employees in question because BFI does not ‘share, or co-determine [with Leadpoint] those matters governing the essential terms and employment.’” D&DE at 15. The D&DE found that, as to Leadpoint employees’ wages and benefits, “the record is clear that Leadpoint sets their pay scale and is the sole provider of their benefits.” *Id.* The D&DE also found that “the authority to control the recruitment, hiring, counseling, discipline, and termination of Leadpoint employees is vested solely with Leadpoint.” *Id.* at 16. The D&DE further found that “BFI does not possess the authority to terminate Leadpoint employees.” *Id.* at 16-17. Finally, the D&DE found that “BFI does not control or co-determine Leadpoint employees’ daily work.” *Id.* at 17-19 (“the record is clear that Leadpoint [employees] are supervised solely by Leadpoint leads and [a Leadpoint manager]. Nothing in the record supports Petitioner’s argument that BFI controls Leadpoint’s employees’ daily work functions . . . the record establishes that Leadpoint solely supervises its own employees . . . is solely in control of scheduling its own employees’ shifts, scheduling its own employees for overtime, running the Leadpoint employee sick line, and approving or rejecting Leadpoint employees’ requests for vacation . . . and Leadpoint has the sole discretion to assign or grant individual employees’ overtime work”).

Indeed, it might well be argued that there is less evidence of a joint-employer relationship in the present matter than there was in either *TLI* or *Laerco*. In *TLI*,

the alleged joint employer, Crown Zellerbach (“Crown”): (1) directly instructed the employees as to which deliveries needed to be made on a particular day; (2) supplied incident reports when it observed a driver engage in conduct adverse to Crown’s operation; (3) received reports of accidents involving the drivers at issue; (4) was “solely and exclusively . . . responsible for maintaining operational control, direction, and supervision” of the drivers; (5) owned the facility at which the drivers reported daily and returned their trucks upon the completion of a route; (6) received reports of mechanical or other problems on the road experienced by the drivers; (7) kept all drivers’ logs and records; and (8) attended two bargaining sessions with TLI, in which Crown outlined its economic position and its need to cut labor costs substantially in order to remain in its business. *TLI*, 271 NLRB at 798-99. Despite this evidence, the Board concluded that the control exercised by Crown was insufficient to establish that Crown jointly employed the workers. In the instant case, there is no evidence of BFI exercising any degree of “control” at all similar to the control exercised by Crown in *TLI*.⁴

Similarly, in *Laerco*, the customer and alleged joint employer, Laerco: (1) supplied the vehicles used by the drivers employed by CTL; (2) provided direction to CTL's driver on their routes; (3) maintained the right to impose safety requirements

⁴ Although the Board cited evidence demonstrating that BFI’s Operations Manager twice alerted Leadpoint of instances in which he believed he observed misconduct committed by Leadpoint employees as BFI’s control of Leadpoint employees, this isolated conduct shows the opposite – BFI’s non-control over Leadpoint employees. Rather, the BFI Operations Manager alerted Leadpoint to the misconduct so that Leadpoint – as the true employer of the workers -- could take appropriate employment action.,

for the driver; (4) determined driver qualifications; (5) reserved the right to reject drivers provided by CTL who did not meet Laerco's qualifications; (6) required CTL to furnish reports, records, and data as may be necessary to enable Laerco to comply with government regulations; (7) requested the removal of a CTL employee assigned to it; (8) entered into a cost-plus contract with CTL for CTL's services; (9) reserved the right to inform the drivers of their job duties; (10) provided all supervision to the drivers at the Laerco facility; and (11) attempted to resolve any problems that arose concerning a CTL driver. *Laerco*, 269 NLRB at 324-25. Taking all these factors into consideration, the Board still ultimately concluded that Laerco did not jointly employ the drivers at issue.

Here, there is less evidence that BFI provides any meaningful control over Leadpoint's employees' terms and conditions of employment. Unlike in *Laerco*, Leadpoint maintains its own management and operational supervision at the site, exclusively resolves all issues relating to its employees, provides the training and orientation for all newly-hired employees, and maintains its own personnel policies and safety standards. Thus, both *TLI* and *Laerco* support the conclusion that Leadpoint is the sole employer of the employees at issue in the instant case.

III. CONCLUSION

Accordingly, as the evidence in the instant case does not demonstrate sufficient direct, indirect or potential control by BFI over essential terms and conditions of employment of the Leadpoint employees, but instead demonstrates only indirect control that is intrinsic to ordinary third-party contracting

relationships, and because, in any event, no meaningful bargaining could be accomplished with both BFI and Leadpoint at the table, the Board should affirm the Regional Director's initial finding that BFI is not a joint employer of Leadpoint's employees. The Board should return to its long-standing previous standard for finding joint employers, and state that it will further clarify its joint-employer standard in the pending rulemaking.

DATED AT Washington, District of Columbia this 17th day of April 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 17th, 2019, a copy of the foregoing
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