

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

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**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 No. 32-CA-160759**

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

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**CHARGING PARTY'S STATEMENT OF POSITION ON REMAND**

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**Submitted by:  
Susan K. Garea  
Beeson, Tayer & Bodine  
483 Ninth Street, Suite 200  
Oakland, CA 94607  
(510) 625-9700  
sgarea@beesontayer.com**

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**I. INTRODUCTION**

The Court of Appeals remanded this case to the Board for three, limited purposes. *See Browning-Ferris Indus. of California, Inc. v. NLRB* (“*Browning-Ferris*”), 911 F.3d 1195, 1221-23 (D.C. Cir. 2018). First, to further define what forms of indirect control over employees’ terms and conditions of employment are relevant to a finding of joint employment. Second, to further define “meaningful collective bargaining” in this context and explain why the Board concluded it is possible here. Third, to further explain why the decision in this case should apply retroactively. We address each of those issues below and, in addition, point out that the holding in this case also rested on substantial evidence of direct control over terms and conditions of employment that would have led to a finding of joint employment even without the evidence of reserved and indirect control.

The Board cannot exceed the limited scope of the remand and generally reconsider or rewrite its ruling. Had the Court intended the Board to address any questions beyond the three, specific questions described above, it would have so

indicated. The Board has long held that it “does not have the authority to exceed the scope of the court’s remand.” *Sagamore Shirt Co.*, 166 NLRB 437, 437 n. 3 (1967). The holding in *Sagamore* is binding here, “Respondent, after the court’s opinion, should have petitioned the court to enlarge the scope of its remand order. As Respondent has failed to do this, the Board is bound, at this time, to determine only the issues remanded to it by the court of appeals.” *Id.* See also *Dubuque Packing Co.*, 303 NLRB No. 66 n. 19 (1991).

The General Counsel urges the Board to exceed the scope of the remand in numerous respects, yet he cites no authority for the proposition that the Board has the authority to do so. For example, the General Counsel seeks to have the Board exceed the scope of the remand to decide whether indirect control alone is sufficient to establish joint employment. This issue was neither decided by the Board, nor passed on by the Court of Appeals. See *Browning-Ferris*, 911 F.3d at 1218 (D.C. Cir. 2018) (“whether indirect control can be ‘dispositive’ is not at issue in this case.”) The General Counsel urges the Board to reject elements of the standard for assessing joint employment that were not in any way rejected by the Court nor remanded for consideration. See, e.g., GC Statement on Remand at 18-19 (urging Board to discount evidence of even direct control if it is “limited and routine”). The General Counsel urges the Board to “use this opportunity to return to its long-standing prior standard” even though the Court of Appeals upheld the key aspects of the Board’s reformulation of the standard. *Id.* at 7. The General Counsel further urges the Board to radically alter decades of its own precedent, uniformly upheld in the courts of appeals and in the Supreme Court and long predating the decision in this case, for example, by holding that an employer “must control all essential terms and conditions of employment” and that “there can never be ‘meaningful collective bargaining’ by forcing multiple employers to bargain for the same unit of employees,” *i.e.*, that there can never be joint employers that both have a duty to bargain with the same set of employees. *Id.* at 19, 21 (caps removed).

Indeed, the General Counsel goes beyond improperly urging the Board to exceed the remand by openly asking the Board to defy the Court of Appeals' construction of the common law. GC Statement on Remand at 7 fn. 3 (“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 confirms to the D.C. Circuit’s interpretation of the common law.”) But the Court of Appeals instructions concerning the common law were not dicta and it did not “seem” to require the Board to follow its interpretation. The Court ordered the Board to do so and the Board is bound to do so.<sup>1</sup> The General Counsel’s position statement is in substance an improperly styled, untimely motion for reconsideration.<sup>2</sup>

## II. ARGUMENT ON REMAND ISSUES

### A. Indirect Control

1. The Scope of the Remand is Limited; the Board May Not Eliminate or Restrict Consideration of Indirect Control that Bears On Essential Terms and Conditions of Employment

The Court remanded this case to the Board in order to better define what forms of “indirect control” are relevant to joint employer status. *Browning-Ferris*, 911 F.3d at 1219-21. That is necessary, the Court explained, in order to “prevent the Board from trenching on the common and routine decisions that employers make when hiring third-party contractors and defining the terms of those contracts.” *Id.* at 1219.

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<sup>1</sup> We do not identify all the respects in which the General Counsel urges the Board to exceed the remand and reconsider its prior decision and we do not brief *any* of those issues here because we have not been given a fair opportunity to do so for the reasons stated in the subsequent note.

<sup>2</sup> Teamsters Local 350 intends to submit a motion to strike the General Counsel’s Statement of Position. Not only is the filing in substance an untimely and improper motion for reconsideration, but in filing it styled as a statement of position on remand only days before the Charging Party’s statement was due, the General Counsel deprived the Charging Party of an adequate opportunity to respond under the Board’s rules. Thus, the Board should strike the filing and the General Counsel can, if he so chooses, file a motion for reconsideration subject, at that time, to the Charging Party’s objections that the motion will be untimely and improper under the Board’s rules.

The Board must begin its analysis of the question posed by the Court of Appeals with the Court's clear holding: "we affirm the Board's articulation of the joint-employer test as including consideration of . . . indirect control over employees' terms and conditions of employment." *Id.* at 1200. The Court of Appeals also made clear that the joint employer inquiry "is not controlled by the fact that one putative employer is an independent contractor of another." *Id.* Parties to arms-length, good faith independent contractor arrangements may nevertheless be joint employers. Relevant indirect control can be based on or coexist with a bona fide contractual arrangement.

The Court of Appeals opinion is the law of the case in these regards. The Board is not free to revisit the question of whether indirect control is relevant to employer status. Nor can the Board define the category of indirect control so narrowly as to defy the clear holding of the Court of Appeals.

The only task remaining for the Board on remand is to "distinguish evidence of indirect control that bears on workers' essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting." *Id.* at 1216. The Board must distinguish the relevant forms of indirect control from "routine decisions that employers make when hiring third-party contractors and defining the terms of those contracts," or, in other words, from "employer decisions that set the objectives, basic ground rules, and expectations for a third-party contractor." *Id.* at 1220. The Court characterized the latter as the "quotidian aspects of common-law third-party contract relationships," in other words, the ordinary aspects of contract relationships. *Id.* Among those ordinary aspects of contract relations are "routine contractual terms, such as a very generalized cap on contract costs, or an advance description of the tasks to be performed under the contract," which, the Court stated, "would seem far too close to the routine aspects of company-to-company contracting to carry weight in the joint-employer analysis." *Id.*

In performing its assigned task on remand, the Board must remember that whether an entity is a joint employer has always been a fact-intensive inquiry, requiring that “all of the incidents of the relationship must be assessed and weighed.” *NLRB v. United Insurance Co. of Am.*, 390 U.S. 254, 258 (1968). In evaluating the totality of the circumstances, even “slight” or “minor” factual differences may lead to different outcomes. *Holyoke Visiting Nursing Assn. v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993); *North American Soccer League v. NLRB*, 613 F.2d 1379, 1382-83 (5th Cir. 1980). Categorical exclusions of evidence do not comport with the joint-employer framework under the common law. Indeed, the factual context will influence the type of control needed to prove joint employment. The Board may not set limits on consideration of indirect control that are narrower than the common law. Thus, the Board should adopt the Court’s articulation of the guiding principle -- the relevant forms of indirect control “bear on the ‘essential terms and conditions of employment.’” *Browning-Ferris*, 911 F.3d at 1221.

The type of indirect control that would not be relevant comprises indirect control that does not implicate the essential terms and conditions of work, but instead represents routine aspects of company-to-company contracting that do not bear on the essential terms and conditions of employment. The Court explained that a “very generalized” cap on contract costs or an “advance description of the tasks to be performed under the contract” or “the basic contours of a contracted-for-service” is not relevant. *Id.* at 1220, 1221. “Global oversight,” *i.e.*, oversight needed to insure that the “advance description of the tasks to be performed under the contract” are, in fact, performed, is not relevant. *Id.* at 1220.

By using the terms “advance,” “basic contours,” and “global,” the Court intended to distinguish contractual specification of the services to be provided and overall assessment of whether those services are being provided, from relevant forms of indirect control of employees, *even if* the purpose of the later is to insure that the desired services

are performed. After all, even a single, undisputed employer supervises its employees to insure that desired services are performed, not to intentionally establish its employer status, so the latter motive cannot possibly cause the supervision to be discounted simply because the question at issue is one of joint employment. A contractor specifies the services to be performed and assesses the services actually performed, raising any deficiencies with the other party to the contract. An employer gives direction to employees, directly or indirectly, about what services to perform, how to perform them, whether there are defects in the performance, and how to correct any defects.

In sum, all indirect control that bears on the essential terms and conditions of employment can be relevant.

2. BFI Exercised Indirect Control Relevant to the Joint-Employer Analysis

After more clearly articulating the standard -- that the indirect control considered relevant must bear on the essential terms and conditions of employment and not constitute “the routine parameters of company-to-company contracting” -- applying it to this case is straightforward. There is ample evidence of indirect control that bears on the essential terms and conditions of employment and is more than “the routine parameters of company-to-company contracting.” The “routine parameters of company-to-company contracting” include specification of the product or services to be provided and the price. If BFI had merely delivered materials to Leadpoint and specified the categories of material it wanted separated, the indirect impact of those specifications on the work performed by Leadpoint-supplied employees would not have been evidence that BFI was a joint employer of the employees. If BFI had merely specified the overall rate of error it would tolerate in sorted material, the indirect impact of that specification on the work performed by Leadpoint-supplied employees would not have been evidence that BFI was a joint employer of the employees. If BFI had merely specified a timeframe in which it wanted the garbage sorted, the indirect impact of that specification on the work of Leadpoint’s employees would not have been evidence that BFI was a joint employer of

the employees. Similarly, if BFI had merely specified the price it would pay Leadpoint per day or per ton of sorted garbage, the indirect impact of that specification on the wages paid to Leadpoint-supplied employees would not have been evidence that BFI was a joint employer of the employees.

But BFI did not limit its indirect control to those normal, inherent incidents of company-to-company contracting. BFI did not limit its exercise of control in this case to specification of what service it wanted Leadpoint to perform and at what price. BFI went beyond “advance description of the tasks to be performed under the contract” or advance description of “the basic contours of a contracted-for-service” and beyond “global oversight” of performance in at least seven respects.<sup>3</sup>

First, BFI did not simply evaluate the quality and timeliness of the product produced by Leadpoint, the sorted materials, rather BFI reached into the hiring of the Leadpoint-supplied employees by establishing qualifications for the unskilled employees supplied by Leadpoint, including that they “meet or exceed [BFI’s] own standard selection procedures and tests, pass a drug test, and not have been deemed ineligible for rehire” by BFI. *Browning-Ferris Indus. of California d/b/a BFI Newby Island Recyclery* (“*Browning-Ferris*”), 362 NLRB 1599, 1601 (2015). While BFI did not hire the Leadpoint-supplied sorters, it specified who Leadpoint could hire to work at the BFI facility rather than leaving it to Leadpoint to determine what qualifications employees needed in order to fulfill BFI’s specifications concerning the product. Thus, BFI exercised relevant indirect control over employee qualifications and hiring.

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<sup>3</sup> The Board’s finding that BFI was a joint-employer did not rest solely on evidence of indirect control. *See, infra*, Section D. The Court of Appeals did not in any way question those findings. Standing alone, the evidence of direct control establishes that BFI is a joint employer. The evidence of indirect control merely adds to that already firm foundation for the joint-employer determination. Thus, however the Board on remand formulates the scaffolding around the inquiry into indirect control, it is clear that BFI remains a joint employer of the Leadpoint-supplied employees.

Second, BFI did not simply retain Leadpoint to operate the BFI facility, leaving decisions about how many employees to use and how to deploy them within the facility to Leadpoint. Rather, BFI set up the employees' work stations and imposed specific manning requirements in order to indirectly control the manner in which employees work. BFI built every work station and specified the responsibilities of employees at each station. *Browning-Ferris*, 362 NLRB at 1600-03; Tr. 15-16, 155.<sup>4</sup> Each day BFI dictated to Leadpoint the exact number of workers needed, exactly where the workers must stand throughout the day, and the duties of each worker. *Id.* at 1601-03.

Third, BFI did not simply evaluate the quality and timeliness of the product produced by Leadpoint, the sorted material, rather BFI supervisors maintained continuous oversight of Leadpoint-supplied employees. 362 NLRB at 1617. BFI supervisors were present in the Leadpoint-supplied employees' work areas throughout the work day in order to monitor their performance. Tr. 82, 97, 114-15, 127-28. BFI monitored the employees not their product.

Fourth, BFI did not simply monitor the employees' output. Rather it actively managed and supervised their work through Leadpoint's managerial and supervisory personnel. BFI trained Leadpoint employees and management in how to perform the work and continued to dictate through Leadpoint managers and supervisors how Leadpoint-supplied employees perform the work. From the inception, BFI trained Leadpoint supervisors (in addition to training Leadpoint workers directly) when BFI began using Leadpoint and, as needed, thereafter. Tr. 96, 102-103 (describing training throughout the first month of Leadpoint employees and leads regarding what material to pull of the belt and how to get a rotor out of a screen). Similarly, BFI dictated to Leadpoint the safety policies and procedures for Leadpoint employees and trained

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<sup>4</sup> The transcript and the exhibits citations refer to the record in the underlying R-Case proceedings, 32-RC-109684, upon which the Board issued its ruling in 362 NLRB 1599 (2015). The transcript and exhibits are part of the joint appendix submitted to the Court of Appeals.

employees in safety. Tr. 48, 83-85, 273-274. BFI manager John Sutter explained that the Leadpoint leads who direct workers “got their information from [BFI] management,” including himself. Tr. 102-103.

BFI’s indirect direction then continued on a daily basis. Before each shift, a BFI shift supervisor met with Leadpoint’s on-site manager, shift supervisor, and leads to present and coordinate the day’s operating plan. 362 NLRB at 1603; Tr. 107. BFI’s shift supervisors used these meetings to advise Leadpoint supervisors of the specific tasks to be completed by Leadpoint-supplied employees during the shift. *Id.* BFI supervisors maintained constant contact via walkie-talkie with the BFI operators running the production lines who monitored Leadpoint-supplied employees’ work at all times, and, BFI supervisors communicated throughout the day with Leadpoint supervisors over BFI-provided walkie-talkies, discussing matters such as quality problems, cleaning needs, job performance defects, the need to move sorters from one stream to another, and overtime requirements. Tr. 74-75 (one BFI supervisor estimated he spent 40% of his day communicating with Leadpoint supervisors), 98, 103-04, 108, 211. For example, BFI managers would give directives and corrections to Leadpoint workers through Leadpoint managers regarding the use of the emergency stop. Tr. 103-104.<sup>5</sup> BFI managed the plant. It managed the plant no differently than if the Leadpoint-supplied supervisors and sorters had been employed by BFI alone.

Fifth, BFI exercised indirect control over the retention of Leadpoint-supplied employees. When BFI demanded the dismissal of specific Leadpoint-supplied employees, they were dismissed. 362 NLRB at 1602; *see, e.g.*, Union Ex. 2; Tr. 184.

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<sup>5</sup> The significance and extent of this indirect control is heightened because the Leadpoint-supplied employees are working in BFI’s core business, in BFI’s facility, on BFI’s machines, and BFI is simultaneously exercising direct control as explained, *infra*, in Section D. *See, e.g.*, 362 NLRB No. 186 at 5; Tr. 83-85, 111, 112-113, 136-137, 145-147, 221-223, 244, 247-248, 259-260, 273, 282-284; 229, 241-243, 245-247, 248-249 (on Saturdays all work directions come from BFI), 296-297.

Although Leadpoint investigated each matter, BFI had an unqualified right to “discontinue the use of any personnel.” Tr. 182. Additionally, BFI placed a cap on Leadpoint-supplied employees’ tenure, providing they may work at its facility for no more than six months. Jt. Ex. 1 para. 4.

The Court of Appeals made clear that these forms of indirect control -- conveying directions to employees via an intermediary or directing the intermediary to discipline or discharge employees – is relevant to employer status. “[I]ndirect control over matters commonly determined by an employer can, at a minimum, be weighted . . . especially insofar as indirect control means control exercise ‘through an intermediary.’” *Browning-Ferris*, 911 F.3d at 1216-17. [T]he Board’s conclusion that it need not avert its eyes from indicia of indirect control – including control that is filtered through an intermediary – is consonant with established common law.” *Id.* at 1218. The Court confirmed that the Board properly “indicated that indirect control means control that is conveyed ‘through an intermediary.’” *Id.* (quoting 362 NLRB at 1614). “[T]he common law has never countenanced the use of intermediaries . . . to avoid the creation of a master-servant relationship.” *Id.* at 1217. The Court specifically stated, “Such use of an intermediary either to transmit Browning-Ferris directions to a Leadpoint sorter . . . or to implement Browning-Ferris-influenced disciplinary measures . . . may well be found to implicate the essential terms and conditions of work.” *Id.* at 1220.

The Court cited its own prior precedent to reinforce this point. “Our cases too have considered indirect control relevant to employer status.” *Id.* at 1217. The Court proceeded to cite two cases in which it had considered evidence that a putative joint employer had effectively recommended hiring or discharging employees to be relevant to employer status. In *Dunkin-Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004), the D.C. Circuit, as it explained in this case, considered the facts that “joint employer’s warehouse supervisor ‘reported his opinion about [warehouse applicants’] qualifications, which [the contractor] generally followed,’ and joint

employer’s transportation manager ‘prevented hiring of [driver] applicants he did not approve.’” *Browning-Ferris*, 911 F.3d at 1217 (quoting *Dunkin-Donuts*, 363 F.3d at 440). Similarly, in *Al-Saffy v. Vilsack*, 827 F.3d 85 (D.C. Cir. 2016), the D.C. Circuit cited evidence that State Department officials had recommended the dismissal of the plaintiff to the Department of Agriculture in reversing a grant of summary judgment on the question of whether the State Department was his joint employer. *Id.* at 97 (State Department officials “recommended Al-Saffy’s removal from his Yemen post shortly before it occurred”).

The Court also cites a Kansas Supreme Court decision with approval, specifically quoting that Court’s holding that a “master’s use of . . . a ‘mere instrumentality’ ‘did not break the relation of master and servant.’” *Browning-Ferris*, 911 F.3d 1217 (quoting *Nicholson v. Atchison, T. & S. Ry. Co.*, 147 P. 1123, 1126 (Kan. 1915)). In short, the Court made clear that “control that is exercised through an intermediary” is one of the forms of indirect control that is relevant to joint employer status. *Id.* at 1217.

The relevance of this form of indirect control is also consistent with the statutory definition of the term “supervisor” in the NLRA. Section 2(11) defines a supervisor as an employee who possesses specified authority “in the interest of the employer.” 29 U.S.C. § 152(11). Section 2(11) further defines a supervisor to include “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, *or effectively to recommend such action.*” *Id.* (emphasis added). And the Board, with court approval, has consistently held that employee A is a supervisor even if his or her decisions about terms and conditions of employment are executed by employee B. *See, e.g., NLRB v. Mo. Red Quarries, Inc.*, 853 F.3d 920, 923–28 (8th Cir. 2017) (upholding Board finding that employee was statutory supervisor under section 2(11) based in part on evidence that he had the authority to make hiring recommendations); *Monotech of Mississippi v. NLRB*, 876 F.2d

514, 517 (5th Cir. 1989) (same but concerning recommendations as to wage increases); *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 345 (5th Cir. 1980) (same but concerning recommendations regarding the assignment of workers); *cf. NLRB v. J.K. Elecs., Inc.*, 592 F.2d 5, 6–7 (1st Cir. 1979) (upholding Board’s determination that group leaders were statutory supervisors, which “rested on its finding that the group leaders ha[d] the power to effectively *recommend* disciplinary action in the areas of rule infractions and low production” (emphasis added)); *Wine & Liquor Salesmen & Allied Workers v. NLRB*, 452 F.2d 1312, 1318 (D.C. Cir. 1971) (upholding Board’s determination that sales managers were supervisors based in part on record evidence that “[o]n one occasion they investigated the alleged misconduct of a salesman, recommended his dismissal, and he was dismissed by [the employer’s vice president]”) Thus, under settled law, supplier firm’s employee A is a supervisor of the supplier’s employees if he or she effectively recommends discipline to higher management in the supplier firm. It follows that if a user employer like BFI employs employee A, the user employer is the employer of the supervised employees if employee A effectively recommends discipline to employees of the supplier employer, *i.e.*, Leadpoint. That is exactly what happened here.

Sixth, BFI did not simply specify what Leadpoint-supplied employees should produce, leaving it to Leadpoint to determine how many employees were needed and how they should be assigned within the facility in order to meet BFI’s specifications. Nor did BFI limit itself to dictating the number of lines to be run, leaving it to Leadpoint to determine staffing levels and work locations. Rather, BFI specified the number of employees who would work on each shift and on each line, and, specifically, where employees should stand at the lines. *Browning-Ferris*, 362 NLRB at 1600-03. BFI also adjusted those manning and placement directions at will. An August 2, 2013, directive from BFI’s Operations Managers to a Leadpoint supervisor is typical:

Please reduce the CDR presort line by 2 employees on each shift = total reduction of 4, leaving staff at 163. Two of your employees should be positioned at the east end of the presorts focusing primarily on glass. Their secondary picks should be plastics into the Recycling Stream drop chute. The remaining two should be positioned accordingly:  
One between residue and metal, focusing on items potentially damaging to downstream equipment, or that pose downtime issues (wrap). Residue to drop chute, large metal “picked” to reduce “swipe” contamination. Great spot for a right hander. 30 gallon garbage can needed to collect plastic and glass bottles and cans.

One between wood and metal, focusing on items potentially damaging to downstream equipment, or that pose downtime issues (wrap). Large metal “picked” to reduce “swipe” contamination, wood picked to wood drop. Great spot for a right hander. 30 gallon garbage can needed to collect plastic and glass bottles and cans.

If there are “lefties” on the lines, one might consider placing them where they can be left hand dominate.

**This staffing change is effective Monday, August 5, 2013.**

Union Ex. 1.

Seventh, BFI did not simply set the price it would pay for Leadpoint’s services, leaving it to Leadpoint to allocate the resulting revenue, BFI specified that Leadpoint could not pay the sorters more than a set wage. In other words, BFI placed a cap on the wages Leadpoint could pay the sorters. 362 NLRB at 1602.<sup>6</sup>

In each of these manners, BFI exerted indirect control over the sorters’ terms and conditions of employment that went beyond “routine contractual terms, such as a very generalized cap on contract costs, or an advance description of the tasks to be performed under the contract.” The Board should thus reaffirm its holding that each of the seven

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<sup>6</sup> The General Counsel’s suggestion that the Board should find that these forms of “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” because the contract provision “could simply be a statement of what the supplier employer itself was planning to do (or pay) on its own,” GC Statement on Remand at 19, is untenable because there is a significant difference between a unilateral intention, which can be carried out or not at the supplier employer’s sole discretion, and a contractual commitment that can be changed only with the consent of the user employer.

forms of indirect control described above was relevant to BFI's status as a joint employer.

## **B. Meaningful Bargaining**

In remanding this case to the Board, the D.C. Circuit instructed the Board to “explain which terms and conditions are ‘essential’ to permit ‘meaningful collective bargaining,’ and . . . clarify what ‘meaningful collective bargaining’ entails and how it works in this setting.” *Browning-Ferris*, 911 F.3d at 1221 (quoting *Browning-Ferris*, 362 NLRB at 1600).

The Board has explained that, “in a particular case, a putative joint employer’s control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining.” *Browning-Ferris*, 362 NLRB at 1614. That is to say, there may be circumstances “where there is a common-law employment relationship [between the putative joint employer and] the employees in question,” but, for purposes of effectuating the purposes of the Act, the putative joint employer does not “possess[] sufficient control over employees’ essential terms and conditions of employment” such that requiring its participation in the bargaining process would be merited. *Id.*

The point is largely one of efficiency. Where one of the employees’ employers controls all essential terms and conditions of employment save one, for example, the Board could reasonably decide in exceptional cases that requiring the second employer to participate in collective bargaining to address the single issue it controls would not meaningfully advance the purposes of the Act. The determinative question in this regard is whether a combination of (1) the relative unimportance of the particular topic to the employees<sup>7</sup> and (2) the other employer’s ability to effectively address the topic suggests

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<sup>7</sup> We note here that the General Counsel attempts to smuggle in, via the meaningful bargaining question, aspects of the Board’s prior articulation of the joint employer standard that was rejected by the Board and upheld without question by the Court of Appeals. This is not proper. Thus, for example, the General Counsel argues that there

that the additional logistical burden associated with requiring the joint employer to bargain is not justified.

Notably, the burden is likely to be very light. To the extent a joint employer's control over essential terms and conditions of employment is limited, its duty to bargain is also limited, *see Browning-Ferris*, 362 NLRB at 1614 (“as a rule, a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control”),<sup>8</sup> and the practical need to coordinate the bargaining is likely to be limited as well. In the latter regard, the General Counsel is mistaken in suggesting that the two joint employers must bargain *together*. *See, e.g.*, GC Statement of Position at 14. He is also mistaken in suggesting that a finding of joint employment somehow makes one joint employer the representative of the other. *Id.* at 21 (“The Board has never before dictates who should serve as the bargaining representative for employers.”) He is also mistaken in suggesting that the Board must address “how differences in the bargaining positions of the employers could be resolved.” *Id.* at 14. Each joint employer could bargain with the union separately over the terms and conditions it controls. Or, as the General Counsel himself suggests, one joint employer could designate the other as its agent for purposes of bargaining, “which,” the General Counsel concedes, “is likely to occur.” General Counsel Statement of Position on Remand at 23.

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can be no meaningful bargaining with a common law joint employer even if it exercises direct and immediate control over the employees if the control is “limited and routine,” defined as “primarily . . . telling employees what work to perform, or where and when to perform the work, but not how to perform the work.” GC Statement on Remand at 19. But that position is not only outside the scope of the remand, for the reasons we explain above, but untenable as it would suggest that an employer that provides all day-to-day supervision should have no duty to bargain.

<sup>8</sup> The General Counsel's suggestion that the specification of the nature of a joint employer's duty to bargain in this case is somehow inconsistent with *Central Transport*, 306 NLRB 166, 166 (1992), *enf. denied on other grounds*, 997 F.2d 1180 (7th Cir. 1993), is simply wrong because the earlier case in no way addressed the question, merely holding that both joint employers had a duty to bargain.

The specific topic controlled by the joint employer matters a great deal. If the term is wages, the Board obviously must require the joint employer to bargain. The same is true if the term is daily job duties and responsibilities. If, on the other hand, the sole term actually controlled by the joint employer is the hours when the cafeteria is available to employees, the determination would likely fall within the Board's zone of discretion. Exempting the common law joint employer from a duty to bargain might be appropriate in that situation, if, for example, the other joint employer has the ability to adjust employees' work and lunch schedules to account for the cafeteria's availability. In those circumstances, the Board could reasonably conclude that requiring the joint employer to participate in bargaining to address this sole issue would not effectuate the purposes of the Act.

Notably, this is an entirely distinct analysis from that at issue in *Management Training Corp.*, 317 NLRB 1355 (1995). In that case, which concerned whether a government contractor was required to bargain given the limited terms and conditions it controlled, "the Board approved of . . . limited bargaining . . . only because some terms of employment were controlled by a government entity that was outside of the Board's jurisdiction." *Browning-Ferris*, 362 NLRB at 1611 fn.70. In other words, but for the requirement that the government contractor bargain, employees would have no one to negotiate with at all. From this perspective, and especially when viewed in light of the earlier decisions which *Management Training* overruled – see, e.g., *Res-Care, Inc.*, 280 NLRB 670 (1986) (government contractor not required to bargain) – "the thrust of *Management Training* was that an employer subject to the Act is required to bargain over the significant terms of employment that it *does* control." *Browning-Ferris*, 362 NLRB at 1611 n.70 (emphasis in original).

Here, similarly, the straightforward answer to the question "how [collective bargaining] works in this [joint employment] setting," *Browning-Ferris*, 911 F.3d at 1222 (quoting *Browning-Ferris*, 362 NLRB at 1600), is that each "employer subject to the Act

is required to bargain over the significant terms of employment that it *does* control,” 362 NLRB at 1611 n. 70 (emphasis in original). The Board’s acknowledgment that there will occasionally be circumstances where requiring a joint employer to bargain would not meaningfully add to the collective bargaining process – because the employer’s control over terms and conditions of employment is so limited that any gains achieved by its participation in bargaining is outweighed by the minor logistical challenges such participation presents – bears no resemblance to the situation presented by *Management Training*. In stark contrast to *Management Training* – where the choice faced by the Board was to require bargaining over a limited set of topics or deprive employees entirely of their statutory right to bargain – in the case of joint employers, the Board may decline to require one joint employer to bargain, but only when that joint employer controls few and only insignificant terms of employment and employees already have an entirely-satisfactory opportunity to negotiate over all essential terms and conditions of employment with their other employer.

The record readily establishes that BFI exercises sufficient control over essential terms and conditions of employment to permit meaningful bargaining. Indeed, BFI is a *necessary* party in order for the Union to negotiate over wages, hours, productivity standards, staffing levels, the speed and quantity of work, safety and other work rules, drug testing, and discipline and discharge. These terms and conditions of employment are fundamental to any union contract, central to employees’ decision to unionize generally and, specifically, motivated the employees here to unionize in an attempt to use collective bargaining to resolve their own workplace disputes.

The General Counsel’s suggestions for how the Board should answer this question on remand would far exceed the scope of the remand, require reversal of decades of precedent, and defy common sense. The General Counsel first asserts, “Basing a determination of joint employment on control of a single term and condition of employment would certainly be inconsistent with the weight of authority and prior Board

law.” GC Statement of Position on Remand at 19-20. That would suggest that a joint employer that only controls wages has not duty to bargain even though the General Counsel himself concedes that wages and benefits are “the most central subjects of collective bargaining.” *Id.* at 17. The General Counsel then asserts that “[i]t 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.” *Id.* at 20. But that would leave large numbers of employees unable to bargain with the joint employer that supervises their day-to-day work and contradict decades of Board and court precedent not addressed in this case by the Board or the Court of Appeals. *See, e.g., Oakwood Care Center*, 343 NLRB 659, 659 (2004); *Manpower, Inc.*, 164 NLRB 287, 287-88 (1967); *Reynold v. CSX Transportation, Inc.*, 115 F.3d 860, 869 (11th Cir. 1997).

The record clearly demonstrates that BFI can engage in meaningful bargaining over the essential terms and conditions of employment. Indeed, meaningful bargaining is impossible without BFI.

### **C. Retroactivity**

The D.C. Circuit also required the Board, on remand, to consider whether it is appropriate to apply its decision retroactively to BFI and Leadpoint. *Browning-Ferris*, 911 F.3d at 1222. The Board’s application of its joint employer standard to the parties in this case does not raise retroactivity concerns for two, independent reasons. First, the Board made clear that it was clarifying, not changing, its joint employer standard. Moreover, even if a court were to find that the Board did modify its standard, those limited modifications did not affect the outcome in this case, *i.e.*, BFI would have been found to be a joint employer based on its actual, direct control of Leadpoint-supplied employees under any of the Board’s previous joint employment standards. Second, the Court’s concern with retroactivity is inapplicable here because this is a test-of-certification case where the effect of the Board’s decision in the representation case was prospective only – imposing a duty to bargain with the union upon certification.

1. The Board's Decision Must Apply to BFI and Leadpoint Because the Decision Did Not Create a New Standard and Any Changes to the Standard Did Not Effect the Outcome

The Board repeatedly made clear in its decision that it was “restat[ing] the Board’s joint-employer standard to reaffirm the standard articulated by the Third Circuit in [its] *Browning-Ferris* decision.” *Browning-Ferris*, 362 NLRB at 1600. As the Board explained in detail, in a series of Board decisions following the Third Circuit’s *Browning-Ferris* ruling, “the Board’s view of what constitutes joint employment under the Act . . . narrowed,” but “the Board . . . never clearly and comprehensively explained . . . the shift in approach.” *Id.* at 1609. The Board issued its decision in this case to address this unexplained departure from its governing precedent, “restat[ing] the Board’s legal standard for joint employer determinations and mak[ing] clear how that standard is to be applied going forward.” *Id.* at 1613. Indeed, the General Counsel concedes that “the Board’s decision to *consider* indirect and potential control was not a change from prior law.” GC Statement on Remand at 4.

BFI would be a joint employer under any of the Board’s prior iterations of its joint employment test. As the Board made clear, “BFI is an employer under common-law principles, and the facts demonstrate that it shares or codetermines those matters governing the essential terms and conditions of employment for the Leadpoint employees,” including “exercis[ing] . . . control, both directly and indirectly.” *Id.* at 1616 (footnote omitted). In particular, the direct control that BFI actually exercised over Leadpoint-supplied employees – described in detail in the section that follows – is more than sufficient to make BFI a joint employer under any legal standard. Thus, there is no “retroactivity” at issue. Even if viewed as a change in the law, however, retroactive application is appropriate.

2. The Court's and the Board's Retroactivity Standard is Plainly Met Here

Because this is a test-of-certification case, the Board decision actually at issue – from the representation case – applied only prospectively, imposing a duty to bargain

running from the subsequent date of the certification. *Mike O'Connor Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701, 703 (1974), *enf. Denied on other grounds*, 512 F.2d 684 (8th Cir. 1975). Concerns about retroactivity are, therefore, misplaced.

“The Board’s usual practice is to apply all new policies and standards to all pending cases in whatever stage.” *Crown Bolt, Inc.*, 343 NLRB 776, 779 (2004) (quoting *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 729 (2001)). “Moreover, in representation cases, the Board has recognized a presumption in favor of applying new rules retroactively.” *Ibid.* The only exception to the practice of applying changes retroactively occurs where its application would work a “manifest injustice.” *Pattern Makers (Rite Industrial Model)*, 310 NLRB 929 (1993). At no stage in this litigation has BFI ever sought to rebut the presumption. And, because BFI’s duty to bargain attached *after* the decision at issue, it cannot make such a showing.

This case is thus wholly unlike *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001), cited by the Court of Appeals. *Epilepsy Foundation* involved (1) a Board finding – based on the Board’s then-fresh interpretation of the NLRA that *Weingarten* rights apply in non-union workplaces – “that the Foundation committed unfair labor practices when it discharged Ashraful Hasan and Arnis Borgs in violation of § 8(a)(1) of the National Labor Relations Act,” and (2) an order of reinstatement and backpay. *Id.* at 1096. On review, the Court rejected the Board’s remedy, explaining that, under governing principles of retroactivity, “it would be a manifest injustice to require the Foundation to pay damages to an employee who, without legal right, flagrantly defied his employer’s *lawful* instructions.” *Id.* at 1102-03 (citation and quotation marks omitted; emphasis in original).

In contrast, here, there is no issue of backpay, reinstatement or any other retrospective relief or of substantial reliance on prior law, only the prospective obligation to bargain with the union. As the D.C. Circuit has explained, where “the Board has been in the process of changing its approach toward recognition of the appropriate bargaining

unit,” “it is entirely appropriate that the company test the Board’s action in the courts.” *Retail, Wholesale, & Dep’t Store Union v. NLRB*, 385 F.2d 301, 308 (D.C. Cir. 1967). However, once the Court sustains the Board’s representation decision – even in circumstances where the bargaining unit sought by the union would not previously have been approved, *see, e.g., id.* at 304 (noting employer’s argument that the petitioned-for unit would have been inappropriate under prior Board precedent) – the Court will not hesitate to enforce the Board’s order that the company bargain with the union. *See id.* at 308.

The Board should reaffirm its holding that the decision applies in this case, explaining that that is equitable for the reasons set forth above.

**D. BFI Exercised Sufficient Direct Control to Establish Joint Employment**

In answering the specific question posed by the Court of Appeals about indirect control, meaningful bargaining, and retroactivity, the Board cannot ignore the evidence of direct control of terms and conditions of employment actually exercised by BFI and the fact that such evidence would have been sufficient to support a finding of joint employment even under the pre-*BFI* articulation of the standard.

The Board has already found that BFI exercised significant, direct control over terms and conditions of employment of the Leadpoint-supplied employees. That finding was in no way questioned by the Court of Appeals. In fact, it was not questioned by BFI in its brief or argument to the Court.

First, in the area of “supervision, direction of work, and hours,” the Board found it to be of “particular importance” that BFI exercised “unilateral control over the speed of the streams” on which the Leadpoint-supplied employees work. 362 NLRB at 1616. Because BFI established the location of the work stations on each stream, determined how many employees would work at each station, established productivity standards, and controlled the speed of the lines, *id.* at 1603, 1618 fn. 117, BFI exercised direct and

ongoing control over the most basic working condition of the Leadpoint-supplied employees – the speed and quantity of their work. During each shift, BFI alone determined and adjusted the employees’ work load, increasing it or decreasing it at will. If employees had difficulty with the speed demanded, only BFI could respond by adjusting the speed of the stream or the angle of the screens. *Id.* at 1603. The evidence established that Leadpoint played no role in establishing the employees’ workload and was powerless to adjust it up or down.

Workload is a mandatory subject of bargaining, that is, a working condition over which the Act requires employers to bargain with their employees. For decades, the Board, with uniform judicial approval, has held that “there can be no doubt that workloads constitute a mandatory subject for collective bargaining.” *Bonham Cotton Mills, Inc.*, 121 NLRB 1235, 1266 (1958), *enfd.*, 289 F.2d 903 (5th Cir. 1961). The reason is obvious:

[E]xcluding workloads from the realm of bargainable issues would make bargaining almost as unworkable as a bilateral means of establishing conditions of employment as removing the bottoms from measuring containers would render bargaining between merchants and their customers, where price was agreed upon but there was no means available to measure the quantity of the product to be delivered.

*Id.* The amount of work an employee must perform and its speed are terms and conditions of employment and BFI directly controlled both here.

In fact, the record indicates that the speed of the line was a source of conflict between the Leadpoint-supplied employees and BFI. 362 NLRB at 1616-17. On occasion, Leadpoint-supplied employees utilized emergency measures to stop a stream so that they could catch up and meet the BFI-imposed production standards. BFI instructed the employees not to do so “on multiple occasions” and directed them to simply work more efficiently. 362 NLRB at 1603. If the employer that controls the speed of the line has no duty to bargain with employees, the Act’s purpose of preserving industrial peace will be frustrated because employees who engage in strikes or other protests concerning

“the speed of the conveyor . . . [are] engaged in quintessentially protected concerted activity.” *Greater Omaha Packing Co.*, 360 NLRB No. 62, slip op. at 1 n. 3 (2014), *enfd in relevant part*, 790 F. 3d 816, 820-22 (8th Cir. 2015).

Both Leadpoint and the Leadpoint-supplied employees were powerless to adjust the employees’ workload in response to BFI’s unilateral changes in the speed of the line by adding employees. BFI unilaterally “specifies the number of workers that it requires.” 362 NLRB at 1617. As explained above, the record includes an email from BFI’s Operation Manager Keck instructing Leadpoint to reduce the headcount on a certain line by two per shift, stating that “[t]his staffing change is effective immediately.” 362 NLRB at 1603; Union Ex. 1. When asked why this change was made, BFI’s Manager stated, “Because in my observation the cost benefit of the additional two people on that presort line didn’t weigh out. And that we could get cost savings without losing productivity by removing two people off that sort line.” Tr. at 55-56. The Board has held that staffing levels are mandatory subjects of bargaining. *St. Anthony Hospital Systems*, 319 NLRB 46, 50 (1995) (duty to bargain over staffing policy as they may result in decision “to continue doing the same work [but] with fewer employees”). Only BFI can bargain with the Leadpoint-supplied employees about this core condition of employment.

Second, the Board has already found that BFI managers, “in numerous instances” communicated directly with sorters in the workplace in order to direct their work, including assigning tasks to employees that took priority over assignments from Leadpoint, and met with sorters to correct their work and otherwise give them instructions. 362 NLRB at 1603.

Finally, the Board has already found that BFI directly determined Leadpoint supplied employees’ hours by unilaterally setting the start and stop time of each shift, unilaterally deciding when the lines stop so that employees may take breaks and how long those breaks last, and unilaterally determining when overtime is required. *Id.* These are clearly terms and conditions of employment over which an employer has a duty to

bargain. See *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965) (“the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of ‘wages, hours, and other terms and conditions of employment’ about which employers and unions must bargain”).

Leadpoint played no role in setting the employees’ regular hours or the times or length of breaks and could not make decisions about when employees work overtime. Thus, Leadpoint alone could not fully bargain with the employees about these terms of employment.

Several courts have held that this form of control over work hours is evidence of joint employer status. In *Browning-Ferris*, the Third Circuit considered it relevant that “BFI established the work hours of the drivers, determining when the two shifts it established would start and end” even though the drivers’ brokers “schedule the drivers for particular shifts.” 691 F.2d at 1120, 1124-25. In *Int’l Union, United Govt. Security Officers of America v. Clark*, the district court found it relevant that the user employer could “alter the daily assignments of [employees], requiring the contractors to shift personnel from one duty station to another or assign them special projects” even though “[t]he contractors will decide *which* individual [employee] will, for example, perform overtime or shift duty stations.” 2006 U.S. Dist. LEXIS 64449, \*26-27 n. 10 (D.D.C. 2006). Compare *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 859 (D.C. Cir. 1995) (putative employer did not exercise sufficient control because drivers themselves “decide . . . when to take a break, and . . . when to start and stop work.”).

Thus, the Board should hold that BFI is a joint employer of the Leadpoint-supplied employees even without considering its reserved control and indirect control of their terms and conditions of employment and under the articulation of the standard in place before or after the earlier decision in this case.

### III. CONCLUSION

The Board should reaffirm its prior decision in this case, answering only the questions posed by the Court of Appeals in its remand order as set forth above.

**DATED AT** Oakland, California, this 22nd day of April 2019.

Respectfully submitted,

*/s/ Susan K. Garea*

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Susan K. Garea  
Beeson, Tayer & Bodine  
483 Ninth Street, Suite 200  
Oakland, CA 94607  
Phone: (510) 625-9700  
Email: [sgarea@beesontayer.com](mailto:sgarea@beesontayer.com)

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 22, 2019, a copy of the foregoing CHARGING PARTY'S STATEMENT OF POSITION ON REMAND in Case 32-CA-160759 was served by electronic mail on the following case participants:

Eric C. Marx  
Counsel for the General Counsel  
Division of Advice  
National Labor Relations board  
1015 Half Street, SE  
Washington, D.C. 20570  
Email: [emarx@nlrb.gov](mailto:emarx@nlrb.gov)

Michael Pedhirney  
Littler Mendelson, P.C.  
333 Bush Street, 34th Floor  
San Francisco, CA 94104-2874  
Email: [mpedhirney@littler.com](mailto:mpedhirney@littler.com)

Joshua L. Ditelberg  
Seyfarth Shaw LLP  
233 South Wacker Drive, Suite 8000  
Chicago, IL 60606-6448  
Email: [jditelberg@seyfarth.com](mailto:jditelberg@seyfarth.com)

Stuart Newman  
Seyfarth Shaw LLP  
1075 Peachtree Street, NE, Suite 2500  
Atlanta, GA 30309-3958  
Email: [snewman@seyfarth.com](mailto:snewman@seyfarth.com)

Valerie Hardy-Mahoney  
National Labor Relations Board, Region 32  
1301 Clay Street, Suite 300N  
Oakland, CA 94612-5211  
Email: [Valerie.Hardy-Mahoney@nlrb.gov](mailto:Valerie.Hardy-Mahoney@nlrb.gov)

/s/ Tanya Gatt  
\_\_\_\_\_  
Tanya Gatt  
Beeson, Tayer & Bodine  
483 Ninth Street, Suite 200  
Oakland, CA 94607  
Phone: (510) 625-9700  
Email: [tgatt@beesontayer.com](mailto:tgatt@beesontayer.com)