Case No. 21-1093

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Petitioner,

v.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC.,
d/b/a NEWBY ISLAND RECYCLERY,

Intervenor.

JOINT DEFERRED APPENDIX

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OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 32

In the Matter of:

Browning-Ferris Industries of California, Inc., D/B/A BFI
Newby Island Recyclery,

Employer,

Leadpoint

Employer,

and

Teamsters Local 350,

Petitioner.

Case No. 32-RC-109684

Place: Oakland, California

Dates: August 5, 2013

Pages: 1 through 304

Volume: 1

OFFICIAL REPORTERS

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made by any party that need to be addressed at this time?

Okay. In off the record discussions the parties have agreed that the leads -- they have agreed to a unit description in case the two companies are found to be joint employers and in case Leadpoint is found to be a sole employer. They have agreed that the leads, the six leads employed by Leadpoint at the facility are statutory supervisors.

MR. PEDHIRNEY: That is correct, however I should make one clarification that there are seven line lead positions. There is one employee who's been in training for several weeks to become a line lead. It's anticipated, you know, that there will be seven line leads once the training's completed, but as of now there are six people in that position.

HEARING OFFICER LOYA: Okay. So then all the leads employed by Leadpoint are supervisors as defined in the Act. And the parties have agreed to use the -- have no objection to using the Davison-Paxon formula for the on-call employees or casual employees.

Are there any petitions pending in other regional offices involving other facilities of the Employer?

MR. PEDHIRNEY: No.

HEARING OFFICER LOYA: Will the parties please identify the issues for hearing and their positions on each issue starting with Leadpoint?

MR. PEDHIRNEY: It is Leadpoint's understanding that the
Since January of 2011.

Okay. Can you give us an overview of the Recyclery Operations that you oversee as division manager?

Recyclery Operations is a recycling sort process that happens inside a building located at 1601 Dixon Landing Road. We receive approximately 1200 tons a day of mixed materials, mixed waste, mixed recyclables that gets sorted out into commodities that are sold at the end of a process inside that building.

Okay. How large is that building?

Eighty-thousand square feet.

Does it have different areas that are physically separated?

There's a break room, there's a tip floor, there is a sort platform area.

Can you explain what a tip floor is?

A tip floor is where we receive the material that needs to be sorted out so we have trucks that come in. They drop their load of material on the ground in the area called a tip floor.

And is that inside or outside the building?

That's inside the building.

Okay. Is it -- where is it in relation to the sort platform area?

It's on the north side of the building, separated by some metering bins and a push wall, which is just a wall where you
push material up to.

Q You said you had drivers, or trucks that come in and actually dump the material to be sorted. Are those Republic employees, BFI employees?

A Some of them are.

Q Are some of them employed by a different company?

A Yes.

Q What company?

A We have a company called Tiger Lines, McFadden. To my -- that's pretty much it; that's the bulk of it. And then Republic Services' trucks.

Q Okay. So are BFI employees drivers at that site? Do they employ any other type of employee?

A The Recyclery does employ other types of employees. We have loader operators, equipment operators, forklift operators, sort line equipment operators, spotters who are employees who work on the tip floor. And we have one sorter.

Q Approximately how many employees does BFI employ at the Recyclery?

A We employ approximately 60.

Q Okay. Do the drivers, the BFI employees who are drivers, do they typically work anywhere other than the tip floor?

A The drivers that come into our facility are part of the hauling operation of Republic Services, which don't fall under my division. And they're actually under a separate legal
entity but work off the same property.

Q So the BFI drivers are not under your supervision?
A Correct.

Q Not part of --
A And they're not included in that 60 -- approximately 60 BFI employees.

Q Okay. For the 60 some BFI employees who are under division employed at the Recyclery where do they typically work?
A Most of them work on the exterior portion of the facility. With what we do, we have a lot of material movement. So they're moving bailed material with forklifts. They're pushing material with loaders at the tip floor. We're dragging material that's been processed around the site.

Q Uh-huh.
A But most of them are outside of the building.

Q You mentioned sort platform area that's physically separate from the tip floor. Can you explain what the sort platform area is, how it works?
A Sure. In sorting recyclables there's a lot of mechanical means that are used in that process. So I would guess probably about 70 percent of that 80,000 square foot building has a series of conveyors, and screens, and motors. And built around that are work platforms. So that is where our sorting activities happen. Where we have stations located throughout
that equipment package where sorters would sort out prohibited
materials or sort out recyclable materials depending on where
they're at.

Q Can you explain what that means, depending on where
ty they're at?

A Depending on what the person -- that sorter is responsible
for doing. Not all material looks the same on each one of the
belts. So somebody might be doing quality control for aluminum
cans and in another area somebody might be picking just
cardboard out of a mixed waste stream.

Q Are there -- you said there are a lot of different
conveyor belts running throughout that area. Are certain ones
designated for certain types of material?

A Yes.

Q How does that work?

A Well, there's four different material streams that we have
coming into the building. Residential mixed recyclables,
commercial mixed recyclables. And we have a dry waste process
and a wet waste process. Each one of those types of materials
gets loaded into our system at a different feeding, or a bin.
And from there that bin will lead to various conveyors to sort
out that material separately.

Q Okay. And who are the people actually doing the sorting?

A They are contract workers.

Q And who do you contract with for that labor?
A Leadpoint.

Q Do you know how long BFI's contracted with Leadpoint for that work?

A Since 2009.

Q Do you know whether BFI contracted with any other companies to do that work prior to 2009?

A Yes, they did.

Q Do you know who those companies are?

A I'm aware of Labor Ready prior to Leadpoint. And before that it was Staffing Network. Prior to that I don't recall what the names were because they precede my time at the facility.

Q Do you have managers -- outside of the employees we've talked about at the Recyclery for BFI do you have managers that report up to you?

A Yes. In -- at the Recyclery we have an operations manager. And then we have a shift manager for our day shift and a shift manager for our swing shift. And then we also have a shipping supervisor.

Q Can you give me the names for each of those supervisors?

A Sure. Paul Keck is the operations manager. John Sutter is the dayshift supervisor. Augustine Ortiz is a swing shift supervisor. And Phil Carroll is our shipping supervisor.

Q And do those supervisors supervise particular BFI employees?
A Yes. They supervise BFI employees.

Q Okay. Do they have particular groups that report to them of BFI employees?

A Yes, they do. Basically each BFI employee that is on shift when they are there reports to one of the day supervisors. The shipping supervisor has the forklift operators and scale house operations reporting to him.

Q And those are the forklift operators that are mainly working outside the building; is that correct?

A Yes.

Q Do the supervisors supervise anyone else at the facility?

A No.

MS. GAREA: Objection and move to strike. Sorry for the late objection. Calls for a legal conclusion.

MS. TOWNSEND: Well, on a day-to-day basis they supervise. That's what they're being asked to testify to.

HEARING OFFICER LOYA: I'll allow it.

Q BY MS. TOWNSEND: You mentioned Leadpoint provides the labor for the sorters at the Recyclery. Do they provide labor for any other types of work there?

A There are I believe seven contract employees working in our composting operation doing general labor.

Q Is the composting operation part of the Recyclery?

A Yes.

Q Have you been responsible for hiring any of the Leadpoint
workers that provide labor at the Recyclery?

A No.

Q Do you place any type of recruitment ads for Leadpoint?

A No.

Q Do you review job applications that Leadpoint receives?

A No.

Q Do you interview anyone that's applied for a position with Leadpoint?

A No.

Q Do you conduct any pre-hire drug screen for Leadpoint workers?

A Republic Services does not.

Q Okay. And just to be clear when I ask you, I mean you as BFI. Does BFI do any other type of pre-employment testing for Leadpoint workers?

A No.

Q Do you convey any type of job offer to Leadpoint workers?

A No.

Q Do you have any input in Leadpoint's hiring decisions?

A No.

Q Does Leadpoint inform you when they hire a particular individual?

A No.

Q Do you conduct any type of employee orientation for Leadpoint workers?
Q Are you able to have the final say in Leadpoint's hiring decisions?
A No.

MS. GAREA: Objection, vague.

HEARING OFFICER LOYA: Can you rephrase your question?

MS. TOWNSEND: Sure.

Q BY MS. TOWNSEND: Do you have any input at all into Leadpoint's hiring decisions?
A No.

Q Does BFI have any type of employee handbook or policies?
A We do.

Q Do those apply to your employees that you've talked about the work at the Recyclery, BFI's employees?
A Yes.

Q Can you explain generally do you have written policies, do you have a handbook?
A They're generally mostly safety related items that we have in our handbook, but there are some general I would call HR policies related to drug and alcohol, discrimination, those types of HR policies.

Q Does BFI have policies related to for example employee benefits, FMLA leave time, pay?
A Yes, we do.

Q Okay. For all those HR related policies which apply to
your BFI employees at the Recyclery, do they also apply to Leadpoint workers?

Q No.

Q Do your BFI employees wear any type of uniform at the Recyclery?

A Yes.

Q What do they wear?

A They wear a -- I guess a button up shirt that's a safety lime yellow with some reflective stripes. It has our company's logo along with their name on a patch. We also issue them Republic Services hard hats. They're issued a pair of blue work pants. We do provide safety boots and then general personal protective equipment, like ear plugs, safety glasses, those types of items. They also -- some employees will have safety vests with a Republic Services logo on that as well.

Q And does BFI supply all those items to the BFI employees?

A We do.

Q Do you supply any of those items to Leadpoint's workers?

A No.

Q Are Leadpoint's -- do Leadpoint workers have any type of personal protective equipment that they wear at the Recyclery?

A Yes.

Q Do you know where they receive that from?

A From Leadpoint.

Q Do any Leadpoint workers wear anything with BFI or
Republic Services on it?

A No.

Q Do they wear any type of -- do the Leadpoint workers wear any type of uniform at the Recyclery?

A No.

Q Do they wear any type of safety vests or hard hat the facility?

A Yes.

Q Is the same safety vest and hard hat that BFI employees wear?

A No. It's issued by Leadpoint with their logo.

Q Do Leadpoint workers ever attend any type of employee training that you conduct for BFI employees?

A No.

Q Are Leadpoint workers ever present at any employee meetings that you hold for the BFI employees?

A No.

Q Have you been involved in any discipline for BFI -- or I'm sorry, Leadpoint workers?

A No.

Q Have you ever conducted a disciplinary investigation involving a Leadpoint worker?

A No.

Q Have you ever recommended disciplinary action be taken against a Leadpoint worker?
1 A No.
2 Q Have you ever written or issued discipline to a Leadpoint worker?
3 A No.
4 Q Has Leadpoint ever authorized you to verbally reprimand or discipline a Leadpoint worker?
5 A No.
6 Q Have you ever been present when a Leadpoint worker has received discipline?
7 A No.
8 Q If you have an issue in terms of the services provided by Leadpoint workers what do you do?
9 A I notify the onsite manager.
10 Q Onsite manager for which company?
11 A For Leadpoint.
12 Q So Leadpoint has managers onsite?
13 A They do.
14 Q Do you know how many managers they have onsite?
15 A They have two, what I will call operational managers, one for each shift. And then they also have a human resources manager on site. And then they have leads that report to that group.
16 Q Does BFI have an HR manager onsite?
17 A We do not.
18 Q Okay. Have you ever -- if you have ever had an issue with
the services provided by Leadpoint workers at the Recyclery have you ever addressed it directly with that Leadpoint worker?

A No.

Q Do you ever set the schedule for individual Leadpoint workers?

A No.

Q Do you ever decide which Leadpoint worker is going to provide services for which shift?

A No.

Q Do you ever decide which Leadpoint worker may work a shift including overtime when providing services at the Recyclery?

A No.

Q Do you ever decide when a particular Leadpoint worker can take a break when providing services at the Recyclery?

A Did you say a particular worker?

Q Correct.

A No.

Q Have you ever had any Leadpoint workers come to you with any issues at the Recyclery?

A No.

Q Ever had any Leadpoint workers ask you any questions at the Recyclery?

A Yes.

Q What questions have been asked by a Leadpoint worker?

A I've had the question of how do they get a job with
Republic Services.

Q And did you respond?

A I said, all postings are on our website when we have an opening and that they would have to apply through that website.

Q Okay. Does BFI issue paychecks to Leadpoint workers?

A No.

Q Does BFI make any contributions or deductions required by law on the behalf of Leadpoint workers?

A No.

Q Has BFI ever been held responsible for court ordered compliance for withholding, for example for child support for Leadpoint workers?

A No.

Q Does BFI maintain any payroll records for the Leadpoint workers?

A No.

Q If there's a pay issue with a Leadpoint worker who do they go address it with?

MS. GAREA: Objection, calls for speculation, lacks foundation.

MS. TOWNSEND: I can rephrase.

HEARING OFFICER LOYA: Rephrase please.

Q BY MS. TOWNSEND: Have you ever had any Leadpoint workers bring any payroll issues to you?

A No.
Q Okay. Are you responsible for determining the pay that Leadpoint gives to its workers?

MS. GAREA: Objection, vague.

MS. TOWNSEND: Vague as to what?

MS. GAREA: Responsible to determine, it's -- I mean, it's vague why you're asking and how BFI might be involved in determining pay rates for these workers.

HEARING OFFICER LOYA: Can you rephrase the question?

Q BY MS. TOWNSEND: Do you have any involvement in determining how much Leadpoint pays its individual workers?

MS. GAREA: Same objection.

HEARING OFFICER LOYA: I'm sorry?

MS. GAREA: Same objection.

HEARING OFFICER LOYA: Go ahead, I'll allow it. And then --

Q BY MS. TOWNSEND: Do you want me to re-ask it?

A No. I don't determine any individual pay.

Q Are Leadpoint workers eligible for BFI benefits?

A No.

Q Do you -- does BFI maintain any type of time records for Leadpoint workers?

A No.

Q How do BFI employees record their time at the Recyclery?

A They use a time clock.

Q And who provides that time clock?
Q Do Leadpoint workers use that same time clock?
A No.

Q Are you aware whether they have any type of time clock at the Recyclery that they use?
A They do.

Q Do you know who supplies that time clock?
A Leadpoint does.

Q Do BFI employees have any type of employee identification at the Recyclery?
A They have a badge on their uniform.

Q And who provides that badge?
A Republic Services does.

Q For BFI employees' time clock, do they -- is that any electronic thing they type into, do they have an actual physical timecard that they punch in?
A It's a swipe card system.

Q Swipe card system. And who provides that swipe card?
A Republic Services.

Q Does BFI provide any type of time swipe cards to the Leadpoint workers?
A No.

Q Are you involved with approving any time records for the Leadpoint workers?
A No.
Q Are you involved with approving any leave or time off requests from the Leadpoint --

A No.

Q -- workers?

A Sorry.

Q Are you familiar with the names of the Leadpoint workers?

A I would say no.

MS. GAREA: Objection, vague as to you. Are you asking him as personally, or are you asking you as BFI? And if it's you as BFI I think it lacks foundation to say whether the entire company is -- anyone at the entire company is familiar with Leadpoint worker names.

MS. TOWNSEND: When I say you I'm typically speaking to him versus I've asked, does BFI do something.

MS. GAREA: Okay.

MS. TOWNSEND: So I'm asking if he personally is familiar with the names.

THE WITNESS: I only would maybe know a handful of first names. I would say in general no.

Q BY MS. TOWNSEND: Do Leadpoint workers ever have to check in with you or BFI's management when they start their services that day or leave at the end of the day?

A No.

Q If a Leadpoint worker's going to be late for their shift do they need to notify you or any of your supervisors?
A No.

Q Does BFI maintain personnel files for its employees at the Recyclery?
A Yes.

Q Are those maintained offsite or onsite?
A Offsite.

Q Does BFI maintain any personnel files for Leadpoint workers at the Recyclery?
A No.

Q Does BFI ever direct Leadpoint as to what should be in any personnel files that they may have for the Leadpoint workers?
A No.

Q For you, yourself can you give a ballpark percentage during the day how much time do you interact with Leadpoint supervisors at the Recyclery?
A Less than five percent of my day.

Q And same question in regards to the Actual Leadpoint workers. What percentage of your day do you think you interact directly with them?
A Zero.

Q For the Leadpoint workers working as sorters, providing those services at the Recyclery, who directly -- who gives them directions as to what to do during the day if you know?
MS. GAREA: Objection, lacks foundation.
MS. TOWNSEND: I said if you know.
HEARING OFFICER LOYA: Well, that's fine, if you know, answer it.

THE WITNESS: The Leadpoint management staff.

Q BY MS. TOWNSEND: Do you personally give any daily work directions to Leadpoint workers at the Recyclery?

A No.

Q Do you -- does that go for the sorters, and the housekeepers, and the screen cleaners?

A Yes. It's consistent that way.

Q Uh-huh. Are you aware of -- BFI does have HR in general, correct? Even though --

A Correct.

Q -- not on site. Are you aware of any Leadpoint workers ever contacting BFI HR for daily labor relations needs?

A No.

Q Have you ever been involved with giving any input to a Leadpoint worker being discharged from employment?

A No.

Q Have you ever been given any input into a Leadpoint worker being transferred?

A No.

Q Have you ever given any input to a Leadpoint worker being promoted by Leadpoint?

A No.

Q Do your BFI employees routinely work side-by-side with
Leadpoint workers at the Recyclery?

MS. GAREA: Objection, vague as to routinely.

HEARING OFFICER LOYA: What do you mean by routinely?

MS. TOWNSEND: On a daily basis.

THE WITNESS: The one sorter that we have in our group is in the same sort platform area as the Leadpoint workers.

Q BY MS. TOWNSEND: Other than that one sorter do any other BFI employees work side-by-side with Leadpoint workers on a daily basis?

A We have one other worker that is on a platform; he's the sort line equipment operator.

Q And who's that individual?

A David Martinez.

Q Is he on a platform right next to Leadpoint workers or is he in a control room?

A He's in a control room which is located on the equipment platforms.

Q Are Leadpoint workers allowed to enter that control room?

A Yes, they're allowed.

Q For what reason?

A If they need to talk to one of their leads and Leadpoint leads have their, I guess working office or working space in that control room.

Q Other than Leadpoint workers talking to their supervisors do they have any reason in regards to the services that they
provide at the Recyclery to be in that control room?

MS. GAREA: Objection, lacks foundation, calls for speculation.

HEARING OFFICER LOYA: Answer if you know.

THE WITNESS: From what I know they don't have a reason to go into that control room other than to talk to their leads.

MS. TOWNSEND: I don't think I have any further questions at this point, although I would reserve the right to recall him based on once we actually hear the evidence from the Union.

HEARING OFFICER LOYA: Okay. Any questions from Leadpoint?

MR. PEDHIRNEY: No questions.

HEARING OFFICER LOYA: Questions from --

MS. GAREA: Sure, I have a few.

CROSS-EXAMINATION

Q BY MS. GAREA: Good morning, Mr. Mennie. My name is Susan Garea. I'm an attorney for the petitioning party, Teamsters Local 350.

You gave a list of different categories, classifications of BFI employees at the Recyclery. You didn't mention mechanics. Do you employ any mechanics?

A Yes, we do.

Q BFI employed?

A Yes.

Q Okay. And those mechanics have worked with -- alongside
with maintenance helpers supplied by Leadpoint, correct?

MS. TOWNSEND: Objection, vague as to work alongside.

HEARING OFFICER LOYA: Can you rephrase your question to be more specific as to what you mean?

MS. GAREA: Well, I believe the attorney for BFI had asked Mr. Mennie previously if BFI workers worked alongside Leadpoint workers. So I'm following up on that line of questioning with respect to a particular kind of employee called a maintenance helper. Can you --

THE WITNESS: Am I free to go?

HEARING OFFICER LOYA: I'm sorry, go ahead.

THE WITNESS: Okay. Yes. I think I know what position you're talking about.

Q BY MS. GAREA: You know the position?

A It is a general laborer that provides some assistance to the mechanics.

Q So those general laborers supplied by Leadpoint are working alongside the mechanics throughout the day?

A They have a general routine of things that they're supposed to go through. And a mechanic may ask him for assistance from a general laborer standpoint, not --

Q And the mechanics that you're referring to are BFI mechanics?

A Correct.

Q And if they ask that Leadpoint supplied general laborer
for assistance that general laborer must follow those
directions, correct?

MS. TOWNSEND: Objection, vague as directions. I'm
assuming we're not arguing that that's a supervisor for the
mechanics.

HEARING OFFICER LOYA: Can you be more specific as to what
type of help the mechanics can ask --

THE WITNESS: The mechanic may need help lifting
something, carrying equipment or parts to an area to kind of
make his job more expedient.

Q BY MS. GAREA: So it's your testimony that the only thing
that the -- the only kind of help that maintenance helpers are
asked for by BFI is for lifting or carrying?

A Let me say I don't know everything that's concluded in
what that person does.

Q Okay. And who would know that from BFI?

A Paul Sutter might.

Q Does Paul Sutter -- I'm sorry, Paul Sutter you said?

A Correct.

Q Okay. Does he supervise the mechanics?

A He does.

Q Who supervises the one BFI sorter?

A That would be the day shift supervisor, John Sutter.

Q And what percentage of Mr. Sutter's time does he spend in
the sort platform area each day?
MS. TOWNSEND: Objection --

THE WITNESS: I don't know.

MS. TOWNSEND: -- foundation. It's all right. He answered he didn't know.

Q BY MS. GAREA: You directly supervised Mr. Sutter, correct?

A No.

Q Okay. He reports to you?

A He reports to Paul Keck.

Q He reports to Paul Keck who then reports to you?

A Correct.

Q Okay. It's your understanding that Mr. Sutter spends some percentage of his workday on -- at the -- in the sort platform area, correct?

A Yes.

Q In addition to supervising the one sorter does Mr. Sutter also supervise the line operator?

A Yeah -- yes.

Q Who's also located on the sort platform area?

A He's located in the control room.

Q Is that separate from the sort platform area?

A It's located on the sort equipment in the platform -- it's located on the sort platforms.

Q Okay. How many sorting lines are there at BFI?

A Four general sort lines.
Q And on any given day BFI determines what sort lines will be running, correct?

A Yes.

Q And BFI tells Leadpoint what headcount they need for any particular day, correct?

A Yes. We give them a target headcount.

Q I'm sorry, can you -- I --

A We give them a target headcount.

Q And that's based on the number of lines that you're going to have running and the number of sorters you need on each line?

A Correct.

Q Is Leadpoint permitted to say, we got your target headcount, but we're going to go ahead and provide ten more employees than that?

A It's not come up.

Q So Leadpoint complies with your target headcounts in your experience?

A Yes.

Q You're aware that Leadpoint employees sometimes work overtime at your facility?

A Yes.

Q And whether or not the Leadpoint employees on a given shift are going to work overtime or not is determined by BFI, correct?
A Did you see that on an individual basis, or --
Q Whether or not the Leadpoint employees that are working on a particular line are going to work overtime is determined by BFI?
A BFI determines how long we're going to run the equipment. Leadpoint would determine who stays around if we're going to run overtime.
Q So let's say you have a particular line that BFI is determined is going to work overtime. Do you stop the line at the end of the scheduled shift and give time for Leadpoint to sort around the workers, or do you just keep running that line right into overtime?
MS. TOWNSEND: Objection, mischaracterizes the testimony.
He did not say that BFI determines overtime.
THE WITNESS: What we do --
Q BY MS. GAREA: Uh-huh.
A -- is we determine how long we're going to run a particular sort line.
Q Uh-huh.
A The supervisor then will let Leadpoint management staff or their line leads know how long we're going to run individual lines. At that point I don't know what happens on how Leadpoint determines who stays.
Q And my question was, does BFI stop the line that it's determined it's going to run overtime on at the end of the
shift and then restart it, or does it just keep running it
continuously?

MS. TOWNSEND: Objection, mischaracterizes testimony. He
did not state that BFI decides if they're going to do overtime.

HEARING OFFICER LOYA: Does -- can you rephrase your
question so that --

MS. GAREA: I don't think I'm mischaracterizing his
testimony. Let me try to ask this question again.

Q BY MS. GAREA: BFI determines that it's going to run a
particular line -- it's going to run a particular line past the
end of a shift, correct?

A Correct.

Q Okay. Now my question is, when BFI does that, does it
stop the line at the end of the shift and then restart it
sometime later or does the line just continuously run from the
shift time into overtime?

A I don't know. We'll have to check with a supervisor that
actually is on site when that transition would -- or when we
arrive at the situation; I just don't know.

Q Okay. So that would be John Sutter or Augustine Ortiz?

A Correct.

Q Okay. And you mentioned that the supervisors let the lead
-- the BFI supervisors let the Leadpoint supervisors know at
some point during the shift if the line's going to run
 overtime, correct?
Q And how do they inform them?

MS. TOWNSEND: Objection, lacks foundation.

HEARING OFFICER LOYA: Do you know?

THE WITNESS: Our supervisors let Leadpoint's management and supervisory staff know how long we're going to run.

Q BY MS. GAREA: Do they tell them over a walkie-talkie, or how do they tell them?

MS. TOWNSEND: Objection, lacks foundation.

THE WITNESS: I don't know on a given day how that transaction happens.

Q BY MS. GAREA: Okay. But you know that your -- the BFI supervisors communicate with the Leadpoint supervisors throughout the day via walkie-talkie, correct?

A Yes.

Q And those walkie-talkies are provided by BFI?

A Correct.

Q BFI sets the shifts that the Leadpoint workers work, correct?

A Set the timing of the shift, yes.

Q Yes. And BFI pays Leadpoint based on headcount or the number of employees that Leadpoint had working on any particular day, correct?

A We pay them a contractual service fee.

Q And that contractual service fee is based on the number of
employees that Leadpoint had working on a particular day,
correct?

A It's based on hours --
Q Based on hours.
A -- serviced.
Q Hours worked by the Leadpoint employees?
A Correct.
Q The BFI supervisors, John Sutter and Augustine Ortiz, they
hold pre-shift meetings with the Leadpoint supervisors,
correct?
A Yes.
Q And those happen every day?
A They should. I can't say that they do every day.
Q Do you allow -- does BFI allow Leadpoint employees to
operate the sorting lines?
A No.
Q So Leadpoint -- a Leadpoint employee can't turn a
particular sorting -- can't turn the sorting lines on or off,
correct?
A They can turn it off with an emergency stop switch at
their location, but they are not able to start equipment.
Q And you've instructed Leadpoint -- BFI's instructed
Leadpoint employees on when they can use the emergency switch?
MS. TOWNSEND: Objection, vague as to who BFI's
instructing, Leadpoint employees, is it supervisors or workers?
HEARING OFFICER LOYA: Can you rephrase?

MS. GAREA: I think --

THE WITNESS: No. Say it again so I can hear --

Q BY MS. GAREA: Sure.

A -- how you said that.

Q BFI has instructed Leadpoint employees as to when they can use the emergency switch, correct?

A Instruct the leads on when they can use emergency stops who then in turn train their employees.

Q Who sets the pace that the sorting lines run at?

A It's a collaboration between the equipment sort line operator and the Republic Services supervisor.

Q Who is the Republic Services supervisor?

A It would be either John Sutter or Augustine Ortiz. And the sort line operator would either be David Martinez or Lupe and for some reason her last name escapes me right now.

Q And those same folks stop the line for breaks?

A Yes.

Q BFI maintains productivity standards for the lines, correct?

A Yes.

Q And what are those?

A They track how much time the equipment is down versus running. We track how many tons per hour are processed on individual lines.
Q: And do you have a particular standard for the tons per hour?

A: It'll vary depending on what -- there are several factors but we have to hit a quality standard. So that often times dictates the speed of the equipment.

Q: And you said they vary. Do they vary day by day, shift by shift, how often do they vary?

A: It can vary by the load that's brought in, depending on whether it's wet outside and the material's wet. There's a lot of factors.

Q: And who sets the productivity standard for any given load or period of time?

A: The supervisor and the sort line equipment operator.

Q: So that would be John Sutter, or Augustine Ortiz, and David Martinez, and Lupe?

A: Yes.

MS. GAREA: I'd like to mark this as an exhibit. This is the temporary labor services agreement. I think we believe -- before we agreed we could enter this as a Joint Exhibit, or at least there wouldn't be any objection to its admission.

(Joint Exhibit Number 1 Marked for Identification)

MR. PEDHIRNEY: Correct.

Q: BY MS. GAREA: Have you seen this document before?

A: Yes.

Q: What is it?
A It's a Republic Services agreement with Leadpoint on the services they are providing onsite at Newby Island.

Q At where, sorry?

A Newby Island Recyclery.

Q Okay. And just to clarify, BFI is a subsidiary of Republic Services, correct?

A BFI's a legal entity.

Q Uh-huh.

A Republic Services has, I guess is the parent company.

Q Okay. Colloquially some of the employees might refer to BFI as Republic and vice versa. Do those names -- are those names used interchangeably at the site?

A These days most times you'll hear Republic Services. It's pretty rare to hear somebody say BFI --

Q Okay.

A -- or at least the legal entity name.

Q And when someone says Republic Services you understand them to mean the company we've been referring to as BFI today?

A Correct.

Q Okay. Have you reviewed this document before?

A From time to time, yes.

Q Okay. So you're familiar with it generally?

A Generally I can. Wouldn't say I've read every single sentence and paragraph.

Q Okay. And this is the agreement that was entered into
with Leadpoint back in 2009?

A That's correct.

Q And are these terms still in place today?

A Yes. I think there's been updates to exhibits --

Q Okay.

A -- on fee schedules. I believe that's the only change.

Q So at the end of the document we've got attachments marked Exhibit C, Exhibit A and Exhibit B. Your testimony is that some of these exhibits may have been updated or changed, but all of the pages prior to that, 1 through 11 remain the same?

A Exhibit A has been updated as recently as March. Exhibit C has not been updated although it's -- well, it's become obsolete because it was based on old equipment. We are -- it's no longer onsite. And Exhibit B I'm not sure. I'm not aware of a change to Exhibit B.

Q Okay. And then pages 1 through 11 as far as you know these terms remain in effect today?

A Correct.

Q Okay.

A Yes.

Q Okay. If you look -- if you could look at paragraph 4 titled Agency's responsibility for personnel.

A Okay.

Q And before I continue asking questions about this document, agency is referring here to Leadpoint, correct?
A: That's what the service agreement says.

Q: Okay. I just want to make sure that we're reading this correctly. And if you look at the second paragraph it starts agency will recruit.

A: Uh-huh.

Q: Okay. And then -- I'm sorry. If you -- that's the wrong paragraph. If I could have you look at the fourth paragraph saying, "Prior to referral of personnel to client" --

A: Uh-huh.

Q: -- and client refers to BFI?

A: Yes.

Q: Okay. It requires that -- it says, "The agency shall ensure in a manner consistent with applicable law that one, such personnel referred to client have passed at a minimum a five panel urinalysis drug screen."

A: Yes.

Q: And --

A: I see it.

Q: -- so you require Leadpoint to drug test its employees before they come and work at BFI, correct?

A: That's what the agreement says.

Q: And consistent with the agreement BFI does in fact require that, correct?

A: Are you asking about Republic's -- or BFI's policy about our -- of our employees?
Q No. I'm asking about you to confirm that BFI does in fact require Leadpoint to drug test its employees before they work at BFI?
A Yes. That's I assume why we put it in the agreement.
Q Okay. And if you turn to the fifth paragraph under that section.
A That was four that we were on, wasn't that correct?
Q Yeah.
A So just the next one.
Q So the next one.
A Okay.
Q Uh-huh. That starts, "Agency has the sole responsibility", that paragraph.
A Yeah.
Q And the last sentence says, "Client maintains the right to reject or discontinue the use of personnel as set forth in paragraph 7"; do you see that?
A Yes.
Q So BFI retains the authority to reject or discontinue any of the Leadpoint employees, correct?
A Well, can I read through that sentence real quick and I'll ask you to repeat your question?
Q Sure.
A Okay. So what was the question again?
Q That BFI reserves to itself the authority to reject or
1. discontinue any Leadpoint employees.
2. A I think this is saying that we have the right to maintain
3. a drug and alcohol free worksite.
4. Q Okay. If you can turn to the paragraph that's numbered
5. number 7. It's called personnel changes. Can you read that
6. first sentence in that paragraph out loud?
7. A "Client may reject any personnel and client may
8. discontinue the use of any personnel for any or no reason."
9. Would you like me to continue?
10. Q No, that's it. So BFI reserves to itself the authority to
11. discontinue the use of any Leadpoint personnel for any reason,
12. correct?
13. A In this agreement that's what it states.
14. Q Okay. If you look at paragraph -- what's numbered
15. paragraph 5, safety and training; do you see that one?
16. A Which page are we on -- or which section number? It's
17. probably --
18. Q Section number 5, safety and training.
19. A Okay.
20. Q And then if you turn to the second -- sorry. The end of
21. the first paragraph is actually on the next page.
22. A Okay.
23. Q And if you look at that last sentence it says, "Client
24. reserves the right to enforce the safety policy provided to
25. personnel."
A Okay.

Q So it was your understanding that BFI reserves the right to itself to enforce its safety policy as to Leadpoint employees, correct?

A Having read the whole paragraph, but I am sure that the agreement says that we can enforce or we can have a safety policy onsite and require Leadpoint to live up to it.

Q Okay. And you do, correct?

A Require safety?

Q Yeah.

A Yeah. We have safety standards, yes.

Q Yeah. Can you take a look at paragraph number 14, client's books and records?

A Okay.

Q Okay. And the second paragraph, that first sentence it says, "Client shall be entitled to exam Agency's books and records pertaining to the personnel; do you see that?

A Yeah.

Q So BFI retains to itself the authority to inspect the personnel records of Leadpoint employees, correct?

A It's stated in the agreement, yeah.

Q Okay. Okay. And looking at paragraph number 3 entitled "Rates and payments" on the first page; can you turn to that one?

A Okay.
THE WITNESS: There was a video and photo shoot August probably timeframe of 2012 where Leadpoint employees were asked to wear PPE with Republic Services logos for that photo shoot. Not full uniforms, but the PP --

Q BY MS. GAREA: And with the Republic Services logo?
A Would have been on their vest, yes.

HEARING OFFICER LOYA: What is PPE?
THE WITNESS: Personal protective equipment.

Q BY MS. GAREA: And are you aware of metals that have been given out by BFI to Leadpoint employees for productivity?
A No.

Q BFI sometimes requires Leadpoint employees to come out on Saturdays, correct?
A We have a Saturday housekeeping crew, yes.

Q So apart from -- withdrawn. So is it your testimony that it's regularly scheduled Saturday work every single week?
A Yes. There is a Saturday crew every week.

Q BFI shuts down its facility for certain holidays; is that right?
A There's only three.

Q Three holidays?
A Thanksgiving, Christmas Day and New Year's.

Q And Leadpoint doesn't have the authority to shut down your facility for different holidays, correct?
A No, they do not.
Q And BFI requires Leadpoint employees to sign a benefits waiver; is that right?

A It's not a requirement of Republic Services.

Q Okay. If you turn to what was marked as Exhibit B to Union Exhibit 1 I guess. It's the very last page. So --

A I guess I was incorrect on that.

Q Okay. So there is a benefits waiver for the Leadpoint employees?

A Yes.

Q Leadpoint employees use the BFI bathrooms, and break room, and parking lot, correct?

A They use the facility. We provide bathroom and break room facilities at the operation.

Q Okay. And you -- and BFI maintains those facilities that you provide?

A Sure. We contract out people to clean them out.

MS. GAREA: I'd like to move for the admission of Union Exhibit 1 I guess, the temporary labor services agreement.

HEARING OFFICER LOYA: Any objection?

MS. TOWNSEND: Wasn't it a joint exhibit? Joint --

MS. GAREA: Yeah. Joint Exhibit 1 then.

MS. TOWNSEND: No objection.

HEARING OFFICER LOYA: Okay. So I'll receive Joint Exhibit 1.

(Joint Exhibit Number 1 Received into Evidence)
MS. GAREA: Okay.

MR. PEDHIRNEY: No objection, although I have one request. We request that the rates set forth in Exhibit A be redacted. The rates that we produced in response to subpoena were redacted. I don't know where this version came from, but we'd ask that this be reduced for the -- redacted for the record.

HEARING OFFICER LOYA: So you just -- you're asking for which particular numbers?

MR. PEDHIRNEY: Yeah. The numbers in Exhibit A to this joint exhibit.

HEARING OFFICER LOYA: So all the numbers or just certain numbers?

MR. PEDHIRNEY: All of the numbers please.

HEARING OFFICER LOYA: At the 41 point --

MR. PEDHIRNEY: Yes.

HEARING OFFICER LOYA: Okay. Any objection to that being the rates?

MS. TOWNSEND: No objection.

MS. GAREA: No objection.

HEARING OFFICER LOYA: So on -- during a break we can go ahead and redact the rates from the official exhibit.

MS. GAREA: Okay. I'd like to mark this as Union Exhibit 1. It's for identification an email from Paul Keck sent on August 2nd to Vincent Haas CC Carl Mennie.

(Union Exhibit Number 1 Marked for Identification)
Q BY MS. GAREA: Can you take a look at this and do you recognize this document?
A Yes.
Q What is it?
A It's instruction to Leadpoint's site manager.
Q And the instruction's being given by Paul Keck, correct?
A Correct.
Q Who's the operations manager for BFI?
A Yes.
Q And the instruction is to reduce the headcount, correct?
A Correct.
Q Okay. And then also to position employees in a particular place, correct? At the east end of the presorts.
A He's saying -- he's instructing him what the requirement will be on that sort line, yes.
Q Okay. Okay. And in the very last line of the email says in bold and underlined, "This staffing change is effective Monday, August 5th, 2013." Do you see that?
A Uh-huh.
Q Yes?
A Yes, I do. Sorry.
Q Okay. And in fact that staffing change was made on Monday, August 5th, correct?
A I would assume that --
MS. TOWNSEND: Objection, lacks foundation.
THE WITNESS: I haven't seen a report to know how many
people showed up today at this point, but --

Q BY MS. GAREA: You have no reason to believe it wasn't
complied with?

A Correct, yes.

Q Okay. And you say you haven't seen a report. Can you
tell me what report you're referring to?

A We get I guess periodic and daily reports from Leadpoint
on how many people they have brought in along with hours
worked.

Q Who reviews those reports on a daily basis?

A Several people receive them. I'm not sure who actually
spends the time to look at them each day.

Q Okay. Is it any particular person's responsibility to
review the reports?

A Paul Keck has to manage --

Q Uh-huh.

A -- his expenses. So I would think he is looking at that
report.

Q And do you know the reason that Paul Keck instructed this
two employee reduction on August 2nd?

A Yes.

Q Why was that?

A 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 of that sort line. So I asked Paul to implement that change.

MS. GAREA: I'd like to move for the admission of Union Exhibit 1.

HEARING OFFICER LOYA: Objection?

MS. TOWNSEND: No objection.

MR. PEDHIRNEY: No objection.

HEARING OFFICER LOYA: Union Exhibit 1 is received.

(Union Exhibit Number 1 Received into Evidence)

MS. GAREA: Okay. I am going to mark for identification Union Exhibit 2.

(Union Exhibit Number 2 Marked for Identification)

MS. GAREA: It's an email from Paul Keck to Frank Ramirez on June 5th, 2013.

Q BY MS. GAREA: Have you seen this document before?

A Yes.

Q What is it?

A It's a report of alcohol being on the job site.

Q And the report was made by who?

A Paul Keck.

Q And at the -- if you look at the very last sentence of the email it says, "I hope you'll agree this Leadpoint employee should be immediately dismissed." Do you see that?

A Yes.
MR. PEDHIRNEY: I do.

MS. GAREA: So if I can show you this.

HEARING OFFICER LOYA: Okay.

MS. GAREA: Okay.

Q BY MS. GAREA: So it's actually two pages but I'm just going to --

A Sure.

Q Do you recognize this document, Mr. Mennie?

A Yes.

Q Okay.

MS. GAREA: I'm going to mark this for identification as Union 3.

(Union Exhibit Number 3 Marked for Identification)


Q BY MS. GAREA: What is it?

A It's an addendum to the rate schedule based on a change in city ordinance in San Jose.

Q Okay. And you signed this document on behalf of Republic Services?

A Yes, I did.

Q And you entered into this agreement with Republic on March 6th, 2013? I'm sorry, you enter -- withdrawn. You entered this agreement with Leadpoint on March 6th, 2013; is that right?
A: That's when I signed it, yes.

Q: Okay. And when in fact did the Leadpoint employees receive the raise?

MS. TOWNSEND: Objection, mischaracterization in terms of raise.

HEARING OFFICER LOYA: Do you know what --

THE WITNESS: The change in service fee was effective March 11th, 2013.

Q: BY MS. GAREA: So you changed the service fee that you paid Leadpoint as of March 11th, 2013?

A: Correct.

Q: Okay.

MS. GAREA: I'd like to move for admission of Union 3.

MR. PEDHIRNEY: No objection.

MS. TOWNSEND: No objection.

HEARING OFFICER LOYA: It is received.

(Union Exhibit Number 3 Received into Evidence)

MS. GAREA: All right. I have no further questions at this time.

MS. TOWNSEND: I do have some follow-up questions. I don't know if you want to take a break now or have me go through them.

HEARING OFFICER LOYA: Do you think it'll take --

MS. TOWNSEND: I don't think it'll take --

HEARING OFFICER LOYA: Go ahead then.
MS. TOWNSEND: -- all that long.

HEARING OFFICER LOYA: That's fine.

MS. TOWNSEND: I just want to make sure no one needed a break.

REDIRECT EXAMINATION

Q BY MS. TOWNSEND: Mr. Mennie, you testified earlier about mechanics, BFI employees asking Leadpoint workers for some assistance such as lifting or carrying; do you remember that testimony?

A Yes.

Q How often are you aware of that that's actually occurred?

A I don't know; I'm not out there.

Q So you have no idea if it's every day, if it's once a year?

A There is an assistant assigned to that position.

Q That a BFI mechanic would be asking a Leadpoint worker for some type of help with lifting or carrying?

A I'm honestly not with those guys to know exactly what the interchange is.

Q Okay. Does BFI provide walkie-talkies to any of the Leadpoint workers; people who are not supervisors?

A We were just issuing them to Leadpoint leads and onsite managers.

Q You testified earlier about four general sort lines and how those work. And you testified that BFI determines which
sort line is running; do you remember that testimony?
A Yes.

Q Does BFI decide which particular Leadpoint worker is working on any of the sort lines at any given time?
A No.

Q Do you or any of your supervisors have a practice of reviewing all of the Leadpoint employees who might be assigned to service your contract and either accepting or rejecting them prior to being assigned to that contract?
A No.

Q Have you ever yourself rejected or discontinued the use of a Leadpoint worker at the Recyclery?
A No.

Q Union's counsel asked you a lot of questions about the agreement.
A Uh-huh.

Q One of them -- one of the sections was section 5, safety and training. Do you know whether BFI as a company has any requirements under the law to maintain certain safety standards at its facility?
MS. GAREA: Objection, relevance, vague.

MS. TOWNSEND: Well, we got a lot of questions about the safety policy, so whether or not we have certain safety requirements is relevant to why we would have safety requirements in place in reference in this contract.
MS. GAREA: Well, whether or not they're required by law or not is irrelevant to the control that BFI exercises over the enforcement of its safety policies if they're pursuant to law or pursuant to their own personal HR policies or some combination thereof. It's not really relevant.

MS. TOWNSEND: I believe it's relevant. If they're required to maintain safety regardless of who the individual is on the worksite that does go to whether or not they're actually controlling terms and conditions of employment or they're just complying with state and federal law.

MS. GAREA: Well, whether or not they're compliant with state and federal law it doesn't impact the fact that the analysis of whether or not they are controlling the employees.

HEARING OFFICER LOYA: Okay. I think it's helpful to have a clear understanding of what the safety policy is and why is it in place, and how it's enforced, and to whom it's enforced.

So I'll allow the question.

Q BY MS. TOWNSEND: Do you want me to re-ask the question?
A Yeah, if you could.

Q Through all our banter.
A I got a little confused.

Q Do you as a person overseeing the facility know whether the company has any type of legal requirements to maintain certain safety standards at the facility regardless of who the individual is, whether it's an employee, a contract worker, or
even a customer or third party onsite?

A I don't know what the law would state for contractors onsite. I know we have to have our own safety policies to remain in compliance with OSHA. How that liability is shared with Republic Services in relationship to a contract service provider I don't have that legal knowledge.

Q Okay. You answered some questions earlier about section 14 of the agreement in regards to retaining authority to inspect personal records of Leadpoint workers. Do you remember that testimony?

A Yeah.

Q Have you ever actually asked to look at a personnel file for a Leadpoint worker?

A No, I have not.

Q Are you aware of any of your supervisors ever requesting a look at a personnel file of a Leadpoint worker?

A I'm not aware of it.

Q You had some questions on section 3, rates and payment. Has Leadpoint ever asked -- strike that. Has Leadpoint ever told you that they wanted to pay any of their workers a pay rate in excess of the pay rate for full-time employees of BFI?

A Could you say that one more time?

Q Sure.

A Because I want to make sure I understood that.

Q There's a provision that you answered some questions about
that states, "Agency shall not without client's prior approval pay a pay rate in excess of the pay rate for full-time employees of client who performs similar tasks." Do you see that in paragraph -- or section 3?

A Yeah. So the question is?

Q Has that ever actually occurred where Leadpoint has told you that they want to pay their employees a pay rate in excess of BFI employees who --

A No, they have not.

Q -- performed similar tasks? Okay. You testified you have a house crew that -- or housekeeping crew that works every Saturday, right?

A Yes.

Q Do you select which particular Leadpoint workers actually work that Saturday shift?

A No.

Q Do you have any involvement in directly speaking to those Leadpoint workers in regards to their Saturday shift and what they should be doing?

A I do not.

Q Does BFI pay their employees holiday pay?

A Yes.

Q Do you know whether Leadpoint pays its employees holiday pay?

A I don't know.
Q Leadpoint ever ask you to change your contract service rates to reflect holiday pay?
A No.
Q Do -- have Leadpoint workers ever come to you with a holiday request for days when Recyclery was open but they want to take a holiday?
A No.
Q Do you know whether Leadpoint gives their employees holidays other than Thanksgiving, Christmas and New Year’s Even?
A I don't know.
Q Do you still have Union Exhibit 1 in front of you? Union Exhibit 1, email about Monday reductions.
A Yes.
Q Did you have any involvement in selecting any Leadpoint workers who would no longer be working that shift referenced in the email?
A No.
Q Do you have any idea which Leadpoint workers Leadpoint may have selected to no longer work that shift?
A No.
Q Turn to Union Exhibit 2. Do you have that in front of you?
A Is that the other email, or is that --
Q Correct.
A Okay.

Q The second email that you looked at.

A Okay.

Q Did you, yourself have any input into whether or not Leadpoint continued to employ the workers referenced in this email?

MS. GAREA: Objection, vague and argument. He's already testified that -- oh, withdrawn. That's my objection.

HEARING OFFICER LOYA: Your objection is that it's vague?

MS. GAREA: Vague -- you know, I'll withdraw the objection. Go ahead. You can --

Q BY MS. TOWNSEND: Did you want me to restate the question?

A Yeah, please.

Q Sure. In regards to these Leadpoint workers referenced in the email did you personally have any input into whether or not they remained employed with Leadpoint?

A No.

Q For those Leadpoint workers that had some PPE on for that video shoot in August of I believe you said 2012, did they keep that PPE?

A No.

Q How long roughly was that video shoot if you're aware?

A I believe it was two days.

Q Okay.

A Might have been three.
Q And do you know what happened to the PPE that they used for the video shoot once it was over?

A Yes. It was turned back into our offices.

Q Okay.

MS. TOWNSEND: No further questions at this time. Again, reserving the right to recall.

MR. PEDHIRNEY: No questions.

MS. GAREA: No questions.

HEARING OFFICER LOYA: No questions, okay. So BFI has a safety policy. Is this in writing somewhere?

THE WITNESS: Yeah. We have an injury illness prevention program. They have several different safety programs as part of that.

HEARING OFFICER LOYA: Okay.

THE WITNESS: And they're written programs, yes.

HEARING OFFICER LOYA: Okay. Is this given -- handed out to employees at the facility, or how --

THE WITNESS: We do. Not the whole program, but we do training that familiarizes Republic Services employees with what those programs are.

HEARING OFFICER LOYA: Okay. And who -- is it only Republic Services employees or do the Leadpoint employees also attend those?

THE WITNESS: Leadpoint employees do not attend those training classes.
HEARING OFFICER LOYA: Do you know how or if the BFI safety policy is communicated to the Leadpoint employees?

THE WITNESS: We have communicated what our general requirements are for job site safety. I haven't seen their updated program to know how it necessarily compares to our program, but they maintain their own.

HEARING OFFICER LOYA: And regarding Exhibit B of the agreement, the benefits waiver, do you know who gives that exhibit to the employee to sign?

THE WITNESS: I know it's not Republic Services but I don't know who at Leadpoint does.

HEARING OFFICER LOYA: Okay. Okay. Any further questions from any of the parties?

MS. GAREA: None.

MR. PEDHIRNEY: No further questions.

HEARING OFFICER LOYA: Okay. Sir, you may step down.

MR. MENNIE: Okay.

HEARING OFFICER LOYA: And we can take a quick break off the record.

(Off the record at 11:39 a.m.)

HEARING OFFICER LOYA: We're on the record. And off-the-record discussions, and the Union has to resubmit its request to a sequestration of the witnesses, and being now that the conference room next door is open, and I won't order sequestration, but if the parties wish to voluntarily have
their witnesses sit in the conference room next door as they
wait to go on, they may have their witnesses do so, and so they
may do that at this point if they wished.

BFI?

MS. TOWNSEND: I think we're fine still having to run in
the room.

MR. PEDHIRNEY: Same position with respect to Leadpoint.

HEARING OFFICER LOYA: And -- okay. So we can continue,
then, with -- do you wish to make an argument as to why the
witnesses of the parties should go into the other room?

MS. GAREA: Well, I like to -- I won't restate my argument
made previously, on the record, but I would like to add that
efficiency concerns do not seem particularly valid as there's
an open room right next door, and further raised issues of
witness intimidation.

MR. PEDHIRNEY: My response to that, I've been through,
you know, several R hearings; sequestering witnesses is an
unusual event for an R hearing. I see no reason for any
different protocol or procedure in this particular case.

MS. TOWNSEND: I believe points position. I certainly
don't see any intimidation concerns here.

HEARING OFFICER LOYA: So we can go ahead and move on then
to the -- our next witness?

MS. TOWNSEND: Next witness? Sure.

HEARING OFFICER LOYA: BFI, please call your next witness.
MS. TOWNSEND: BFI would like to call Augustine Ortiz.

HEARING OFFICER LOYA: Please, raise your right hand.

MR. ORTIZ: Yes.

Whereupon,

AUGUSTINE ORTIZ

having been duly sworn, was called as a witness herein and was examined and testified as follows:

HEARING OFFICER LOYA: Okay. Can you please state your name, and spell it, for the record.

THE WITNESS: Yes. My name is Augustine Ortiz. It's A-U-G-U-S-T-I-N-E, Ortiz, O-R-T-I-Z.

Q BY MS. TOWNSEND: Good morning, Mr. Ortiz.

A Good morning.

Q Where are you currently employed?

A I'm working for public services, as a second shift MRF supervisor.

Q Okay. Can you, sir, explain what MRF stands for, if you know?

A Manufacturing process.

Q Okay. How long have you been with the company?

A For about a year. I started on June 16, 2012.

Q Did you start as that second-shift supervisor at the MRF at that point?

A Yes.

Q Okay. And what are you current job duties?
Basically, I oversee the process of -- well, the processing side. There is four lines, so recycling the streams. Residential single stream, commercial single stream; commercial wet and commercial dry.

As shift supervisor, do you actually supervise any BFI employees?

Yes.

MS. GAREA: Objection; calls for legal -- you can answer. I'll withdraw my objection.

MS. TOWNSEND: Okay.

And which BFI employees do you supervise?

I am -- supervise heavy-equipment operators on the tipping floor. I supervise the roll-up driver, a Class A driver, bailer operator, forklift operators, and then control-room operator.

Do you supervise any of the Leadpoint workers who provides sorting services at the Recyclery?

No.

Have you been involved with hiring any of those Leadpoint workers?

No.

Do you place any recruitment ads for Leadpoint?

No.

Have you reviewed any applications for Leadpoint?
Q Are you involved with interviewing any of Leadpoint's employees?
A No.

Q Are you involved with any type of pre-hire drug-screen tests for Leadpoint employees?
A No.

Q Has Leadpoint ever come to you to ask for approval before they assign a particular Leadpoint worker to the Recyclery?
A No.

Q Have you ever given any Leadpoint workers employee orientation or training?
A No.

Q Do you ever speak with the Leadpoint workers directly at the Recyclery?
A No.

Q Do you ever speak with the Leadpoint supervisors directly at the Recyclery?
A Yes.

Q What percentage of your time do you think during the shift that you actually speak with Leadpoint supervisors?
A I would say about 40 percent.

Q And what's sorts of things are you discussing with Leadpoint supervisors? And hang on, let me -- just to make the record clear for her, and make it easier for the court
reporter, make sure I finish my question before you start answering, okay?

A Yeah.

Q Okay. So what sorts of topics do you discuss with Leadpoint supervisors?

A What I do is, I conduct the daily meeting, so based on the volume of the T-controller, that dictates what lines are going to be run. So based on that, I discuss the plan for the day, and to coordinate what's going to be executed throughout the day.

Q During -- for those daily meetings, are there any Leadpoint workers who are not supervisors present for the meeting?

A No. Basically, it's just a Leadpoint assistant manager and their supervisors. The Leadpoint supervisors and maintenance on the Republic side.

Q On a day-to-day basis, do you speak directly with Leadpoint workers?

A No.

Q Are you out in the area where Leadpoint workers are doing their sorting duties during the day?

A I do, but if I see any quality issues on the line, I call the lead. Throughout the plant we break down, and the lead has different departments, different sections, so if I see a quality issue, I call the lead in charge of that specific
1 department --
2 Q Okay.
3 A -- and bring up my concern about quality.
4 Q Do you ever bring up quality concerns directly to
5 Leadpoint workers?
6 A More likely, I will call the lead supervisor on board.
7 Q You ever been involved with any discipline for Leadpoint
8 workers?
9 A No.
10 Q You ever conducted any type of disciplinary investigation
11 involving a Leadpoint worker?
12 A Excuse me. No.
13 Q Have you ever been -- have you ever been present when a
14 Leadpoint worker has received discipline?
15 A No.
16 Q Have you ever recommended discipline to Leadpoint for one
17 of their workers?
18 A No.
19 Q Have you ever written or issued actual discipline to a
20 Leadpoint worker?
21 A No.
22 Q Does Leadpoint authorize you to discipline its workers?
23 A No.
24 Q Has Leadpoint ever asked for your approval before they
25 reassign a Leadpoint worker from a Recyclery to another
contract that Leadpoint may have?

A No.

Q Do you ever schedule individual Leadpoint workers?

A No.

Q Do you ever grant or deny time off requests for Leadpoint workers?

A No.

Q Do you ever decide which particular Leadpoint worker is going to work overtime?

A No.

Q Do you ever decide which particular Leadpoint worker might work on Saturday?

A No.

Q Do you maintain any type of payroll records for the Leadpoint workers?

A No.

Q Do you maintain any type of time records for Leadpoint workers?

A No.

Q Have you ever been asked to approve Leadpoint workers' time records?

A No.

Q Are you familiar with the names of the Leadpoint workers at the Recyclery?

A Just the lead supervisor and the assistant manager, and
just their names, to be honest.

Q So in terms of --

A I don't know their last names.

Q That's fine. In terms of actual Leadpoint workers and non-supervisors, are you familiar with their names?

A No.

Q Do you maintain any personnel files for the Leadpoint workers?

A No.

Q Are the Leadpoint workers ever required to check in with you when they start their shift, or when they leave their shift?

A No.

Q If a Leadpoint worker is going to be late or absent, are they required to contact you?

A No.

Q Do they ever actually contact you if they're going to be late or absent?

A No.

Q Have you ever had Leadpoint worker come to you with any pay issues?

A No.

Q You ever had --

A Not that I know.

Q Have you ever had a Leadpoint worker come to you with any
scheduling issues?

A  No.

Q  Have you had a Leadpoint worker come to you for any type of HR concerns?

A  Not that I know of.

Q  If you need something to get done on the line that you talked about --

A  Uh-huh.

Q  -- how do you get that accomplished?

A  Basically, what I do is almost at the beginning of the shift, I go and see how much material we've got on the tipping floor. That's when I had a meeting on a daily basis with the super -- Leadpoint supervisors, the Leadpoint assistant manager, and then a Republic maintenance to coordinate and come up with a plan. It pretty much starts when I kind of coordinate what's going to be the plan for the day.

Q  And you said that you coordinate that with Leadpoint supervisors?

A  Yes.

Q  Do you ever coordinate that with Leadpoint workers who aren't supervisors?

A  No. That's the -- part of the reason that I like to have a meeting on a daily basis. What I do is I have a meeting in the control room, and it's just the supervisors attend the meetings, so that way they can plan it out with Leadpoint --
their Leadpoint employees. So I pretty much coordinate with
the Leadpoint supervisors.

Q And are you present or involved with that effort, where
you said the Leadpoint supervisors plan it out with their
Leadpoint workers, are you present when they're doing that?
A No. No.

Q What percentage of time during you day do you think you
spend around the Leadpoint workers, the non-supervisors?
A I would say about 25 percent, but it's just more like
this, a platform, so I pass by, but initially I try to
concentrate on the Republic issues that we have.

Q Are you going to be discussing anything directly with the
Leadpoint workers as you're passing by them?
A No. Somebody might call me, then I'll say talk to your
supervisor and just -- I just keep going.

Q Okay. Are you personally involved with deciding how much
Leadpoint pays their workers?
A No.

Q Have you ever been involved with any Leadpoint worker
being discharged from their employment with Leadpoint?
A No.

Q Have you been involved with any promotions of Leadpoint
workers?
A No.

Q Have you been involved with any transfers of any Leadpoint
workers?

A No.

MS. TOWNSEND: No further questions right now. Again, I'm reserving the right to recall.

MR. PEDHIRNEY: Any questions from Leadpoint?

CROSS-EXAMINATION

Q BY MS. GAREA: Hi, Mr. Ortiz.

A Hi.

Q My name is Susan Garea, attorney for the Union, and I have a few follow-up questions for you.

A Yeah.

Q Is it your testimony that you never speak to Leadpoint -- non-supervisor Leadpoint employees?

A I say, no. If I -- like I say, I pass by; if somebody call me and say, hey, Augie, then I will go refer to your supervisor.

Q So the only time you've spoken to the non-supervisory Leadpoint employees is to tell them to talk to their supervisor?

A More than likely.

Q So sometimes you've said other things on occasion?

A I don't -- I don't -- I don't recall.

Q Your job, in part, is to insure the productivity at the lines, correct?

A Uh-huh. Yes.
Q That's right? Yeah. And part of the way that you do that is to make sure that the Leadpoint supervisors are making sure that the Leadpoint employees are working continuously, correct?

MS. TOWNSEND: Objection; vague as to working continuously.

HEARING OFFICER LOYA: What do you mean by working continuously? Can you rephrase your question.

Q BY MS. GAREA: Part of the way that you do your job of insuring the productivities of the lines is to make sure that the Leadpoint supervisors make sure that the Leadpoint employees are sorting properly, correct?

A I always refer to the lead on the department assigned to that specific area. If I have any issues with quality, any issues with the flow of material coming up on the line, I call the lead specifically in charge of that specific area.

Q Right. So you might identify a problem with quality or with the flow on the line, and then you raise that issue to the Leadpoint supervisor, correct?

A Yes.

Q And that's so that the Leadpoint supervisor can take care of the problem, correct?

A Yes.

Q You're on the -- on the -- in the sorting area every day, correct?

A Throughout the day.
Q Yeah. And you've been to meetings with Leadpoint employees, correct?

A I conducted a couple of safety meetings, but it was not related specifically to the Leadpoint employees. It was more like in general. I had the assistant manager onboard, and I had all the leads onboard.

Q And when you say leads, you're referring to the Leadpoint leads?

A The Leadpoint leads.

Q Okay.

A The Leadpoint assistant manager -- I mean, the Leadpoint manager to get onboard.

Q And in attendance at these meetings were Leadpoint employees, correct?

A Yes.

Q Okay. And you said a couple. Can you give me an estimate of how many you've held?

A It was about two, I believe.

Q Okay. And what topics did you go over at these meetings?

A I talked about quality issues that we had on specific, like OMP, OCC, PET. That's the commodities that we process.

Q Okay. I'm sorry. Can you -- I -- just for the record, I don't know what those things are. Can you explain it quickly?

A PET is like the water bottles, Gatorade bottles.

Q Okay.
OMP is like the -- usually a newspaper.

Okay. And the PEC?

PET, that's the water bottles.

Oh, I see. So there was OMP and PET?

Uh-huh.

And what were the quality issues that you had noticed with the OMP and PET?

I guess, some contaminants; textiles, Styrofoam, different contaminants that they are not supposed to be.

And so what instructions -- what instructions did you give to fix the contaminant issue?

What I did is I explained to them about, you know, how it's affecting productivity, I mean, quality, and how the customer -- like, we are in a global market, so if we produce poor quality, that affects the quality.

Okay. And what were the other issues that you raised at these safety meetings with the Leadpoint employees?

That was the only one I recall about it, it was that one, quality.

Uh-huh.

And when we had the emergency-evacuation meeting?

Emergency evacuation?

Yeah.

So on those occasions, you spoke to Leadpoint employees, didn't you, at those safety meetings?
A: Yes, but I -- in their presence, I had assistant manager and a Leadpoint supervisors.

Q: Okay. So in front of the Leadpoint managers and supervisors, you spoke to the Leadpoint employees?

A: Yes.

Q: Okay.

A: But I make it clear --

MS. TOWNSEND: I don’t think --

THE WITNESS: This is a correction. I make it clear --

MS. GAREA: There's no question pending.

MS. TOWNSEND: There's no question pending.

Q: BY MS. GAREA: Have you ever directed housekeeping employees as to what to clean up?

A: Not that I remember. We may ask Leadpoint in that.

Q: You've asked Leadpoint to send housekeeping employees to a specific place?

A: Yeah.

Q: Is that right?

A: I sent -- not that I -- I don't know, or that I recall.

Q: Uh-huh.

A: You may ask Leadpoint for that question.

Q: Okay. Have you ever changed the speed of the line that is being -- the sorting lines that are being operated?

A: It's a decision based on the volume coming up on the lines.
Q And you make that decision?
A Yes.
Q Okay. When the lines -- sometimes the lines will go down, correct?
A Uh-huh.
Q And have you ever had that happen on your shift?
A Yes.
Q And during that time, have you ever instructed Leadpoint employees to do something else; to go clean up something, or anything like that?
A No.
Q Never?
A I instruct the supervisor, their supervisor.
Q Okay. So you've instructed the Leadpoint supervisors --
A Yes.
Q -- to have --
A I only coordinate usually with the onsite manager. Let them -- let him know what's the plan.
Q Okay. And so you -- you communicate to the onsite manager for Leadpoint, who then communicates that to the Leadpoint employees?
A And we have a radio onboard, so I call the control-room operator --
Q Uh-huh.
A -- so I tell her what's going to be the plan, and
everybody can get what's the plan, all the Leadpoint supervisors.

Q  And who controls when the lines stop for breaks; is that you, or is that Lupe or somebody else?
A  It's a team effort.

Q  Between you and Lupe?
A  Between me and Lupe.

Q  And when -- is it you that decides whether or not the lines are going to continue to work after the shift?
A  It's based on -- like I said, it's based on the volume. I usually -- throughout the shift, I go see --

Q  Okay.
A  -- how much we got on the tipping floor --

Q  Uh-huh.
A  -- and that's when I have a meeting and set up the plant for the day.

Q  And what time of day is it that you call that meeting?
A  Usually, it's about 4 or 5:00. Between 4 and 5.

Q  And you hold that meeting with the Leadpoint supervisors?
A  Yes.

Q  And you try to tell them what's going to happen with the overtime?
A  Yes.

Q  Have you ever had employees -- Leadpoint employees stop the line for an emergency?
A Yes.

Q And have you talked to Leadpoint employees about trying to decrease the amount of times that they stop the line?

A I have talked to the supervisor.

Q Okay. What have you told the supervisor?

A The supervisor, when I have -- conduct my meetings, I explain to the supervisors and assistant manager the impact that it has when stopping the lines, and how it affects productivity. And then the supervisor has a radio onboard, so usually that supervisor will go reset the emergency stop and call the control-room operator to start up the system.

Q Do you ever go in on Saturdays?

A No.

MS. GAREA: Okay. I have no further questions.

HEARING OFFICER LOYA: Attorney --

MS. TOWNSEND: I have just a couple of follow-up questions.

HEARING OFFICER LOYA: Sure.

REDIRECT EXAMINATION

Q BY MS. TOWNSEND: Do you ever select particular Leadpoint workers in terms of who is going to work overtime?

A No.

Q You said that the schedules are based on volume; is that correct?

A Yes.
Q Are breaks based on volume as well, when you decide --
A If there's breakdowns, then I call a little break to go ahead, and we're going to take a break.
Q I'm sorry. I don't think I -- I caught your answer. Are break times based on volume as well?
A We set up a time frame when they're supposed to take their breaks.
Q Okay. In relation to that one safety meeting that you had, that you just talked about; did you ever individually counsel or discipline any Leadpoint workers in regards to quality issues?
A No.
Q And you said if you do see a quality issue, you'll bring it to the Leadpoint lead's attention?
A Yes.
Q Do you remember that testimony? Do you ever tell that Leadpoint lead how to deal with it; for example, move this person around; get rid of this person; anything like that, or do you just let them decide how to deal with it?
A I let the Leadpoint supervisor onboard decide what he wants to do.

MS. TOWNSEND: No further questions.
MR. PEDHIRNEY: No questions from Leadpoint.
MS. TOWNSEND: None. She may have some questions for you.
THE WITNESS: I'm sorry.
HEARING OFFICER LOYA: So the daily meetings that you have, who attends those meetings?

THE WITNESS: Yes. It's -- it's Lupe; she's the control-room operator. The Leadpoint onsite manager, and the leads from Leadpoint, and then a maintenance; there is two maintenance that come to the meetings.

HEARING OFFICER LOYA: Okay. And aside from the plan for the day, what else is discussed in those meetings?

THE WITNESS: Usually, what I do is come up with a list of plan in advance of things that we're going to work it out. If it's a maintenance issue, I oversee what needs to be done, so I plan it for the day. If some screens need to be cleaned, I let the assistant manager plan it out for the day. If there's any quality issues, I'll bring it up. If there's any mechanical issues, I ask maintenance. So go around the table and ask, you know, what needs to be done. And then if there's anything that wanted to be -- that important for maintenance.

HEARING OFFICER LOYA: Do you give them anything in writing?

THE WITNESS: No, it's more like a -- there is like a board, and I just make my set points, comments.

HEARING OFFICER LOYA: And when the sorting lines are down, what do -- what do the employees do?

THE WITNESS: When the lines go down?

HEARING OFFICER LOYA: Uh-huh.
THE WITNESS: If the line goes down, I call Lupe, the control-room operator and tell her, Lupe, we're going to have -- we had a jam up on so and so; we're going to be down for 15 or 20 minutes. So I call Arturo and say, Arturo, we're going to be down for 20 minutes, you coordinate accordingly.

HEARING OFFICER LOYA: Arturo is?

THE WITNESS: He's the onsite manager from Leadpoint.

HEARING OFFICER LOYA: Okay.

THE WITNESS: And he assigns his people to do housekeeping.

HEARING OFFICER LOYA: So he decides?

THE WITNESS: Yeah.

HEARING OFFICER LOYA: Okay.

Any other questions from the parties?

MS. TOWNSEND: I just want to make sure it's clear.

REDIRECT EXAMINATION CONTINUED

Q BY MS. TOWNSEND: The maintenance people you're talking about in the daily meetings, are those BFI employees?

A Yeah, that's BFI. Yeah.

Q Okay.

A That's BFI employees.

MR. PEDHIRNEY: No questions.

HEARING OFFICER LOYA: Union?

MS. GAREA: No questions.

HEARING OFFICER LOYA: Okay. You may step down. Thank
you.

BFI, do you want to call your third witness?

MS. TOWNSEND: Okay. Did you want to take the lunch break now at 12:30, because this one will probably go a little longer than he did.

HEARING OFFICER LOYA: He'll go longer? Do the parties have any preference of when to take lunch break?

Off the record.

(Off the record at 12:26 p.m.)

HEARING OFFICER LOYA: Okay. BFI, call your third witness.

MS. TOWNSEND: Yeah. Thank you. BFI would call John Sutter.

HEARING OFFICER LOYA: Please raise your right hand.

MR. SUTTER: Yes.

Whereupon,

JOHN SUTTER

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

HEARING OFFICER LOYA: Okay. Please state and spell your name.


DIRECT EXAMINATION

Q BY MS. TOWNSEND: Good afternoon, Mr. Sutter. Where are you currently employed?
1 A Republic Services, RPS.

2 Q And what is your current job title?

3 A Dayshift supervisor.

4 Q And how long have you been in that position?

5 A Since May of 2012.

6 Q And what are your current job duties in that position?

7 A I supervise the whole entire facility of the MRF. The shipping manager is off right now, so I've expanded.

9 Q Okay. And in that job, do you supervise BFI employees?

10 A Yes.

11 Q And which specific BFI employees do you supervise?

12 A Anybody that shows up for dayshift falls under my umbrella.

14 Q Okay.

15 A From both ends of the MRF.

16 Q Okay. And you said you currently are overseeing the shipping supervisors job duties?

18 A Yeah. So I am working with the shipping and receiving, and I'm working with the forklift drivers.

20 Q Are those all BFI employees?

21 A Yes.

22 Q Okay. Do you supervise any Leadpoint workers as part of your job duties?

24 A No.

25 Q In terms of the Leadpoint workers, have you been involved
with hiring any of them?

A No.

Q Have you been involved with replacing recruitment ads for Leadpoint?

A No.

Q Do you review any job applications for Leadpoint?

A No.

Q Have you ever interviewed anyone for Leadpoint?

A No.

Q Are you involved in any pre-hire drug screens or testing for Leadpoint workers?

A No.

Q Do you have any involvement for the hiring decisions for Leadpoint workers?

A No.

Q Have you ever been involved in a promotion of a Leadpoint worker?

A No.

Q Ever been involved with Leadpoint transferring a Leadpoint worker off of BFI's contract onto another contract?

A No.

Q Have you ever provided employee orientation to a Leadpoint worker?

A No.

Q Does Leadpoint ever come to you before they assign one of
their workers to the Recyclery and ask for your approval of
that assignment?

Q A No.

Q Have you ever been involved with any discipline for
Leadpoint workers?

A None.

MS. GAREA: Objection, vague. Involved with is a vague
phrase.

Q BY MS. TOWNSEND: Have you ever disciplined any Leadpoint
workers yourself?

A None. No.

Q Has Leadpoint ever authorized you to discipline any of
their workers?

A No.

Q Have you ever been involved in a disciplinary
investigation for any Leadpoint workers?

A No.

Q Have you ever been present during a disciplinary meeting
for any Leadpoint workers?

A No.

Q Have you gone to Leadpoint and made a recommendation or
asked that they discipline one of their workers?

A No.

Q Have you ever conducted any employee meetings where
Leadpoint workers have been present?
A No.

Q Have you ever conducted any training for Leadpoint workers, like you would provide to Republic -- or I'm sorry, BFI employees?

A I'm -- you need to be more specific. If you're talking about training when we first started up, nobody knew anything, so there was training. I'm not sure if that answers --

Q Do you give -- do you currently give any training to BFI employees?

A No.

Q Okay. Do you currently give any training to Leadpoint workers?

A No.

Q Do you set the -- do you schedule any individual Leadpoint workers?

A No.

Q Do you ever approve or deny leave requests for Leadpoint workers?

A No.

Q Do you decide which specific Leadpoint workers need to work overtime?

A No.

Q Are you involved with determining how much Leadpoint pays its specific workers?

A No.
During your shift, where are you, typically, in the facility?

Everywhere.

Everywhere?

I constantly walk from one end of the building to the other; outside, inside, everywhere.

Do you ever spend any time in work areas where there are Leadpoint workers present?

Yes.

What percentage of your day do you think you spend in those areas?

Nowadays, it's probably 15.

Fifteen percent? Do you ever speak directly with Leadpoint workers while you're in those work areas?

Yes, I have.

And on what occasions have you done that?

Well, again, you should be more specific, because sometimes it will be non-work related. For example, a Leadpoint worker and I were growing beards. There will be times where somebody will ask for tools; for example, that all the shelves are broken, they'll -- they'll come to me, and I'll say, okay, and then I'll go right to the Leadpoint supervisor to see if they can get them their tools.

Okay.

I'll go to maintenance to try and see if I can get them
their tools.

Q  Do you ever speak directly with Leadpoint workers in terms of the services that they're providing at the Recyclery?

A  No.

Q  Have you ever had any Leadpoint workers come to you with any pay issues, for example?

A  No.

Q  Have you ever had any Leadpoint workers come to you with any concerns with their schedule?

A  No.

Q  Ever had any Leadpoint workers come to you with any HR related concerns?

A  No. None.

Q  Have you ever had any Leadpoint workers come to you in terms of the services that they're providing at the Recyclery?

A  No.

Q  Have you ever had -- well, do you ever had conversations with Leadpoint leads at the Recyclery?

A  Yes.

Q  On what -- for what reasons would you have conversations with the leads?

A  Tools, quality issues, cleaning issues.

Q  And when you bring quality or cleaning issues to the Leadpoint leads, are you directing them how to resolve the issue with their workers?
A: No, not -- no. It's more of I'll see a problem, and I'll mention that there's a problem on this line; there's too much plastic.

Q: Uh-huh.

A: I mean, that's all I need to say. They understand.

Q: Okay. So then you're not telling them specifically, here's what --

A: How to or what to --

Q: -- you need to do with your workers?

A: -- they know.

Q: Okay. Do you maintain any type of payroll records for the Leadpoint workers?

A: No.

Q: Do you maintain any type of time records for the Leadpoint workers?

A: No.

Q: Are you required to approve Leadpoint workers' time records?

A: No.

Q: Are Leadpoint workers required to check in and out with you as they come and go from the facility?

A: No.

Q: If a Leadpoint worker is going to be tardy or absent, are they expected to notify you of that?

A: Not me.
Q Do you know the names of the Leadpoint workers at the Recyclery?

A I know some.

Q How many names do you think you know?

A I'd probably say, workers, right?

Q Workers, right.

A Just workers?

Q Non-supervisors, non-leads.

A Six or seven.

Q Okay. Do maintain any type of personnel files for the Leadpoint workers?

A No.

Q Do ever discuss with Leadpoint leads or supervisors the types of personnel files or time records that they should keep for their workers?

A No.

Q Do you set the line speeds when you're on shift?

A I've heard you ask that question before, and I'm not really sure what you're talking about. You say line speed. There's two types of speed; there's the hand speed of the workers, and then there's the speed of the belt, and I honestly don't know which one you're talking about.

Q Well, let's talk about the speed of the belt.

A Yes. I can control the speed.

Q Are you involved with that? And is that based on any
particular factors? How do you determine the speed of the belt?

A It will be based on the flow of material.

Q Okay. You said there's also another speed that --

A Well, the hand speed of the workers themselves.

Q Uh-huh.

A I have nothing to do with that. That's all the Leadpoint criteria.

Q Okay. So you don't set out any criteria for the Leadpoint workers in terms of hand speed.

A Huh-uh.

MS. TOWNSEND: No further questions right now.

HEARING OFFICER LOYA: Leadpoint?

MR. PEDHIRNEY: No questions from Leadpoint.

MS. GAREA: I have a few questions.

CROSS-EXAMINATION

Q BY MS. GAREA: Good afternoon, Mr. Sutter. My name is Susan Garea, and I'm going to ask you a few follow-up questions.

Do you direct any of the housekeeping employees for Leadpoint as to what to clean up throughout the day?

A No. Not -- no.

Q No? Do you ever give any directions directly to the housekeeping employees?

A If I'm approached and they ask about something, I may, or
I may just to got the lead. If it's a small pile, but if it's a big project, it's got to be -- I go to the leads.

Q So if it's -- you have directed housekeeping employees to clean up smaller -- smaller issues?

A When I'm -- when I'm asked, I give an answer, yes.

Q Now, you mentioned that when you first started up, no one knew anything, so you had to do some training. What time period are you talking about there?

A Oh, I'd say the first month.

Q The first month with the Leadpoint employees?

A The first month with everybody.

Q Okay. And that included the Leadpoint employees? Yes?

A Yeah.

Q Okay.

A Yes.

Q And what kind of training was given to the Leadpoint employees during that first month?

A What to pull off the belt. If there's a jam, how to get a rotor out of a screen.

Q And who specifically gave that training about the pulling -- what to pull off the belt, and how to deal with a jam?

A Well, the leads would direct the workers, and they got their information -- the leads got their information from management.

Q Including yourself?
A Including myself.

Q And have you given directions either directly to Leadpoint workers, or through Leadpoint managers regarding pressing the emergency stop?

A Say that, again, please.

Q Sure. Let me back up. There's a way for the employees working on the lines to press some sort of emergency stop, correct?

A Right.

Q Yeah. So have -- have you ever given any instructions as to when to use that emergency stop to the Leadpoint employees, either directly or through the Leadpoint managers?

A Through the Leadpoint managers.

Q Uh-huh.

A So if there's an animal on the line, they'll stop it; take off the animal, and then they can't -- all -- there's a button to reset it, but then David in the control room has to start the system running again.

Q Okay. And have you -- did you give specific instructions about what kinds of situations you should press the emergency stop for, and what kinds of --

A To the leads I have, yes.

Q Okay. And have you had to follow back up with the leads regarding how often their -- it's being pressed?

A Yes. You can also look in the computer and see how many
times a belt has been stopped.

Q Is that something that you do?
A No.

Q Okay.
A A BFI employee will do that.

Q Who? Who?
A A BFI -- David in the control room.

Q Okay. And then does David also have a walkie-talkie?
A Yes.

Q And he communicates with the Leadpoint supervisors?
A Yes.

Q Throughout the day?
A Yes.

Q And can you hear the communications that -- between the -- between David and the Leadpoint leads?
A Yes.

Q And you also communicate with the Leadpoint supervisors with those walkie-talkies as well?
A Yes.

Q Have you ever called any Leadpoint employees into the control room?
A No.

Q Have you been in the control room with Leadpoint employees?
A Yes.
Q On what occasions has that happened?
A There's been times where they'll have a question, and they'll just go in the control room if the leads there. If they have a cut on their finger, they'll go to Leadpoint, and then they'll deal with that, but they don't come to me, no.
Q Do you give a headcount to the Leadpoint leads?
A No.
Q That comes from --
A Every day there's a sheet that's filled out, and the leads count their lines, and then they have a paper that they record that on every morning.
Q And I'm sorry, who gives the headcount to the Leadpoint leads?
MS. TOWNSEND: Objection; vague as to headcount. I think there's confusion about headcount requirements versus actual headcount during the day.
Q BY MS. GAREA: Okay. So do you give the headcount targets to the leads, or does that come from somebody else?
A That comes from somebody else.
Q Okay. Do you know who that comes from?
A Paul Keck.
Q Okay. And then you're saying that Leadpoint then reports back to BFI on their headcount each day?
A Yes.
Q And they do that in writing?
Q And have you seen those sheets?
A Yes.
Q Does BFI maintain them? Does BFI keep those headcount sheets?
A You know, that's a good question. I don't know. They're in the control room; where they go from there, I honestly don't know.
Q Okay. Are those sheets documents -- blank documents provided by BFI to Leadpoint to fill in; do you know?
A Yeah, I believe so.
Q And do you review the daily headcount sheet that Leadpoint turns in?
A No.
Q Do you know what the purpose of that is, the purpose of the sheet is?
A So Leadpoint is expected to have X number of people per day, and so they're trying to track if that actually happens. So today there was -- they were short three people.
Q And is Leadpoint also paid based on that headcount?
MS. TOWNSEND: Objection; lacks foundation. I don't know that he's familiar with the agreement between the two companies.
Q BY MS. GAREA: If you know?
A No, I have no idea.
Q Do you have pre-shift meetings with you -- with the -- with any Leadpoint employees or supervisors?
A Supervisors, no employees.
Q Okay. And -- well, supervisors at Leadpoint are employees of Leadpoint, correct?
MS. TOWNSEND: Objection; calls for a legal conclusion.
THE WITNESS: Isn't that what we're fighting over right now, partly?
MS. GAREA: Not quite, but --
Q BY MS. GAREA: So Leadpoint, you have pre-shift meetings with Leadpoint supervisors, correct?
A Yeah.
Q Okay.
A Yes.
Q And you have those every day?
A Yes, at 5:30.
Q Okay. And do you ever discuss overtime at those meetings?
A No, not at those meetings.
Q Do you discuss overtime at some other point?
A Later -- later in the day.
Q When you know how much overtime you're going to need?
A Yes. So typically, 11:00 somebody's -- David is calling wanting to know if we're going to run overtime that day or not, and if we are, what lines would we be running.
Q And is that you who decides?
A Yes. So I'll make the decision at that point. Most of
the time, it's on the radio; like, 98 percent of the time, it's
on the radio. Either way, the leads are told what time we're
going to run until, so they have an hour to manipulate whatever
people they need to move to whatever line that's going to run,
and who's going to go home; that's all their decisions.
Q And you and David -- withdrawn.
A Yes.
Q David is the line operator that works on the dayshift,
correct?
A Yes.
Q Okay. So you supervise him directly?
A Yes.
Q And the -- together, you two control when any one of the
particular lines starts or stops?
A Yes, to a degree. There are -- there are other factors
that could stop a line.
Q Such as a maintenance problem or the emergency?
A Yeah, or a wire wrapped around the screen, it will just
stop the screen. You know, there's a --
Q And if one of those things happened, you and David figure
out how to deal with it, correct?
A Yes.
Q And you decide if you're going to send the Leadpoint
employees on break or not?
A Yes. Based on a given problem, yes.
Q And you're aware that BFI has productivity standards for the lines, correct?

A We have productivity standards, not so much for the individual lines like you're suggesting, more for the plant, more for the tonnage, for overall, more for percentage of up-run time. I get that a lot. I don't get this line has to have X number of -- so it does not really go by the lines; it just goes by --

Q You control, I think you testified, the speed of the belt, correct?

A Yes.

Q And the speed of the belt is one of the factors that is going to influence the overall productivity of the plant?

A To a degree, but there's also other factors. I don't know how much nuts and bolts you want me to get into.

Q Well, I think my question is, whether it's one of the factors, not the sole factor. You would agree, it's one of the factors, the speed of the belt?

A You move a belt faster -- okay. You asked. So material comes in and it's moving slow, and then as it goes to each conveyor belt, it can -- it will pick up speed and get faster and faster. The reason why you want that is because the faster it spreads out the material, so it's not necessarily because we're going to run more material, or we're going to get more material, it's actually more beneficial to the worker to be
able to get a wider spread, to be able to pull things off. You can actually run, you know, noticeably slower. If you slow the belt and you start piling up the material really to a high depth, so running the speed, this helps, but not -- not -- it doesn't help the way you're thinking. You think everything's going to go faster, that way you're doing more, and that's not really the case.

Q But you run the belt at what you think is the optimal speed to sort most efficiently, correct?

A Exactly, yes.

Q And you expect the employees to keep up with that speed?

MS. TOWNSEND: Objection; vague as to employees.

HEARING OFFICER LOYA: Who are you talking about?

Q BY MS. GAREA: You expect the employees that are working on the lines to keep up with that belt speed?

A No. If they can't keep up, we'll make adjustments, and that could be a variety of reasons. There's not just flick one switch and that solves everything. There's factors that are involved in making any given belt work better.

Q What kind of adjustments have you made for employees that can't keep up?

A We have slowed down the infeed so the operators and the loaders or the material handlers loading the system will put in a lower depth so there's no so much volume hitting them. There are times where Leadpoint will put another man on that line
that will help them get a better quality to pull more things
out that we'd want to get out. We can change the speeds of the
screen. We can lower or raise the angle of the screens, and
that will direct it to different areas.

Q What do you do if you see -- withdrawn.

You've seen -- in the time that you walk around the
sorting area, you've observed Leadpoint employees missing
certain items that they're supposed to pick up, correct?

A Yes.

Q And what have you done on those occasions?

A There's been times where I've pulled some stuff off;
there's been times when I tell the lead supervisor, this line
is not picking up. There's been times where I've just gone
back and I've adjusted a screen to compensate. Maybe move more
vitriol from one line to another. There's been times where
I've told David, the operator, he needs to slow the system
down. So he can slow -- he can slow the whole system overall
down, not just one individual belt. Or I've gone to the
operators and told them to slow down or pick more; it just
depends. There's -- there's no one single magic bullet. It's
generally a whole bunch of stuff that can fall into play here.

I understand what you're trying, but you're really opening
up a huge -- there's a lot of factors to running the place.

It's not just that easy.

Q Uh-huh. Yeah, no, I understand that there's a lot of
factors. I'm just trying to understand what all the
different --
A Yeah.
Q -- interventions that you've done in those situations.
A Yeah, and it can vary.
Q BFI expects the Leadpoint employees to keep the area that
they're working clean, correct?
A Yes.
Q And have you instructed the Leadpoint supervisors to have
the Leadpoint employees clean up their areas before they go to
break after the belt stops?
A Yes.
Q And I believe you heard Mr. Ortiz's testimony about
holding two safety meetings with Leadpoint employees; did you
hold any similar safety meetings on the dayshift?
A No. I've never done that.
Q Are you aware of meetings on the dayshift that Paul Keck
attended with Leadpoint employees?
A For educational purposes; is that what you're asking?
Q For any purpose.
A Yeah, educational.
Q Okay. And do you know what kind of topics were covered at
those meetings with Paul Keck and the --
A The wet line.
Q Okay. Do you know specifically what was discussed about
1 the wet line?
2 A The time to get the plastic off.
3 Q Say that, again? Sorry.
4 A So the wet line gets a lot of organic material and plastic
5 is not organic, so that has to come off. It sounds very simple
6 when I say it like that, but it is a big deal.
7 Q Okay. So was it a discuss -- were you in attendance at
8 that meeting?
9 A Yes.
10 Q Okay. And did Paul give instructions about how to take
11 that plastic off the wet line?
12 A Yes, technique wise.
13 Q Technique wise? Anything else?
14 A No.
15 Q Any other meetings you can recall attending with Paul and
16 the Leadpoint employees?
17 A No.
18 Q Do you ever work on Saturdays?
19 A I've worked probably five or six. After Thanksgiving, we
20 have to work that Saturday; Christmas, that Saturday; New
21 Year's, that Saturday, and then there's been a few Saturdays
22 for tests.
23 Q Okay. And are you involved at all in when Leadpoint
24 employees work on Saturdays?
25 MS. TOWNSEND: Objection; vague as to involved.
HEARING OFFICER LOYA: Can you rephrase?

Q BY MS. GAREA: Are you involved in determining when Leadpoint employees work on Saturdays?

A Oh, no.

Q Thank you. Were you present at the facility when there was the two days of the photo shoot that occurred?

A Yes.

Q Okay. And you -- and you observed the Leadpoint employees put on -- were instructed to put on gear with the Republic Services logo on it?

A Yes. They have an office equipment helmets and glasses and vests; whenever there's a tour that goes through, those people have to wear the PPE, and so they had -- that was where that stuff came from for the photo shoot.

Q And that was supplied by Republic? Those -- that PPE was supplied by BFI?

A Yes.

Q Were you aware of David giving out medals to Leadpoint employees?

A No. If they're going to give out medals, I should be getting the medals.

Q You testified that currently you're spending about 15 percent of your time in the area where the Leadpoint workers work; was that a different percentage before you took on the responsibility for overseeing shipping as well?
A Yes.

Q And what percentage of the time was that?

A Oh, probably 25, 30.

Q And you said that in your experience, the Leadpoint supervisors, after you identify a problem, that they understand and they know what -- and they know how to handle it?

A The majority of the time, yes.

Q Okay. And what is that -- what is that statement based on?

A If there's a jam in screen 71, it's happened so many times, they just -- they just know it.

Q Okay.

A They don't need to be explained to. All they just need to hear is, jam on screen 71, and they're responding.

Q But that wasn't always the case?

A Well, there's a lot of different things that can happen throughout a day where it's not, you know, the standard, common problem.

Q Right. So I guess my point is that, at some point, the Leadpoint supervisors had to learn what to do with the -- when there's a jam in screen 71, correct?

A Yes.

Q And that's -- and you taught them that?

A I -- yes. Our other mechanics. The mechanics were involved quite a bit in the beginning to undo a jam, and then
as Leadpoint assigned people that they felt were capable, then
those people were taught.

Q And those people were taught by mechanics?
A Yes.

Q So now problems come up that come up frequently, and
Leadpoint supervisors, at this point, know how to deal with
them, correct?
A Yes.

Q Whether it be a jam on screen 71, or some other typical
problem that you've addressed in the past?
A Yes.

MS. GAREA: Okay. I have no further questions.

MS. TOWNSEND: I have a few follow-up questions.

  REDIRECT EXAMINATION

Q BY MS. TOWNSEND: In regards to your testimony that you
just had about helping the Leadpoint supervisors understand how
to deal with mechanical issues that came up, are you ever
telling them how to deal with their workers?

MS. GAREA: Objection; vague. He testified that in
dealing with the mechanical issues involved, they're -- he's
dealing with -- they're potentially dealing with Leadpoint
workers, so I think the question is unclear.

MS. TOWNSEND: Well, I believe the testimony was -- the
example he gave was, how to deal with a jam, for example.

Q BY MS. TOWNSEND: That's a mechanical problem to you, or a
physical issue that needs to get resolved?

A Yes.

Q As opposed to those issues, learning how to unjam something, et cetera, are you telling Leadpoint leads how to deal with their workers if there's some kind of issue with their workers, or do you just notify them of the issue and let them deal with it how they want to?

MS. GAREA: The same objection; vague as to issue. I don't --

Q BY MS. TOWNSEND: If there's any concern with the services that Leadpoint workers are providing at the Recyclery, you said you bring those issues to Leadpoint leads, I believe you testified earlier, correct?

A Yes.

Q Do you then also tell the Leadpoint leads, and here's how I want you to address this issue with your worker, or do you simply let them decide how best to address it?

A Oh, I let them decide how best they want to address that particular issue.

Q We had some testimony about David, who is a BFI employee, correct?

A Yes.

Q Do you know whether or not David belongs to a union?

A Yes.

Q Is he represented by the Teamsters?
Q: So he's not a supervisor for BFI, correct?
A: No.

Q: You testified earlier about an educational meeting that you remember being present for with Paul Keck in regards to getting plastic off the wet line; do you remember that testimony?
A: Yes.

Q: Were you involved with or are you aware of any individual counseling or discipline that either yourself or any other BFI supervisor gave to Leadpoint workers in relation to that meeting?
A: None.

Q: You also testified earlier, at least in your viewpoint, productivity standards are looked at more from a plantwide basis, not specifically -- specific to each line?
A: Yes.

Q: Do you remember that testimony? Do you have any productivity standards for individual Leadpoint workers?
A: No, I don't.

Q: Okay. In regards to your testimony about discussing overtime, you stated you typically have a discussion with Leadpoint lead maybe an hour ahead of time; do you remember that testimony?
A: Yes.
Q What is that need to go into overtime based on?
A The material on the tipping floor.
Q Do you have any involvement in deciding who stays and who may go during that overtime for Leadpoint workers?
A No.
Q You mentioned a headcount sheet that Leadpoint leads fill out every day?
A Yes.
Q So that's just Leadpoint leads that fill that out. Does BFI supervisors ever fill those out for Leadpoint workers?
A No.
Q You also testified you can hear communications between Leadpoint leads and David about the lines; do you remember that testimony?
A Yes.
Q Are you able to hear that because you have a walkie-talkie?
A Yes.
Q Do any of the Leadpoint workers, to your knowledge, the non-supervisors, non-leads, do any of them have a walkie-talkie?
A No.
Q You mentioned, when you had your first-month training, because no one knew how to do anything. Did the equipment manufacturer provide any training on how to use that equipment
A: Yes, but I don't think they -- off the top of my head, I don't think that they had any training with Leadpoint. I think a lot of their training -- they had separate classes, but if I'm not mistaken, that was almost all with the mechanics.

Q: Okay. And when you say in the first month, was it your first month with the company, or had something happened with the Recyclery that --

A: That -- the --

Q: -- made it the first month of something?

A: So it's always been a recycling facility, but in June, July, they opened up a bigger facility, and so that was the start for a lot of people. There was a small group that had been there prior, when it was a smaller facility. They shut it down for six months, rebuilt it bigger, and that was when I started.

Q: Okay. And by small group, do you mean BFI employees? You state there was a smaller group before they --

A: Yeah. Well --

Q: -- rebuilt it?

A: -- and there was Leadpoint back then, too.

Q: Okay.

A: It's just that now it's much bigger, and so there's that many more people.

Q: And there's, from what you understand, different equipment
once they reopened it than there was before?
A Yes.
Q Okay.
A Similar, just newer, bigger, more.
Q Something like you said, that's why no one knew how to do
anything; everyone was getting training?
A Yeah. It's -- if you haven't heard, it's the worlds
largest, and became the worlds largest and it just -- since it
had never been done before, there as a whole bunch of stuff
that -- there was a lot of, all right, let's see what happens.
Q Okay. Currently, if Leadpoint does assign a new worker to
the Recyclery, do you provide any of that training --
A No.
Q -- now to those workers?
A No.
Q Do know who does?
A Oh, it would be Leadpoint, the leads.
Q Okay. You also mentioned that you've been approached by
housekeeping before, and if it's a small -- and asked if they
should clean up a small pile, I think was how you referred to
it, and you might tell them yes or no; is that --
A Yes.
Q -- correct? Are you going to be telling them how to clean
it up, or are you simply telling them yes or no?
A It will be -- I don't tell them how to clean it up. I
would just say yes or no or where.

Q Okay. Outside of occasions where the housekeeping workers approach you, do you independently approach the housekeeping workers and direct them --

A No.

Q -- what to do? Okay.

MS. TOWNSEND: No further questions, subject to recall.

MR. PEDHIRNEY: None from Leadpoint.

MS. GAREA: No questions.

HEARING OFFICER LOYA: Okay. You may step down.

(Off the record at 1:09 p.m.)

HEARING OFFICER LOYA: Back on the record.

BFI, you may call your next witness.

MS. TOWNSEND: Thank you. BFI calls Paul Keck.

Whereupon,

PAUL KECK

having been duly sworn, was called as a witness herein and was examined and testified as follows:

HEARING OFFICER LOYA: Please state your name and spell it for the record.

THE WITNESS: My name is Paul Keck, P-A-U-L K-E-C-K.

DIRECT EXAMINATION

Q BY MS. TOWNSEND: Good afternoon, Mr. Keck. Where are you currently employed?

A Newby Island Recyclery.
1 Q What is your current job title?
2 A Operations manager.

3 Q How long have you been in that position?
4 A September 2006.

5 Q What are your current job duties in that position?
6 A Operational oversight of the material recovery facility
7 and the organic operation.

8 Q Do you supervise any BFI employees as an operations
9 manager?
10 A Yes.

11 Q Which employees from BFI do you supervise?
12 A All of the employees that work in the recycling operations
13 for Republic Services, to include drivers, heavy equipment
14 operators, forklift operators, control room operators, the
15 single sorter.

16 Q Okay.
17 A Baler operators.

18 Q Do you supervise any of the Leadpoint workers that
19 currently provide sorting services at the Recyclery?
20 A No.

21 Q So you've been at the facility in your current position
22 since 2006. Do you know how long Leadpoint has been providing
23 contract workers for sorting duties?
24 A Leadpoint's been the vendor for four years.

25 Q Did any companies that you're aware of provide contract
workers to perform those services before Leadpoint?

Q  Okay. You mentioned there was one sorter who is a BFI employee; is that correct?

A  Correct.

Q  Who is the one sorter who is a BFI employee?

A  Virginia Pimentel.

Q  Do you know how long she's been a sorter?

A  She became a sorter when we had Alameda County materials coming from the City of Fremont, and that material shifted back over to Alameda County. I would say seven years ago.

Q  What was she doing at that point, before she became a sorter?

A  She was a heavy equipment operator. We lost business, we were subject to reducing our -- at that point -- Allied Waste staff, so she was subject to layoff. But instead the election was to retain her, along with another individual. That
individual never actually needed to go to the sorting operation simply because another position opened up that he was able to take.

Q And you're aware that the Teamsters currently represent BFI employees at the Recyclery; is that correct?

A Correct.

Q Is that one sorter part of the group that's represented by Teamsters?

A She is.

Q Do you know whether there's anything in the collective bargaining agreement -- let's step back. Are you familiar with the collective bargaining agreement that the company has with the Teamsters?

A Yes.

Q Are you aware of whether there's anything in that contract addresses sorters?

A Just that sort position.

Q Are sorters --

A We have exclusion for the contracted agreement that we have with Leadpoint.

Q What kind of exclusions?

A I can't tell you specifically how it's worded, but there is language in the contract that exempts that group from our bargaining unit.

Q So you mean exclusions of -- sorters are generally
excluded, is that what you mean, from the bargaining unit?

A If I had it in front of me I could read it to you, but we
have different positions that are cited in the contract not
being covered under the agreement.

Q Okay. For the Leadpoint workers that currently provide
services at the Recyclery, have you been involved with hiring
any Leadpoint workers to work there?

A No.

Q Been involved with placing any type of recruitment ads for
Leadpoint?

A No.

Q Have you been involved with interviewing applicants for
Leadpoint?

A No.

Q Are you ever required to review applications for
Leadpoint?

A No.

Q Conduct any type of pre-hire drug screen for Leadpoints
workers?

A No.

Q Do you convey any type of job offer or contract assignment
to Leadpoint workers?

A No.

Q Does Leadpoint ever come to you and ask for your approval
before they assign one of their workers to the Recyclery?
Q Are you ever involved with a Leadpoint workers promotion?
A No.

Q Ever been involved with a Leadpoint worker being transferred to another Leadpoint contract?
A No.

Q Does Leadpoint notify you when they hire a specific worker?
A No.

Q Are you involved at all with the hiring decisions that Leadpoint makes for its workers?
A No.

Q Do you ever give any type of employee orientation to Leadpoint workers?
A No.

Q What you are on duty, are you ever in the work areas where the Leadpoint workers are performing their services?
A Yes.

Q Typical day on average percentage-wise, how much time do you think you spend in those areas?
A Leadpoint has workers throughout the facility to include the organic operation and -- 30 percent of my time.

Q Do you ever converse directly with the Leadpoint workers in regards to the services they're providing at the facility?
A If the Leadpoint workers include the supervisory and
managerial staff, absolutely.

If they don't -- just for helpfulness, if I -- by Leadpoint workers, I'm going to be generally referring to non-supervisors, non-leads. So for the Leadpoint workers that aren't in the lead positions, aren't supervisors for Leadpoint, are you going to be communicating directly with them in terms of the services they're providing?

No.

Going around the facility as part of your job duties, do you ever see issues with services that the Leadpoint workers are providing?

Yes.

What do you do to address those issues, if anything?

I would get ahold of the site manager. And in his absence, I would get ahold of a -- one of the shift leads or the -- they have shift leads and they also have line leads.

These are all supervisors for Leadpoint you're referring to?

Correct. That would be my course of action.

When you have had to bring issues to a Leadpoint supervisor's attention, what are you telling them?

You know, typically our issues relate to quality, particularly outside the building where we have material that reports from various conveyor belts to a single spot, and there are different commodities that belts deliver product to, and
contamination is an issue. Bring it to their attention that
there's issues somewhere in the system that's led to this, and
help them in their effort to get to the root cause.

Q    Are you ever directing Leadpoint supervisors how to deal
with their workers in regards to addressing issues?
A    Just understand the flow of material and understand the
potential sources.

Q    Are you ever telling them how to deal with the specific
worker, to take them off the line, to have someone else go help
them to conduct their work --
A    No.  No.

Q    Have you ever been involved in any discipline for a Lead
Point worker?
A    No.

Q    Have you ever conducted any type of disciplinary meeting
with a Leadpoint worker?
A    No.

Q    Have you ever recommended a disciplinary action for a
Leadpoint worker?
A    No.

Q    Have you ever written or issued discipline yourself to a
Leadpoint worker?
A    No.

Q    Does Leadpoint authorize you to discipline its workers for
Leadpoint?
1 A They're not my employees.

2 Q So that's a no?

3 A That's a no.

4 Q I'm going to -- do we still have the exhibits up there? There should be an exhibit marked Union Exhibit 1. I'm sorry, Union Exhibit 2.

5 A 2?

6 Q Yes. Are you familiar with that document marked as Union Exhibit 2?

7 A Yes, I am.

8 Q What is that document?

9 A It's a document that I sent to -- after dealing with the on-site, sent to the owner of the company, Frank Ramirez, as it related to my witnessing of two Leadpoint employees passing a bottle of whiskey.

10 Q Did you view that as an issue?

11 A Absolutely.

12 Q Why?

13 A Well, these people were in harnesses. They're subject to engaging in fall-protection-type activities. And it's an egregious safety violation, should they actually do something with the bottle of whiskey.

14 Q You said you first spoke to on-site management; is that correct?

15 A Correct.
Q Do you remember who you spoke to?
A I talked to Vincent Haas.
Q Who is Vincent Haas?
A Vincent is the site manager for the Leadpoint at our jobsite.
Q And what do you tell Vincent?
A I told him exactly what I wrote here, that I witnessed -- I happened to be in an office and looked down into the courtyard below and the witnessed the passing of a bottle of whiskey from one Leadpoint employee to another. That individual then saw me, quickly put it away and left the area.
Q Did Vincent have any response?
A Vincent did reply. He came. I called him on the radio. He responded immediately. He then handled it. He did ask me to go down to verify that the individuals were in fact the same people that I saw. One of them I absolutely recognized, and the other one I quite honestly wasn't sure if it was him or not, but he was also present.
Q Do you know the names of either one of those two Leadpoint workers?
A I do not.
Q When you spoke to Vincent, did you tell him to take any disciplinary action against those Leadpoint workers?
A I told him that we couldn't tolerate this on the jobsite.
Q So that's a no. No disciplinary action --
A No, it's --
Q -- just that you couldn't tolerate it on the website --
I'm sorry, jobsite.

MS. GAREA: Objection, mischaracterizes his testimony.

Q BY MS. TOWNSEND: Your testimony is the only thing that you told Vincent was you couldn't tolerate it on the worksite.
A I can't have this on the jobsite.
Q Did you tell him he should suspend these workers?
A Told him that this is our jobsite, and I can't tolerate this, so I guess it could be inferred.
Q No. I'm asking a specific question. Did you tell them to take any type of disciplinary action in terms of their employment with Leadpoint as opposed to what can and cannot occur on the jobsite? Did you tell them to take any -- recommend any disciplinary action with their employees?
A In terms of how they would inflict the discipline, no.
Q Okay. Do you know if they took any disciplinary action against those workers?
A The one that I recognized, I no longer see on the jobsite.
Q Do you know whether that individual is still employed with Leadpoint?
A I do not know.
Q Do you know whether the other individual involved is still on the assignment with the Recyclery?
A He could be at our jobsite, yes.
Q: Do you know if Leadpoint took any disciplinary action against that individual?

A: I don't know what action they took in either case.

Q: Looking at Union Exhibit 2, very last line reads, "I hope you will agree this Leadpoint employee should be immediately dismissed." Do you remember writing that?

A: Correct.

Q: Do you remember what you meant by that?

A: This was actually -- same day, different employee, different Leadpoint employee.

Q: In regards to the alcohol incident, going up a couple paragraphs, you state "I request their immediate dismissal."

A: Uh-huh.

Q: Do you see that?

A: Uh-huh. That's not underlined, sure.

Q: You stated one individual you no longer see at the Recyclery; is that correct?

A: Correct.

Q: Do you know whether or not that individual is still assigned to the Recyclery?

A: The one at the very end here?

Q: No.

A: We have two incidents here.

Q: Let's go back to the --

A: We were talking about the alcohol. That's the issue I
1 thought I was addressing.

2 Q  Right, so let me go back. In terms of the alcohol
3 incident we have two Leadpoint workers who were involved,
4 correct?
5 A   Correct.
6 Q   You said one you no longer see at the Recyclery.
7 A   Uh-huh.
8 Q   Do you know whether or not that worker is still assigned
9 to the Recyclery?
10 A   I don't. Could be, but I haven't seen that individual. I
11 would recognize the facial features.
12 Q   The other individual, you said you have no idea whether
13 or not they could be still be assigned to the Recyclery.
14 A   Could be.
15 Q   When you request their immediate dismissal, do you
16 remember what that referred to; what you meant by that?
17 A   Their job assignment at our site.
18 Q   Okay. Given you don't know whether the one individual is
19 still there, is it possible that Leadpoint would have continued
20 to assign him to the jobsite?
21 A   It's certainly possible.
22 MS. GAREA: Objection, calls for speculation.
23 HEARING OFFICER LOYA: Can you rephrase your question?
24 MS. TOWNSEND: Sure.
25 Q   BY MS. TOWNSEND: Do you know whether or not Leadpoint
actually dismissed both of those workers from the job assignment at the Recyclery?

A I do not know for a fact, no.

Q Have you ever conducted any employee meetings where Lead Point workers have been present?

A I have.

Q What meeting or meetings were those?

A More recently we went over the plant-wide evacuation sounding system and where people were to report, what the alarm would sound like, to ensure that everybody was able to be accounted for.

Q Was that a meeting with both BFI employees and Leadpoint workers present?

A We had conducted a more in-depth training with Republic Services employees. This was kind of a Reader's Digest version with the Leadpoint staff.

Q So this meeting was specific to Leadpoint; is that correct?

A Correct.

Q So there weren't BFI employees present at that meeting.

A There may have arbitrarily been some people there because it may have been prior to their shift starting, a break period, a lunch period. It's conceivable that there may have been a Republic employee or two there. But they weren't asked to be there.
Q You don't remember anyone specifically as a BFI employee being present.

A Again, if they were there --

Q I'm just asking if you have a specific memory --

A No.

Q -- of anyone.

A No.

Q Okay. You said it was a Reader's Digest version. Is the evacuation system that's something specific to the Recyclery?

A Correct.

Q So that's something that BFI has the information on in terms of how it works?

A Site specific, yes.

Q Any employee meetings that you've conducted other than that, where you've had both BFI employees and Leadpoint workers, non-supervisory present?

A No. I absolutely conducted a couple of educational meetings with specific groups of sort, people involved in the sort line operations, really educational pieces.

Q Okay.

A Pulled them off the line, because it's a loud environment, difficult to shout and it's not the tone that you want for the meeting. So I bring them into the control room and talk about the objectives on that given line.

Q Do you remember any specifics in terms of educational
meetings, topics or specific line that you were addressing?
A  Well, yeah, the wet line. It's kind of new business. I
don't think that anybody anywhere is processing wet material
the way that we've sought to, and we were going through a very
difficult time in getting the next processor to accept our
material. They were continually rejecting it because of the
presence of non-organic materials. So we --
Q    And that's -- go ahead.
A    We just needed to highlight to the sort operations what
the objectives were and make sure everybody really understand
the goal.
Q    And the company that was rejecting the material is
considered to be a BFI customer?
A    BFI customer, yes.
Q    You said that this is a new industry in materials of
processing wet lines. No one really does it; is that correct,
in terms of how were you doing it?
A    Yes. Nobody's processing -- we take bagged wet cafeteria
waste, restaurant waste and we need to yield this wonderful
organic product that might have bottles and cans in it and
plastic bags, and assorted other non-organic items. And the
focus needs to be on targeting those items for removal. That's
why we have that operation.
Q    So that type of operation is specific to not the BFI
Recyclery at issue, not something people in the industry would
have general knowledge of how to process wet in that way?

MS. GAREA: Objection, calls for speculation, lacks foundation about what people generally have knowledge of in the industry.

HEARING OFFICER LOYA: Rephrase.

MS. TOWNSEND: Okay.

Q BY MS. TOWNSEND: How long have you been in the industry?

A I've been in the industry 35 years.

Q How many different companies have you worked at in the industry?

A I've worked for the same company under various names.

Q Have you worked at under various names with other ways of Processing wet lines?

A Well, I started in the solid waste side, the garbage side, with BFI. BFI was acquired by Allied Waste. That happened when I was working at the Recyclery. So at the Recyclery we were processing initially a completely different type of waste strain. It's residential, primarily, and commercial. But items that were targeting for recycling. The wet line process is really in an effort to yield organics from what otherwise two years ago would have gone directly to the landfill.

Q Okay. In your experience in the field in 35 years, even though you worked for basically one company that's changed names, are you familiar with other companies that provide similar service?
A Other recycling services, yes.

Q Are you -- this current process, in terms of how you're processing wet lines right now, are you aware of other companies?

A No.

Q Processing that way?

A No.

Q Do you personally have any involvement with scheduling the individual Leadpoint workers, who is going to work when?

A No.

Q Do you have any involvement in deciding whom Leadpoint selects to work overtime?

A I do not.

Q Do you have any involvement with maintaining payroll records for Leadpoint workers?

A No.

Q Any involvement in maintaining time records for Leadpoint workers?

A No.

Q Are you required to approve a Leadpoint worker's time records?

A I am sent an invoice, and it's always titled "for your review."

Q For individual Leadpoint workers, do they ever come to you and say "here's my time card, can you approve it"?
1 A I'm not aware of how they record their time, so the answer is no.

3 Q Do you maintain any type of personnel files for Leadpoint workers?
4 A No.

6 Q Have you ever asked to see the Leadpoint workers' personnel files?
7 A No.

9 Q Have you ever told Leadpoint what they should keep in their workers' personnel files?
10 A No.

12 Q Are you personally involved with setting the speed of the belts on the lines?
13 A No.

15 Q Are you personally involved in deciding which lines are running at what times?
17 A We have a schedule. People can't just show up when they want to show up to work. We have a schedule.

19 Q Are you personally involved in setting that schedule?
20 A Yes.

21 Q What does the schedule get set based on?
22 A It is a long-standing schedule. We start operations at 4:00 in the morning, and we cease operations on two of the lines ideally at 12:30. An eight-hour day. Two of those lines continue to run for one more half hour until 1:00 p.m. From
1 1:00 p.m. to 2 p.m., we have a maintenance window, a cleaning
2 window, and then at 2:00 p.m., the second shift starts.
3 Q If one of those lines needs to keep running longer than
4 that general schedule, are you personally involved with making
5 that decision?
6 A I would like to be. Again, the wet line and the dry line
7 both are scheduled to run until 1:00 p.m. That's just a given.
8 On occasion John Sutter, the day shift operator, shift
9 supervisor, has extended one or the other of the two single
10 stream lines to run until 1:00 p.m. And I've talked to John
11 about having that discussion prior to making that decision.
12 Q Are you involved with deciding how much Leadpoint pays its
13 individual workers?
14 A No.
15 Q Have you ever had a Leadpoint worker raise an issue of his
16 or her schedule with you?
17 A No.
18 Q Have you ever had a Leadpoint worker raise an issue of his
19 or paycheck being incorrect?
20 A No.
21 Q Have you ever had Lead workers raise any type of HR-
22 related concerns with you?
23 A There may have been a time or two, but it's not my issue.
24 I would direct them back to Leadpoint. I recall somebody
25 having an issue with one of the supervisors, and I suggested
they talk to the site manager about that.

Q Okay. Besides that one issue that a Leadpoint worker had with their supervisor, any other issues you remember Leadpoint workers raising with you from an HR perspective?

A No.

Q Have you ever had Leadpoint workers come to you to ask questions about the services that they're providing on the site?

A Asking for endorsement or -- specifically.

Q Sure. Direction, endorsement.

A Am I doing a good job?

Q Uh-huh. Sure. Have you ever had a Leadpoint worker ask you that?

A I've had somebody -- I had a statement made to me just recently "tell me what you want and we'll do it."

Q Did you direct them to what duties they should be doing?

A I said I want this place to look like Disneyland.

Q Have you ever issued any PPE to Leadpoint workers to use while they were performing their services onsite?

A I have not, but I do know that one of the Leadpoint -- actually business development managers was at the site one day and I think they were short a hard hat. He was wearing ours and gave our hard hat to one of the workers many months ago.

Q Was that something he asked permission to do or he just
1 did it?

2 A No. And when I saw that, I told him that can't be done.

3 But we do not issue our PPE to Leadpoint employees.

4 MS. TOWNSEND: No further questions at this time.

5 MR. PEDHIRNEY: None from Leadpoint.

6 MS. GAREA: Your Honor, can we have one.

7 CROSS-EXAMINATION

8 Q BY MS. GAREA: I have a few questions, Mr. Keck. My name is Susan Garea. I'm an attorney with Teamsters Union and I just wanted to ask you a few follow-up questions. If you could take a look back at the exhibit that was marked as Union 2 that your counsel asked you about.

9 A Yes.

10 Q Okay. You viewed the drinking on the job as violating BFI's safety rules, correct?

11 A I did not witness either party consume alcohol, but yes. The presence of alcohol on the job, I think any jobsite, as far as that goes.

12 Q And you have a responsibility to enforce those safety rules at the site.

13 MS. TOWNSEND: Objection, vague as to enforce, as to which individuals.

14 MS. GAREA: I think it's pretty clear. I'm going to stand by the question and ask for a ruling.

15 HEARING OFFICER LOYA: I'll allow it.
THE WITNESS: I would phrase it as not on my watch.

Q BY MS. GAREA: Did you get a response from Mr. Ramirez to this email, a written response?

A You know, I did. Quite honestly, I can't recall specifically what he said or what he stated in his response.

Q Uh-huh.

A But it was truly his decision to make.

Q Now, you received a response. Did you look and see if you still had that response in an email?

A Yes.

Q Were you able to find it?

A Yes. Did I read it again? No, I did not.

Q Do you know why it wasn't produced here today?

A I do not know why.

Q Now, the second incident that's raised in this same email, you suggest that this Leadpoint employee should be dismissed; is that right?

A Uh-huh.

Q Do you know what --

HEARING OFFICER LOYA: Is that a yes?

THE WITNESS: Yes.

Q BY MS. GAREA: Do you know what happened to that Leadpoint employee?

A I do not.

Q Have you seen that Leadpoint employee at the facility?
A I could not identify that employee to begin with, so I wouldn't know if that employee was still working for Leadpoint or not at our jobsite. Site management recognized him.

Q And did they tell you what they were going to do with respect to that second incident?

A They said they were going to take care of it.

Q You said that you held a couple of, quote/unquote, educational meetings with sorters; is that right?

A Sure.

Q Who came up with that term, educational meetings?

A Would you like to call it something different?

Q No, I'm just asking.

A Well, that's what it was.

Q Is that --

A The intention was to educate.

Q Okay. Educate the sorters about what?

A About target materials that, you know, here we have a line that is organic. Certainly not organic is presented to them and our objective is to make it an organic result. So they need to understand the difference between what's organic and what's not organic.

Q So you're educating them on what items should be removed from the line; is that accurate?

A Sure.

Q And the purpose of educating them about that fact is so
that they perform their job in compliance with that education, correct?

A To meet the objective, yes.

Q Did you have any kind of sign-in sheet for these meetings or record in any way which employees were present?

A Very informal.

Q And how many -- you said you had a few, brought some of these employees into the control room in small groups; is that right?

A The wet line group currently is seven headcount, so I brought all seven in with their site -- with their line supervisor. And if the site manager was present, they were certainly welcome to attend.

Q Was that a one-time meeting or did you meet with them a couple of occasions?

A I met with the wet line on swing shift probably two, maybe three times. And I think I did the same thing with the day shift twice. More recently I just did that with our commercial single stream line on swing shift.

Q How many employees work on that commercial single?

A That was a group of six.

Q What were you educating that group about?

A I stood -- there's a lot of really non-descript things that come across.

Q Uh-huh.
And it was an effort to educate all of us, quite honestly. What would you do? Was kind of the theme behind it, and tried to come to a consensus.

What prompted you to call these meetings? Well, the other night, because these are things that I captured at the end, after it had gone by them. These are things that we would want to try to capture on the front end.

So based on your own observations about the work that was being done; is that right? Uh-huh. Or to fulfill their level of understanding. Based on your own observations though; is that right? Yes.

Now, you review the amount of hours that are worked by the Leadpoint employees, correct? I am provided an Excel spreadsheet and it has totals, yes. Who provides that to you? Leadpoint corporate, gentleman named Paul Russo.

Did BFI request that information from Leadpoint at some point?

Well, we've got to pay them. That's how we know what to pay them.

Okay. What's the purpose of your review of the document? It's a list of all of their employees by name, whether, you know, their regular time, their overtime, their grand totals, their bill rate. We're charged by the hour.
Q  Are you checking it for any particular purpose?
A  I have a model, you know, based upon -- as I discussed, our scheduled hours and the expectation and headcount target, and to see if things are in line, sure. That's the level of my review.
Q  Does Leadpoint have any authority to change the shift times that you described earlier?
A  We start at 4:00 in the morning. Do they have the ability to make that 3:30?
Q  Yeah.
A  No. They could certainly ask us, I suppose, if they felt that it would be more conducive to something, but there are Republic Services employees that adhere to it. You know, there is a schedule for all the employees for Republic. So a shift like that would dictate a shift in Republic staffing schedule changes as well.
Q  If you could take a look at what's marked as Union Exhibit 1, which is an email, dated August 2, 2013.
A  Okay.
Q  You sent this email, correct?
A  Correct.
Q  And if you look at the very last sentence of the email it says "this staffing change is effective Monday, August 5, 2013."
A  Correct.
Was that staffing change in fact complied with on Monday, August 5?

A I'm hoping. I'm here. It's August 5th. I didn't go in to work today. I came here.

Q Okay. Do you have any reason to believe that BFI ignored the staffing change?

A BFI requested the staffing schedule.

Q I'm sorry, withdrawn. Do you have any reason to believe that Leadpoint ignored BFI's request on the staffing change?

A No, I don't.

Q Do you ever attend any of the pre-shift meetings with BFI and Leadpoint supervisors?

A I have. Rarely.

Q Is there any particular reason why you have on rare occasions?

A If I were in at that hour. They're usually before I get in to work.

MS. GAREA: Those are the questions I have.

HEARING OFFICER LOYA: Any follow-up?

MS. TOWNSEND: Just a few questions, thank you.

REDIRECT EXAMINATION

Q BY MS. TOWNSEND: In regards to Union Exhibit 1 that the Union's attorney just asked you about --

A Uh-huh.

Q -- staffing changes, total reduction of two headcount.
Were you involved in identifying any specific Leadpoint worker who would be involved with this headcount reduction?

No.

In terms of the Excel spreadsheet with the totals that you just testified to that Leadpoint provides to you, are you involved -- when looking at that you said it shows individual hours, correct?

Uh-huh.

Are you involved with making any decisions in terms of how many regular hours or overtime hours any particular Leadpoint worker works under our contract?

Not any particular worker, no.

In terms of safety policies and violations of those, have you ever had a Leadpoint worker, outside of the individuals in Union's Exhibit 2, engage in something that you viewed as a safety violation at the Recyclery?

Have I responded to it or am I aware of it?

Has there ever been any Leadpoint worker that's engaged in what you feel is a safety violation that you've responded to?

There was a Leadpoint worker beaten pretty badly one day in the men's bathroom. That's a safety violation.

What was your response to that?

The police were called.

Did you issue any type of discipline or counseling to any Leadpoint worker involved in incident?
I did not. That became a police issue.

Did you bring it to the Leadpoint supervisor's attention?

I did.

In regards to the educational meetings that you've had, have you issued any individual counseling or discipline to any Leadpoint workers related to those topics?

No.

MS. TOWNSEND: No further questions at this time, subject to recall.

MR. PEDHIRNEY: No further questions from Leadpoint.

MS. GAREA: No further questions from the Union.

HEARING OFFICER LOYA: I just have a couple of questions. So are there other times, aside from the occasions in Union's Exhibit 2 that you've asked Leadpoint to dismiss Leadpoint employees from the facility?

No.

HEARING OFFICER LOYA: Is there anyone else, aside from you, that can ask Leadpoint to dismiss their employees from your facility?

From our jobsite, is there anybody else that can do that?

Yeah.

I would imagine that Carl would reserve that right if there was some egregious act, and the shift supervisors could certainly bring that to Carl's or my
HEARING OFFICER LOYA: The Excel spreadsheet that you receive, is that the same as the invoice or is that a different document?

THE WITNESS: I don't receive the invoices. I'm not accounts payable. We have a pay -- electronic payment process. If I'm buying shop towels or I'm buying any service, we issue a purchase order, and then we need backup documentation to receive on that purchase. So the Excel spreadsheet serves to provide me the backup documentation, which I then include electronically, download, attach, and then it goes through the system and I don't believe AP gets involved at that point because I think the system at the corporate level takes care of that.

HEARING OFFICER LOYA: What if you spot an error in this spreadsheet that you receive of the hours?

THE WITNESS: I wish I had the time. There's over 200 line items there. I just -- I look for funny numbers. If the grand total looks funny, I might dig a little bit deeper to try to figure out why.

HEARING OFFICER LOYA: And then going back to the one sorter that's employed by BFI, how are her wages and hours set?

THE WITNESS: Per our collective bargaining agreement.

HEARING OFFICER LOYA: Is that any difference than what the Leadpoint sorters work or receive in wages?
more witnesses?

MS. TOWNSEND: We do not. Thank you.

HEARING OFFICER LOYA: Leadpoint you may present your first witness.

MR. PEDHIRNEY: Yes, Leadpoint calls Frank Ramirez.

Whereupon,

FRANK RAMIREZ

having been duly sworn, was called as a witness herein and was examined and testified as follows:

HEARING OFFICER LOYA: Please state and spell your name.


DIRECT EXAMINATION

Q BY MR. PEDHIRNEY: Mr. Ramirez, are you currently employed?

A I am.

Q By whom are you employed?

A Self-employed by Leadpoint Business Services.

Q What's your position with Leadpoint Business Services?

A President and CEO.

Q What are your responsibilities as president and CEO?

A Well, I have responsibilities for the company, financial responsibilities, operational responsibilities, risk management, legal, administrative.

Q How many employees does Leadpoint have across the country?

A Approximately 1,000.
Q Are you familiar with Leadpoint's operations in Milpitas, California?

A I am.

Q Specifically, are you familiar with the operations that Leadpoint provides with respect to the Newby Island Recyclery?

A Yes.

Q How are you familiar with those operations?

A I negotiated the contract with representatives from Republic Services.

Q When did you negotiate the contract?

A November of 2009, I believe, or October, if I recall right.

Q Are you familiar with Leadpoint's supervisors hierarchy at the Milpitas facility?

A Yes.

Q Could you explain briefly what the supervisory hierarchy is?

A Sure. Sure. We have an on-site manager, a site on-site Manager, that's responsible for our operations there on the site. We have a shift supervisor. There's three shift supervisors, I believe, that report to the on-site manager. And then I believe there's seven line leads that report to their perspective shift supervisor.

Q Do any --

A At the MRF, anyway.
Q Okay. Do any of those individuals report to you?
A No.

HEARING OFFICER LOYA: I'm sorry, can you please give the names of everyone you just --

THE WITNESS: Well, I'll try. The on-site manager is vacant. The position is vacant. Vincent Haas is acting as the interim on-site manager right now. The shift supervisors are Arturo Pena, I believe is his last name. Vincent Haas is in that role right now. And I can't recall the third individual.

MR. PEDHIRNEY: For the record, Mr. Haas is here to testify as well, so he can provide those names further down the road.

Q BY MR. PEDHIRNEY: Mr. Ramirez, are you familiar with the hiring process for Leadpoint employees at the Milpitas facility?
A I am.

Q What is the hiring process?
A Well, we have an HR generalist. We call them the admin representative there in a mobile trailer office that's on the site. We recruit individuals through various means. We then test them in terms of their ability to perform the specific task. We evaluate them. We hire them. If they meet the qualifications, we do all the necessary background checks. Drug screened, employment checks. We hire, pay, discipline, if needed, counsel, train, and terminate, and also counsel the
employees.

Q    You testified that the HR generalist works in a mobile trailer office.
A    Right.

Q    Do you know who else -- do you know if anybody else works in that trailer office?
A    I believe he has an assistant.

Q    Are there -- to your knowledge, are there any Republic employees who work in that mobile trailer office?
A    No.

Q    Is there any signage on the office that indicates which employees report there?
A    There is. There's a Leadpoint sign. I believe it says check in, Leadpoint check in, with our logo.

Q    Are there any other offices on site to which Leadpoint supervisors work out of?
A    It's not an office, but we share some space in the control room. I think it was referred to earlier. That's on the sorting platform deck. I believe we have a computer there.

Q    You testified earlier with respect to the recruiting process. Does Republic have any role whatsoever in the recruiting process?
A    No.

Q    Who determines what wages Leadpoint employees will be paid?
Q    Does Republic have any role with respect to determining how much a Leadpoint employee will be paid?
A    No.

Q    Does Leadpoint offer any benefits to its employees?
A    We do.

Q    What benefits does Leadpoint offer?
A    We have paid PTO after a certain period of time. I believe it's 2000 AV hours of work. We have three paid holidays that are available after 2000 AV hours. The employees are -- can accept on day one medical benefits, medical insurance benefits that they contribute solely to. That's it. Also, they have the option to select life insurance and disability insurance, medical insurance for their families or their family.

Q    Are these benefits offered to anyone beyond Leadpoint employees, to your knowledge?
A    No.

Q    Does Republic have any role whatsoever in providing these benefits to Leadpoint employees?
A    No.

Q    Does Republic have any role with respect to which employees are hired by Leadpoint?
A    No.

Q    Does Leadpoint provide any orientation for its employees
A No.

Q Does Leadpoint enforce any sort of dress code policy with respect to employees in the Milpitas facility?

A Yes.

Q What is this dress code?

A Well, it's part of the orientation. Leather boots above the ankle. I believe they must have laced boots, long pants to protect their legs. No jewelry. No hanging garments from your neck or otherwise. It's all detailed in the orientation. That's generally speaking the requirement.

Q Did Republic -- strike that. Is this dress code policy one that was prepared by Leadpoint?

A Yes.

Q To your knowledge did Republic have any role whatsoever in drafting the dress code policy?

A No.

Q Do you know who's responsible for disciplining employees, disciplining Leadpoint employees at the Milpitas facility?

A Leadpoint management, our supervisors and ultimately the on-site manager.

Q Does Republic have any role whatsoever in the disciplinary process?

MS. GAREA: Objection, vague.

Q BY MR. PEDHIRNEY: Do you -- does Leadpoint ever request permission from Republic to discipline a Leadpoint employee?
A No.

Q Does Leadpoint ever consult with Republic to discuss whether or not to discipline an employee?

A No.

Q Does Leadpoint ever consult with Republic to determine what sort of disciplinary action to take against a Leadpoint employee?

A No.

Q If there's an allegation raised against a Leadpoint employee that requires some follow-up investigation, who is responsible for -- strike that. If there is somebody who is -- strike that. If there's an allegation against a Leadpoint employee that requires some sort of investigation, who would be responsible for conducting an investigation into that matter?

A Well, it would be led by our HR manager, Paul Russo, under his direction. But in terms of someone on the ground or at the site, it would be our on-site manager. If necessary, others from our corporate office, if it required that kind of attention, if it escalated up.

Q Has Leadpoint ever asked Republic to provide any assistance whatsoever with respect to the investigation of issues involving a Leadpoint employee?

A No.

Q Who's responsible for setting work schedules with respect to Leadpoint employees at the Milpitas facility?
A: I'm not involved at that level in terms of the day-to-day work requirements. What -- I have a general understanding that Republic, our client, sets a requirement for us to meet in terms of the scope of the job that we're involved with. And having the required amount of labor there at a particular time is part of that.

Q: Who issues the paychecks to Leadpoint employees?

A: Leadpoint supervisors.

Q: Do you know whether Leadpoint offers direct deposit to the employees in the Milpitas facility?

A: We do.

Q: This is with respect to the Leadpoint employees at the Milpitas facility?

A: Yes.

Q: Does Leadpoint maintain payroll records for the Leadpoint employees in the Milpitas facility?

A: Yes.

Q: Do you know where those payroll records are maintained?

A: Yes.

Q: Where are they maintained?

A: At our corporate office in Phoenix.

Q: Does Leadpoint maintain time records for the employees who work out of the Milpitas facility?

A: Yes.

Q: Where are those records maintained?
They are electronically -- they're in the Cloud. They're in the database but, yes, we have access and we own that space.

Who maintains that Cloud?

An IT vendor that we hire.

Did Republic have any role with respect to hiring that IT provider?

No.

MR. PEDHIRNEY: I would ask the witness to look at Joint Exhibit 3.

HEARING OFFICER LOYA: Are you needing Exhibit 3?

MR. PEDHIRNEY: Yes. Temporary labor services agreement.

HEARING OFFICER LOYA: Joint Exhibit 1.

MR. PEDHIRNEY: Okay, Joint Exhibit 1.

Q BY MR. PEDHIRNEY: Mr. Ramirez, I would like you to take a look at page 2 of Joint Exhibit 1. I'd like you to look at the short paragraph in the middle of page 2. It says that "Personnel shall not be assigned to client for a period of more than six months commencing on the date such personnel was first assigned to client, or the date such personnel was reassigned to client pursuant to the terms of this agreement."

To your knowledge does Leadpoint have any employees who work at the Milpitas facility who have been working at the Milpitas facility for a period of more than six months?

I don't have any direct knowledge of that, but I have general knowledge that we have employees that have been there
longer than six months, but I couldn't tell you who and how long.

Q Are you aware of any circumstances in which Republic has requested that Leadpoint remove an employee from the Milpitas facility because the employee has worked there for a period of more than six months?

A No.

Q I'd like you to look at the very last page of the document, which is Exhibit G. It's a benefits waiver for CWF employees. Are you familiar with this document?

A I am.

Q How are you familiar with this particular document?

A I was responsible for its creation.

Q Who drafted this document?

A Myself, with our counsel.

Q Who provides this document to Leadpoint employees?

A Our hiring manager, our supervisor.

Q Did Republic have any role whatsoever with respect to drafting this document?

A No.

MR. PEDHIRNEY: I'd like the witness to look at Union Exhibit 2.

BY MR. PEDHIRNEY: Mr. Ramirez, I'm showing you a document that's been marked Union Exhibit 2, which is an email that was sent to you from Paul Keck on Wednesday, June 5. Are you
familiar with this email?

A Yes.

Q Do you recall receiving this email?

A I do.

Q Do you recall responding to this email?

A I do not.

Q Now, the first part of this email refers to an incident in which Mr. Keck made reference to witnessing two Leadpoint employees passing a pint of whiskey between them. Do you recall what Leadpoint did in response to this email?

A I do. I informed our HR manager, Paul Russo, to contact Paul Keck and to investigate this allegation in his complaint.

Q Do you know what Mr. Russo did afterwards?

A Yes, he called Paul Keck.

Q Do you know what Mr. Russo and Mr. Keck discussed?

A No.

Q What steps did Leadpoint take after Mr. Russo spoke with Mr. Keck?

A After their discussion and a subsequent investigation, the two employees that were allegedly -- from our point of view, anyway -- being observed drinking or at least in possession of liquor were, per our policy, were questioned to get their statement and taken to a clinic we use to be tested for drugs and alcohol.

Q Do you know who questioned the employees?
A: Yes. Our on-site manager, Vincent Haas.

Q: Do you know whether Leadpoint was involved at all in the questioning -- strike that. Do you know if Republic was involved at all in questioning the employees?

A: As far as I know, no.

Q: Do you know if Republic was involved at all insofar as any investigation of the incident?

A: My knowledge, no.

Q: Whose decision was it to refer these two employees to the clinic for testing?

A: I would assume it's part of our policy in terms of when there's a probable cause or there's an allegation of drugs or alcohol for the employee to be tested. So I'm assuming it was Paul Russo, but -- our HR manager that instructed Vincent Haas to do this.

Q: Did Republic ask Leadpoint to have these two employees tested?

A: No.

Q: To your knowledge, did the employees proceed with the screening?

A: Yes, they did.

Q: What did the company do in response to the screening, the company being Leadpoint?

A: Well, we reviewed the results or Paul Russo reviewed the results to establish chain of custody and to have a
1 conversation with the clinic.

2 Q What did Mister -- what happened after Mr. Russo reviewed
3 the results?

4 A Based on those results, one employee was terminated and
5 the other was reassigned.

6 Q Did Mr. Russo consult with Republic at all -- to your
7 knowledge, did Mr. Russo consult with Republic in reviewing the
8 results of the drug screenings?

9 A No.

10 Q Who made the decision to terminate the employee?

11 A Paul Russo.

12 Q Did anyone from Republic contribute -- strike that. Did
13 Mr. Russo consult with anyone from Republic with respect to
14 whether to terminate the employee?

15 A No.

16 Q Who made the determination to reassign the employee -- the
17 other employee?

18 A I believe it was Paul Russo, but he didn't directly report
19 that to me.

20 Q Do you know whether Republic was consulted with respect to
21 whether to reassign the employee?

22 A Was consulted?

23 Q Yes.

24 A No.

25 Q Do you know where this employee was reassigned?
MR. PEDHIRNEY: Let me introduce a new document. I provided a copy to counsel earlier. We can make additional copies, if necessary.

HEARING OFFICER LOYA: It's a three page --

MR. PEDHIRNEY: Five page.

HEARING OFFICER LOYA: We'll have this marked Leadpoint Exhibit 1.

(Leadpoint Exhibit Number 1 Marked for Identification)

Q BY MR. PEDHIRNEY: Mr. Ramirez, I'm showing you a document that's been marked Leadpoint Exhibit 1. Do you recognize this document?

A I do.

Q What is this document?

A It's describing the training required for a sorter, for a sorter position.

Q How are you familiar with this?

A My company developed this.

Q Do you know whether this document is utilized by Leadpoint at the Milpitas facility?

A Well, absent to this there's a standard of work. Are you
that right?

A Yes.

Q Okay. And one of those qualifications for being hired to work at the BFI facility is passing a drug screening test.

A It's pre-employment, yes. It's a screen. It's administered if we determine that person meets the testing requirements, whether it's -- if they have the hand/eye coordination, they have the balance necessary, they can select the right material at the right time.

Q So it's a criteria that only comes into play if they've already met certain other criteria.

A Sure, yeah.

Q You mentioned that the Leadpoint employees at the BFI facility in Milpitas get three holidays; is that right?

A Yes.

Q And those three holidays are the days that the BFI facility is closed.

A It's Christmas, Thanksgiving and New Year's Day.

Q And those are the three days that the BFI facility is closed.

A I don't know.

Q So you don't know whether or not the holidays that the Leadpoint employees get are the same as the days that the BFI facility is closed.

A I don't know when the BFI facility is closed.
Q How did it come about that Leadpoint came up with those three holidays?
A Because that's our -- part of our benefits for all our employees.
Q Okay. So it's just a coincidence that the three holidays that Leadpoint --
A Apparently so.
Q -- gives are the same three holidays.
A This is news to me. This is the first I've heard of this.
Q Okay. Apart from the three holidays that BFI is closed, your contract requires you to provide a certain level of employees to BFI for all the other days of the year, correct?
A I don't understand your question.
Q You have a contract to provide employee -- you have a contract with BFI to provide employees, correct?
A Yes.
Q And that contract requires to you provide a certain level of employees.
A No, nowhere in the contract -- you mean a number of employees we have to provide?
Q I mean an agreement that you will meet the staffing needs of BFI.
A Yes, yes.
Q Yes. And you will do that throughout the year on all the other days that BFI is open, correct?
A: I guess that's an assumption you could make. It's not specifically detailed in the agreement. If you read the agreement it says provide the number of employees required.

Q: Right. And your understanding is you couldn't decide say tomorrow to say you know what, I'm going to give all the employees Christmas Eve off too and we're not going to supply any employees to BFI.

A: If the facility is operating and BFI notifies us that the facility must operate, and we must supply our services that are required, yes, we will provide the labor.

Q: And you're aware that there's a cap on the wages that you can provide to the employees that work at the BFI facility, correct, per the contract?

A: Are you referring to not the exceed the wages of Republic's employees?

Q: Yes.

A: Yes.

Q: You're aware that the contract gives the authority to BFI to train Leadpoint employees on safety issues, correct?

A: To be honest, I haven't -- we provide training, Leadpoint provides training from our material that we've developed that is administered by our employees. As a rule, whether it's this facility or any other facility, I would hope that if an employee is in harm's way or is not -- or is putting themselves in danger that, regardless of whose employee that was, that...
s some would correct that.

Q Apart from your hope, the contract specifically gives BFI

the authority to enforce its own safety policies as to --

A Can you give me a minute to look at the contract? Because

I don't recall seeing that, but I'm not disputing that.

Q Okay, sure.

A I it Number 5 that you're referring to, page 3?

Q Yeah. Covered under section 5.

A Okay. Are you referring to the sentence like in the

middle of the paragraph where it says, "Further, if client has

provided agency with safety training program"?

Q If you go -- I'm actually referring to the last sentence

of the first paragraph. "Client reserves the right to enforce

the safety policy and provide it to personnel." I guess it's

related. Yes.

A Yeah.

Q Okay.

A Yes. I would agree to that.

Q Okay. And you wouldn't think there was anything wrong if

you heard that BFI was, say, having a meeting with employees --

Leadpoint employees about safety at the facility. You wouldn't

have a problem with that?

A About safety?

Q Uh-huh.

A No.
Q You -- for Leadpoint employees overtime is mandatory. Correct? At this facility -- at the BFI facility?
A It is.
Q You're aware that BFI maintains the right to dismiss or reject Leadpoint employees from its facility?

MR. PEDHIRNEY: Objection. Vague and ambiguous as to dismiss.

HEARING OFFICER LOYA: Can you clarify or rephrase?
MS. GAREA: It's the language used -- that we've been using all day. And I think it's in the contract. And I said dismissed from its facilities. I think it's pretty clear.
MR. PEDHIRNEY: If I'm not mistaken the word dismissed pertains to correspondence not from the contract, necessarily.
I could be --

MS. GAREA: It -- you're right. It might have been on the correspondence.

HEARING OFFICER LOYA: Can you rephrase?
MS. GAREA: So you're instructing me that this -- I can't ask that question? You -- okay.

Q BY MS. GAREA: You are aware that BFI maintains the right to reject or discontinue the use of Leadpoint personnel at the BFI facility. Correct?
A If someone -- I -- well -- we hire our employees. We evaluate them and hire them. So my interpretation of that language is that they do not have the right, if we hire someone
in good faith based on a set of criteria that we both agreed to
that they would not reject that person. And that has never
happened, to the best of my knowledge, anyway. Now if someone
is being disruptive, someone is -- has violated a -- what we
call a golden rule in terms of safety -- jumping over a belt,
going into a machine that's not locked out, tagged out. Those
types of infractions, yes. I would hope that not only BFI but
anyone around would correct in that situation.

Q So it's your interpretation of the contract that BFI does
not have the right to reject a Leadpoint employee from
employment?

A From employment? No. They don't.

Q That is -- or from working at its facility?

A They -- yes. I would agree with that. They have that
right.

Q They have that right. And they also have the right to
discontinue the employment of a Leadpoint employee at the BFI
facility.

A Yes.

Q And they can do that for any reason or no reason.

A Okay. Well as far as what they've done and what they can
do, I mean, the -- yeah. I would agree with that.

Q And there's been three occasions that BFI has raised the
issue of discontinuing the employment of a Leadpoint employee
at the BFI facility. Correct?
MS. TOWNSEND: Objection. Vague as to employment.

MR. PEDHIRNEY: Yeah. Objection. Yeah. Misstates witnesses testimony and vague as to employment.

HEARING OFFICER LOYA: Can you rephrase?

Q BY MS. GAREA: There's been three instances where BFI has raised the issue of discontinuing the work of a Leadpoint employee at the BFI facility. Correct?

A I'm only aware of one.

Q You're only aware of one instance?

A Yes.

Q And what's that one?

A The one that you referred to earlier.

Q I'm not sure what that means.

A You brought it up about the two employees that were observed passing a bottle of liquor around.

Q Okay. So and I believe your attorney asked you about that --

A Oh I'm sorry.

Q -- that issue earlier.

A Okay.

Q That's fine. So the two -- so that incident actually involved two different --

A Yes.

Q Correct?

A Yes.
Q Okay. And in fact after that incident was raised to Leadpoint, both of those employees discontinued working at the BFI facility. Correct?

A Yes.

Q And then in that same email correspondence that was marked as Union -- pardon me -- Union 2, Mr. Keck raised a third issue. Did you see that in the last paragraph?

A Okay.

Q Do you recall that issue?

A As I read this, I do now.

Q Okay.

A Yes.

Q And what happened to that employee?

A I don't know.

Q Do you know who would know?

A Yes.

Q Who is that?

A Paul Russo.

Q Okay. Anyone else?

A I would suspect possibly Vincent Haas.

Q Okay.

A But I don't know that for sure.

Q Okay.

MS. GAREA: I have no further questions.

HEARING OFFICER LOYA: Any follow up?
CROSS-EXAMINATION

Q BY MS. TOWNSEND: In regards to the contract language that states BFI has the right to reject or discontinue the use of one of your employees at its site, in your experience does that have any bearing on whether or not those individuals remain employed with Leadpoint?

A No.

MS. TOWNSEND: No further questions.

HEARING OFFICER LOYA: All right. Any follow up?

I have a few more general questions. How many Leadpoint employees work at the BFI Milpitas facility?

THE WITNESS: The entire complex? Including organics and the landfill?

HEARING OFFICER LOYA: Yes.

THE WITNESS: I believe it's about 185.

HEARING OFFICER LOYA: How many work -- I guess can you describe the departments that they work in --

THE WITNESS: Yes.

HEARING OFFICER LOYA: -- and the jobbing in each?

THE WITNESS: I believe there's seven in the organics. And ten or 11 at the landfill. And the balance at the MRF.

HEARING OFFICER LOYA: And what do those employees do?

THE WITNESS: Well at the MRF there are sorters,
housekeepers, line supervisors. And at the landfill there is a
-- I think they -- they have an outdoor sorting facility there
and housekeeping. So it's kind of a hybrid job responsibility.
In organics it's housekeeping. And screen cleaners at the MRF,
I guess.

HEARING OFFICER LOYA: At the MRF?

THE WITNESS: Yes.

HEARING OFFICER LOYA: Okay. Can you briefly describe
what screen cleaners do?

THE WITNESS: Well as far as my limited knowledge to
screen cleaning is when the screen -- that's in -- that's part
of system, when it gets jammed or cluttered with material, they
stop it. They lock out and they tag out. And the then screen
cleaners go in there with harnesses, fall protection gear, and
clean the screen. So they remove the material from the screen.
That's layman's terms, but --

THE COURT REPORTER: I just want to remind everyone to
keep their voices up.

HEARING OFFICER LOYA: And how do you determine how many
employees to send to the facility? Or --

THE WITNESS: To each of those facilities?

HEARING OFFICER LOYA: Or to the -- to BFI Milpitas
facility?

THE WITNESS: Well the customer gives us requirements that
they have produced a certain amount of tonnage through a
certain period of time. And the areas of their machine --
there's stations on the machine where a sorter is -- that's
their workstation. That those stations have to be manned or
that a sorter must be in those stations to collect the
material. And I would suspect that that requirement comes from
the equipment manufacturer and within collaboration with our
customer, BFI.

HEARING OFFICER LOYA: Okay.

Any follow up questions?

MR. PEDHIRNEY: One quick follow up question.

REDIRECT EXAMINATION

Q BY MR. PEDHIRNEY: In preparation for today's hearing do
you know whether the company prepared a list of the active
employees and their start dates?

A I believe so.

Q And these were the employees that work at the Newby Island
facility?

A When you say the company, you mean Leadpoint?

Q Correct.

A Yes.

Q Do you recall how many employees were -- how many
employees were list -- how many Leadpoint employees were listed
in that sheet?

A Yeah. I believe it was in the area of 245 or somewhere
around there. 240, I think.
Q Okay.
A It included our back-up pool.
Q And by back-up pool what do you mean?
A By employees that have worked part time or casual -- some would describe it as casual labor, to support the number required at the facility.
Q And these casual employees, what's their schedule? What are their schedules like?
A I -- you know, I don't know specifically. I know they're on call. That's the best way to describe it. If we need them to fulfill a particular job, we'll call them.
MR. PEDHIRNEY: All right. I have no further questions.
HEARING OFFICER LOYA: Any questions?
MS. GAREA: No.
HEARING OFFICER LOYA: Thank you. You may step down.
Off the record.
(Off the record at 3:44 p.m.)
HEARING OFFICER LOYA: We're on the record.
MR. PEDHIRNEY: Leadpoint calls Victor Haas.
THE WITNESS: Vincent Haas.
MR. PEDHIRNEY: Vincent Haas. I apologize.
Whereupon,

VINCENT HAAS

having been first duly sworn, was called as a witness herein and was examined and testified as follows:
HEARING OFFICER LOYA: All right. Spell your name.


DIRECT EXAMINATION

Q BY MR. PEDHIRNEY: Mr. Haas, are you currently employed?
A Yes, sir.

Q By whom are you employed?
A Leadpoint.

Q What's your job with Leadpoint?
A I'm an assistant on site -- assistanceship on site.

Q Are you a -- do you have -- is supervisor part of your title?
A Yeah.

Q Okay. How long have you been with the company?
A Since July 16th, 2012.

Q And how long have you been in your current job role?
A November 2012.

Q What was your position before November 2012?
A Lead -- line lead.

Q What are your current job responsibilities?
A My current job responsibilities consist of assigning and delegating tailgate meetings per shift, overall control of the PPE, assisting with top rating process, also coaching line leads. Also making sure we achieve the proper headcount per shift and everybody is properly assigned to their positions.

Q Who is your direct supervisor?
A: My direct supervisor is Saul Diaz.

Q: Who does Mr. Diaz work for?

A: Leadpoint.

Q: Do you know his title by chance?

A: No. I don't.

Q: You testified earlier that you are responsible for the tailgate meetings. Is that correct?

A: Yes, sir.

Q: Does anyone else assist you with preparing the tailgate meetings?

A: No.

Q: What is your responsibility with respect to the PPE?

A: Making sure everybody is in compliance, gloves -- their gloves are good, wearing ear plugs, have glasses, safety helmet, steel toed boots. Make sure everybody is in the proper compliance.

Q: Do you receive any direction from Republic with respect to compliance with PPE?

A: No.

Q: You mentioned that you also coach line leads. How many line leads are there for Leadpoint at the site in Milpitas?

A: Regarding to the MRF, there's seven line leads.

Q: Could you identify those seven line leads?

A: Yes. I can. For day shift there's Johnny Mosley, also Jorge Noegua (phonetic) and Miguel Delarosa. Second shift
consists of Ricardo Picho (phonetic), Herman Ramirez (phonetic), and Benjamin Torres (phonetic). And also on third shift there's Antonio Escavido (phonetic).

Q: Do you know what hours the day shift runs?
A: Day shift runs typically 4:00 a.m. to 1:00 p.m.

Q: What hours does the second shift run?
A: Second shift runs 2:00 p.m. to typically 11:30 p.m.

Q: And the third shift?
A: Third shift is 10:30 p.m. to 7:00 a.m.

Q: Do you know who schedules the Leadpoint employees to work their shifts?
A: We do.

Q: Who is we?
A: Leadpoint.

Q: Who at Leadpoint does the scheduling?
A: I do.

Q: Does anyone assist you with the scheduling?
A: No.

Q: Does anyone from Republic tell you which employees to schedule when?
A: No, sir.

Q: Are there any other line leads at the -- any other -- strike that. Are there any other Leadpoint leads at the Milpitas site other than the seven leads in the MRF that you identified already?
A: No. There's also a housekeeping lead.

Q: Who is that?

A: The housekeeping lead is -- for first shift is Patrick Baker and second shift is Michael Ramirez. And they're essentially responsible for the housekeeping duties outside. Also I do have a lead in the organics division.

Q: And who is that?

A: That's Josue (phonetic) -- I can't remember his last name right now. Josue Medina (phonetic).

Q: I'm going to show you an Exhibit. I've got two copies that were provided to counsel earlier. And I'm just going to show them to counsel before producing them to the witness.

(Counsel Confers)

MR. PEDHIRNEY: All right. I'll have these marked Leadpoint Exhibits 2(a), 2(b), 2(c), and 2(d). So there's four pages. The first page is 2(a). The second pages is 2(b). The third page is 2(c). And the fourth page is 2(d).

(Employer Exhibit Number 2(a) through 2(d) Marked for Identification)

Q: BY MR. PEDHIRNEY: Mr. Haas, I'm showing you documents that have been labeled Leadpoint Exhibits 2(a), 2(b), 2(c), and 2(d). I'd like you to take a look at the first document, which has been labeled Exhibit 2 -- Leadpoint Exhibit 2(a). It's a document called "Standard of work." Are you familiar with this document?
1 A   Okay.
2 Q   Do you recall this incident about the day locker door
3 being kicked in?
4 A   I do not recall the door locker being kicked in. But I do
5 recall the -- one of the mounts being broken in the break room.
6 Q   How was this situation brought to your attention?
7 A   It was brought to my attention by Mr. Paul Keck.
8 Q   How did he bring this to your attention?
9 A   He had brought -- he said he witnessed on a video an
10 employee -- a Leadpoint employee smashing in one of his things
11 in the break room.
12 Q   What did you do in response to Mr. Keck's report of his
13 incident to you?
14 A   So what I did is -- it was Fatima (phonetic) and myself. 
15 Fatima was an assistant onsite at the time. We went to go
16 review the video to see who it was exactly, so if we knew who
17 it was exactly -- a Leadpoint employee. Once we reviewed the
18 video we identified who the employee was. So therefore we got
19 the employee. We brought him down to the break room. We
20 questioned him. We did our investigation and it was -- came to
21 find out that it was him. He broke it out of anger. So that's
22 what we did in regards to that. We did an investigation.
23 Q   Fatima, who was she employed by at the time?
24 A   Leadpoint.
25 Q   And what was her job responsibility? Or what was her job
1 title?
2 A Assistant onsite.
3 Q So she was in the same position as you at that time?
4 A Yes, sir.
5 Q Was anyone from Republic present when you questioned the employee about the incident?
6 A No.
7 Q Did anyone from Republic provide you with any direction as far as how to question the employee as far as what happened?
8 A No.
9 Q Was Republic involved at all in the investigation?
10 A No.
11 Q After the investigation what did you and Fatima do next?
12 A After we came to the conclusion that he was the one that broke the mount on the wall, we did suspend him. And we did follow up with our HR Department on what course of action to take. And it is part of Leadpoint policy anybody destroying property or defacing property that's grounds for termination.
13 Q Who decided to suspend the employee?
14 A That was done by myself.
15 Q Did you consult with anyone from Republic before suspending the employee?
16 A No, sir.
17 Q Whose decision was it to terminate the employee's employment?
A: That was a decision made by Paul Russo.

Q: Did Mr. Russo speak with you with respect to your belief as to whether the employee should be terminated?

A: After the findings we were both -- came to the conclusion that that was the best -- that would have been the best decision.

Q: Do you know whether Mr. Russo spoke with anybody at Republic about the issue as to whether to terminate this particular employee?

A: No.

Q: Did you speak with anybody at Republic about Republic's position as to whether this employee should be terminated?

A: No.

Q: Do you have any responsibility with respect to recruiting employees at Leadpoint for the Newby Island facility?

A: Yes. I do.

Q: What is your role with respect to recruiting?

A: So when the employees come through, we do call the process top rating. When the employees do come through after Anthony Chavez is done processing them. They're finished with the safety video. I do bring them to the MRF. I let them know the expectations that they're going to be going through regarding the top rating. That we do have a standard and -- which is 45 picks a minute. We take them through the MRF. It's either myself or the leads take them through the MRF, a small tour.
We show them post sort, presort, show them different lines where they may be working. And then we put them on the lines. We show them what actually to pick at the specific stations where we put them. And we see if they have the hand and eye coordination and if they're actually able to do the job.

Q What's the next step after that?
A The next step -- well if they pass then the next step after that is then they go back to the trailer. They finish the application process. They do go over Leadpoint policies that -- and safety policies that they will be held accountable for. And then they get put on the backup list.

Q When you say top rating, what do you mean?
A Testing.

Q Okay. Is Republic -- strike that. Is there anyone from Republic present during the top rating process?
A No.

Q Is any -- does Leadpoint share any of the information it obtains during this process to anyone at Republic?
A No.

Q Is there anyone from Republic who meets with an applicant before Leadpoint hires the employee?
A No.

Q To your knowledge does Republic have any role with respect to the interview process?
A No.
Q Who ultimately decides whether or not to hire an employee at Leadpoint to work at the Newby Island facility?

A The ultimate decision is by Anthony Chavez our admin, HR and the office.

Q Does anyone provide recommendations to Mr. Chavez as to whether or not someone should be hired to be a Leadpoint employee at the Newby Island facility?

A Well they go through the test and we do write their test results on their paper. But besides that, no. If they pass what we have our standard -- which is 45 picks per minute, then there's no -- there should be no issue.

Q All right. I want to turn your attention back to Union Exhibit 2.

A Okay.

Q And I asked you earlier about the second part of the email.

A Correct.

Q Your name is also referenced with respect to the first part of the email. And that pertains to an alleged incident of Leadpoint employees passing a bottle of Whiskey. Are you familiar with this incident?

A Yes, sir.

Q How are you familiar with this incident?

A Paul Keck brought this to my attention that he witnessed two individuals outside of his window passing a bottle of
liquor. He asked me to respond to where he was immediately so I could follow up. When I did he pointed out one of the individuals. He wasn't sure who the other individual was. He said he'll be over to point him out to me. So what I did is I got both the individuals and I brought them downstairs to the break room. And I asked them to sit in place while I got Keck. Keck did identify one of them. And the other one was later identified as to be the guy that was corresponding with him.

Q After you questioned the employees and brought in Mr. Keck, what did you do next?

A It was my intentions that both these individuals have probable cause to be taken to a clinic for alcohol and drug testing. Before I did that, though, I did follow up with my direct boss Saul Diaz. And he did confer that that was the best option to do. And that's what we went ahead -- we sent them to our clinic for drug screen and alcohol screen.

Q Did you confer with anyone at Republic about whether these employees should be referred to the clinic?

A No.

Q Do you have any further interactions with anybody at Republic after Mr. Keck identified the two employees?

A Say that again?

Q After Mr. Keck came in for that meeting where you were questioning the two employees, did you have any other discussions with anybody at Republic about the incident or the
employees?

A No. But there was an incident where Keck did try to talk to one of the employees about the incident. And the individual, Leadpoint employee said that he didn't have anything to do with it. Mr. Keck did call him a liar, and so forth and did walk out of the break room. But besides that Keck left the situation. And I went ahead with my investigation.

Q And how are you familiar with this interaction between Mr. Keck and the employee?

A Because I was there.

Q You were there?

A Yes, sir.

Q And what did you do -- did you do anything in response to that incident?

A Well Keck was walking away. That was his response -- walking away from the situation. He was walking away. So I -- he left the break room and I took my employees to the Leadpoint trailer.

Q Okay.

A To follow through with our process.

Q And after that interaction are you aware of any other involvement that -- or any other interaction between Republic and -- a Republic employee and a Leadpoint employee pertaining to what to do with those two individuals?
MR. PEDHIRNEY: I have no further questions for this witness.

HEARING OFFICER LOYA: Any questions?

MS. TOWNSEND: No questions.

HEARING OFFICER LOYA: Any questions?

CROSS-EXAMINATION

Q BY MS. GAREA: Hi, Mr. Haas. I just have a few follow up questions for you.

A Sure.

Q Thanks. You mentioned that you're responsible for scheduling the Leadpoint employees to meet the shifts and headcount requirements for BFI. Correct?

A Correct.

Q Okay. How do you do it?

A How do I schedule the employees? Well a lot of the employees -- well we do have the first shift, second shift, and third shift. So in response to that if I have new employees coming on then I would schedule them accordingly to the corresponding shift that they'll be working.

Q So how -- you say if I have new employees coming on.

A Right.

Q So when would you have a new employee coming on?

A In regards to using a back up.
A: It was -- they were issued to Leadpoint. Correct.

Q: And describe for me the conversation between Mr. Keck and one of the employees involved in the Whiskey bottle incident. Do you recall that testimony?

A: Right.

Q: Okay. Were you there for the whole conversation?

A: Yes. It was brief. And -- what I stated. I mean they just -- Keck kind of confronted him. He denied it. Keck walked away.

Q: Okay. So it was Mr. Keck who initiated the conversation --

A: Yes.

Q: -- with the Leadpoint employee.

A: Correct.

Q: And you've seen other Leadpoint managers speak directly to Leadpoint employees on occasion. Correct?

A: Leadpoint managers?

A: Uh-huh.

A: Speak to Leadpoint employees?

Q: I'm sorry. I'm going to withdraw that question. You've seen other BFI managers speak directly Leadpoint employees on occasion. Correct?

A: I have seen them. Correct.

Q: Sometimes sorters are -- move from one line to another. Correct?

A: Yes.
Q And sometimes that happens based on Republic directions. Correct?

A It happens depending on the need of the material that's being ran, and what the expectation is for the material being ran.

Q And sometimes that expectation is directly communicated to Leadpoint supervisors by Republic. Correct?

A Correct.

MS. GAREA: Okay. No further questions.

**REDIRECT EXAMINATION**

Q BY MR. PEDHIRNEY: When sorters are moved to different lines, and I'm talking about Leadpoint sorters, who is it who directs the leads to move to a different line?

A The leads are actually independent.

Q Or -- yeah. I withdraw that. I asked the question -- that was not the question I intended to ask. Who is it who advises the sorters to move to a different line?

A Either a Republic supervisor or control room operator.

Q Who actually communicates with the -- who gives the direct word to the sorters?

A Either the line leads or the assistant managers for Leadpoint.

Q And who is it that decides which specific Leadpoint sorters to move to a different line?

A The line leads.
Q Does Republic ever select which sorter to move to a different lead -- to a different line?

A No.

Q Does Republic ever decide --

MR. PEDHIRNEY: Or I withdraw the question. I have no further questions.

MS. TOWNSEND: I --

MR. PEDHIRNEY: Subject to recall for rebuttal if necessary.

MS. TOWNSEND: I have one quick question.

HEARING OFFICER LOYA: Sure.

RECROSS-EXAMINATION

Q BY MS. TOWNSEND: That brief conversation that you just testified about that Mr. Keck had with the one individual involved in the Whiskey incident, was that part of your investigation or did that conversation -- brief as it was, occur before or outside of your investigation?

A Outside.

MS. TOWNSEND: No further questions.

HEARING OFFICER LOYA: I have a few questions.

THE WITNESS: Sure.

HEARING OFFICER LOYA: I'm just a little bit confused about who Saul Diaz, Anthony Chavez and Paul Russo are -- what their titles are and where they work.

THE WITNESS: So Paul Russo is the VP of HR. Saul --
Anthony Chavez is a -- he's a support team, team leader. Saul Diaz is my direct boss. He's in charge of several plants. I'm not sure his job title.

MR. PEDHIRNEY: That's fine.

THE WITNESS: Okay.

HEARING OFFICER LOYA: Where do they work physically?

THE WITNESS: Anthony Chavez works Newby Island, Paul Russo works out of the corporate office in Phoenix. And Saul Diaz, I believe he works out of -- I'm not sure. I'm not sure where he works out of.

HEARING OFFICER LOYA: But not out of Newby Island?

THE WITNESS: No. No Not out of Newby Island.

HEARING OFFICER LOYA: Who do the Leadpoint employees report to when they need to call in sick or request time off?

THE WITNESS: So they need to request time off, they report to the Leadpoint trailer and they fill out a time request form for time off. We call that RTOs or PTOs. Also they call in we have a line lead phone for each shift. So they can call their shift lead. And we ask two hours in advance.

HEARING OFFICER LOYA: And can you describe the tailgate meetings, what they are what you -- what their purpose is.

THE WITNESS: So our seven minute tailgate meetings consist of safety -- a few examples is proper use of PP, safe lifting techniques and so forth. And we do have a safety manual. We do -- well myself I pull -- I delegate what safety
meetings they're going to have per shift. And the purpose is just kind of to share the knowledge with everybody so they have safe practices. And also another reason for our tailgate meeting is to bring up any issues we had the day before and just so we could address some and there's some near misses or so forth, we can address them. Quality issues. Different change something, material be pulled off a line. So we just keep them informed.

HEARING OFFICER LOYA: Okay. Do you hold a tailgate meeting once -- at the beginning of each shift or is it per line?

THE WITNESS: Per beginning of each shift.

HEARING OFFICER LOYA: Per shift.

THE WITNESS: Yeah. And the third shift they join the first shift tailgate meeting at their lunch.

HEARING OFFICER LOYA: And where do you hold the tailgate meetings?

THE WITNESS: In the break room.

HEARING OFFICER LOYA: Any follow up questions from --

MR. PEDHIRNEY: Two quick questions.

FURTHER REDIRECT EXAMINATION

Q BY MR. PEDHIRNEY: You mentioned an RTO form -- request time off. Do you know who created that form?

A Leadpoint.

Q You also testified about a safety manual, do you know who
-created the safety manual?

A Leadpoint.

MR. PEDHIRNEY: No further questions.

MS. TOWNSEND: None.

MS. GAREA: No questions.

HEARING OFFICER LOYA: Okay. You may step down. Thank you.

Leadpoint, do you have any other witnesses?

MR. PEDHIRNEY: No other witnesses, subject to rebuttal.

HEARING OFFICER LOYA: Union, you may call your first witness.

MS. GAREA: Sure. The Union calls Clarence Harlin.

Whereupon,

CLARENCE HARLIN

having been duly sworn, was called as a witness herein and was examined and testified as follows:

HEARING OFFICER LOYA: Okay. Can you please state and spell your name?


DIRECT EXAMINATION

Q BY MS. GAREA: Good afternoon, Mr. Harlin. Are you -- did you receive a subpoena to testify here today?

A Yes.

Q Where do you work?
At the Newby Island Landfill for Leadpoint.

What is your job?

Housekeeping.

Can you briefly describe your job duties in housekeeping?

Just to pretty much maintain the back area, keep it clean.

That's really it.

Okay. Do you receive directions from any Republic employees?

As far as --

Direction --

-- what to do?

Yes.

Yes.

Which Republic employees do you receive directions from?

I don’t always receive directions.

Which --

I have received directions.

Okay.

As far as in the back, Phil. I don't know his last name.

Paul -- or what was his name -- John.

Do you know John's last name?

Sutter.

And how often have you received directions during your workday from one of those three Republic employees that you named?
A: In a day?

Q: Or do you receive directions from someone from Republic every time you work?

A: No.

Q: Okay. How often?

A: I don't know, actually, but I mean not all the time. I have though.

Q: How regularly?

A: I mean it's pretty regular.

Q: Okay.

A: Yeah.

Q: Can you give me an estimate?

A: Well you got to ask me. I mean what are you asking? Like what do they tell me? Or how many times are they telling me what to do?

Q: How many times --

A: I'm saying that because I've sat here and watched you ask questions and everybody's saying, "No. No. No." And that's bullshit.

Q: Okay. I'm going ask --

A: To everything. So I want to know exactly what you want to know and I'll tell you exactly what you want to know.

Q: Okay. How many times do receive directions? If you can give me an estimate.

A: Yeah. I do receive directions.
Q Okay.

A Whenever they feel the need to say something.

Q Okay. And can you give me an estimate of how often that happens?

A No. I don't have no estimate. I don't.

Q Okay. Do you think it happens at least once a week?

A Yes.

Q More than that?

A Yes.

Q A couple times a week at least?

A Yes.

Q Okay. Can you give me some examples of some of the directions you've received from Republic employees directly?

A Okay. Well just Friday --

Q Uh-huh.

A I was told by a Republic guy, he's not even a lead or nothing. He's just Republic, to clean bales off -- to cut them -- he actually handed me the tools to cut the bales and to clean them off.

Q Okay.

A As I've heard another lead ask him why doesn't he do it.

Q Okay. So you were -- just this last Friday given tools by someone from Republic and told to clean off bales?

A Fred. Yes.

Q Okay. What other kinds of instructions have you been
given?

A Just to clean up.

Q Okay.

A Yeah.

Q Where to go, what to do?

A I wouldn't really say what to do and where to go, it's just -- clean up, period.

Q Any particular thing that you're supposed to clean up?

A Well when I went out there, I had just a -- a particular, like a zone from my lead, Patrick Baker.

Q Okay.

A He gave me a zone to clean.

Q Okay.

A And as a Republic dude walks by and he sees something else, he would tell me what to do, and of course I would do it.

Q I see.

A Clean the fence line.

Q Okay.

A Clean under these 18 footers, you know.

Q And on those occasions when you've received instructions from the Republic guys is it because you go and ask them, "Hey, what should I do?"

A No. I have to ask that, and I've just asked that recently, because I felt that I ask a question to one of my leads, and it always comes back to they don't have the answer.
It's up to Republic. The Republic says this. Republic says that. So lately -- I mean just last week I think I asked a question to a Republic guy, because I felt that that was the only way for me to get an answer, because I don't get a direct answer.

Q Okay.

A So I ask him, "What do you want me to do?" And we'll do it.

Q But some of these -- these other instances that you've described, it's the Republic guys that come up to you --

A Right.

Q -- and given you instructions.

A Right.

Q Have you always worked as a housekeeper?

A No. I was on the line.

Q Okay.

A I was a sorter and on the wet line.

Q When you worked on the line how did you get breaks?

A That's --

Q How are breaks called?

A Well there was a set time pretty much, and the line was shut down. And then after the line is shut down, you get a three bell alarm or whatever. And then you'll know that's the break.

Q Okay. Who shut down the lines?
A Well when I was on the -- I can't -- I don't remember her name. It was the -- it was Republic. I don't know her name, though.

Q Okay.

A I forgot it.

Q Do you know what she did for Republic?

A She sat there in the control booth and ran the little buttons on the screen.

Q Okay. And how are you called back from break?

A We got a five minute warning from our leads.

Q Okay. When you were working on the line did you ever get any directions from any Republic supervisors or managers?

A As far as on what to do?

Q Yes.

A Yes.

Q Please tell me more.

A I had an incident with John Sutter. And he had actually raised his voice. And they had brought us all into the control room. And I asked him, "How am I supposed to do it, if you keep telling me not to stop the line?" He says, "Well we still got to get it."

Q Okay. Well let me back up.

A So he wanted me -- yeah?

Q Let me back you back you up for a second. So before you were called into the control room --
A: Uh-huh.

Q: Did -- am I understanding you right that John Sutter gave you the instruction not to actually stop the line with the emergency?

A: He sat on the other side of the line and said we need to grab these things. Grab these materials.

Q: Uh-huh.

A: The only way to grab the materials with seven people on the line is to slow the machine down or stop it. But it stops production. So he said he didn't want me to do it like that.

Q: So I said, "Well I can't pull the material if I can't slow it down or stop it." So then that was brought to the control room to talk about that.

Q: Okay. So John asked you then to go to the control room?

A: Yeah.

Q: Anyone else?

A: Asked to go?

Q: Did he ask anyone else?

A: The whole line. Yeah.

Q: The whole line.

A: Yeah.

Q: Okay. And what happened then in the control room?

A: We just sat there and talked. I let him know how I felt about it. He let me know how he felt about it.

Q: And what --
A It went on from there.

Q And what specifically did John say in the control room?

A That it's not about stopping the line. It's about working efficiently.

Q And I said we can't -- you want this material done. You're talking about you're getting rejections. The only way we can help you all out is if you stop the line or you all give us more people. He couldn't do either or. So --

Q Okay.

A Just work harder.

Q Any other times that you can think of that Republic supervisor or managers talked to you about how you were doing your job on the line?

A No.

Q Okay. At some point when you were working for -- at the Recyclery did you ever receive a raise?

A Yes.

Q How did that come about?

A I was on the line and -- his name was Mark, I think, tapped me on the shoulder and said that he asked Leadpoint to give me a raise.

Q And Mark, is he a --

A He was like a boss --

Q -- Republic --

A -- far as I could tell I thought he was like the top dog
of the whole thing.

Q And he was a Republic employee?
A Yes.

Q And he told you that he told Leadpoint to give you --
A Leadpoint to give me a raise.

Q And did you -- at some point then did you get a raise from Leadpoint?
A Yeah. I got one about two months later.

Q Okay. And then did it then get taken away?
A It did. It got taken away.

Q How -- and did you talk to anyone about that?
A I've asked the -- yeah, my supervisor. And his response was that Paul Keck looked at the papers and didn't want me to have it no more. So my response to that was can I --

MS. TOWNSEND: I would object based on hearsay.
THE WITNESS: -- talk to Paul Keck.
MS. TOWNSEND: That's a supervisor for -- not identified and I'm objecting based on hearsay in terms of whether or not it actually happened.

THE WITNESS: What was your question?

Q BY MS. GAREA: I think you answered the question. So let's see -- after you talked to your supervisor about this issue, did you talk to anyone else from Leadpoint about it?
A About it getting taken?
Q Yeah. About getting a raise.
A: About it getting taken or getting the raise
Q: Getting it taken away?
A: No.
Q: Okay.
A: I talked to my manager.
Q: Okay. And did you ever raise the issue of raises with anyone form Leadpoint?
A: As far as --
Q: As far as how to get more raises?
A: Yes.
Q: How did you raise it?
A: Well we had a meeting about three weeks ago, at safety meeting. And I asked the guy, you know, who do we talk to about this money? And he had no answer for me.
Q: Who did you ask at this meeting?
A: I don't know his name. He's from out of state. He came to do a safety meeting. And he opened it up at the end with questions. If anybody had any questions.
Q: And this was someone that came out of state from Leadpoint?
A: From Leadpoint.
Q: Okay. And what did you say?
A: The questions -- he asked like a -- at the end of whatever the safety, he had questions -- anybody have questions. And a lot of people asked about the money. And he had no answer to
it. So our answer to that was, is it the budget? Because we're hearing that Paul Keck doesn't want to give us nothing. It's not directly out of Paul Keck's mouth, it's directly out of our leads' mouth. Because we want to know who do we talk to? Who do we talk to? Who do we talk to? And we can't talk to nobody about it.

Q And what did the Leadpoint representative say in response?

A He had no answer for me. He had absolutely no answer for me.

Q Did he tell you --

A To the point where I was cussing and carrying on. I was getting here like really disturbed at, like how you don't have an answer for this, but you have an answer for everything else.

Q So did he ever tell you who at Leadpoint you could talk to about getting a raise? Did he identify a person?

A No. And then I went so far as to ask him well who does he talk to, to ask for money? And he says -- pretty much didn't give me no answer at all.

Q Have you ever been called into the control room by anyone else from Republic?

A No.

Q Okay. And sometimes you have to work overtime. Is that right?

A Yes.

Q And who decides if you work overtime?
A: Who lets us know?
Q: Who decides?

MS. TOWNSEND: Objection. Lacks foundation.

MS. GAREA: Go ahead.

THE WITNESS: I have no idea who decides --

MS. GAREA: Sorry. Hold on.

THE WITNESS: We just get notified through our leads.


HEARING OFFICER LOYA: Ask him what he knows only. Like,

if he doesn't know who decides then --

MR. PEDHIRNEY: He just answered that.

Q: Do you know who decides?
A: I don't know who decides.
Q: Okay.
A: We get it from our leads. We get the work from our leads.
Q: Okay. And have you ever asked your leads if you're going to work overtime on a particular day?
A: Yes.
Q: And what kind of responses have you gotten?
A: They have to find out as soon as Republic knows.
Q: Okay. And do they usually find out and let you know?
A: The last break.
Q: Okay.
A: But it goes so far as to ten minutes before we go home, too, sometimes.
Q Okay.
A Yeah.

MS. GAREA: All right. No further questions.

HEARING OFFICER LOYA: Any follow up?

MS. TOWNSEND: I have questions.

CROSS-EXAMINATION

Q BY MS. TOWNSEND: Afternoon, Mr. Harlin. I'm an attorney for BFI. You testified just a minute ago about a BFI employee named Fred, I believe that --
A Fred.

Q -- told you to cut some --
A This was just last week.
Q -- wires of bales.
A Yes.
Q Okay. Fred's not a supervisor for BFI.
A No.
Q Correct? And you said a lead asked him why he didn't do that. Was that a Leadpoint lead or a Republic --
A Pena. Yeah a Leadpoint.
Q Leadpoint lead.
A Yeah.
Q Okay.
A Told him, "Since you're in the area standing up, how come you can't do it?" And he said, "Because I have Leadpoint."
Q Okay. I don't have a question pending. And then you
answered some questions, I believe you stated -- initially you were given a zone to clean. Correct?

A Right.

Q And gave two examples of BFI supervisor telling you to clean a fence line or under the 18 wheelers. Is that correct?

A Right.

Q Who told you to clean the fence line?

A Paul Keck.

Q When was that?

A Maybe last month or a couple months, whenever game wardens came and was worried about the debris going over the fence.

Q Okay. Do you actually clean the fence line?

A Yeah. We -- that’s our -- part of our tasks now.

Q Who told you to clean under the 18 wheelers?

A John Sutter.

Q When was that?

A Every time he sees it. Maybe once a week.

Q And do you actually clean under --

A No.

Q -- the 18 wheelers? You said no?

A No.

Q Okay. And you talked about an incident when all of you were brought into the control room. Right?

A Right.

Q John Sutter was in there?
1  Q  Were there any Leadpoint leads in there at that time?
2  A  Right.
3  A  Yeah.  It was Carlos, but he's no longer here.
4  Q  Okay.
5  A  Vincent Haas.
6  Q  Okay.
7  A  And Fatima.
8  Q  Okay.  Did any of those Leadpoint leads say anything during that conversation?
9  A  Yeah.
10  Q  What did they say?
11  A  They asked John what was his argument.  And they told him.  And then they asked me to talk.
12  Q  Okay.
13  A  So I spoke.
14  Q  Were you -- did you receive any type of discipline coming out of that meeting?
15  A  No.
16  Q  Okay.  How was that issue resolved, if it was, in terms of what you were supposed to pick off the line, how quickly the belt was moving?
17  A  Well we just continued to do what we've been doing on the wet line.
18  Q  Okay.  So nothing different based on what --
19  A  On as far --
Q -- John Sutter said.
A -- our performance. No.

Q Okay. Leadpoint leads never told you, you had to follow what John Sutter said. Right? Since you kept doing the exact same thing you were doing?
A No.

Q Okay. You claimed somebody named Mark told he asked Leadpoint to give him a -- give you a raise. Correct?
A Correct.

Q Mark never gave you a raise himself. Did he?
A No.

Q Not able to do that, is he?
A I'm not sure.

Q Not as far as you're aware of. Right?
A As far as I'm aware of they are able to do that.

Q You just said you're not sure actually.
A Okay. You said --

MS. GAREA: Objection argumentative.

THE WITNESS: -- is he able to do that I said I'm not sure. You said am aware of it --

Q By MS. TOWNSEND: So Mark's never given you a raise that you're aware of.
A Mark's never gave me a raise that I'm aware of.

Q Okay. You said you did get a raise a couple months later.

Is that correct?
A Yes.

Q Do you have any knowledge whether Republic specifically says I want Clarence to work overtime today?

A No. They don't say my name. No.

Q Okay.

MS. TOWNSEND: I don't think I have any further questions.

HEARING OFFICER LOYA: Any follow up questions?

MR. PEDHIRNEY: Yes.

CROSS-EXAMINATION

Q BY MR. PEDHIRNEY: Mr. Harlin, I just have a few quick questions for you. Did you testify earlier that Mr. Sutter asks you about once per week to clean under the 18 wheeler?

A Yes.

Q You -- and did you testify that you don't actually clean under the --

A Yeah. I don't.

Q Okay.

A I don't do what -- the task he's asking.

Q And that's your choice not to do the task.

A That's my choice. Yeah.

Q And have you ever gotten in trouble for not doing what he's asked you to do?

A No. Because I stay busy on other things so that I don't have to get to that.

Q Okay. So do you know whether anyone's gotten in trouble
for not following an instruction from Mr. Sutter?

A I’m not aware of that.

Q You testified earlier that you grew frustrated because your lead wasn't answering questions from you about what you were supposed to do on your job. Is that correct?

A Say what?

Q You said that you -- at one point in time you got frustrated because your leads weren't answering your questions. So you decided to ask a question directly to a Republic employee.

A No. I didn't say that. I got frustrated with the guy that came from out of town on the safety meeting when he didn’t answer my questions. And I can't get a question -- I can't get an answer from anybody.

Q What was the specific question that you --

A About the money issue.

Q Okay. Do you --

A But that wasn't my -- my question --

Q No question pending.

A All right.

Q When you testified earlier about your interaction with John Sutter, with respect to the line speed.

A Uh-huh.

Q Was that your decision to go up and ask Mr. Sutter about why you weren't getting more help?
A didn't ask him that.

Q What did you ask Mr. Sutter?

A What -- well he was across from us telling us what to do. Telling me I need to get this plastic, I need to get this plastic.

"I have to stop the line."

"You can't stop the line."

"Well give me more people."

So I just stopped the line. Then he called us in the control room and we went from there. He had his argument. I had my argument. And then I went back to the line with the crew and continued to do what we'd been doing, slowing down the line.

Q Did you hear anything further from Mr. Sutter after that?

A No.

Q Was that the only time that anyone from Republic talked to you about the line issue?

A Yeah.

Q And how long did you work as a sorter?

A I was a sorter until probably from July of last year to probably about three or four months ago.

Q So to around May or June --

A Yes.

Q -- of 2013?

A Yes.
Whereupon,  

ANDREW MENDEZ  

having been duly sworn, was called as a witness herein and was  
examined and testified as follows:  

HEARING OFFICER LOYA:  Can you please state and spell your  
name?  

THE WITNESS:  Andrew Mendez; Andrew, A-N-D-R-E-W, last  
name, M-E-N-D-E-Z.  

DIRECT EXAMINATION  

Q  BY MS. GAREA:  Good afternoon, Mr. Mendez.  
Where do you work?  

A  I work at the Newby Island Recycle and Recovery; 1601  
Milpitas, California.  

Q  What is your job there?  

A  My job title, I work on a QC line, which is quality  
control. I deal with mixed plastics. I -- on my line I take  
out residue and whatever is not mixed plastic, along with  
taking out different other kinds of plastic, like rigid plastic  
or, you know, laundry soap, you know, jugs, stuff like that,  
you know.  

Q  And do you work as a sorter?  

A  Yeah, I'm a sorter, yeah.  

Q  Okay. And the line you work on is called the QC line?  

A  QC, yeah, quality control mixed plastic.  

Q  What shift do you work on?
Q And on the second shift, do you see Augustine Ortiz or Augie?
A Yes, I frequently see him walking around the MRF.
Q Okay. And have you ever observed him giving directions to any Leadpoint employees?
A No, not really to any other employee but just recently he gave me orders.
Q He gave you orders?
A Yeah.
Q Okay. What did he tell you?
A I was on my line and the line -- all lines stopped; we had downtime. So, you know, like I said, I take off plastic off my line and I have a big ole garbage can behind me. Well, I've got to take that around to the other side and dump it where the plastic goes.

   While doing that, he was coming out from a bunker. And he just walked up to me and handed me a broom kind of like out of nowhere and said, "I need you to clean up this area because we need to load in a bunker and I need to have this cleaned out." And I go, "I got to get back to my line because we're going to be starting up soon." He goes, "No, don't worry about that, I need you to do this." So, I went ahead and did it.

   And then when I finished -- by the time I got done doing it and I got back to my line, my line already had started up
running and material was just going by and going by.

Q Okay.

A And that was it.

Q Have you seen Augie direct any housekeeper -- housekeeping staff?

A No, I can't really say because where I'm located at, I'm away from everybody else and it seems like everything that's really happening is up on the MRF, like --

Q Okay.

A -- on top of where the control room's at. So, I don't really see much.

Q And have you attended any meetings that Augie has held with the Leadpoint employees?

A No, but I've heard of him calling meetings, you know, what I mean, because the meetings that he usually calls pertains to the lines up above, it doesn't really pertain to the QC lines.

Q Okay. Have you seen him call meetings for those other employees --

A Yes.

Q -- or employees --

A Just recently he did a meeting where he walked everybody around the place and was --

MS. TOWNSEND: Objection; hearsay.

He stated he's never been in a meeting with Augie, so lacks foundation.
MS. GAREA: Oh, he is testifying as to what he has observed.

THE WITNESS: Nah, I wasn't in the meeting, I like -- I've heard of him -- I heard of a meeting that was -- that he was going to have.

MS. TOWNSEND: And I'm going to object based on hearsay.

Q BY MS. GAREA: And did you -- have you seen -- you said you were testifying about a meeting where he was walking employees around the MRF, did you see that at all?

A Yeah, I headed back to my station. And I remembered leaving out -- before leaving the break room, people -- the leads and everybody were like, "Oh, we're going to -- they're going to -- they're taking us outside. You know, Augie's taking us outside to show us."

And they were like -- they were -- yeah, because our line leads were saying such and such lines after break are going to go on a little tour. You know what I mean, "Augie's going to take them on a little tour and the rest, just go to your lines."

(Telephone ringing)

THE WITNESS: So, as I went to my line, right after break room, I was on my line and I could -- everybody came out the break room. And, you know, there they go, Augie, you know, taking them on a lead.

Q BY MS. GAREA: Have you ever attended any meetings called
by Paul Keck at which he spoke?

A The last -- the recent that was yesterday was a safety meeting that he had called in.

Q Okay.

A And that was pertaining to, you know, what would happen in case of -- you know, of an emergency and yeah. So, yeah, it was a safety meeting that, yeah, he --

Q Okay.

A -- he did call.

Q And did he also have another meeting at some point?

A Yeah, one -- the one before that, it was a meeting that he had called and he spoke about that from that point on, that when our breaks came, that he didn't want us to go to break right there and then, that when those lines stopped for break, for the following five minutes, we had to clean up our areas.

Q Uh-huh.

A And then we would go to break.

Q Okay. And that cut into your break time then, having to --

A Yeah.

Q -- clean up?

A Well, in a way it does cut in because for the -- because and for the majority of the people because, you know, you got to go upstairs and, you know -- and especially of the wet line
and all these other CVR/RSS lines, they're way in the back. And, you know, it takes these people time to get, you know, to the break room. And by the time they take their lunch and every -- I mean, they take their break, it's already time to go back. So, you know, it --

Q Now, after Paul gave that direction, have you followed it, have you cleaned up after --

A Uh-huh.

Q -- the --

A Yeah.

Q Yes, you have?

A Uh-huh.

Q You complied with it?

A Uh-huh.

HEARING OFFICER LOYA: Was that a yes?

THE WITNESS: Oh, yes, sorry.

Q BY MS. GAREA: Okay. Do you sometimes work overtime?

A Yes, I work overtime every day.

Q Okay.

A And Monday through Friday.

Q And how do you know if you're going to work overtime on any particular shift?

A We'll know mainly towards our last break or one of our -- well, my line lead, he'll call me on the walkie-talkie, he'll say, "Augie, Augie what is it looking like tonight?" And then
Augie will give his response, you know. And usually it's, you know, 11:30.

Okay. So --

And then therefore our line lead will, you know, yell out, you know, to like the break room and outside smoking area, "Okay. This line's staying," you know, so-and-so line staying. And then -- yeah.

Okay. And has it ever happened that you're not even told that you're going to work overtime or --

There's been a few occasions that nothing was said. Our last break would come, right, and we ask our line leads, "Hey, what time are we getting off tonight?" And they go, "Oh, I don't know yet, we haven't heard nothing from Augie."

And then they would, you know, ask him over the thingy and Augie, you know, wouldn't give them a time. And then the next thing you know, 10:30's coming and the next thing you know we're doing all right. And since they didn't say anything we're kind of figuring, oh, we'll probably get off at 10:30. Well, 10:30 comes, lines keep on running and that's pretty much when we were like, oh, we're staying then.

And as long as the lines are running, you have to keep --

Yeah.

-- working?

Because we were told that we can't leave our lines until our lines stop.
Q Okay.
A We're not supposed to leave our lines running.
Q Okay.
MS. GAREA: No further questions.
MS. TOWNSEND: Just a couple questions.
HEARING OFFICER LOYA: Sure.

CROSS-EXAMINATION

Q BY MS. TOWNSEND: In regards to those few times when lines kept running after your scheduled shift with no one having said anything to you about overtime, did Augie or anyone else from Republic Services or BFI directly tell you about overtime?
A No.
Q Has Augie or anyone else from -- as a supervisor from BFI or Republic Services ever told you specifically you're going to work overtime this day or you're not going to work overtime this day?
A No.
Q Okay. When the lines do stop running at the end of your shift, are you required to check out with anyone before you actually leave the facility?
A No, when the lines stop at the end of our shift, we just -- we get off our lines and we go into the break room and we sign out and clock out and everything.
Q So, no one from -- Augie, no one else from Republic or BFI as a supervisor tells you when it's time for you to leave at
the end of the day, right?

A No.

Q Okay. In terms of cleaning up cutting into break time, did you ever inform any supervisor about that?

A About -- say that again.

HEARING OFFICER LOYA: Okay.

MS. TOWNSEND: Do we need to stop?

HEARING OFFICER LOYA: Off the record.

THE WITNESS: Trying to lock us in here.

(Off the record at 5:57 p.m.)

THE COURT REPORTER: We're on the record.

MS. TOWNSEND: Okay. I think I'll probably re-ask my last question.

HEARING OFFICER LOYA: Sure.

Q BY MS. TOWNSEND: Oh, you testified earlier that there was a request when the lines went down to clean up your area before you went on your break?

A Uh-huh, yes.

Q And you said that you felt that cut into your break time --

A Yeah.

Q -- generally? Did you ever inform anyone in Leadpoint management about that?

A Well, Leadpoint -- our leads were in the break room when Paul -- when he addressed this to us.
Q Okay.
A So --
Q My question though is did you ever -- after -- once you started doing that --
A Uh-huh.
Q -- and if you felt that it cut into your break time, did you ever go tell Leadpoint management you felt it was cutting into your break time?
A No, we -- I just -- no, I didn't.
Q Okay. And last question, you stated one time that Augie had recently directed you --
A Yes.
Q -- to clean up something while the line was down?
A Yes.
HEARING OFFICER LOYA: I'm sorry, can we keep the side conversations outside of the -- if you need to have a conversation, please step out.
Thank you.
MS. TOWNSEND: Okay. I'll restate the question.
Q BY MS. TOWNSEND: You testified that Augie one time recently asked you to clean up something while the line was down?
A Yes.
Q Remember that testimony? And you said your line was actually going again by the time you got back --
Q Have you ever received any directions from any Republic managers?
A Yes.
Q Okay. Who have you received directions from?
A Sometimes John Sutter or David.
Q Okay. You mentioned John Sutter, what directions has he given you?
A He will go on the line and sometimes they take out more plastic, which they do because a lot of material is going to the bails.
Q Okay. So, he's instructed you about how much plastic you need to take out?
A Yeah, that a lot of bad stuff are going through the belt.
Q Okay.
A And they need more clean -- because I take out cardboard and residue.
Q And has he given you those kind of instructions on more than one occasion?
A Yes, he does sometimes.
Q Okay. Has he ever -- has Mr. Sutter ever directed you to -- in terms of your work that you're performing?
A He will tell me sometimes to go on the other lines to help out because sometimes it look more dirty on the belt and he needs somebody to go faster because I'm the fast one right there and he wants us to help each other.
Q Okay. So, he has -- Mr. Sutter has sent you to work on a different line?
A Uh-huh.
Q Which line has he sent you to work on?
A I don't know which -- the number of the line.
Q You don't know the number?
A Huh-uh.
Q Do you know what material it was that was being sorted?
A I did residence -- that you have to take out.
Q Okay. And have you -- when he's directing you to go work on a different line, have you followed his direction?
A Yes, I have.
Q Can you estimate how many times he has moved you to a different line?
A A couple of times.
Q A couple of times. And you mentioned that you've also gotten directions from David?
A Exactly.
Q What kind of directions did you receive from David?
A That he will move me different locations to help out or our belt lines will be stuck and the other ones are running, they want us to help the other lines.
Q Okay. And how did -- how have you gotten those directions from David?
A He will honk the horn from the control or he will give us
signs, like go to the other one, go to other line.

Q Okay. And after David's given you those instructions to move to a different line, you've complied?
A And I'll -- yeah.
Q And you mentioned that sometimes that's happened if your particular line is down?
A Right.
Q Has he then directed more -- the other people on the line to also go to different areas?
A Sometimes it will happen.
Q Okay. And can you give me an estimate of how many times you've been instructed by David to move to a different line?
A A couple of times.
Q A couple of times. And you've complied with those instructions, yes?
A Yes.
Q Have you ever received any instructions about having to clean up before going to breaks?
A Yes.
Q Who have you received those instructions --
A Sometimes they will tell us to clean up our line leads.
Q Okay. And have you ever received instructions about cleaning up from any Republic managers?
A Yes and when our lines are stopped, he will give us a signal to honk the horn thing and he will tell us, "Sweep."
will give a sign, don't just stand there, do something.

Q And who is that?
A David.

Q Okay. And you said sometimes you will get the
instructions about cleaning through your line leads?
A Right.

Q Okay. And do you know where those instructions have come
from?
A No.

Q Okay. All right.

MS. GAREA: No more questions.

HEARING OFFICER LOYA: Any follow-up?

MS. TOWNSEND: Just a couple questions.

CROSS-EXAMINATION

Q BY MS. TOWNSEND: Ms. Mendoza, you said that David will --
gives the sign for sweep?
A Right.

Q How many times have you actually seen him do that?
A A couple of times.

Q Can you recall the last time you actually saw David do the
gesture for sweep?
A Friday -- no, not Friday, Thursday, sorry, because Friday
he didn't came.

Q I'm sorry.
A Friday he didn't came, on Thursday.
Q Okay. You never received any discipline John Sutter, have you?
A No.
Q John Sutter doesn't tell you when to show up at work or when to leave, does he?
A No.
Q The lines typically start moving for --
A Yeah.
Q -- the given shift at the exact same time -- at the same set time every day, correct?
A Correct.
Q And John, David, they're not telling you when to stretch, are they?
A No.
Q That's just your leads that do that?
A It's our leads.
Q Okay. And David that you mentioned, do you know whether he's represented by the Teamsters currently?
A I don't know.
Q So, you don't know if he's actually a supervisor for Republic Services --
A No.
Q -- do you?
A No.
Q Okay.
MS. TOWNSEND: No further questions.

CROSS-EXAMINATION

Q BY MR. PEDHIRNEY: One very quick question, Ms. Mendoza.

Does the line start at the same time every day?

A  No, it depends.

Q   Okay.

A   It was jammed or something right away when I will start, it depends.

Q   But if there's no jam, to your knowledge --

A   They will do it right away.

Q   Did the -- about the same time instead of just --

A   Yeah, at the same time.

Q   Okay.

MR. PEDHIRNEY: No further questions.

MS. GAREA: None.

HEARING OFFICER LOYA: Okay. I have no questions.

Thank you. You may step down.

MS. GAREA: The Union rests subject to surrebuttal.

HEARING OFFICER LOYA: Okay. Do any of the other two parties have a -- wish to call any witnesses for rebuttal?

MS. TOWNSEND: I would like to.

HEARING OFFICER LOYA: Okay. Go ahead.

MS. TOWNSEND: BFI would like to call in its rebuttal.

HEARING OFFICER LOYA: Go ahead.

MS. TOWNSEND: Can I have just one minute off the record
with my client?

HEARING OFFICER LOYA: Off the record.

MS. TOWNSEND: Sorry.

(Off the record at 6:13 p.m.)

HEARING OFFICER LOYA: BFI, you wish to present a witness for rebuttal?

MS. TOWNSEND: Yes, please.

BFI would like to call Paul Keck.

HEARING OFFICER LOYA: Okay.

Whereupon,

PAUL KECK

having been previously sworn, was called as a witness herein and was examined and testified as follows:

HEARING OFFICER LOYA: And I'd like to remind you that you're still under oath.

THE WITNESS: Okay.

DIRECT EXAMINATION

Q BY MS. TOWNSEND: All right. Mr. Keck, does BFI have any requirements in terms of Leadpoint workers stretching at the Recyclery?

A Republic does not.

Q Okay. Are you aware of whether Leadpoint workers do engage in stretching activities at the facility?

A I am unaware.

Q Okay. Do your lines have a designated start time?
A: There is a designated start time, yes.

Q: If there -- well, who's responsible for making sure the Leadpoint workers are on the lines ready to work by that designated start time?

A: Leadpoint supervisors.

Q: Have you ever had any issues with Leadpoint workers not being ready on the lines at that designated start time?

A: Yes.

Q: And have you done anything in response to that issue?

A: Alerted the Leadpoint supervisors.

Q: Okay. Are you familiar with an individual Travis Stevens who testified earlier today?

A: I learned his name today, yes.

Q: Okay. Do you remember having any meeting with Leadpoint workers where you talked to them about selling material or labor expenses?

A: I do.

Q: Do you remember if Mr. Stevens was present during that meeting?

A: I don't know if he was actually present at that meeting or not.

Q: Okay. Do you remember what you said during that meeting to the best of your ability?

A: Yes, we have material that we need to reprocess and we had equipment runtime availability on a particular line. And so,
when that group was formed, I let them know that this was not a
budgeted headcount, that if we were able to generate the
revenue by processing this material and selling it, we could
cover the labor expense.

Q And do you ever -- did you recall making any statements to
the effect of you don't have the budget to employ them?
A No.

Q Okay. Did you ever threaten any type of discipline or
termination against those Leadpoint workers in that meeting?
A No.

Q Did you ever tell those Leadpoint workers in that meeting
that you would have to let them go if they didn't meet
production requirements?
A No.

Q Are you familiar with an individual named Pablo?
A Yes.

Q And is Pablo a BFI/Republic Services employee?
A Pablo Salinas is a mechanic on our swing shift.

Q Is he a supervisor for the company?
A He is a bargaining unit mechanic.

Q So, to the best of your knowledge, he's actually
represented by the Teamsters?
A He is represented, he is not a supervisor.

Q Does Pablo have any authority from the company to
discipline anyone?
1  Q  Does Pablo have authority to schedule anyone?
2  A  No.

3  Q  Does Pablo have the authority from the company to hire anyone?
4  A  No.

5  Q  Does Pablo have authority to promote anyone?
6  A  No.

7  Q  Is Pablo held responsible if another BFI employee or a Leadpoint worker does not complete their tasks for the day?
8  A  Pablo does not have that responsibility.

9  Q  Okay. You hear of another individual named Chris who works in maintenance as well?
10  A  Chris is also a mechanic.

11  Q  Do you know whether Chris is represented by the Teamsters?
12  A  He is.

13  Q  Is Chris considered a supervisor for the company?
14  A  No.

15  Q  Does Chris have any authority to hire anyone?
16  A  He does not.

17  Q  Does Chris have any authority to fire anyone?
18  A  Does not.

19  Q  Does Chris have any authority to discipline anyone?
20  A  No.

21  Q  Does Chris schedule anyone?
A No.

Q Based on your knowledge of the supervisor's structure for BFI, who does Chris report to as his direct supervisor?
A Paul Sutter, our maintenance manager.

Q Is Chris held personally responsible if either a BFI employee or a Leadpoint worker does not complete their tasks for the day?
A No.

Q Do you know what position or positions Travis Stevens holds as a Leadpoint employee?
A I do not.

Q Anyone from Leadpoint ever inform you that they were moving him into a screen cleaner position or a maintenance helper position or a harness lead position?
A No.

Q Do you have any input into any position that Leadpoint would put Travis Stevens into?
A I do not.

Q Have any of your supervisors said that they've had any involvement in terms of where Leadpoint puts Travis Stevens as a Leadpoint employee?
A No.

Q Have you ever take a raise away from any Leadpoint employees?
A I have not.
A Based on Clarence's testimony, it was his election, yes.

Q Okay. There was some earlier testimony about you asking Leadpoint workers to clean -- once the lines end, to clean up before they go on break?

A Correct.

Q Is that something that you stated to Leadpoint workers?

A I did.

Q Did you say anything else about their break time in regards to that?

A I wanted to make it very clear, this is a cultural change in that -- or condition change. I think the condition was that when they -- the bell rang, everybody just simply abandoned their worksite and headed off to take their break. And we needed to recondition to simply stop, collectively gather up the debris that was on the ground. And then I made it very clear that this does not impact your break, your break simply starts at the conclusion of that cleanup period.

Q So, there'd be -- okay. I'll withdraw that question. Did any Leadpoint workers -- after you had that conversation with them, did any Leadpoint workers tell you that it was impacting their break?

A No.

Q Had you previously given any type of similar instructions to the Leadpoint leads for them to communicate to the Leadpoint workers?
A: Oh, I had.

Q: So, if you had previously given those instructions, why did you then give the instructions directly to the Leadpoint workers?

A: The message wasn't being conveyed.

Q: Okay. Are you familiar with the -- there was testimony earlier referencing a Republic employee named Fred?

A: Uh-huh.

Q: Are you familiar with that person?

A: Fred Gonzales.

Q: Do you know whether Fred is represented by the Teamsters?

A: He is.

Q: So, you don't consider him to be a Republic Services supervisor?

A: Not at all.

Q: Does he have authority to hire, fire, discipline any --

A: He does not.

Q: If a BFI employee or a Leadpoint worker does not complete their duties during the day, is Fred ever held personally accountable or responsible for that?

A: He is not.

Q: Okay.

MS. TOWNSEND: I don't believe I have any further questions.

HEARING OFFICER LOYA: Any --
CERTIFICATION

This is to certify that the attached proceedings before the National Labor Relations Board (NLRB), Region 32, Case 32-RC-109684, Browning-Ferris Industries of California, Inc., D/B/A BFI Newby and Leadpoint, and Teamsters Local 350 at the National Labor Relations Board, Region 32, Oakland Federal Building, 1301 Clay Street, North Tower, Second Floor, Conference Room A, Oakland, California 94612, on Monday, August 5, 2013, at 9:55 a.m., was held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.

TAHSHA SANBRAILO

Official Reporter
TEMPORARY LABOR SERVICES AGREEMENT

This Temporary Labor Services Agreement ("Agreement") is made and entered into by and between Allied Waste North America, Inc., a subsidiary of Republic Services, Inc., doing business as the Newby Island Recyclery, 1601 Dixon Landing Road, Milpitas, Ca 95035 ("Client"), and Leadpoint Business Services, LLC. With its principal office located at 4411 S. 40th Street, Suite D-4 Phoenix, AZ 85040 ("Agency").

1. General Scope of Services. During the Term of this Agreement, from time to time as requested by Client, Agency shall furnish to Client full- and/or part-time personnel ("Personnel") to assist Client in the orderly operation of its business. Agency acknowledges that Client conducts its business directly and through its direct and indirect subsidiaries, and that the Personnel Agency furnishes under this Agreement will be furnished to Client and its direct and indirect subsidiaries, and the various Divisions within each, as Client directs. Agency is an independent contractor of Client, and this Agreement shall not be construed as creating a partnership or joint venture between Agency and Client. Agency shall not provide Personnel for the following positions: drivers, heavy duty operators, spotters, or scale operators. In addition, Agency shall not provide Personnel for positions involving the handling of cash or sensitive information unless such Personnel comply with relevant procedures and controls established by Client, in its sole discretion.

2. Term. The term of this Agreement shall begin on October 22, 2009 and shall end when terminated by either party in accordance with this paragraph ("Term"). Either party may terminate this Agreement at any time by giving 30 days prior written notice to the other party in accordance with Paragraph 18. In the event that one party breaches any of the provisions set forth in this Agreement, the non-breaching party may terminate this Agreement by providing written notice to the breaching party in accordance with Paragraph 18. Upon termination of this Agreement, Agency shall return to Client any Confidential Information in the possession of Agency or any of its Personnel. Notwithstanding anything to the contrary in this Agreement, the provisions of Paragraphs 9-11, 13-15, 17, and 18 shall survive the termination of this Agreement.

3. Rates and Payments. Client agrees to pay Agency's fees for services rendered under this Agreement as specified in Exhibit A. Although Agency solely determines the pay rates paid to its Personnel, Agency shall not, without Client's prior approval, pay a pay rate in excess of the pay rate for full-time employees of Client who perform similar tasks. The method for calculating the overtime time bill rate as set forth in Exhibit A is as follows: bill rate for the applicable position x 1.5 = overtime time bill rate. If Client so requests, Agency shall provide an on-site coordinator for any amount of Personnel provided over 50, at no additional charge to Client, to coordinate the work of Agency Personnel.

Agency shall send a weekly fee invoice to each Division of Client or its subsidiaries to which Personnel were referred in the previous week, and, subject to Paragraph 6, the Division billed shall pay each invoice net thirty (30) days. Agency shall attach to the weekly fee invoice copies of the signed summary of hours of services rendered (as required in Paragraph 6). In addition, Agency shall send a monthly report to Supervisor, Employment Services, Human Resources Department, 18500 North Allied Way, Phoenix, AZ 85054, in the format set forth in Exhibit B, unless an alternate format is authorized by Client. Any accrued and unpaid fees due to Agency as of the date this Agreement is terminated shall be paid by Client to Agency within 70 days following the termination date.

4. Agency's Responsibility for Personnel. Agency is the sole employer of the Personnel supplied by Agency pursuant to the terms of this Agreement. Nothing contained in this

Contract number 5010-110-1

Joint Exhibit 7
Agreement shall be construed as creating an employment relationship between Client, any direct or indirect subsidiary of Client, or any Division of Client or any subsidiary, on the one hand, and any of Agency's Personnel, on the other hand.

Agency will recruit, interview, test, select, hire, and train the Personnel to be assigned to perform work for Client as agreed to herein at no cost to Client. Prior to referral of Personnel to Client, Agency shall ensure that its Personnel have the appropriate qualifications (including certification and training), consistent with all applicable laws and instructions from Client, to perform the general duties of the assigned position. If the position requires any knowledge or ability that is particular to Client's operation, upon agreement between the parties, Client will provide training in that specific area. Agency also shall be solely responsible for completing documents required by federal and state law for purposes of verifying that all Personnel are legally authorized to work in the United States. Client shall have the right to request that the Personnel supplied by Agency meet or exceed Client's own standard selection procedures and tests. Agency shall ensure that its Personnel are able to perform the essential functions of the duties required by Client, with or without a reasonable accommodation. If an accommodation is necessary, Agency and Client will be responsible for all costs, if any, associated with the provision of such an accommodation. Agency will make reasonable efforts to not refer to Client Personnel who previously were employed by Client and who were discharged and are not eligible for rehire according to Client's computer database or written records. Such efforts must include, but not be limited to, asking Personnel if they were previously employed by Client and verifying with Client that all Personnel provided are eligible to perform work for Client. Should Agency refer any such Personnel without knowledge of their ineligibility for rehire, Agency agrees to immediately cease referral to Client of such Personnel once Client has made Agency aware of their status.

Personnel shall not be assigned to Client for a period of more than six months commencing on the date such Personnel was first assigned to Client, or the date such Personnel was reassigned to Client pursuant to the terms of this Agreement. Personnel will not be eligible to be reassigned to Client for one year from the earlier of (i) the last day worked during the applicable six-month period or (ii) the last day of the applicable six-month period.

Prior to referral of Personnel to Client, Agency shall ensure, in a manner consistent with applicable law, that (i) such Personnel referred to Client have passed, at a minimum, a five-panel urinalysis drug screen, or similar testing as agreed to in writing with Client's safety, legal and commercial group and (ii) Agency has verified each Personnel's social security number with the Social Security Administration as required by law. To the extent permitted by applicable law, any Personnel previously referred to Client must have passed, at a minimum, a five-panel urinalysis drug screen prior to being referred to Client on any subsequent date in the event that the applicable Personnel was not assigned to Client for a period of thirty days or more. The five-panel urinalysis drug screens described above must be administered within the 30 days prior to the applicable Personnel being referred to Client. Agency will be responsible for all costs associated with drug screening and social security number verification. Agency will not refer to Client Personnel who did not successfully complete the drug screen and/or whose social security number was not verified with the Social Security Administration as permitted by law. Upon written request of Client, Agency will provide Client with a written certification for all Personnel referred to Client attesting that such Personnel have successfully passed the aforementioned drug screen and social security verification process. Further, Agency shall obtain from Personnel referred to Client a written acknowledgement that they understand they are obligated to perform services for Client free from the effects of alcohol and illegal drug use. Agency shall maintain such written acknowledgments during the Term of this Agreement. If requested by Client at any time during the Term of this Agreement or upon termination of this Agreement, Agency shall provide
Client with a copy of all such written acknowledgments. After referral of Personnel to Client, Agency shall ensure, in a manner consistent with applicable law, that all Personnel placed with Client (including, but not limited to, Personnel assigned to Client as of the date of this Agreement) report for and remain at work free from the effects of alcohol and illegal drug use and in condition to perform assigned duties. With respect to all Personnel assigned to Client on the date of this Agreement, Agency shall ensure, to the extent permitted by, and in a manner consistent with, applicable law, that (i) all such Personnel pass a five-panel urinalysis drug screen administered within 30 days after the date of this Agreement, and (ii) each Personnel’s social security number is verified with the Social Security Administration. Upon written request of Client, Agency will provide Client with a written certification that all Personnel assigned to Client on the date of this Agreement have successfully passed the drug screen and social security verification process.

Agency has the sole responsibility to counsel, discipline, review, evaluate, determine pay rates, and terminate the Personnel assigned pursuant to this Agreement. Notwithstanding the foregoing, Client reserves the right to ensure that Personnel performing services for Client do so free from the effects of alcohol and illegal drug use, and Client maintains the right to reject or discontinue the use of Personnel as set forth in Paragraph 7.

Agency shall maintain all necessary payroll and personnel records. Agency is fully and solely responsible for all payments whatsoever required to be made to or with respect to Personnel including, without limitation, all wages and salaries (including overtime and any bonuses), all benefits (including health insurance, medical payments, life insurance, and/or retirement benefits), all federal, state and local payroll taxes, and all worker’s compensation insurance and unemployment coverage and payments. In addition, in accordance with Paragraph 17, Agency shall indemnify and hold Client harmless from and against any penalty, claim, suit, liability, deficiency or damages (including reasonable attorney’s fees) arising in any manner out of Agency’s failure to make such payments. Client shall have no obligation whatsoever to make any payment to or in respect of any Personnel. Rather, Client is responsible solely for paying Agency’s fees in accordance with Paragraph 3. Agency’s fees include, and Agency shall be liable for, all taxes, excises, assessments, and other charges levied by any governmental agency on, or because of, the services performed hereunder, and any materials, equipment, services, or supplies furnished or used in performance of services under this Agreement. Personnel shall not be eligible to participate in any employee benefit plans, programs, or arrangements offered by Client to its employees.

5. Safety and Training. For each job category described in a Statement of Work (SOW) attached hereto as an exhibit or addendum, Agency shall use its best efforts to ensure that Personnel review Client’s safety training (“Safety Policy”) applicable to said job category, which performance shall be measured per EPI Amendment A attached hereto and incorporated herein by this reference. Agency shall provide Personnel performing duties Client deems (in a writing provided to Agency) to be safety sensitive with a copy of the Safety Policy and shall require its Personnel to comply with any and all of Client’s applicable safety policies, procedures and training requirements as set forth in the Safety Policy. Further, if Client has provided Agency with a safety-training program applicable to the position to which Personnel are being referred, Agency agrees to provide the training to its Personnel. For all Personnel performing duties Client deems to be safety sensitive, Agency shall obtain a written acknowledgement from Personnel that Personnel have read, understand and agree to comply with the Safety Policy and, if applicable, that they have reviewed the safety materials provided in the training and understand the safety standards described therein. Agency shall maintain such written acknowledgments during the Term of this Agreement or for three (3) years. If requested by Client at any time during the Term of this Agreement or upon termination of this Agreement, Agency shall
provide Client with a copy of all such written acknowledgments. Notwithstanding Agency's responsibility to discipline Personnel pursuant to Paragraph 4, Client reserves the right to enforce the Safety Policy provided to Personnel.

At Agency's own expense, Agency shall require its Personnel to wear all personal protective equipment, (such personal protective equipment shall be limited to hard hats, steel toed boots, gloves, ear and eye protection, and safety vests as requested by Client or required by applicable law), as necessary for the work to which Personnel are being referred as set forth in the applicable SOW. If the position to which Personnel are assigned requires any knowledge or ability that is particular to Client's operation, upon agreement between the parties, Client will provide training in that specific area. Agency shall use its best efforts to ensure that Personnel are wearing proper attire, as requested by individual Client locations; performance of which will be measured by KPI Amendment A.

Agency will require its Personnel to attend all meetings regarding safety issues that relate to the work performed by Personnel for Client. Further, Agency will require its Personnel to sign an attendance sheet for any such meetings attended. In addition, Agency will notify its Personnel that all accidents occurring while performing services for Client must be reported immediately to a member of Client's management. Agency will demand that its Personnel report all such accidents immediately to Agency, and Agency in turn agrees to inform Client's local management of all such reports as soon as Agency becomes aware of an accident.

6. Personnel Information. It is the responsibility of each of the Personnel assigned to Client to provide Agency, on a weekly basis and on forms which Agency shall supply, a summary of the hours of services rendered by each of the Personnel during the preceding week. Personnel must obtain the signature of an authorized representative from Client attesting to the accuracy of the summary on all forms claiming compensation for hours of services rendered on behalf of Client. Client reserves the right to refuse payment to Agency for any time claimed for payment for which Personnel failed to obtain a signature from an authorized representative of Client.

7. Personnel Changes. Client may reject any Personnel, and Client may discontinue the use of any Personnel for any or no reason. After notice of such rejection is given, Client shall thereafter have no obligation to use the services of such discontinued Personnel. If Client discontinues the use of any Personnel within eight (8) hours of the Personnel first commencing services for Client, Agency will not bill Client for any services performed by or charges related to that Personnel in addition, will promptly replace personnel to avoid service disruption. In addition, Client shall not be responsible for any charges for discontinued Personnel for periods after such discontinuance and for any of Agency's financial obligations to or with respect to such discontinued Personnel occurring after or as a result of such discontinuance. If any Personnel ceases to perform work before the end of a scheduled shift for which the Personnel has been referred, Agency will not bill Client for the services provided by such Personnel for that day unless such Personnel was replaced within a time frame deemed acceptable to Client.

8. Client's Hiring Personnel. With Agency's prior consent, Client may hire any Personnel as an employee of Client for no additional fee to Agency. Following the actual hire/start date of the individual, that person shall no longer be considered part of the Personnel supplied by Agency pursuant to this Agreement, and Agency shall no longer be considered the employer of such person. Rather, Client shall be considered the sole employer of such person. Otherwise, if Client hires any Agency Personnel as a direct employee without Agency's prior consent, or retains any Agency Personnel as an independent contractor, or through any person or firm other than Agency during or within
180 days any assignment of the affected Agency Personnel to Client from Agency, Client shall notify Agency immediately and continue the Agency Personnel’s assignment through Agency for up to 180 days; or alternatively may pay Agency a fee in the amount of $2000.00 per Agency Employee.

9. Insurance. Agency agrees at all times during this Agreement to maintain in full-force and effect at least the following insurance coverages:

<table>
<thead>
<tr>
<th>Coverages</th>
<th>Minimum Limits of Liability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Workers' Compensation</td>
<td>Statutory</td>
</tr>
<tr>
<td>Employer's Liability</td>
<td>$1,000,000 each occurrence</td>
</tr>
<tr>
<td>Comprehensive General Liability,</td>
<td>$1,500,000 each occurrence</td>
</tr>
<tr>
<td>Including Bodily Injury, Property Damage</td>
<td>$5,000,000 general aggregate</td>
</tr>
<tr>
<td>and Contractual Liability</td>
<td>$5,000,000 aggregate</td>
</tr>
<tr>
<td>Products/completed operations aggregate</td>
<td>$1,000,000 each occurrence</td>
</tr>
<tr>
<td>Automobile Liability, Including Bodily Injury</td>
<td>$5,000,000 each occurrence</td>
</tr>
<tr>
<td>and Property Damage</td>
<td></td>
</tr>
<tr>
<td>Excess Liability (Umbrella Form)</td>
<td>$5,000,000 aggregate</td>
</tr>
</tbody>
</table>

All such insurance policies will be primary without the right of contribution from any other insurance coverage maintained by Client. Client and its affiliates shall be shown as an additional insured on all policies except the Workers' Compensation policy. The fact that insurance is obtained by Agency shall not release or diminish the liability of Agency, including liability under the indemnity provisions of this Agreement.

The additional insured endorsement shall not limit coverage for Client to liability that is derivative of the liability of Agency, its agents or employees, but shall provide coverage to Client for any claim or liability arising from or relating to this Agreement or work performed in accordance with this Agreement. The Workers' Compensation insurance maintained by Agency shall extend to all workers’ compensation claims made by its Personnel, without regard to whether the Personnel names Agency or Client as the employer in the claim.

All policies required herein shall be written by insurance carriers with a rating of A.M. Best's of at least “A-” and a financial size category of at least VIII. Insurance certificates evidencing the above requirements shall be furnished by Agency to Client before commencing Services and provide for not less than 30 days prior notice to Client of any cancellation or non-renewal of the policies. In addition, the following requirements apply:

The Commercial General Liability policy must include Contractual Liability coverage specifically covering Agency's Indemnification of Client.

Any liability policy shall also contain a Cross Liability/Severability of Interests provision assuring that the acts of one insured do not affect the applicability of coverage to another insured.
If Agency fails to pay any premium when due, Client, in its sole discretion, may pay the same and Agency shall reimburse Client for the full amount of such premium within five business days after Client's payment. If reimbursement is not made within such period, Client may deduct the full amount from the next payment(s) Client is required to make to Agency under this Agreement.

Insurance similar to that required for the Agency shall be required by Agency of any subcontractors to cover their operations performed under this Agreement. The Agency shall be held responsible for any modifications in these insurance requirements as they apply to subcontractors, unless such modifications have the Client's approval.

10. Waiver of Subrogation. Agency hereby agrees to waive any and all rights of subrogation it may have against Client by virtue of any claims which may arise as a result of services performed in connection with this Agreement, and all policies of insurance herein shall be so endorsed. Agency also hereby agrees to obtain from its insurance carrier(s) a waiver of subrogation in favor of Client. Agency hereby agrees to waive any and all rights of subrogation it may have against Client by virtue of any claims which may arise as a result of services performed in connection with this Agreement, and all policies of insurance herein shall be so endorsed. Agency also hereby agrees to obtain from its insurance carrier(s) a waiver of subrogation in favor of Client.

11. Protecting Client's Interests. Agency agrees that, in performing its obligations under the terms of this Agreement, Agency and its Personnel will act at all times in the best interests of Client and will not commit any act or make any statement, oral or written, that would injure Client's business, interests or reputation.

12. No Service Interruption; Injunctive Relief. Agency agrees and acknowledges that Client is relying upon Agency and the Personnel it provides to assist in the orderly operation of Client's business and in fulfilling Client's contractual obligations to its customers. Accordingly, as a material inducement to Client to enter into this Agreement, Agency agrees that, for all services at all sites and Divisions of Client covered by this Agreement, Agency shall not stop, interrupt, or diminish the provision of any Personnel or service under this Agreement, even in the event of a non-material payment or service dispute between Agency and Client. Should a payment or service dispute arise, Agency agrees that it must notify Client's designated representative in writing with details as to the exact nature of the dispute. Agency further agrees that, unless otherwise instructed in writing by Client, Agency must continue to provide the Personnel to Client under this Agreement for a minimum of sixty (60) days following Client's receipt of the dispute notice, and for a reasonable time thereafter (the "Waiting Period") if Client is endeavoring in good faith to resolve the dispute to both parties' mutual satisfaction. Upon conclusion of the Waiting Period, as extended, Agency and Client may determine that an alternative vendor of temporary labor services should be put in place; Agency agrees to cooperate with any such change in the temporary labor services vendor, but without prejudice to any other rights it may have under this Agreement.

If Agency or its Personnel commits a breach, or threatens to commit a breach, of any of the provisions of this Paragraph 12, Client shall have, in addition to any other rights and remedies at law or in equity, each of which shall be independent of the other and severally enforceable, the right to have the provisions of this Agreement specially enforced by any court of competent jurisdiction, it being acknowledged and agreed that any such breach or threatened breach will cause irreparable injury to Client and that money damages will not provide an adequate remedy to Client. In the event that Client is forced to pursue injunctive relief under the terms of this Paragraph, Agency waives any requirement that Client post a bond in order for the injunction to take effect.

Contract number 2020-110-6
13. **Confidential Information.** Both Parties agree that it and its Personnel will maintain in confidence all of the other Party's Confidential or Trade Secret Information. Both Parties shall take all reasonable steps to prevent unauthorized use, disclosures, dissemination, or publication of Client's Confidential or Trade Secret Information; shall not disclose such information, directly or indirectly, to any third party; and shall not use such information other than in connection with the duties assigned to Agency and its Personnel hereunder. Upon termination of this Agreement, all Confidential or Trade Secret Information, and all copies thereof, in either Party's possession will be promptly returned to the disclosing Party or destroyed. Both Parties shall ensure that all Personnel who are involved with this Agreement are aware of the provisions of this Paragraph and the Personnel’s responsibilities hereunder. Upon either Party's request, the other Party shall have each of its Personnel covered by this Agreement execute an acknowledgment of these confidentiality undertakings. In the event that either Party becomes legally compelled to disclose any Confidential or Trade Secret Information, it will provide the other Party with 30 days advance notice of the required disclosure.

"Confidential Information" shall mean all information, whether in tangible form or communicated orally, that is learned or developed by either Party or its Personnel in the course and performance of their duties under this Agreement (a) which is labeled or stamped "Confidential" (or words to that effect), (b) which is of the type employees have been instructed to maintain as confidential, or (c) regardless of whether so marked or instructed, which concerns the Client's or Agency's products or services (existing or potential), business affairs, pricing, suppliers, customers, routes and distributors, including without limitation, computer hardware and software (in existence or under development); pending patent applications; technical, sales and business reports; technical or research notebooks; manufacturing techniques and processes; facility lay-out and equipment and information; and data, whether owned by Client, Agency or a third party, relating to the Client's or Agency's activities. "Trade Secret Information" shall have such meaning as defined by applicable state law.

This Paragraph 13 shall remain in full force and effect and survive termination of this Agreement and shall be enforceable against either Party and its Personnel, whether or not such Personnel remain employed by the Party. If either Party or its Personnel commits a breach, or threatens to commit a breach, of any of the provisions of this Paragraph 13, the other Party shall have, in addition to any other rights and remedies at law or in equity, each of which shall be independent of the other and severally enforceable, the right to have the provisions of this Agreement specially enforced by any court of competent jurisdiction, it being acknowledged and agreed that any such breach or threatened breach will cause irreparable injury to the disclosing Party and that money damages will not provide an adequate remedy. In the event that a Party is forced to pursue injunctive relief under the terms of this Paragraph, the other Party waives any requirement that the Party seeking enforcement post a bond in order for the injunction to take effect.

14. **Client's Books and Records.** Agency expressly agrees that all books and records relating in any manner whatsoever to the business of Client, and all other files, books and records and other material owned by Client or used by it in connection with the conduct of this Agreement, whether prepared by Agency Personnel, contract employees or otherwise coming into Agency's possession, shall be the exclusive property of Client regardless of who actually prepared the original material, books or records. All such books and records and other materials shall be returned immediately to Client upon the termination of Agency's services. This Paragraph 14 does not encompass any payroll, benefits or other personnel documents or records pertaining solely to the employment relationship between Agency and its Personnel.

Client shall be entitled to examine Agency's books and records pertaining to the Personnel, Agency's obligations and duties under this Agreement, and all services rendered by
Agency or the Personnel under this Agreement, at any time for purposes of auditing compliance with this Agreement, or otherwise.

15. Compliance with Laws. In the performance of its obligations hereunder, Agency agrees to comply with all applicable federal, state, provincial and local laws, ordinances, and statutes, and all lawful orders, rules and regulations of any constituted authority, including but not limited to, social security and income tax withholding laws, employment compensation laws, fair employment practices, anti-discrimination laws, immigration laws, transportation laws, environmental laws, and safety, health and working conditions laws with respect to all Personnel.

Without limiting the foregoing, Agency acknowledges that by entering into this Agreement, Agency may be subjecting itself to the requirements of Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, ("Section 503"), the Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. § 4212, ("VEVRAA"), and the Executive Order 11246 of September 24, 1965 ("Executive Order"), which impose certain requirements concerning anti-discrimination and affirmative action.

In performing this Agreement and during the Term of the Agreement, Agency and Client agree to comply with the following:

a. Agency and Client will not discriminate against any Personnel or applicants because of race, color, religion, sex, citizenship, national origin, handicapped/disabled status, veteran status, or because of any other status protected by law. Agency and Client will act to ensure that applicants are employed and that Personnel are treated during employment without regard to their race, color, religion, sex, citizenship, national origin, handicapped/disabled status, veteran or other protected status. Such action shall include but not be limited to the following: employment, promotion, demotion, transfer, recruitment, recruitment advertising, layoff, termination, rates of pay, other forms of compensation and selection for training, including apprenticeship. Agency agrees to post in conspicuous places, available to Personnel and applicants, notices informing Personnel and applicants of these anti-discrimination provisions.

b. In all solicitations or advertisements for employees placed by or on behalf of Agency with Client, Agency shall include a statement that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, citizenship, national origin, handicapped/disabled status, or veteran or other status protected by law.

c. Agency will comply with all applicable provisions of Section 503, the VEVRAA, the Executive Order, and with all applicable rules, regulations and relevant orders of the Secretary of Labor.

d. Agency will take affirmative steps to provide Client Personnel who are diverse in their racial backgrounds, gender, and handicapped/disabled or veteran status.

In the event of Agency’s noncompliance with the provisions set forth in this Paragraph 15 or with any applicable nondiscrimination laws, rules, regulations or orders, this Agreement may be canceled, terminated or suspended in whole or in part.

16. Representations and Warranties. Agency represents and warrants that it has all necessary
permits, licenses and other forms of documentation, and that its Personnel have received all training
agreed to in any SOW attached hereto as an exhibit or addendum. Agency further represents and
warrants that all Personnel are qualified and able to perform the duties and tasks for which they have been
requested by Client. Upon Client's request, Agency shall furnish copies and/or evidence to Client of such
training and qualifications.

17. Indemnification. Agency agrees to defend, hold harmless and unconditionally indemnify
Client, Client's Affiliates (as defined in Section 9 above), and all of their respective officers, directors,
employees and former employees, and agents (collectively, "Client Indemnified Parties") from and
against all direct and indirect losses, claims, demands, actions, causes of action, liabilities, suits,
debs, costs, expenses (including attorneys' fees, court costs, and expenses of investigation),
penalties, fines, assessments and damages (collectively, "Losses") Client may at any time suffer or
sustain or become liable for by reason of any accidents, damages, violations, injuries, illness or
diseases (including injuries, illness or diseases resulting in death) either to the employees or property
or both of Agency or Client, or to any other person or entity, (including any civil or criminal fine, penalty
or assessment levied by any local, state or federal governmental entity), in any manner caused by,
resulting or arising from or related to: (i) Agency's breach of this Agreement, (ii) negligent actions or failures to
act by Agency or its Personnel or agents, or (iii) the negligent work performed by Agency, its Personnel
or agents in relation to this Agreement, (iv) Losses asserted against any Client Indemnified Party by or
on behalf of any Agency Personnel or any of their family members, heirs or assigns, where such
Losses are caused in whole or in part by any actions of any third party or of any Agency
Personnel; provided, however, that Agency shall have no obligation to defend, hold harmless, and
indemnify for any Losses that are caused solely by the actions, failure to act, negligence, fault or strict
liability of any Client Indemnified Party. Agency's obligations under this Agreement shall survive
the expiration, termination or non-renewal of this Agreement.

As a condition precedent to indemnification, the party seeking indemnification will inform the
other party within 45 business days after it receives notice of any claim, loss, liability, or demand for
which it seeks indemnification from the other party; and the party seeking indemnification will cooperate
in the investigation and defense of any such matter. The Indemnified party shall have the sole right to
designate the attorney or law firm subject to any restrictions or requirements of client's insurance carrier
that will defend and represent it in regard to any suit, claim, or action referred to in this Paragraph 17.
The Indemnifying Party shall pay all fees and costs incurred in defending any such suit, claim, or
action and shall participate and cooperate fully in the defense of any such claim asserted against the
Indemnified Party. The term "attorneys' fees" includes attorneys' fees and costs incurred by or on
behalf of the Indemnified Party in establishing the right to defend or indemnity under this Paragraph
17.

With the exception of the party's indemnification obligations as set forth above, neither party
shall be liable to the other party for any incidental, consequential, exemplary, special, punitive, or lost
profit damages that arise in connection with this Agreement, regardless of the form of action (whether in
contract, tort, negligence, strict liability, or otherwise) and regardless of how characterized, even if such
party has been advised of the possibility of such damages.

18. Notices. Any notice or communication required or permitted in connection with this
Agreement shall be in writing and shall be deemed to have been given when delivered by hand, facsimile
(confirmation received), or certified U.S. mail (postage prepaid) to the individual, number and/or
address set forth below (provided that notice of a change of number or address shall be deemed given
only when received):

Contract number 0020-110-9
If to Agency:

Attention: Frank Ramirez
Leadpoint Business Services, LLC.
4411 S. 40th Street, Suite D-4
Phoenix, AZ 85040

If to Client:

Supervisor, Employment Services
Republic Services Procurement Inc.
18500 North Allied Way
Phoenix, AZ 85054
and to General Counsel
Republic Services, Inc.
18300 North Allied Way Phoenix, AZ 85054

Either party may change the name, number or address to whom notice to that party should be directed by providing the appropriate written notice to the other party in the manner specified in this Paragraph 18.

19. Headings. Headings in this Agreement are for convenience only and shall not be used to interpret or construe the provisions herein.

20. Entire Agreement; Severability. This Agreement (including any exhibits hereto) constitutes the entire agreement and understanding between the parties and supersedes any prior agreements and understandings, whether written or oral, relating to the subject matter of this Agreement. This Agreement may be modified or supplemented by the parties only if done in writing and signed by an authorized representative of each party. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision of this Agreement.

21. Construction. The terms of this Agreement constitute the written expression of the mutual agreement of the parties and shall be construed neutrally as to the parties, and not for or against either party.

22. Assignment. Client may assign this Agreement in whole or in part to one or more of Client's Affiliates. If Client is consolidated with or merged into, or if all or a part of its assets are transferred to, another entity or corporation carrying on all or a substantial part of Client's business ("Successor"), Client may assign this Agreement to the Successor. Agency shall not assign or subcontract this Agreement without the express advance written approval of an authorized representative of Client. Any attempted assignment or subcontract by Agency without Client's advance written approval shall be null and void.

23. Applicable Law. The parties agree that this Agreement shall be governed, construed and enforced in accordance with the internal laws of the State of Arizona, without regard to any State's laws governing conflicts in or choice of law. Any action arising hereunder shall be brought exclusively in the federal or state courts in Maricopa County, Arizona, and the parties expressly waive any objection to the action being brought or pursued in this forum.

6-24. Attorneys' Fees. If an action is brought to enforce any provision of this Agreement, the party prevailing in such action shall be entitled to recover a reasonable attorney's fee.
prevailing party shall be entitled to recover all costs and expenses of any such action from the non-prevailing party, including reasonable attorneys' and expert witness fees and all costs, whether considered taxable or non-taxable, in addition to all of the rights and remedies available at law.

25. Waiver of Breach. The waiver of a breach of any provision of this Agreement by either party shall not operate or be construed as a waiver of any subsequent breach by either party. No waiver shall be valid unless it is in writing and signed by an authorized officer of the party granting the waiver.

26. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, and all of which when taken together shall constitute one and the same instrument.

27. Non-Exclusive Arrangement. The relationship between Client and Agency is not exclusive and Client retains the right to contract with entities other than Agency for the provision of temporary labor services to Client.

Dated: 11-2-09

CLIENT: Allied Waste North America, Inc.
By
Printed Name: Thomas J. Pratt
Title: VP Procurement

Dated: 10-30-09

AGENCY
By
Printed Name: Frank P. Ramirez
Title: President/CEO

Contract number 5010-119-11

JA-236
Exhibit A
Rate Schedule

Republic Services, Newby Island - Milpitas, CA.

Bill Rates October 26, 2009 through October 25, 2010

1) Bill Rate Mark up on regular time and;
2) Over time and Double time mark up on wage.
3) Reg Time Example: \( \text{bill rate} = \text{RT wage} \times 1.1 \times \text{mark up} \)
4) Over Time Example: \( \text{bill rate} = \text{OT wage} \times 1.5 \times \text{mark up} \)

Payment Terms
Net 30 days on receipt of invoice

Workers Compensation Rate Increase Provision
Client agrees to pay any MANDATORY state base rate increases in workers compensation premium. The increase rate(s) is/are not subjected to bill rate mark ups and will be directly applied to the bill rate. Example:

\( \text{WC Rate increase per hour} + \text{(Current RT Bill Rate)} \times \text{mark up} = \text{(New Bill Rate)} \)
\( \text{WC Rate increase per hour} + \text{(Current OT Bill Rate)} \times \text{mark up} = \text{(New Bill Rate)} \)

CLIENT

Signature

Printed Name

Title

Date

LEAPPOINT

Signature

Printed Name

Title

Date
Exhibit B
Benefits Waiver for CWF Employees

Agreement and Waiver
In consideration of my assignment to CLIENT by LEADPOINT, I agree that I am solely an employee of LEADPOINT for benefits plan purposes and that I am eligible only for such benefits as LEADPOINT may offer to me as its employee. I further understand and agree that I am not eligible for or entitled to participate in or make any claim upon any benefit plan, policy, or practice offered by CLIENT, its parents, affiliates, subsidiaries, or successors to any of their direct employees, regardless of the length of my assignment to CLIENT by LEADPOINT and regardless of whether I am held to be a common-law employee of CLIENT for any purpose; and therefore, with full knowledge and understanding, I hereby expressly waive any claim or right that I may have, now or in the future, to such benefits and agree not to make any claim for such benefits.

EMPLOYEE

---

WITNESS

---

Signature

---

Signature

---

Printed Name

---

Printed Name

---

Date

---

Date

---
Exhibit C
Leadpoint/ RStaff Workforce Performance Metrics

1. Single Stream Line
   a. 21.0 TPRH (Tons per Run Hour)
   b. 18.5 TPLH (Tons per Labor Hour)

2. Container Line
   a. 240 lbs PLH (Per Labor Hour)

3. Commercial
   a. 9 TPLH (Tons per line hour)

4. Product Quality
   a. Product must meet quality standards that assure marketability.
INSTRUCTIONS: Submit an original of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

The Petitioner alleges that the following circumstances exist and requests that the NLRB proceed under its proper authority pursuant to Section 9 of the NLRA.

1. PURPOSE OF THIS PETITION (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)

☐ RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.

☐ RM-REPRESENTATION (EMPLOYER PETITION) - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.

☐ RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE) - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.

☐ UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES) - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.

☐ UC-UNIT CLARIFICATION - A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees:

☐ AC-AMENDMENT OF CERTIFICATION - Petitioner seeks amendment of certification issued in Case No. __________.

2. Name of Employer

Newby Island Recycling & LeadPoint

3. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)

1601 Dixon Landing Road, Milpitas, CA 95035

4a. Type of Establishment (Factory, mine, wholesaler, etc.)

Recollecting center (Newby Island) and Temporary agency (LeadPoint)

4b. Identify principal product or service

Recyclable materials

5. Unit Involved (In UC petition, describe present bargaining unit and attach description of proposed clarification.)

Included - All full and part-time sorters, housekeepers and screen cleaners employed at the Employer's facility located at 1601 Dixon Landing Road, Milpitas, California.

Excluded - Employees currently covered by collective bargaining agreements, clerical employees, supervisors and guards as defined in the Act.

6a. Number of Employees in Unit

Present - 120

7a. ☐ Request for recognition as Bargaining Representative was made on (Date) ________ by this petition

7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent (If none, so state.)

None

9. Expiration Date of Current Contract. If any (Month, Day, Year)

10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop

11a. Is there now a strike or picketing at the Employer's establishment(s) involved?

Yes ☐ No ☑

11b. If so, approximately how many employees are participating?

None.

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. (If none, so state)

None.

13. Full name of party filing petition (If labor organization, give full name, including local name and number)

Teamsters Local 350

14a. Address (street and number, city, state, and ZIP code)

255 - 89th Street, Suite 304

Daly City, CA 94015-1729

14b. ☐ Tel. No.

14c. Fax No.

14d. Cell No.

14e. e-Mail

15. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (to be filled in when petition is filed by a labor organization)

International Brotherhood of Teamsters

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)

Signature

Address (street and number, city, state, and ZIP code)

483 Ninth Street, 2nd Floor, Oakland, CA 94607

Tel. No. (510) 625-9700

Fax No. (510) 625-8572

Cell No. (650) 757-7290

e-Mail susan@ibtoocal350.com

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary.
**UNITED STATES OF AMERICA**

**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**REGION 32**

**Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery**

Employer

**FPR-II, LLC, d/b/a Leadpoint Business Services**

Employer

**Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters**

Petitioner

**STIPULATION**

We stipulate and agree that:

1. We have been informed of the procedures at formal hearings before the National Labor Relations Board by service of the Statement of Standard Procedures with the Notice of Hearing. The Hearing Officer has offered to us additional copies of the Statement of Standard Procedures.

2. To the extent that the formal documents in this proceeding do not correctly reflect the names of the parties, the formal documents are amended to correctly reflect the names as set forth above.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

4. The Petitioner claims to represent the employees in the unit described in the petition herein, but the Employer declines to recognize the Petitioner as the collective bargaining representative of those employees.

5. There is no collective bargaining agreement covering any of the employees in the unit sought in the petition herein, and there is no contract bar to this proceeding.

6. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the National Labor Relations Board. Commerce facts:

   **FPR-II, LLC, d/b/a Leadpoint Business Services**
   
   An Oregon corporation, with a facility and an office located in Milpitas, California, is engaged in providing temporary staffing services to companies in multiple states. During the past twelve months the Employer has directly provided services in excess of $50,000 directly to customers located outside the State of California.

   **Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery**
   
   A California corporation, with a facility and an office located in Milpitas, California, is engaged in providing waste management services. During the past twelve months, the Employer has directly purchased and received goods valued in excess of $50,000 directly from suppliers located outside the State of California.

7. The following unit is an appropriate unit within the meaning of Section 9(b) of the Act if the two companies are found to be joint employers:

   All full time and regular part-time employees employed by FPR-II, LLC, d/b/a Leadpoint Business Services and Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery, joint employers, at the facility located at 1601 Dixon Landing Rd., Milpitas, California; excluding employees currently covered by collective bargaining agreements, office clerical employees, guards, and supervisors as defined in the Act.
8. The following unit is an appropriate unit within the meaning of Section 9(b) of the Act if Leadpoint Business Services is found to be the sole Employer:

All full time and regular part-time employees employed by FPR-II, LLC, d/b/a Leadpoint Business Services at the facility located at 1601 Dixon Landing Rd., Milpitas, California; excluding employees currently covered by collective bargaining agreements, office clerical employees, guards, and supervisors as defined in the Act.

Upon receipt of this Stipulation by the Hearing Officer, it may be admitted, without objection, as Board Exhibit No. 2 in this proceeding.

[Signatures]

for the Employer (BF)

for the Employer (Leadpoint)

for the Petitioner

8/5/13

Date

Board Exhibit No. 2
From: Keck, Paul  
Sent: Friday, August 02, 2013 5:54 PM  
To: Vincent Haas  
Cc: Mennie, Carl  
Subject: Monday Reductions

Vincent,

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 dominant.

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

Paul Keck | Operations Manager | Republic Services, Inc. – Newby Island Recycley
1601 Dixon Landing Road Milpitas, CA 95035
Phone: 408.586.2283 | Cell: 408.687.1930 | Fax: 480.270.8934
Note the Office Phone number has changed | E-Mail: pkeck@republicservices.com
Frank,

I personally witnessed the passing of a pint of whiskey between two of your (fall protection trained and harnessed) employees today. The receiver of the bottle happened to look up, saw me watching, then slid the bottle into a pocket. He immediately left my view — I’ll assume to get rid of the evidence. Make no mistake — it was a pint of booze.

I did not witness either party consume any whiskey. However, the fact that whiskey was on the jobsite, and passed by one Leadpoint employee to another is all I need to proceed. Vincent Haas immediately responded to my call, and swiftly secured the two employees. I served witness that Vincent had the correct pair. One vehemently denied participation. The other was silent.

Vincent sent both to the clinic for drug/alcohol screening. Regardless of the outcome, I think you’ll agree — Leadpoint does not want that liability at this jobsite. It goes without saying that the Newby Team does not want this activity to occur on this jobsite. I request their immediate dismissal.

Earlier in the day, I noticed a Republic Services wall mounted shift paperwork drop box had been destroyed. Entering the men’s restroom, I found a “day” locker door had been kicked in — destroyed as well. Throughout the plant, many of our life safety illuminated exit signs have been destroyed. It appears someone elects to slap them in passing; destroying the exit cover, breaking them away from their mounts, or otherwise disabling them through this malicious act. The wall mounted paperwork drop? At 9:11 pm on 6/4, my break room video camera clearly caught the Leadpoint employee as he punched the box. Fatima Bailon and Vincent Haas were shown the video. I may be able to save it to a flash drive if necessary, but would rather not spend the time.

I hope you’ll agree — this Leadpoint employee should be immediately dismissed.
Minimum Wage Increase
Rate Schedule – Addendum 03-11-2013

Republic Services – Newby Island Resource Recovery Park

Minimum Wage increase from $8.75 to $10.00

Bill Rates effective 03/11/13

1) Regular Bill Rate Mark Up remains
2) Overtime and Dbl time Mark Up remains
3) Regular time example increase from $ (RT wage) X =
   (bill rate)
4) Overtime example increases from $ (OT wage) X =
   (bill rate)

Payment Terms

• % / 10 Net
  o Republic Services will receive a % discount off the invoice total if payment is received within 10 days of invoice date

IN WITNESS WHEREOF, this agreement has been duly executed by Leadpoint Business Services and CLIENT on the dates set forth below.

Republic Services – Newby Island Resource Recovery Park

Leadpoint Business Services

Signature

Printed Name

Title

Date

Signature

Printed Name

Title

Date

JA-249
Minimum Wage Increase
Rate Schedule – Addendum 03-11-2013

Republic Services – Newby Island Resource Recovery Park

Minimum Wage increase from $8.75 to $10.00

Bill Rates effective 03/11/13

1) Regular Bill Rate Mark Up remains
2) Overtime and Dbl time Mark Up remains
3) Regular time example increase from $(bill rate) (RT wage) X =
4) Overtime example increases from $(OT wage) X =

Payment Terms

• % / 10 Net
  o Republic Services will receive a 0 discount off the invoice total if payment is received within 10 days of invoice date

IN WITNESS WHEREOF, this agreement has been duly executed by Leadpoint Business Services and CLIENT on the dates set forth below.

Republic Services – Newby Island Resource Recovery Park

Leadpoint Business Services

Signature
Printed Name
Title
Date

JA-251
BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC., D/B/A BFI NEWBY ISLAND RECYCLERY,
Employer

and

FPR-II, LLC, D/B/A LEADPOINT BUSINESS SERVICES²
Employer,

and

SANITARY TRUCK DRIVERS AND HELPERS LOCAL 350, INTERNATIONAL BROTHERHOOD OF TEAMSTERS³
Petitioner

REGIONAL DIRECTOR’S DECISION AND DIRECTION OF ELECTION

Browning-Ferris Industries of California, Inc., D/B/A BFI Newby Island Recyclery, herein called BFI, operates a facility in Milpitas, California, herein called the Facility, where it is engaged in the business of recycling. FPR-II, LLC, D/B/A Leadpoint Business Services, herein called Leadpoint, an Arizona Company, provides subcontracted employees to BFI’s Facility, where they sort recyclable items from waste and clean the Facility. The Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, herein called Petitioner, filed a petition on July 22, 2013, under Section

¹ Herein called the Board.
² The name of each Employer appears as stipulated at the hearing.
³ The name of the Union appears as stipulated at the hearing.
9(c) of the National Labor Relations Act⁴ seeking to represent a unit of approximately 120 employees, which is comprised of sorters, housekeepers, and screen cleaners. As discussed more fully below, and stipulated by the parties, should I find that Leadpoint and BFI are joint employers, Petitioner is seeking to represent a unit consisting of

All full time and regular part-time employees employed by FPR-II, LLC, d/b/a Leadpoint Business Services and Browning-Ferris Industries of California, Inc., d/b/a Newby Island Recyclery, joint employers, at the facility located at 1601 Dixon Landing Rd., Milpitas, California; excluding employees currently covered by collective bargaining agreements, office clerical employees, guards, and supervisors as defined by the Act.⁵

In the alternative, should I find that Leadpoint is the sole employer in question, Petitioner is seeking to represent a unit consisting of

All full time and regular part-time employees employed by FPR-II, LLC, d/b/a Leadpoint Business Services at the facility located at 1601 Dixon Landing Rd., Milpitas California; excluding employees currently covered by collective bargaining agreements, office clerical employees, guards, and supervisors as defined in the Act.⁶

As evidenced at the hearing and on brief, the sole issue before me is whether, as contended by Petitioner, Leadpoint and BFI are joint employers, or as asserted by Leadpoint and BFI, whether Leadpoint is the sole employer of the employees in question.

The parties further stipulated at the hearing that regardless of whether Leadpoint and BFI are found to be joint employers, the seven leads employed by Leadpoint are statutory supervisors within the meaning of Section 2(11) of the Act and will be excluded from either appropriate unit.

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⁴ Herein called the Act.
⁵ The unit description, herein called the Joint Unit, appears as stipulated at the hearing.
⁶ The unit description, herein called the Leadpoint Unit, appears as stipulated at the hearing.
A hearing officer of the Board held a hearing in this matter on August 5, 2013. Petitioner, Leadpoint, and BFI appeared at the hearing, and the parties filed post-hearing briefs with me, which I have duly considered.

I have carefully considered the evidence and the arguments presented by the parties on this issue. For the reasons set forth below, I find, contrary to Petitioner, that Leadpoint is the sole employer of the employees at issue and the Leadpoint Unit is an appropriate unit for the purposes of collective bargaining. Accordingly, I am directing an election in the Leadpoint Unit.

I. **Background**

BFI is engaged in the business of recycling at the Facility. BFI receives approximately 1,200 tons per day of mixed materials, mixed waste, and mixed recyclables that must be sorted into separate commodities that are later sold to outside businesses at the end of the recycling process. To do this, BFI employs approximately 60 employees, including loader operators, equipment operators, forklift operators, sort line equipment operators, spotters, and one sorter. Most of these 60 employees work on the exterior portion of the Facility, moving bailed materials and preparing materials to be sorted inside the facility. These 60 BFI employees comprise a separate existing bargaining unit that is already represented by Petitioner.

Inside the facility there are four conveyor belts, called material streams, which bring distinct materials into the facility: residential mixed recyclables, commercial mixed recyclables, commercial mixed waste, and commercial mixed waste/baled materials. BFI employs one sorter, Virginia Pimentel, who works in the quality control area along with nine other Leadpoint sorters. Pimentel is supervised by BFI Shift Supervisor John Sutter and she earns approximately $5 per hour more than similarly situated Leadpoint sorters. Pimentel was employed by BFI as a heavy equipment operator, but when the predecessor to BFI lost business and had to reduce its staff, her position was eliminated. Instead of laying off Pimentel, she was retained to work in the sorting operation. Pimentel is currently part of a separate bargaining unit already represented by Petitioner.
recyclables, dry waste process, and wet waste process. Each of these materials are loaded from a separate entry to the material streams where they are sorted by sorters.

Leadpoint and BFI are parties to a Temporary Labor Services Agreement, herein called the Agreement, which went into effect on October 22, 2009, and runs indefinitely until terminated by either party. Pursuant to the Agreement, Leadpoint provides employees to do the work of sorting and housekeeping at the Facility. Section 4 of the Agreement states,

[Leadpoint] is the sole employer of the Personnel supplied by [Leadpoint] . . . Nothing in this Agreement shall be construed as creating an employment relationship between [BFI] . . . and any of [Leadpoint’s] Personnel.

Leadpoint employs approximately 240 full-time, part-time, and on-call sorters, screen cleaners, and housekeepers who work at the Facility. The sorters remove contaminants from the material stream so the materials may be recycled; the screen cleaners clear jams in the material stream; and the housekeepers clean the areas around the material streams.

II. **Hierarchy At The Facility**

BFI and Leadpoint maintain their own separate supervisors and leads at the Milpitas plant. According to Leadpoint President and CEO Frank Ramirez, at the Facility Leadpoint employs Acting On-Site Manager Vincent Haas (who is also a shift supervisor), Shift Supervisors Arturo Pena and Haas,8 and seven line leads who work with the Leadpoint sorters. The Acting On-Site Manager is responsible for Leadpoint operations (i.e. sorting) and reports to the Leadpoint corporate office in Arizona. Directly under Acting On-Site Manager Haas are the shift supervisors who create sorters’

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8 Ramirez testified that there is one additional shift supervisor, but he could not remember that person’s name.
schedules, oversee the material streams, and coach the line leads. The line leads work on the floor with the sorters and are Leadpoints’ lowest level supervisors.

For its part, BFI employs Operations Manager Paul Keck, who oversees the material recovery facility and the organic operation and supervises BFI drivers, heavy equipment operators, forklift operators, control room operators, and a single sorter. Directly under Keck is BFI Division Manager Carl Mennie who oversees the recycle lead and compost operations. BFI Shift Supervisors Augustine Ortiz and John Sutter then supervise the BFI employees who bring the material to the stream lines for sorting, including the control-room operator who controls the speed of the stream lines.

It is further undisputed that Leadpoint and BFI maintain their own human resources departments, with BFI’s human resources department located inside the Facility and Leadpoint’s located in a trailer outside the Facility.9

III. Day-To-Day Control Over Leadpoint Employees Terms And Conditions Of Employment

A. Leadpoint Employees’ Wages And Benefits

Pursuant to Section 3 and 4 of the Agreement, Leadpoint has the sole authority to set the wage rates for the employees it provides to BFI. However, Section 3 also states that Leadpoint cannot raise its employees’ wage rates in excess of the wages paid by BFI to full-time BFI employees who perform the same work without first obtaining BFI’s consent.

Leadpoint independently pays all of its employees and provides them with the option to enroll in certain healthcare and insurance plans, which are solely administered by Leadpoint. Leadpoint does this without consulting with BFI and BFI does not have

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9 BFI further maintains a separate employee handbook that only applies to BFI employees.
the authority to change Leadpoint wages save for the proviso of Section 3 of the Agreement. Leadpoint wages and benefits, including deductions and remittances, are administered solely by Leadpoint’s human resources department.

Based on the number of hours worked by Leadpoint employees, Leadpoint sends BFI an invoice, which details the Leadpoint employees’ names, positions, and wage rates. BFI then pays Leadpoint the amount owed pursuant to the Agreement.

BFI and Leadpoint maintain that BFI has no authority to offer Leadpoint employees a wage increase or decrease. Petitioner attempted to refute this contention by offering the testimony of Leadpoint Housekeeper Clarence Harlin, who testified that he received a raise, which was later taken away at the request of BFI Operations Manager Paul Keck. However, Harlin then admitted that at the same time he lost his raise, he transferred from the night shift to the day shift and went from the front of the material stream to the middle of the material stream. According to Keck, Harlin received a differential in pay for his position on the night shift, and after he left that positions, Leadpoint continued to bill BFI for that differential. Keck became of aware of this when he reviewed the invoice and noticed Harlin’s higher rate of pay for the lower classification of work. Keck then notified Leadpoint Acting On-Site Manager Haas who made the change to payroll. Thus, it is apparent that Keck simply informed Leadpoint of this incorrect differential pay because BFI was being billed the incorrect amount.

B. Recruitment, Hiring, Discipline, And Termination of Leadpoint Employees

Section 4 of the Agreement states that Leadpoint has the sole responsibility to counsel, discipline, review, evaluate, and terminate employees assigned to BFI pursuant to the Agreement; however, BFI “maintains the right to reject or discontinue the use of
Personnel.” BFI Operations Manager Keck, BFI Division Manager Carl Mennie, and BFI Shift Supervisors Augustine Ortiz and John Sutter all testified that they do not possess the authority to hire, terminate, discipline, transfer, counsel, promote, or demote Leadpoint employees. They further do not possess the ability to effectively recommend any of these actions.

The record reflects that Leadpoint is solely responsible for recruiting and hiring its own employees, which is done by Leadpoint Acting On-Site Manager Vincent Haas in conjunction with Leadpoint’s human resources department. When a prospective Leadpoint employee is brought in, after filling out paperwork with Leadpoint’s human resources department, Haas takes the applicant to the material stream and discusses what is done and Leadpoint’s expectations. The prospective employee is then assigned to work the material stream while either Haas or a Leadpoint lead observes them to ensure that they are doing the work correctly. If successful, the prospective employee goes back with Haas to Leadpoint’s human resources department where they continue to fill out paperwork and review Leadpoint’s employment policies. According to Haas, BFI Operations Manager Paul Keck, and BFI Division Manager Carl Mennie, Leadpoint is solely in charge of this testing process and no one from BFI is present or plays any role in it. Similarly, no one from BFI is present for the interview process and the final decision regarding hiring is made by Leadpoint’s Human Resources Administrator Anthony Chavez. Leadpoint’s human resources department then conducts a background check and drug testing of each applicant. While the Agreement mandates these tests in general, the manner in which they are administered, and the provider chosen to administer the testing, is decided solely by Leadpoint.
Petitioner asserts that BFI has effectively recommended the termination of employees in the past. In support of its contention, Petitioner proffered evidence that on June 5, 2013, BFI Operations Manager Keck emailed Leadpoint President Ramirez to inform him of two separate incidents. First, Keck witnessed two Leadpoint employees passing around a bottle of whiskey while on duty. Accordingly, Keck then contacted Leadpoint Acting On-Site Manager Haas who “immediately responded . . . and swiftly secured the two employees.” According to his June 5 email, Keck “request[ed] their immediate dismissal.” Instead, upon receiving this report, Leadpoint removed the two employees from the jobsite and sent them for blood-alcohol testing. Later, one employee was dismissed and the other was transferred.

Second, Keck found damage to numerous pieces of BFI property including the wall mounted paperwork drop box. Keck reviewed security footage, which showed a Leadpoint employee as he punched the box. Keck then showed the video to Haas. In Keck’s June 5 email to Leadpoint he wrote, “I hope you’ll agree – this Leadpoint employee should be immediately dismissed.” Haas testified that after receiving this report from Keck, he conducted an independent investigation by reviewing the video and talking with the involved Leadpoint employee who admitted to destroying BFI property. No one from BFI was present for this investigation or questioning. Haas then independently decided to suspend the employee while he consulted with Paul Russo from Leadpoint’s corporate office in Arizona. Russo then made the decision to terminate the employee, based on Leadpoint’s investigation, without consulting with anyone from BFI.

Keck testified that while he requested the Leadpoint employees’ dismissals, it was only dismissals from employment at the BFI facility and not from Leadpoint. Leadpoint
and BFI further assert that regardless of Keck’s requests, Leadpoint conducted its own independent investigations into the matter without BFI’s input and Leadpoint retained the authority to make the final decisions. In contrast, Petitioner argues that this evidence demonstrates that Keck effectively possessed the authority to terminate Leadpoint employees.

C. Daily Work Instruction And Training Of Leadpoint Employees

BFI Operations Manager Paul Keck, BFI Division Manager Carl Mennie, and BFI Shift Supervisors Augustine Ortiz and John Sutter all testified that they do not instruct or give daily work directions to Leadpoint employees regarding their job duties. Further, BFI has no authority over the particular employees who work on the material streams or the authority to decide where a Leadpoint employee is assigned.

BFI does, however, maintain productivity standards for the stream lines. According to BFI Division Manager Mennie, these standards are based on how much time the equipment is down versus running and by tracking the tonnage per hour that is processed on the individual lines. The productivity standard, which changes for each shift, is determined by BFI’s shift supervisors on duty at the time. The BFI shift supervisors both testified that they have changed the speed of the material stream based on the volume of the incoming lines. When this occurs, the BFI shift supervisors contact the Leadpoint leads and instruct them of the change. However, BFI neither controls nor enforces the speed at which the individual Leadpoint employees work in response to these speed changes on the streamline. Instead, BFI contends that it is up to Leadpoint to figure out how to respond to these line speed changes, such as by transferring additional Leadpoint employees to assist when necessary. By contrast, Petitioner contends that
BFI’s ability to stop and start the stream line, and change its pace, demonstrates that BFI has direct control over the Leadpoint employees’ work.

According to BFI Shift Supervisors Ortiz and Sutter and Leadpoint management, if a problem arises with a Leadpoint employee, the BFI manager will contact a Leadpoint lead or supervisor and inform them of the issue. They do not, however, tell Leadpoint how to fix the problem—only that an issue has arisen. Leadpoint Acting On-Site Manager Vincent Haas further testified that if employees need to be moved from one stream line to another, the Leadpoint leads or managers communicate this to the Leadpoint employees.

BFI Shift Supervisors Augustine Ortiz and John Sutter testified that at the beginning of each shift, they review the material in the facility and meet with Leadpoint supervisors to coordinate and come up with a plan. This planning meeting only includes the supervisors and not the sorters, screen cleaners, or housekeepers. The plan includes discussion of the materials that day, but BFI does not instruct Leadpoint on how to staff the lines or how to complete the work.

Leadpoint Housekeeper Clarence Harlin testified that he has received instruction from BFI managers in the past. On unknown dates, approximately weekly, BFI Shift Supervisor John Sutter instructed Harlin to clean under the carriage of an 18-wheel truck. Notably, Harlin admittedly ignored these instructions and never received discipline for his failure to follow Sutter’s instructions.

The only time BFI trained Leadpoint rank and file employees, according to BFI Shift Supervisor Sutter, is when the facility first opened in 2009. Because at the time, “no one knew anything,” for the approximate first month of the contract with Leadpoint,
Sutter trained Leadpoint employees by informing them of what materials to pull off the material stream and how to handle a jam in the machinery.

D. **Leadpoint Employees’ Scheduling And Overtime**

BFI controls the Facility’s hours of operations, which consists of three shifts: 4:00 AM to 1:00 PM, 2:00 PM to 11:30 PM, and 10:30 PM to 7:00 AM. The Petitioner argues that since BFI sets the hours of the three shifts, BFI effectively controls Leadpoint employees’ schedules. Although BFI sets the Facility work hours, Leadpoint’s employees’ individual work schedules are created by Leadpoint Acting On-Site Manager Vincent Haas without the input or directive from BFI. As such, BFI contends that while it sets the hours of operation for the Facility, it is Leadpoint that assigns its employees to work the required shifts.

According to Leadpoint President Frank Ramirez, in general, staffing needs are determined by the customers’ requirements, which are based on the tonnage of material that the customer receives in addition to the equipment manufacturer’s suggested guidelines. As such, Leadpoint determines how many employees are needed at BFI’s plant based on BFI’s tonnage intake in addition to the machinery BFI uses at the Facility. BFI does not specifically request a certain number of employees, Leadpoint comes up with the number of employees, but adjusts it accordingly as needed.

BFI further determines whether there is a need to keep the material streams operating such that employees must work overtime. BFI determines this based on the amount of product that arrives at the facility daily. While BFI solely decides to continue running the streams, Leadpoint managers, without input from BFI, select which Leadpoint employees will work the overtime. However, Petitioner argues that since BFI
controls whether overtime is necessary, BFI therefore controls whether Leadpoint employees work overtime.

As regards requests for time off, the record reflects that Leadpoint employees fill out request forms that are kept in the Leadpoint human resources trailer and the decision to grant the request rests solely with Leadpoint. Should a Leadpoint employee need to call in sick, Leadpoint maintains a phone line for each shift where employees call in and notify their Leadpoint manager that they will not be in. Their position is then backfilled by another part-time or on-call Leadpoint employee selected by a Leadpoint supervisor.

It is undisputed that BFI plays no role in this process.

IV. ANALYSIS

A. The Relevant Case Authority

In TLI, Inc., 271 NLRB 798 (1984), enfld. mem. 772 F.2d 894 (3d Cir. 1985), the Board adopted the United States Court of Appeals for the Third Circuit’s analysis as to when a joint employer relationship exists. To determine whether two separate entities should be considered joint employers, the Board analyzes whether alleged joint employers share the ability to control or co-determine essential terms and conditions of employment. See Oakdale Care Center, 343 NLRB 659, 662 (2004); see also In re Airborne Freight Co., 338 NLRB 597, 597 (2002); TLI, Inc., 271 NLRB at 798-99. Essential terms and conditions of employment are those involving such matters as hiring, firing, discipline, supervision, and direction of employees. See, e.g., Laerco Transportation, 269 NLRB 324 (1984). However, the putative joint employers’ control over these employment matters must be direct and immediate. See TLI, Inc., 271 NLRB at 798-799. The authority to make routine directions of where to do a job, rather than the

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10 See NLRB v. Browning-Ferris Industries, 691 F.2d 1117 (3rd Cir. 1982).
manner in which to perform the work, is insufficient to support a joint employer finding. See Island Creek Coal Co., 279 NLRB 858, 864 (1986).

In Southern California Gas Co., 302 NLRB 456 (1991), the Board affirmed the administrative law judge's finding that a joint employer relationship did not exist where a master entity contracted with a janitorial subcontractor to clean its facility. In his decision, the judge reasoned:

An employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for. It follows that the existence of such control, is not in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor's employees. Generally a joint employer finding is justified where it has been demonstrated that the employer-customer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.

Id. at 461 (citations omitted). Notably, the Board found no joint employer relationship even though the parties' contract: required the subcontracted employees to do certain delineated tasks (sweeping, mopping, and emptying trash); included a chart showing how often the assignments were to be performed; and required the subcontractor to employ an adequate number of trained personnel. See id. at 461-62. Nor did the Board consider it determinative that the contracting employer witnessed a subcontracted employee's misconduct and the employee was subsequently terminated by the subcontractor at the request of the contracting employer. Instead, the Board affirmed the judge's finding that the contractor did not terminate the employee in question, but rather at most indicated that it no longer wanted the employee at its facility and it was the subcontractor who
chose to terminate the employee rather than transfer the employee to another job location. See id. at 462. As such, the actions of the contractor were merely those of an owner exercising their right to protect its own premises. See id. (citing Hychem Constructors, 169 NLRB 274, 276 (1968) (a joint employer relationship did not exist even though the master employer required the subcontracted employees to observe plant safety and other plant rules including the master’s yet unexercised prerogative to remove undesirable subcontracted employees because “the promulgation of such rules, which seek to insure safety and security, is a natural concomitant of the right of any property owner or occupant to protect his premises.”).

Similarly in G. Wes Ltd. Co., 309 NLRB 225, 226 (1992), the Board overturned the judge’s finding of a joint employer relationship based on the absence of evidence establishing that hiring, firing, processing of grievances, administration and negotiation of contracts, granting of vacations or leaves of absence, or discipline were determined jointly by both the employers in question. Instead, the G. Wes Ltd. Co. Board found that the General Counsel failed to establish that the employers shared or codetermined the essential terms and conditions of employment of the employees. See id. Similarly, in Teamsters Local 776, 313 NLRB 1148, 1162 (1994), the judge, in an opinion adopted by the Board, held that two companies were not joint employers where the alleged joint employer exercised only minimal and routine supervision of the other employer’s employees, and had only limited dispute resolution authority due to the routine nature of work assignments it made. By contrast, the Board found that a joint employer relationship existed in Continental Winding Co., 305 NLRB 122, 123 (1991), because even though a supplier employer alone hired employees supplied to a user employer and
it set and paid their wages, the user employer exercised sole authority to assign, schedule, and supervise the workplace conditions, and the supervision was more than "routine."

B. **Application Of The Case Law To The Case At Bar**

Based on the facts as elicited at the hearing and the case law cited above, I find 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" of Leadpoint's housekeepers, sorters, or screen cleaners at BFI's Facility. *TLI, Inc.*, 271 NLRB at 798.

As regards the Leadpoint employees' wages and benefits, the record is clear that Leadpoint sets their pay scale and is the sole provider of their benefits. Nevertheless, Petitioner argues that the limitation to Leadpoint's authority, as set forth in the Agreement—that Leadpoint cannot pay its employees more than BFI pays its employees who do comparable work—mandates a finding that BFI retains control over Leadpoint's wage rates. I find this argument unpersuasive. In this regard, Section 3 of the Agreement limits only one aspect of the wage rates paid to Leadpoint employees—a cap on their maximum wage rate. Moreover, this limitation only applies to the Leadpoint sorters since BFI does not employ any housekeepers or screen cleaners. Notably, Section 4 of the Agreement states that Leadpoint retains the sole responsibility to pay its employees. As such, nothing in the Agreement would forbid Leadpoint from either lowering its employees' wages or increasing the benefits offered to its employees. Therefore, based on the record evidence, I find that Petitioner has presented insufficient evidence to establish that BFI controls or co-determines Leadpoint employees' wages and benefits.
Similarly, I find that the authority to control the recruitment, hiring, counseling, discipline, and termination of Leadpoint employees is vested solely with Leadpoint. In this regard, it is undisputed that Leadpoint maintains its own human resources department in a trailer outside the Facility where recruiting and hiring, termination, and disciplinary decisions are made exclusively by Leadpoint’s supervisory staff. There is no evidence to suggest that BFI participates in any way in these decisions. To the contrary, all testimony indicates that Leadpoint makes the sole decision to hire employees, after it finishes its recruitment phase, without any input from BFI, as well as its decisions regarding termination and discipline.

With regard to termination, however, Petitioner points to BFI Operations Manager Paul Keck’s June 5 email in which he reported misconduct of employees and requested their termination as evidence that BFI has the authority to terminate, or effectively recommend termination, of Leadpoint employees. I reject this contention. As noted above, the very language of the June 5 email to Leadpoint President Frank Ramirez is evidence that BFI does not have the authority to terminate Leadpoint employees. Thus, Keck, who is the highest ranking BFI official at the Facility, wrote, “I request their immediate dismissal” and “I hope you’ll agree—this Leadpoint employee should be immediately terminated.” (Emphasis added). The language is clear and unambiguous. Keck merely requested that the employees be terminated for creating an unsafe environment in BFI’s plant. He did not order or direct Leadpoint to terminate the employees. Surely if BFI had the authority to terminate Leadpoint employees, Keck would have done this without having to email Leadpoint’s President, located in Arizona, to do so. As such, I find that BFI does not possess the authority to terminate Leadpoint.
employees. In further support of this conclusion, I note that it is well established that the enforcement of rules to insure safety and security is a natural outflow of the right of any property owner to protect their premises and does not indicate the authority to terminate or discipline the employees of a subcontractor. See Southern California Gas Co., 302 NLRB at 462; see also Hychem Constructors, 169 NLRB at 276.

I also find that BFI does not control or co-determine Leadpoint employees' daily work. In this regard, the record is clear that Leadpoint sorters, housekeepers, and screen cleaners are supervised solely by Leadpoint leads and Leadpoint Acting On-Site Manager Vincent Haas. Nothing in the record supports Petitioner's argument that BFI controls Leadpoint's employees' daily work functions. While Petitioner correctly asserts that BFI operates the speed of the material stream, BFI does not mandate how many Leadpoint employees work on the line, the speed in which the Leadpoint employees work, where they stand on the material stream, or even how they pick material and contaminates off of the material stream. BFI's mere ability to change the speed of the material stream, which is based on the quantity of the material alone, does not create a level of control that is sufficiently direct or immediate to warrant a finding of joint control. See TLI, Inc., 271 NLRB at 798-799. As such, I find that BFI's control of the speed of the material stream is routine in nature and is not based on individualized assessments of Leadpoint's employees or evidence of control in the manner in which the Leadpoint employees perform their work. 11 See Island Creek Coal Co., 279 NLRB at 864; see also Southern California Gas Co., 302 NLRB at 461-62.

11 Petitioner further argues that BFI management instructed Leadpoint employees, including housekeeper Clarence Harlin. However, the record evidence revealed that these instructions from BFI were either routine or routinely ignored. Specifically, Harlin testified that BFI Shift Supervisor John Sutter instructed him, on a weekly basis, to clean under an 18-wheel trailer. Harlin further stated that he routinely
In its brief, Petitioner relies on *Quantum Resources Corp.*, 305 NLRB 759, 760 (1991), and *Heilman Brewing Co.*, 290 NLRB 991, 999 (1980), for the proposition that the Board will find a joint employer relationship exists where the alleged joint employers closely and routinely supervises and directs the unit employees’ work. I find these cases distinguishable from this matter, as enumerated above, because the record establishes that Leadpoint solely supervises its own employees. In this regard, to the extent that BFI has a problem with a Leadpoint employee, BFI complains to a Leadpoint supervisor who takes care of the matter using their own discretion. I further note that to the extent that any BFI employee instructed a Leadpoint employee, the instruction was merely routine in nature and insufficient to warrant a finding that BFI jointly controls Leadpoint employees’ daily work.

In contrast to Petitioner’s arguments, the testimony at the hearing clearly establishes that Leadpoint 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. While Petitioner correctly points out that BFI sets the times of the shifts and hours of the Facility’s operation, I find that authority alone to be insufficient to warrant a finding that BFI actually control Leadpoint employees’ schedules given Leadpoint’s sole control of all other aspects of its employees’ schedules within that limited parameter. I also note that the Board has previously held that the authority to mandate staffing requirements in a contract with a subcontractor is insufficient by itself to support a finding of joint employer status. *See Southern California Gas Co.*, 302 NLRB 461-62. Finally, Petitioner ignored the order and never received discipline for his inaction. Accordingly, I cannot conclude that BFI instructed Leadpoint employees.
argues on brief that BFI controls whether Leadpoint employees will work overtime; however, this assignment is not entirely accurate. Rather, the record reflects that BFI determines whether overtime is necessary based on the material intake that day and Leadpoint has the sole discretion to assign or grant individual employees' overtime work.

In summary, I find that Leadpoint is the sole employer of the employees in question at BFI's Facility and that Petitioner's arguments for joint employer status between BFI and Leadpoint are unconvincing. Accordingly, I find that the Leadpoint Unit is the appropriate unit, and I am therefore directing an election in the Leadpoint Unit.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The parties stipulated, and I find, that Leadpoint is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner claims to represent certain employees of Leadpoint, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

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12 On brief, Petitioner argues that current Board law should change to reflect the views expressed in former Board Member Liebman's various dissents and concurring opinions, it is undisputed established Board precedent has not been reversed by the Supreme Court. See Waco, Inc., 273 NLRB 746, 749 fn.14 (1984) (citing Iowa Beef Packers, 144 NLRB 615, 616 (1963)).
4. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees of Leadpoint constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

   All full time and regular part-time employees employed by FPR-II, LLC, d/b/a Leadpoint Business Services at the facility located at 1601 Dixon Landing Rd., Milpitas California; excluding employees currently covered by collective bargaining agreements, office clerical employees, guards, and supervisors as defined in the Act. 13

There are approximately 240 employees in the unit.

**DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective-bargaining by the Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

**Eligibility**

Eligible to vote in the election are those in the Leadpoint Unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12

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13 The parties stipulated that the seven Leadpoint leads are supervisors within the meaning of Section 2(11) of the Act and consequently will not be eligible to vote in the instant election.
months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Leadpoint Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

**Leadpoint to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, Leadpoint must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by the Region to assist in determining an adequate showing of interest. The Region shall, in turn, make the list available to all parties to the election.
Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on August 30, 2013. This request may be filed electronically through E-Gov on the Agency’s web site, www.nlrb.gov, but may not be filed by facsimile.

Dated: August 16, 2013

George Velastegui, Acting Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5211

15 To file the request for review electronically, go to www.nlrb.gov, select File Case Documents, enter the NLRB Case Number, and follow the detailed instructions. Guidance for electronic filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter, and is also located on the Agency's website, www.nlrb.gov.
In this case, we consider whether the Board should adhere to its current standard for assessing joint-employer status under the National Labor Relations Act or whether that standard should be revised to better effectuate the purposes of the Act, in the current economic landscape.

The issue in this case is whether BFI Newby Island Recyclery (BFI), and Leadpoint Business Services (Leadpoint) are joint employers of the sorters, screen cleaners, and housekeepers whom the Union petitioned to represent. The Regional Director issued a Decision and Direction of Election finding that Leadpoint is the sole employer of the petitioned-for employees. \(^1\) The Union filed a timely request for review of that decision, contending that (a) the Regional Director ignored significant evidence and reached the incorrect conclusion under current Board precedent; and (b) in the alternative, the Board should reconsider its standard for evaluating joint-employer relationships.

In granting the Union’s request for review, we invited the parties and interested amici to file briefs addressing the following questions:

1. Under the Board’s current joint-employer standard, as articulated in TLI, Inc., 271 NLRB 798 (1984), enfld. mem. 772 F.2d 894 (3d Cir. 1985), and Laerco Transportation, 269 NLRB 324 (1984), is Leadpoint Business Services the sole employer of the petitioned-for employees?

2. Should the Board adhere to its existing joint-employer standard or adopt a new standard? What considerations should influence the Board’s decision in this regard?

3. If the Board adopts a new standard for determining joint-employer status, what should that standard be? If it involves the application of a multifactor test, what factors should be examined? What should be the basis or rationale for such a standard?

In response, the General Counsel, a group of labor and employment law professors, and several labor organizations, as well as other amici, have urged the Board to adopt a new standard. Employer groups, in contrast, argue that the Board should adhere to its current standard.

The current standard, as reflected in Board decisions such as TLI and Laerco, supra, is ostensibly based on a decision of the United States Court of Appeals for the Third Circuit, NLRB v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117 (3d Cir. 1982), enfg. 259 NLRB 148 (1981), which endorsed the Board’s then-longstanding standard. But, as we will explain, the Board, without explanation, has since imposed additional requirements for finding joint-employer status, which have no clear basis in the Third Circuit’s decision, in the common law, or in the text or policies of the Act. The Board has never articulated how these additional requirements are compelled by the Act or by the common-law definition of the employment relationship. They appear inconsistent with prior caselaw that has not been expressly overruled.

Moreover, these additional requirements—which serve to significantly and unjustifiably narrow the circumstances where a joint-employment relationship can be found—leave the Board’s joint-employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships. This disconnect potentially undermines the core protections of the Act for the employees impacted by these economic changes.

In the Supreme Court’s words, federal regulatory agencies “are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation’s needs in a volatile, changing economy."\(^2\) Having carefully considered the record and the briefs,\(^3\) we have decided to revisit and to revise
the Board’s joint-employer standard. Our aim today is to put the Board’s joint-employer standard on a clearer and stronger analytical foundation, and, within the limits set out by the Act, to best serve the Federal policy of “encouraging the practice and procedure of collective bargaining.”\(^4\)

Today, we restate the Board’s joint-employer standard to reaffirm the standard articulated by the Third Circuit in *Browning-Ferris* decision. Under this standard, the Board may find that two or more statutory employers are joint employers of the same statutory employees if they “share or codetermine those matters governing the essential terms and conditions of employment.”\(^5\) In determining whether a putative joint employer meets this standard, the initial inquiry is whether there is a common-law employment relationship with the employees in question. If this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.

Central to both of these inquiries is the existence, extent, and object of the putative joint employer’s control. Consistent with earlier Board decisions, as well as the common law, we will examine how control is manifested in a particular employment relationship. We reject those limiting requirements that the Board has imposed—without foundation in the statute or common law—after *Browning-Ferris*. We will no longer require that a joint employer not only possess the authority to control employees’ terms and conditions of employment, but also exercise that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry.\(^6\) As the Supreme Court has observed, the question is whether one statutory employer “possesse[s] sufficient control over the work of the employees to qualify as a joint employer with” another employer.\(^7\) Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer’s control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly—such as through an intermediary—may establish joint-employer status.\(^8\)

The Board’s established presumption in representation cases like this one is to apply a new rule retroactively.\(^9\) Applying the restated joint-employer standard here, we reverse the Regional Director and find that the Union established that BFI and Leadpoint are joint employers of the employees in the petitioned-for unit.

I. FACTS

A. Overview

BFI owns and operates the Newby Island recycling facility, which receives approximately 1,200 tons per day of mixed materials, mixed waste, and mixed recyclables. The essential part of its operation is the sorting of these materials into separate commodities that are sold to other businesses at the end of the recycling process. BFI solely employs approximately 60 employees, including loaders, equipment operators, forklift operators, and spotters. Most of these BFI employees work outside the facility, where they move materials and prepare them to be sorted inside the facility. These BFI employees are part of an existing separate bargaining unit that is represented by the Union.

The interior of the facility houses four conveyor belts, called material streams. Each stream carries a different category of materials into the facility: residential mixed recyclables, commercial mixed recyclables, dry waste process, and wet waste process. Workers provided to BFI by Leadpoint stand on platforms beside the streams and sort through the material as it passes; depending on where they are stationed, workers remove from the stream either recyclable materials or prohibited materials. Other material is automatically sorted when it passes through screens that are positioned near the conveyor belts.

a group of entities consisting of the National Association of Manufacturers and two other amici; a group of entities consisting of the National Council for Occupational Health and Safety and nine other amici; a group of entities consisting of the National Employment Law Project and nine other amici; the Retail Litigation Center; the Service Employers International Union; and the United States Chamber of Commerce.

3 See, e.g., Restatement (Second) of Agency §2(1) (“A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.”) (emphasis added); id., §220(1) (“A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.”) (emphasis added).

4 See, e.g., *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). To be sure, 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.

5 See, e.g., Restatement (Second) of Agency §220, comment d (“The control or right to control needed to establish the relation of master and servant may be very attenuated.”).

6 See, e.g., *UGL-UNICCO*, 357 NLRB No. 76, slip op. at 8 & fn. 28 (2011).
As indicated, BFI, the user firm, contracts with Leadpoint, the supplier firm, to provide the workers who manually sort the material on the streams (sorters), clean the screens on the sorting equipment and clear jams (screen cleaners), and clean the facility (housekeepers). The Union seeks to represent approximately 240 full-time, part-time, and on-call sorters, screen cleaners, and housekeepers who work at the facility.

The relationship between BFI and Leadpoint is governed by a temporary labor services agreement (Agreement), which took effect in October 2009, and remains effective indefinitely. It can be terminated by either party at will with 30 days’ notice. The Agreement states that Leadpoint is the sole employer of the personnel it supplies, and that nothing in the Agreement shall be construed as creating an employment relationship between BFI and the personnel that Leadpoint supplies.

B. Management Structure

BFI and Leadpoint employ separate supervisors and lead workers at the facility. BFI Operations Manager Paul Keck oversees the material recovery facility and supervises the BFI employees. BFI Division Manager Carl Mennie oversees the recycling and compost operations and reports to Keck. Shift Supervisors Augustine Ortiz and John Sutter supervise BFI employees at the site, including the control room operator. They also spend a percentage of each workday in the material stream areas, monitoring the operation and productivity of the streams. Ortiz testified that part of his job is to ensure the productivity of the streams.

Leadpoint employs Acting On-Site Manager Vincent Haas, three shift supervisors, and seven line leads who work with the Leadpoint sorters. Haas oversees Leadpoint operations at the facility and reports to the Leadpoint corporate office in Arizona. The shift supervisors, who report to Haas, create the sorters’ schedules, oversee the material streams, and coach the line leads. The line leads work on the floor with the sorters and are Leadpoint’s first-line supervisors. Frank Ramirez, Leadpoint’s CEO and President, visits the facility two or three times per quarter to evaluate whether Leadpoint is meeting BFI’s expectations and goals; he also meets with BFI and Leadpoint managers, and addresses any problems.

BFI and Leadpoint maintain separate human resource departments. BFI does not have an HR manager onsite. Leadpoint has an onsite HR manager who operates in a trailer (marked with the Leadpoint logo) outside the facility. Leadpoint employees use the BFI break rooms, bathrooms, and parking lot.

C. Hiring

The Agreement between BFI and Leadpoint provides that Leadpoint will recruit, interview, test, select, and hire personnel to perform work for BFI. BFI Managers Keck and Mennie, and Shift Supervisors Ortiz and Sutter testified that they are not involved in Leadpoint’s hiring procedure and have no input into Leadpoint’s hiring decisions. However, as to hiring, the Agreement requires Leadpoint to ensure that its personnel “have the appropriate qualifications (including certification and training) consistent with all applicable laws and instructions from [BFI], to perform the general duties of the assigned position.” BFI also has the right to request that personnel supplied by Leadpoint “meet or exceed [BFI’s] own standard selection procedures and tests.”

The Agreement also requires Leadpoint to make “reasonable efforts” not to refer workers who were previously employed by BFI and were deemed ineligible for rehire. Under the Agreement, Leadpoint must ask workers if they were previously employed by BFI and verify with BFI that all workers provided are eligible to work with BFI. If Leadpoint inadvertently refers an ineligible worker, it must immediately cease referring her, upon notification by BFI.

Before it refers a worker to BFI, Leadpoint is also required to ensure, in accordance with the Agreement, that she has passed, at minimum, a five-panel urinalysis drug screen, “or similar testing as agreed to in writing with [BFI’s] safety, legal and commercial group.” Leadpoint is not permitted to refer workers who do not successfully complete the drug screen, and BFI may request written certification of such completion. After Leadpoint has referred workers, it is responsible for ensuring that they remain free from the effects of alcohol and drug use and in condition to perform their job duties for BFI.

When an applicant arrives at the Newby Island facility, she reports to Leadpoint’s HR department. Leadpoint tests and evaluates an applicant’s ability to perform the required job tasks at BFI by giving her a try-out on the material stream and assessing whether she has adequate hand-eye coordination. If the applicant passes the test,
she returns to the Leadpoint HR department for drug testing and background checks.

D. Discipline and Termination

Although the Agreement provides that Leadpoint has sole responsibility to counsel, discipline, review, evaluate, and terminate personnel who are assigned to BFI, it also grants BFI the authority to “reject any Personnel, and . . . discontinue the use of any personnel for any or no reason.”

BFI Managers Keck and Mennie, and Shift Supervisors Ortiz and Sutter testified that they have never been involved in any disciplinary decisions for Leadpoint employees. However, the record includes evidence of two incidents where discipline of Leadpoint employees was prompted by BFI action. In a June 2013 email from BFI Operations Manager Keck to Leadpoint CEO Ramirez, Keck stated that he observed two Leadpoint employees passing a pint of whiskey at the jobsite. Keck then contacted Leadpoint Manager Haas, who immediately sent the two employees for alcohol and drug screening. Ramirez testified that, in response to Keck’s email “request[ing] [the employees’] immediate dismissal,” Leadpoint investigated the complaint and terminated one employee and reassigned the other.

In the same email to Ramirez, Keck indicated that he had observed damage to BFI property, including a paperwork drop box that had been destroyed. Keck stated that a surveillance camera recorded a Leadpoint employee punching the box, and that he hoped Ramirez agreed that “this Leadpoint employee should be immediately dismissed.” Haas testified that, pursuant to Keck’s email, he reviewed the video, identified the employee, and Leadpoint terminated the employee after an investigation. Haas stated that BFI was not involved in the investigation of the employee and was not consulted in the decision to terminate him.

E. Wages and Benefits

The Agreement includes a rate schedule that requires BFI to compensate Leadpoint for each worker’s wage plus a specified percentage mark-up; the mark-up varies based on whether the work is performed during regular hours or as overtime. Although the Agreement provides that Leadpoint “solely determines the pay rates paid to its Personnel,” it may not, without BFI’s approval, “pay a pay rate in excess of the pay rate for full-time employees of [BFI] who perform similar tasks.” Mennie testified that Leadpoint has never made such a request. Leadpoint issues paychecks to employees and maintains their payroll records.

The record includes a Rate Schedule Addendum between BFI and Leadpoint executed in response to a minimum wage increase from $8.75 to $10 by the City of San Jose. Pursuant to the Addendum, the parties agreed that BFI would pay a higher hourly rate for the services of Leadpoint employees after the minimum wage increase took effect.

Leadpoint employees are required to sign a benefits waiver stating they are eligible only for benefits offered by Leadpoint and are not eligible to participate in any benefit plan offered by BFI. Leadpoint provides employees with paid time-off and three paid holidays after they have worked for 2,000 hours, and the option to purchase medical, life, and disability insurance.

F. Scheduling and Hours

BFI establishes the facility’s schedule of working hours. It operates three set shifts on weekdays: 4 a.m.—1 p.m., 2 p.m.—11:30 p.m., and 10:30 p.m.—7 a.m. Leadpoint is responsible for providing employees to cover all three shifts. Although Leadpoint alone schedules which employees will work each shift, Leadpoint has no input on shift schedules. Keck testified that any modification in shift times would require modifying the facility’s hours of operation and the work schedules for all BFI employees.

BFI will keep a stream running into overtime if it determines that the material on a specific stream cannot be processed by the end of a shift. A BFI manager will normally convey this decision to a Leadpoint shift supervisor; Leadpoint, in turn, determines which employees will stay on the stream to complete the overtime work.

BFI also dictates when the streams stop running so that Leadpoint employees can take breaks. Keck has instructed Leadpoint employees to spend 5 minutes gathering the debris around their stations before breaking. Although Keck asserted that this assignment would not affect the length of breaks, sorter Andrew Mendez testified that, as a practical matter, the clean-up requirement has cut into employees’ break time.

The Agreement requires that Leadpoint employees must, at the end of each week, submit to Leadpoint a summary of their “hours of services rendered.” Employees must obtain the signature of an authorized BFI representative attesting to the accuracy of the hours on the form. BFI may refuse payment to Leadpoint for any time claimed for which a worker failed to obtain a signature.

G. Work Processes

BFI determines which material streams will run each day and provides Leadpoint with a target headcount of

13 Leadpoint must also supply housekeepers to work a Saturday shift.
workers needed. BFI also dictates the number of Leadpoint laborers to be assigned to each material stream, but Leadpoint assigns specific Leadpoint employees to specific posts. The record includes an email from Keck to Haas directing Haas to reduce the number of sorters on a specific line by two per shift. The email detailed what positions sorters should occupy on the stream, what materials should be prioritized, and whether a right-handed or left-handed sorter was preferred. The email concluded by stating “[t]his staffing change is effective Monday, August 5, 2013.” Ramirez testified that the sorters occupy set work stations along each stream and that BFI dictates the location of these stations. During a shift, BFI might direct Leadpoint supervisors to move employees to another stream in response to processing demands.

Before each shift, BFI’s Shift Supervisors Ortiz and Sutter hold meetings with Leadpoint supervisors—the onsite manager and leads—to present and coordinate the day’s operating plan. During those meetings, BFI’s managers dictate which streams will be operating and establish the work priorities for the shift. Ortiz testified that he uses the preshift meeting to advise Leadpoint supervisors of the specific tasks that need to be completed during the shift, i.e., maintenance, quality, and cleaning issues. Ortiz indicated that Leadpoint supervisors assign employees so as to accomplish these designated tasks.

BFI managers set productivity standards for the material streams. BFI Division Manager Mennie testified that BFI tracks the tons per hour processed on each stream, the proportion of running time to downtime on each stream, and various quality standards. BFI has sole authority to set the speed of the material streams based on its ongoing assessment of the optimal speed at which materials can be sorted most efficiently. If sorters are unable to keep up with the speed of the stream, BFI—but not Leadpoint—can make various adjustments, such as slowing the speed of the stream or changing the angle of the screens. The record indicates that the speed of the streams has been a source of contention between BFI and Leadpoint employees. For instance, former-sorter Clarence Harlin described an incident during which BFI Shift Supervisor Sutter stood across the stream from sorters and criticized them for failing to remove a sufficient amount of plastic. Harlin responded that it was not possible to pull that much material unless the stream was slowed down or stopped. Sutter responded by calling the entire line of sorters to the control room, where he directed them to work more efficiently and dismissed their requests to slow down or stop the line.

Leadpoint employees are able to stop the streams by hitting an emergency stop switch. Sutter testified that he has instructed Leadpoint supervisors on when it is appropriate for Leadpoint employees to use the switch. A BFI employee who works in the control room monitors the operating status of the streams and is required to restart a stream after it has been stopped. Sorter Travis Stevens testified that he has been instructed by BFI managers on multiple occasions not to overuse the emergency stop switch. He stated that BFI Operations Manager Keck and BFI Shift Supervisor Ortiz held a meeting with an entire line of Leadpoint employees to call attention to the frequency of their emergency stops and to direct Leadpoint employees to minimize the number of stops to reduce downtime.

BFI’s managers testified that when, in the course of monitoring stream operation and productivity, they identify problems, including problems with the job performance of a Leadpoint employee, they communicate their concerns to a Leadpoint supervisor. The Leadpoint supervisor is expected to address those issues with the employee. According to the testimony of Leadpoint employees, BFI managers have, on occasion, addressed them directly regarding job tasks and quality issues. Leadpoint Housekeeper Clarence Harlin testified that he receives work directions from BFI managers and employees at least twice a week. Sorters Mendez and Stevens both testified that they have received specific assignments from BFI managers that took priority over the tasks assigned by their immediate Leadpoint supervisors. Sorter Marivel Mendoza testified that Sutter has directed him to remove more plastic from the stream, and has moved him to other streams where assistance was needed.

### H. Training and Safety

When Leadpoint employees begin working at the facility, they receive an orientation and job training from Leadpoint supervisors. Periodically, they also receive substantive training and counseling from BFI managers. For instance, following customer complaints about the quality of BFI’s end product, Keck held two or three educational meetings with Leadpoint employees and supervisors who worked on the wet waste stream. During the meetings, Keck highlighted the objectives of the operation to make sure that Leadpoint employees understood BFI’s goals. He also explained the difference between organic and nonorganic materials and specified which materials should be removed from the line. Keck held a similar meeting with Leadpoint employees who worked on the commercial single stream because he was

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14 For instance, the email stated that “[t]wo 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.”
concerned that sorters were allowing too many materials to pass by on the stream without being sorted. With regard to one line, Keck told the sorters that BFI would only be able to cover the labor expenses for the line if the processed material generated revenue for BFI. As noted above, BFI Shift Supervisor Sutter similarly called a meeting with a group of sorters to direct them to work more productively.

As to safety, the Agreement mandates that Leadpoint require its employees to comply with BFI’s safety policies, procedures, and training requirements. For all employees working in positions deemed safety-sensitive by BFI, Leadpoint must obtain a written acknowledgement that they have read, understand, and agree to comply with BFI’s safety policy. BFI also “reserves the right to enforce the Safety Policy provided to [Leadpoint] personnel.”

New Leadpoint employees attend a safety orientation that is presented by Leadpoint managers. The record shows that, on occasion, BFI also provides safety training to Leadpoint employees.

I. Other Terms

According to the terms of the Agreement, Leadpoint personnel shall not be assigned to BFI for more than 6 months. Ramirez testified that Leadpoint employees have been assigned to BFI for more than 6 months, and BFI has never invoked this provision. The Agreement also allows BFI to examine “[Leadpoint’s] books and records pertaining to the Personnel, [Leadpoint’s] obligations and duties under this Agreement, and all services rendered by [Leadpoint] or the Personnel under this Agreement, at any time for purposes of auditing compliance with this Agreement, or otherwise.” Mennie testified that he has never asked to inspect Leadpoint’s personnel files.

II. THE REGIONAL DIRECTOR’S FINDINGS

The Regional Director, applying TLI, supra, found that BFI is not a joint-employer of the Leadpoint employees because it does not “share or codetermine [with Leadpoint] those matters governing the essential terms and conditions of employment” of the sorters, screen cleaners, or housekeepers. First, the Regional Director found that Leadpoint sets employee pay and is the sole provider of benefits. He acknowledged that, under the Agreement, Leadpoint is prevented from paying employees more than BFI pays employees who perform similar work. But he found that this provision was not indicative of BFI’s control over wages because it limits only employees’ maximum wage rate; it would not prevent Leadpoint from lowering wages or offering more benefits. Moreover, he found that the provision only applies to Leadpoint sorters, since BFI does not employ any screen cleaners or housekeepers.

Next, the Regional Director found that Leadpoint has sole control over the recruitment, hiring, counseling, discipline, and termination of its employees. He noted that there was no evidence to suggest that BFI participates in any of these decisions. With regard to Keck’s email reporting the misconduct of Leadpoint employees, the Regional Director found that Keck merely requested that the employees be terminated; he did not order or direct Leadpoint to terminate them. He thus concluded that BFI does not possess the authority to terminate Leadpoint employees.

Finally, the Regional Director found that BFI does not control or codetermine employees’ daily work. He found that Leadpoint employees were supervised solely by the Leadpoint onsite manager and leads, and that nothing in the record supported the Union’s argument that BFI controls employees’ daily work functions. While acknowledging BFI’s control over the speed of the material stream, the Regional Director found that BFI does not mandate how many employees work on the line, the speed at which the employees work, where they stand on the stream, or how they pick material off the stream. The mere ability to control the speed of the stream, he stated, does not “create a level of control that is sufficiently direct or immediate” to warrant a finding of joint control.

The Regional Director also stated that if BFI has a problem with a Leadpoint employee, it complains to a Leadpoint supervisor who takes care of the matter using her own discretion. To the extent that BFI has directly instructed Leadpoint employees, he found “the instruction was merely routine in nature and insufficient to warrant a finding that BFI jointly controls Leadpoint employees’ daily work.” Although BFI sets the work hours and shifts of the facility’s operation, the Regional Director observed that Leadpoint is solely in control of scheduling its own employees’ shifts, scheduling employees for overtime, and administering requests for sick leave and vacation.

15 Ortiz indicated that he also held educational sessions with Leadpoint employees after he became concerned that sorters were not removing a sufficient amount of contaminants from the stream.

16 Leadpoint employees’ personal protective equipment—a safety vest, a hardhat, safety glasses, ear plugs, and gloves—is provided by Leadpoint and differs from the gear that BFI employees use.

17 Based on our review of the record, we disagree with the Regional Director’s factual findings that BFI does not mandate how many employees work on the line, the speed at which they work, where they stand, or how they pick material.
III. POSITIONS OF THE PARTIES AND AMICI

A. The Union

The Union argues first that, under the Board’s current joint-employer standard, BFI constitutes a joint employer of the Leadpoint employees because it shares or codetermines the following essential terms and conditions of employment: employment qualifications, work hours, breaks, productivity standards, staffing levels, work rules and performance, the speed of the lines, dismissal, and wages. BFI’s direct control over employees is evinced by its regular oversight of the employees and its constant control of their work. BFI, it argues, demands compliance with “detailed specifications, including the number of employees on each line, where they stand, what they pick, and at what rate they sort.” BFI also trains and instructs employees as to how to do their jobs, directing them on picking techniques, what to prioritize, how to clear jams, and when to use the emergency stop.

Alternatively, the Union contends that the Board should adopt a broader standard to better effectuate the purpose of the Act and respond to industrial realities. The Union states that the Board’s current emphasis on whether an employer exercises direct and immediate control over employees conflicts with the language and purpose of the Act, which is focused on ensuring employees’ bargaining rights to the fullest extent. Further, the Union argues that the Board must consider all indicia of control in its joint-employer analysis, rather than the narrow subset of criteria set forth in TLI, supra, 271 NLRB at 798 (hiring, firing, discipline, supervision, and direction). It observes that “a myriad of other essential terms that are mandatory subjects of bargaining may [] also be pertinent to the employees involved.” Based on these concerns, the Union recommends that the Board find joint-employer status where an employer “possesses sufficient authority over the employees or their employer such that its participation is a requisite to meaningful collective bargaining. Such authority can be either direct or indirect.”

Finally, the Union asserts that absent a change in the joint-employer standard, a putative employer, like BFI, that is a necessary party to meaningful collective bargaining will continue to insulate itself by the “calculated restructuring of employment and insertion of a contractor to insulate itself from the basic legal obligation to recognize and bargain with the employees’ representative.”

B. BFI and Leadpoint

BFI argues that, under the Board’s current joint-employer test, the Regional Director correctly found that BFI is not a joint employer of Leadpoint’s employees. To this end, BFI contends that the Regional Director properly concluded that Leadpoint has sole authority to hire, fire, discipline, supervise, direct, assign, train, and schedule its employees. It further contends that the Union points to only a handful of instances in which BFI managers gave routine instructions to Leadpoint employees, evidence that falls far short of establishing that BFI exerted any meaningful control over them. Although BFI’s physical plant dictates where Leadpoint employees must work, BFI does not decide where particular employees work. Likewise, despite the fact that BFI managers meet with Leadpoint supervisors daily to discuss operations, Leadpoint supervisors are solely responsible for controlling and directing their employees. Finally, contrary to the Union, meaningful control cannot be established by a contractual right or its occasional exercise; instead the Board properly looks to the actual practice of the parties.

BFI also urges the Board not to modify its joint-employer standard. It contends that the Union has not presented any compelling reason to revisit Board policy. Any modification, it argues, would undermine the predictability of the law in this area, which the Board has applied uniformly for over 30 years. The Union’s proposed standard, in its view, imposes “no meaningful limit on who could be deemed a joint employer of another’s workers.” Thus, a regional director “would be free to exercise her substantial discretion to determine that completely separate companies constituted a joint employer simply because she believes that bargaining would be more effective if both companies were at the table.”

Leadpoint echoes the arguments presented by BFI: that Leadpoint is the sole employer of its employees, and that the Board should not modify its joint-employer standard. In support of the current standard, Leadpoint contends that it is a clear and understandable approach that has not proven overly onerous for parties seeking to establish a joint-employer relationship. Leadpoint argues that the “vague and ambiguous” standard proposed by the Union lacks clarity and provides minimal, if any, guidance as to what factors are significant for evaluating joint-employer status.

C. The General Counsel

The General Counsel urges the Board to abandon its existing joint-employer standard because it “undermines the fundamental policy of the Act to encourage stable and meaningful collective bargaining.”18 The Board, since TLI, supra, has significantly narrowed its approach by (a) requiring evidence of direct and immediate control over employees; (b) looking only to the actual practice of

18 The General Counsel’s brief takes no position on the merits of this representation proceeding.
the parties rather than their contract; and (e) requiring an employer’s control to be substantial and not “limited and routine.” He posits that this approach is not consistent with the Act, which broadly defines the term “employer.” Moreover, the contingent work force has grown significantly over the past several decades. The General Counsel submits that in many contingent arrangements, the user firm only has limited and routine supervision over employees, and indirect or potential control over terms and conditions of employment. Nonetheless, the user firm can influence the supplier firm’s bargaining posture by threatening to terminate its contract with the supplier if wages and benefits rise above a set cost threshold.

The General Counsel recommends that the Board find joint-employer status where an employer “wields sufficient influence over the working conditions of the other entity’s employees such that meaningful bargaining could not occur in its absence.” Such an approach would make no distinction between direct, indirect, and potential control, and would find joint-employer status where industrial realities make an entity essential for bargaining.

D. Other Amici

Amici in support of the Union uniformly urge the Board to adopt a more inclusive joint-employer standard that would give dispositive weight to more forms of employer control. Specifically, they urge the Board to abandon its recent focus on direct and immediate control and consider instead the totality of a putative employer’s influence over employees’ working conditions, including control that is exercised indirectly or reserved via contractual right. They also argue that the Board should evaluate a putative employer’s control over a broad range of terms and conditions of employment rather than the limited set of factors enumerated in TLI, supra. In urging the Board to modify its approach, many amici note that the number of contingent employment relationships has grown significantly in recent years, and that a sizeable proportion of the labor force now works for staffing agencies. They posit that the Board’s current narrow focus on direct control absolves many user employers of bargaining responsibilities under the Act despite the fact that their participation is required for meaningful bargaining to occur.

Amici in support of BFI uniformly contend that BFI is not a joint-employer of Leadpoint’s employees, and urge the Board not to modify its existing approach. They argue primarily that the Board’s standard—which has been applied consistently for over 30 years—has provided employers with stability and predictability in entering into labor supply arrangements in response to fluctuating market needs. Any change, they contend, would destabilize these relationships and undermine the expectations of the contracting parties. A more inclusive standard, they argue, would also widen the scope of labor disputes and force firms to participate in bargaining even where they have no authority to set or control terms and conditions of employment. Some amici contend that a broader standard could potentially include—and consequently disrupt—any contractual relationship involving labor. Other amici argue that a broader standard would expose employers to unwarranted liability for unfair labor practices committed by the other firm. Some argue too that the common law of agency prohibits the Board from adopting an open-ended approach that considers all of the economic realities of the parties’ relationship.

IV. THE EVOLUTION OF THE BOARD’S JOINT-EMPLOYER STANDARD

In analyzing the joint-employer issue, and evaluating the various arguments raised by the parties and amici, it is instructive to review the development of the Board’s law in this area. Three aspects of that development seem clear. First, the Board’s approach has been consistent with the common-law concept of control, within the framework of the National Labor Relations Act. Second, before the current joint-employer standard was adopted, the Board (with judicial approval) generally took a broader approach to the concept of control. Third, the Board has never offered a clear and comprehensive explanation for its joint-employer standard, either when it adopted the current restrictive test or in the decades before.

The core of the joint-employer standard, which we preserve today, can be traced at least as far back as the Greyhound case, a representation proceeding that involved a company operating a bus terminal and its cleaning contractor. There, the Board in 1965 found two statutory employers to be joint employers of certain workers because they “share[d], or codetermine[d], those matters governing essential terms and conditions of employment.” Significantly, at an earlier stage of that case, the Supreme Court explained the issue presented—whether Greyhound “possessed sufficient control over the work of the employees to qualify as a joint employer with” the cleaning contractor—was “essentially a factual issue” for the Board to determine.

Greyhound Corp., 153 NLRB 1488, 1495 (1965), enf’d. 368 F.2d 778 (5th Cir. 1966). See also Franklin Simon & Co., Inc., 94 NLRB 576, 579 (1951) (finding joint-employer status where “a substantial right of control over matters fundamental to the employment relationship [was] retained and exercised” by both department store and company operating shoe department).

Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964). The Supreme Court reversed a district court injunction against the Board pro-
During the period after Greyhound but before the Third Circuit’s 1982 decision in Browning-Ferris Industries of Pennsylvania, supra, some (though certainly not all) of the Board’s joint-employer decisions used the “share or co-determine” formulation. But regardless of the wording used, the Board typically treated the right to control the work of employees and their terms of employment as probative of joint-employer status. The Board did not require that this right be exercised, or that it be exercised in any particular manner. Thus, the Board’s joint-employer decisions found it probative that employers retained the contractual power to reject or terminate workers; set wage rates; set working hours; approve overtime; dictate the number of workdays; and terminate the contractual agreement itself at will. The Board stressed that “the power to control is present by virtue of the operating agreement.” Reviewing courts expressly endorsed this approach.

In addition to recognizing the right to control as probative, the Board gave weight to a putative joint employer’s “indirect” exercise of control over workers’ terms and conditions of employment. In so doing, the Board emphasized that, in order to exercise significant control, a putative employer need not “hove over [workers], directing each turn of their screwdrivers and each connection that they made.” Instead, the Board assessed whether a putative employer exercised “ultimate control” over their employment. Consistent with this principle, the Board in certain cases found evidence of joint-employer status where a putative employer, although not responsible for directly supervising another firm’s employees, inspected their work, issued work directives through the other firm’s supervisors, and exercised its authority to open and close the plant based on production needs. Likewise, the Board found significant indicia of control where a putative employer, although it “did not exercise direct supervisory authority over” the workers at issue, nonetheless held “day-to-day responsibility for the overall operations” of the worksite and determined the scope and nature of the contractors’ work assignments. Contractual arrangements under which the user employer reimbursed the supplier for workers’ wages or imposed limits on wages were also viewed as tending to show joint-employer status.

The Third Circuit’s Browning-Ferris decision did not question, much less reject, any of these lines of Board precedent. That decision, rather, carefully untangled the...
joint-employer doctrine from the distinct single-employer doctrine (which addresses integrated enterprises only nominally separate), endorsed the Board’s “share or codetermine” formulation, and enforced the Board’s order finding joint-employer status. The Third Circuit explained:

The basis of the [joint employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. . . . Thus, the “joint employer” concept recognizes that the business entities involved are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment.

691 F.2d at 1123 (citations omitted; emphasis added).

The Board subsequently embraced the Third Circuit’s decision, but simultaneously took Board law in a new and different direction. _Laerco_ and _TLI_, both decided in 1984, marked the beginning of a 30-year period during which the Board—without any explanation or even acknowledgement and without overruling a single prior decision—imposed additional requirements that effectively narrowed the joint-employer standard. Most significantly, the Board’s decisions have implicitly repudiated its earlier reliance on reserved control and indirect control as indicia of joint-employer status. The Board has foreclosed consideration of a putative employer’s right to control workers, and has instead focused exclusively on its actual exercise of that control—and required its exercise to be direct, immediate, and not “limited and routine.”

The Board has thus refused to assign any significance to contractual language expressly giving a putting employer the power to dictate workers’ terms and conditions of employment. In _TLI_, for instance, the parties’ contract provided, among other things, that the user employer “at all times will solely and exclusively be responsible for maintaining operational control, direction and supervision over said drivers.”

Although prior precedent found this type of contractual authority probative of joint employer status, _TLI_ Board found it irrelevant, absent evidence that the putting employer “affected the terms and conditions of employment to such a degree that it may be deemed a joint employer.” The Board later emphasized this narrowed approach in _AM Property Holding Corp._, a 2007 decision, supra, where it stated that “[i]n assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties.”

In _Airborne Express_, a 2002 decision, the Board held that “[t]he essential element in [the joint-employer] analysis is whether a putative joint employer’s control over employment matters is direct and immediate.” This restrictive approach has resulted in findings that an entity is not a joint employer even where it indirectly exercised control that significantly affected employees’ terms and conditions of employment. For example, the Board refused to find that a building management company that utilized employees supplied by a janitorial company was a joint employer notwithstanding evidence that the user dictated the number of workers to be employed, communicated specific work assignments and directives to the supplier’s manager, and exercised ongoing oversight as to whether job tasks were performed properly. Likewise, the Board has found, contrary to its earlier approach, that cost-plus arrangements between the employing parties are not probative of joint-employer status.

Even where a putting joint employer has exercised direct control over employees, the Board has given no weight to various forms of supervision deemed “limited and routine.” In _TLI_, for instance, the user employer instructed contract drivers as to which deliveries were to be made on a given day, filed incident reports with the supplier when drivers engaged in conduct adverse to its operation, received accident reports, and maintained driver logs and records. Nonetheless, the Board concluded that “the supervision and direction exercised by [the us-

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40 _AM Property Holding Corp._, 350 NLRB 998, 1001 (2007), enf’d. in relevant part sub nom. _Service Employees Int’l Union, Local 32BJ v. NLRB_, 647 F.3d 435 (2d. Cir. 2011)
41 _TLI_, supra, 271 NLRB at 803.
42 350 NLRB at 1000. The _AM Property_ Board refused to give weight to a contractual provision requiring that the supplier plan, organize, and coordinate its operations “in conjunction with the directions, requests and suggestions” of the user’s management, and that all new hires were subject to the initial approval of the user. Id. at 1019.
44 The Board in _Airborne Express_ added this element in a footnote without any explanation; it cited only _TLI_ as support. But the _TLI_ Board did not use the phrase “direct and immediate control,” let alone identify that concept as the “essential element” in the Board’s test. The _Airborne Express_ majority also asserted that the Board in _TLI_ “abandoned its previous test in this area, which had focused on a putting joint employer’s indirect control over matters relating to the employment relationship.” 338 NLRB at 597 fn. 1. But _TLI_ did not, in fact, purport to overrule any precedent or alter the Board’s approach.
46 See _Goodyear Tire and Rubber Co._, 312 NLRB 674, 677–678 (1993) (rejecting the argument that participation in a cost-plus contract represented a form of codetermination).
47 271 NLRB at 799.
er] on a day-to-day basis is both limited and routine.\textsuperscript{47} The Board elaborated on this concept in \textit{AM Property}, supra, where it stated that “[t]he Board has generally found supervision to be limited and routine where a supervisor’s instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work.\textsuperscript{48}

There, the Board found that the user’s oversight of a supplier’s cleaning employees was “limited and routine” where the user distributed supplies to workers, prepared their timetcards, ensured that their work was done properly, and occasionally assigned work.\textsuperscript{49}

V. REVISITING THE JOINT-EMPLOYER STANDARD

As the Board’s view of what constitutes joint employment under the Act has narrowed, the diversity of workplace arrangements in today’s economy has significantly expanded. The procurement of employees through staffing and subcontracting arrangements, or contingent employment, has increased steadily since \textit{TLI} was decided.\textsuperscript{50} The most recent Bureau of Labor Statistics survey from 2005 indicated that contingent workers accounted for as much as 4.1 percent of all employment, or 5.7 million workers.\textsuperscript{51} Employment in the temporary help services industry, a subset of contingent work, grew from 1.1 million to 2.3 million workers from 1990 to 2008.\textsuperscript{52} As of August 2014, the number of workers employed through temporary agencies had climbed to a new high of 2.87 million, a 2 percent share of the nation’s work force.\textsuperscript{53} Over the same period, temporary employment also expanded into a much wider range of occupations.\textsuperscript{54} A recent report projects that the number of jobs in the employment services industry, which includes employment placement agencies and temporary help services, will increase to almost 4 million by 2022, making it “one of the largest and fastest growing [industries] in terms of employment.”\textsuperscript{55}

This development is reason enough to revisit the Board’s current joint-employer standard. “[T]he primary function and responsibility of the Board . . . is that ‘of applying the general provisions of the Act to the complexities of industrial life.’”\textsuperscript{56} If the current joint-employer standard is narrower than statutorily necessary, and if joint-employment arrangements are increasing, the risk is increased that the Board is failing in what the Supreme Court has described as the Board’s “responsibility to adapt the Act to the changing patterns of industrial life.”\textsuperscript{57} As we have seen, however, the Board has never clearly and comprehensively explained its joint-employer doctrine or, in particular, the shift in approach reflected in the current standard.\textsuperscript{58} Our decision today is intended to address this shortcoming. For the reasons that follow, we are persuaded that the current joint-employer standard is not mandated by the Act and that it does not best serve the Act’s policies.

We begin with the obvious proposition that in order to find that a statutory employer (i.e., an employer subject to the National Labor Relations Act) has a duty to bargain with a union representing a particular group of statutory employees, the Act requires the existence of an employment relationship between the employer and the employees. Section 2(3) of the Act provides that the “term ‘employee’ . . . shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise.”\textsuperscript{59} Section 9(c) authorizes the Board to process a representation petition when it alleges that “employees . . . wish to be represented for collective bargaining . . . and their employer declines to recognize their representative.”\textsuperscript{60} Section 8(a)(5), in turn, makes it an unfair labor practice for an employer “to refuse to

\begin{footnotes}
\item[47] Id. The Board also discounted the user’s role in influencing bargaining where user attended the supplier’s collective bargaining negotiations and explained that the contract was in jeopardy if the supplier failed to achieve cost savings. 271 NLRB at 798–799.
\item[48] 350 NLRB at 1001. See also \textit{Flagstaff Medical Center}, 357 NLRB No. 65 slip op. at 9 (2011), enf’d. in part 715 F.3d 928 (D.C. Cir. 2013).
\item[49] 350 NLRB at 1001.
\item[50] The Board previously recognized the “ongoing changes in the American work force and workplace and the growth of joint employer arrangements, including the increased use of companies that specialize in supplying ‘temporary’ and ‘contract workers’ to augment the workforces of traditional employers.” M. B. Sturgis, Inc., 331 NLRB 1298, 1298 (2000).
\item[54] See Luo et al., supra at 5.
\item[57] See NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975).
\item[58] It is well established that even when an agency is creating policies to fill a gap in an ambiguous statute, the agency has a responsibility to explain its failure to follow established precedent. \textit{Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade}, 412 U.S. 800, 807–809 (1973).
\item[59] 29 U.S.C. §152(3) (emphasis added).
\item[60] 29 U.S.C. §159(c) (emphasis added).
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In determining whether an employment relationship exists for purposes of the Act, the Board must follow the common-law agency test. The Supreme Court has made this clear in connection with Section 2(3) of the Act and its exclusion of “any individual having the status of an independent contractor” from the Act’s otherwise broad definition of statutory employees. In determining whether a common-law employment relationship exists in cases arising under Federal statutes like the Act, the Court has regularly looked to the Restatement (Second) of Agency (1958) for guidance. Section 220(1) of the Restatement (Second) provides that a “servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.”

The Board’s joint-employer doctrine is best understood as always having incorporated the common-law concept of control—as the Supreme Court’s one decision involving the doctrine confirms. In the Greyhound case, as we have seen, the Court framed the issue presented as whether one statutory employer “possessed sufficient control over the work of the employees to qualify as a joint employer with” another statutory employer. Thus, the Board properly considers the existence, extent, and object of the putative joint employer’s control, in the context of examining the factors relevant to determining the existence of an employment relationship.

In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

The General Counsel urges the Board to find joint-employer status: where, under the totality of the circumstances, including the way the separate entities have structured their commercial relationship, the putative joint employer wields sufficient influence over the working conditions of the other entity’s employees such that meaningful collective bargaining could not occur in its absence. Under this approach, the Board would return to its traditional standard and would make no
the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation." To best promote this policy, our joint-employer standard—to the extent permitted by the common law—should encompass the full range of employment relationships wherein meaningful collective bargaining is, in fact, possible. 70

The core of the Board’s current joint-employer standard—with its focus on whether the putative joint employer “share(s) or codetermine(s) those matters governing the essential terms and conditions of employment”—is firmly grounded in the concept of control that is central to the common-law definition of an employment relationship. The Act surely permits the Board to adopt that formulation. No federal court has suggested otherwise, and the Third Circuit in Browning-Ferris, of course, has endorsed this aspect of the standard.

The Board’s post-Browning-Ferris narrowing of the joint-employer standard, however, has a much weaker footing. The Board has never looked to the common law to justify the requirements that a putative joint employer’s control be exercised and that the exercise be direct and immediate, not “limited and routine.” This aspect of the current standard is not, in fact, compelled by the common law—and, indeed, seems inconsistent with common-law principles. Because the Board thus is not obligated to adhere to the current standard, we must ask whether there are compelling policy reasons for doing so. The Board’s prior decisions failed to offer any policy rationale at all, and we are not persuaded that there is a sound one, given the clear goals of the Act.

Under common-law principles, the right to control is probative of an employment relationship—whether or not that right is exercised. Sections 2(2) and 220(1) of the Restatement (Second) of Agency make this plain, in referring to a master as someone who “controls or has the right to control” another and to a servant as “subject to the [employer’s] control or right to control” (emphasis added). In setting forth the test for distinguishing between employees and independent contractors, Restatement (Second) Section 220(2), considers (among other factors) the “extent of control which, by the agreement, the master may exercise over the details of the work” (emphasis added). The Board’s joint-employer decisions requiring the exercise of control impermissibly ignore this principle.

Nothing about the joint-employer context suggests that the principle should not apply in cases like this one. Indeed, the Supreme Court’s decision in Greyhound, supra, was entirely consistent with the Restatement (Second) when it described the issue as whether one firm “possessed [not exercised] sufficient control over the work of the employees to qualify as a joint employer.” 71 Where a user employer reserves a contractual right (emphasis added) to set a specific term or condition of employment for a supplier employer’s workers, it retains the ultimate authority to ensure that the term in question is administered in accordance with its preferences. Even where it appears that the user, in practice, has ceded administration of a term to the supplier, the user can still compel the supplier to conform to its expectations. In such a case, a supplier’s apparently independent control over hiring, discipline, and work direction is actually exert-

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70 Fibreboard Corp. v. NLRB, 379 U.S. 203, 211 (1964).
71 Boire v. Greyhound Corp., supra, 376 U.S. at 481.
cised subject to the user’s control. If the supplier does not exercise its discretion in conformance with the user’s requirements, the user may at any time exercise its contractual right and intervene. Where a user has reserved authority, we assume that it has rationally chosen to do so, in its own interest. There is no unfairness, then, in holding that legal consequences may follow from this choice. 72

Just as the common law does not require that control must be exercised in order to establish an employment relationship, neither does it require that control (when it is exercised) must be exercised directly and immediately, and not in a limited and routine manner (as the Board’s current joint-employer standard demands). Comment d (“Control or right to control”) to Section 220(1) of the Restatement (Second) observes that “the control or right to control needed to establish the relation of master and servant may be very attenuated.” 73 The common law, indeed, recognizes that control may be indirect. For example, the Restatement of Agency (Second) §220, comment 1 (“Control of the premises”) observes that

[if] the work is done upon the premises of the employer with his machinery by workmen who agree to obey general rules for the regulation of the conduct of employees, the inference is strong that such workmen are the servants of the owner...

and illustrates this principle by citing the example of a coal mine owner employing miners who, in turn, supply their own helpers. Both the miners and their helpers are servants of the mine owner. 74 As the illustration demonstrates, the common law’s “subservant” doctrine addresses situations in which one employer’s control is or may be exercised indirectly, where a second employer directly controls the employee. 75 The Federal courts have applied the “subservant” doctrine in cases under Federal statutes that incorporate the common-law standard for determining an employment relationship 76—including the National Labor Relations Act. 77 The most recent authoritative effort to restate the common law related to employment is consistent with traditional doctrine and similarly makes clear that direct and immediate control is not required. 78

In this respect, too, nothing supports the view that common-law principles can or should be ignored in the Board’s joint-employer doctrine. Board case law suggests that in many contingent arrangements, control over employees is bifurcated between employing firms with each exercising authority over a different facet of decision making. Where the user firm owns and controls the premises, dictates the essential nature of the job, and imposes the broad, operational contours of the work, and the supplier firm, pursuant to the user’s guidance, makes specific personnel decisions and administers job performance on a day-to-day basis, employees’ working conditions are a byproduct of two layers of control. The

72 The dissent observes that the Board has assigned probative weight only to evidence of actual authority or control in its assessment of various statutory exclusions, including independent contractors and supervisors. But the guiding policy in those areas, as here, is to ensure that statutory coverage is fully effectuated. See FedEx Home Delivery, 361 NLRB No. 55, slip. op. at 9 (2014), quoting Holly Farms Corp. v. NLRB, 517 U.S. 392, 399 (1996), (“[A]dmiristrates and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach.”). To recognize the significance of the right to control in the joint employment context, in which two putative employers are involved, both serves that policy and is consistent with the common law.

73 “[I]t is not so much the actual exercise of controls as possession of the right to control which is determinative. In other words, ‘subject to the control of the master’ does not mean that the master must stand over the servant and constantly give directions.” The Law of Agency and Partnership Sec. 50 (2nd ed. 1990).

74 See also Restatement (Second) of Agency, Sec. 5, comments e & f, & illustration 6 (discussing subservant relationship between mine owner and miner’s helper).

75 See Restatement (Second) of Agency, Sec. 5 (“Subagents and Subservants”) (1958); Warren A. Seavey, Subagents and Subservants, 68 Harv. L. Rev. 658, 669 (1955) (in subservant situation, the “employing servant . . . is in the position of a master to those whom he employs but they are also in the position of servants to the master in charge of the entire enterprise”). The Restatement (Second) Sec. 5, comment e observes that:

Illustrations of the subservant relationship include that between the mine owner and the assistant of a miner who furnishes his own tools and assistants, the latter, however, being subject to the general mine discipline; the relation between the owner of a building and an employee of a janitor; the relation between the employees of a branch manager of a corporation where the branch manager is free to control and pay his assistants, but where all are subject to control by the corporation as to their conduct. See generally Kelley v. Southern Pacific Co., 419 U.S. 318, 325 (1974) (recognizing subservant doctrine for purposes of Federal Employers’ Liability Act).

76 See Restatement of Employment Law, Section 1.04(b) (June 2015) (“An individual is an employee of two or more joint employers if (i) the individual renders services to at least one of the employers and (ii) that employer and the other joint employers each control or supervise such rendering of services as provided in § 1.01(a)(3).”)(emphasis added). (In relevant part, Sec. 1.01(a)(3) defines an employee as an individual who renders service to an employer who “controls the manner and means by which the individual renders service.”)

77 See Restatement of Employment Law, Section 1.04(b) (June 2015) (“An individual is an employee of two or more joint employers if (i) the individual renders services to at least one of the employers and (ii) that employer and the other joint employers each control or supervise such rendering of services as provided in § 1.01(a)(3).”)(emphasis added). (In relevant part, Sec. 1.01(a)(3) defines an employee as an individual who renders service to an employer who “controls the manner and means by which the individual renders service.”)
Board’s current focus on only direct and immediate control acknowledges the most proximate level of authority, which is frequently exercised by the supplier firm, but gives no consideration to the substantial control over workers’ terms and conditions of employment of the user. 79

The common-law definition of an employment relationship establishes the outer limits of a permissible joint-employer standard under the Act. But the Board’s current joint-employer standard is significantly narrower than the common law would permit. The result is that employees covered by the Act may be deprived of their statutory right to bargain effectively over wages, hours, and working conditions, solely because they work pursuant to an arrangement involving two or more employing firms, rather than one. Such an outcome seems clearly at odds with the policies of the Act.

VI. THE RESTATE joins in the employer

Having fully considered the issue and all of the arguments presented, we have decided to restate the Board’s legal standard for joint-employer determinations and make clear how that standard is to be applied going forward.

We return to the traditional test used by the Board (and endorsed by the Third Circuit in Browning-Ferris): The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may “share” control over terms and conditions of employment or “codetermine” them, as the Board and the courts have done in the past. 80

79 As noted in several briefs in support of the Union, the Board’s longstanding legal formulation for joint-employer status, even post-TLI, nominally acknowledges this bifurcated dynamic by covering employers that “codetermine” employees’ terms and conditions of employment. But the Board’s restrictive application of the test, which precludes any holistic assessment of the way control is allocated between the contracting parties, undermines this aspect of the joint-employer standard.

80 In some cases (or as to certain issues), employers may engage in genuinely shared decision-making, e.g., they confer or collaborate directly to set a term of employment. See NLRB v. Checker Cab Co., 367 F.2d 692, 698 (6th Cir. 1966) (noting that employers “banded themselves together so as to set up joint machinery for hiring employees, for establishing working rules for employees, for giving operating instructions to employees, for disciplining employees for violation of rules, for disciplining employees for violation of safety regulations”). Alternatively, employers may exercise comprehensive authority over different terms and conditions of employment. For example, one employer sets wages and hours, while another assigns work and supervises employees. See D & F Industries, 339 NLRB 618, 640 (2003). Or

We adhere to the Board’s inclusive approach in defining “essential terms and conditions of employment.” The Board’s current joint-employer standard refers to “matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction” a non-exhaustive list of bargaining subjects. 81 Essential terms indisputably include wages and hours, as reflected in the Act itself. 82 Other examples of control over mandatory terms and conditions of employment found probative by the Board include dictating the number of workers to be supplied, controlling scheduling, seniority, and overtime, and assigning work and determining the manner and method of work performance. 83 This approach has generally been endorsed by the Federal courts of appeals. 84

Also consistent with the Board’s traditional approach, we reaffirm that the common-law concept of control informs the Board’s joint-employer standard. But we will no longer require that a joint employer not only possess the authority to control employees’ terms and conditions employers may affect different components of the same term, e.g., one employer defines and assigns work tasks, while the other supervises how those tasks are carried out. See Hambourg Industries, supra, 193 NLRB at 67. Finally, one employer may retain the contractual right to set a term or condition of employment. See Hoskins Ready-Mix Concrete, supra, 161 NLRB at 1493.

81 TLI, supra, 271 NLRB at 798 (emphasis added). After TLI, the Board has continued to take a broad, inclusive approach to determining the relevant object of a putative joint employer’s control, i.e., which terms and conditions of employment matter to the joint-employer inquiry. See Aldworth Co., 338 NLRB 137, 139 (2002) (the “relevant facts involved in [the joint-employer] determination extend to nearly every aspect of employees’ terms and conditions of employment and must be given weight commensurate with their significance to employees’ work life”), enf’d sub nom. Dunkin’ Donuts Mid-Atlantic Distribution Center v. NLRB, 363 F.3d 437 (D.C. Cir. 2004).

82 Sec. 8(d), defining an employer’s duty to bargain, specifically refers to the obligation to “conferr in good faith over wages, hours, and other terms and conditions of employment.” 29 U.S.C. Sec. 158(d) (emphasis added).

83 Mobil Oil, supra, 219 NLRB at 516.


85 D&F Industries, supra, 339 NLRB at 649 fn. 77.

86 DiMucci Const. Co. v. NLRB, 24 F.3d 949, 952 (7th Cir. 1994) (“Factors to consider in determining joint employer status are: (1) supervision of employees’ day-to-day activities; (2) authority to hire or fire employees; (3) promulgation of work rules and conditions of employment; (4) issuance of work assignments; and (5) issuance of operating instructions”).

87 See, e.g., Tanforan Park Food Purveyors Council v. NLRB, 656 F.2d 1358, 1361 (9th Cir. 1981); Sun-Maid Growers of California v. NLRB, 618 F.2d 56, 59 (9th Cir. 1980) (“A joint employer relationship exists when an employer exercises authority over employment conditions which are within the area of mandatory collective bargaining.”); Cabot Corp., 223 NLRB 1388, 1389-1390 (1976), enf’d sub nom. International Chemical Workers Union Local 483 v. NLRB, 561 F.2d 253 (D.C. Cir. 1977) (labor relations policies of the contractor or impact over the wages, hours, and working conditions of the contractor’s employees).
The existence, extent, and object of a putative joint employer’s control, of course, all present material issues. For example, it is certainly possible 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. Moreover, 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.

The dissent repeatedly criticizes our decision as articulating a test under which “there can be no certainty or predictability regarding the identity of the ‘employer.’” But we do not and cannot attempt today to articulate every fact and circumstance that could define the contours of a joint employment relationship. Issues related to the nature and extent of a putative joint-employer’s control over particular terms and conditions of employment will undoubtedly arise in future cases—just as they do under the current test—and those issues are best examined and resolved in the context of specific factual circumstances. In this area of labor law, as in others, the “nature of the problem, as revealed by unfolding variant situations,” requires “an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer.”

Further, while our dissenting colleagues concede that the common law must form the basis of the Board’s joint-employer test, they seem unwilling to apply its mode of analysis. As the Supreme Court has acknowledged, multifactor common-law inquiries are inherently nuanced and indeterminate: “In such a situation as this there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.” Accordingly, the nuanced approach that the dissent decries is a longstanding necessity of our common-law mandate, and not a novel or discretionary feature that we introduce here.

Our dissenting colleagues also accuse us of articulating a test “with no limiting principle” that “removes all limitations on what kind or degree of control over essential terms and conditions of employment may be sufficient to warrant a joint-employer finding.” This is simply not the case. The dissent ignores the limitations that are inherent to the common law, particularly those set forth in the Restatement provisions enumerated above. Instead, the dissent suggests that, under the revised joint-employer test, a homeowner who hires a plumber or a lender who sets the homeowner’s financing terms may each be deemed a statutory employer. But by any common-law analysis, these parties will not exercise, or have the right to exercise, the requisite control over the details of employees’ work to forge common-law employment relationships. It should therefore come as no surprise that the annals of Board precedent contain no cases that implicate the consumer services purchased by unsuspecting homeowners or lenders.

The dissent is particularly pointed in its criticism of our assignment of probative weight to a putative employer’s indirect control over employees; it contends that “anyone contracting for services, master or not, inevitably will exert and/or reserve some measure of indirect control by defining the parameters of the result desired to ensure he or she gets the benefit of his or her bargain.” We do not suggest today that a putative employer’s bare right to dictate the results of a contracted service or to control or protect its own property constitute probative indicia of employer status. Instead, we will evaluate the evidence to determine whether a user employer affects the means or manner of employees’ work and terms of employment, either directly or through an intermediary. In this case, for instance, BFI communicated precise directives regarding employee work performance through Leadpoint’s supervisors. We see no reason why this obvious control of employees by BFI should be discounted merely because it was exercised via the supplier rather than directly.

Finally, the dissent asserts that today’s decision gives the Board license to find joint-employer status based on only the slightest, most tangential evidence of control and “any degree of indirect or reserved control over a single term . . . may suffice to establish joint-employer status.” Today’s decision, however, makes clear that “all of the incidents of the relationship must be assessed.” Here, for example, our conclusion that BFI is a joint employer is based on a full assessment of the facts (set forth

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19 United Insurance, supra, 390 U.S. at 258.

90 United Insurance, supra, 390 U.S. at 258.
The dissent also insists that the “current test is fully consistent with the common law agency principles” and should not be revisited or altered. But it fails to dispute or even acknowledge the extensive legal authority we cite to establish the common-law foundation of our approach. 94

Factual issue before the jury included direct control, as well as indirect control through sub-agency.”)

94 Even where our dissenting colleagues cite case law, their efforts are wholly unpersuasive. In support of their contention (notwithstanding their acknowledgment to the contrary) that the common law requires proof of direct and immediate control to substantiate employer status, our colleagues rely on a number of early common-law decisions that merely confirm the traditional legal distinction between an employer’s control over the final product and an employer’s control over the work of employees, which we do not dispute. Our colleagues also cite various independent-contractor decisions to support their proposition that courts have “implicitly limited their analysis to looking for direct and immediate control.” But none of these decisions hold, even implicitly, that the existence of indirect control would not be probative of employer status; they are merely garden-variety independent-contractor cases in which courts found that individuals were not employees based on the totality of the circumstances. The dissent’s attempt to glean any kind of general principle disfavoring indirect control as a relevant factor from these decisions—without citing any specific facts—is tenuous at best. Likewise, the comments from Sec. 220 of the Restatement (Second) of Agency on which our colleagues rely do not state or suggest that the consideration of indirect control is proscribed under the common law.

As to the more recent circuit court decisions that our colleagues cite, the dissent’s assertions regarding direct control depend largely on the quotation of key phrases taken out of context. In Baldino v. N.Y. State Education Dept., 460 F.3d 361 (2d Cir. 2006), for instance, the court found that the Education Department was not a joint employer (subject to Title VII liability) because it did not hire, promote, or demote teachers, or determine their pay, tenure or benefits. Id. at 379. Although the court stated that it was looking for a “level of control [that] is direct, obvious, and concrete, not merely indirect or abstract”, it did so only to emphasize that all of the evidence presented to support a joint-employer finding was attenuated and insubstantial. Id. In Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009), the plaintiffs were overseas employees who alleged that Wal-Mart was their joint employer because it contracted with their local employers for production of goods. The court emphasized that Wal-Mart contracted with the factories only regarding prices, the quality of products, and the materials used. Id. at 683. As in Baldino, the court’s statement that Wal-Mart did not have the right to exercise an “immediate level of day to day control” over employees was a reflection of Wal-Mart’s total lack of control over working conditions rather than a specific holding on the probative value of indirect control evidence. Id. Indeed, neither of these cases were close, and the courts’ decisions did not turn on any refusal to assign weight to indirect control; rather, in both decisions, there was little if any relevant evidence of control of any sort. In Patterson v. Domino’s Pizza, LLC, 333 F.3d 723, 740 (Cal. 2014), while the Supreme Court of California stated that its employer standard required “a comprehensive and immediate level of day-to-day authority over matters such as hiring, firing, direction, supervision, and discipline of the employee” (internal quotations omitted), the court was expressly relying on precedent under the California Fair Employment and Housing Act. That decision also addressed the particularized features of franchisor/franchisee relationships, none of which are present here.

81 Id. at 129.

82 Citing Justice Stewart’s concurrence in Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964), the dissent sets up a straw man suggesting that our test encroaches on an employer’s decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales. Here, we are dealing only with subjects that are indisputably bargainable.

83 “[The factor of] degree of supervision by the grower, direct or indirect, of the work” [regulation citation omitted] . . . like the growers’ control over the workers, has more to do with common-law employment concepts of control than with economic dependence.” Antenor v. D & S Farms, 88 F.3d 925, 934 (11th Cir. 1996) (applying AWPA, emphasis added). “[I]n considering a joint-employment relationship [under the AWPA] . . . our inquiry looks not to the common law definitions of employer and employee (for instance, to tests measuring the amount of control an ostensible employer exercised over a putative employee), but rather to the ‘economic reality’ of all the circumstances concerning whether the putative employee is economically dependent upon the alleged employer.” Id. at 933, quoting Aimable v. Long & Scott Farms, 20 F.3d 434, 439 (11th Cir. 1994) (emphasis added). See also Williamson v. Consolidated Rail Corp., supra, 926 F.2d at 1350 (in the common-law test for an employment relationship under FELA, “the
VIII. APPLICATION OF THE RESTATED TEST
With the above principles in mind, we evaluate here whether BFI constitutes a joint employer under the Act. As always, the burden of proving joint-employer status rests with the party asserting that relationship. Having assessed all of the relevant record evidence, we conclude that the Union has met its burden of establishing that BFI is a statutory joint employer of the sorters, screen cleaners, and housekeepers at issue. BFI is an employer under common-law principles, and it serves the purposes of the National Labor Relations Act. We rely on the following factors in reaching this conclusion.

A. Hiring, Firing, and Discipline
BFI possesses significant control over who Leadpoint can hire to work at its facility. By virtue of the parties’ Agreement, which is terminable at will, BFI retains the right to require that Leadpoint “meet or exceed [BFI’s] own standard selection procedures and tests,” requires that all applicants undergo and pass drug tests, and prescribes the hiring of workers deemed by BFI to be ineligible for rehire. Although BFI does not participate in Leadpoint’s day-to-day hiring process, it codetermines the outcome of that process by imposing specific conditions on Leadpoint’s ability to make hiring decisions. Moreover, even after Leadpoint has determined that an applicant has the requisite qualifications, BFI retains the right to reject any worker that Leadpoint refers to its facility “for any or no reason.”

Similarly, BFI possesses the same unqualified right to “discontinue the use of any personnel” that Leadpoint has assigned. Although BFI managers testified that they have never discontinued use of a Leadpoint employee or been involved in disciplinary procedures, record evidence includes two specific instances where BFI Operating Manager Keck reported employees’ misconduct to Leadpoint and “request[ed] their immediate dismissal.” In response to Keck’s directive, Leadpoint officials immediately removed the employees from their line duties and dismissed them from the BFI facility shortly thereafter. Though the evidence shows that Leadpoint conducted its own investigation of the alleged misconduct, it is also plain that the outcome was preordained by BFI’s ultimate right under the terms of the Agreement to dictate who works at its facility.

B. Supervision, Direction of Work, and Hours
In addition, BFI exercises control over the processes that shape the day-to-day work of the petitioned-for employees. Of particular importance is BFI’s unilateral control over the speed of the streams and specific productivity standards for sorting. BFI argues that, although it controls the pace of work, Leadpoint supervisors alone decide how employees will respond to BFI’s adjustments. This characterization of the process, however, discounts the clear and direct connection between BFI’s decisions and employee work performance. The employee or former employee of the other without first checking” with the other party).

See Flagstaff Medical Center, supra, 357 NLRB No. 65 slip op., at 9.

It is clear that Leadpoint employees are, in the words of Restatement (Second) of Agency §220(1) “employed to perform services in the affairs of” BFI and “with respect to the physical conduct in the performance of the services” are “subject to [BFI’s] control or right to control.” The record shows that BFI engages in “de facto close supervision” of the work of Leadpoint employees; that the work of Leadpoint employees “does not require the services of one highly educated or skilled;” that Leadpoint employees have “employment over a considerable period of time with regular hours;” and that the work of Leadpoint employees “is part of the regular business” of BFI. Restatement (Second) of Agency Sec. 220, comment h (“Factors indicating the relation of master and servant”). As a general matter, this case closely resembles the situation addressed in Restatement (Second) Sec. 220, comment I, which explains that where “work is done upon the premises of the employer with his machinery by workmen who agree to obey general rules for the regulation of the conduct of the employee, the inference is strong that such workmen are the servants of the owner.” Finally, the record here fairly permits categorizing the Leadpoint employees as subservants of BFI, as well as servants of Leadpoint.

See Value Village, supra, 161 NLRB at 607; Mobil Oil, supra, 219 NLRB at 516 (relying on user’s right to terminate contract at will as evidence of control).

Applicants are tested on BFI’s equipment and are required to meet specific productivity benchmarks in order to qualify for hire.

See K-Mart, 159 NLRB 256, 258 (1966) (relying, in part, on contract language stating that contracting parties would not “hire an employee or former employee of the other without first checking” with the other party).
idence reveals that the speed of the line and the resultant productivity issues have been a major source of strife between BFI and the workers. BFI managers have directly implored workers to work faster and smarter; likewise, they have repeatedly counseled workers, in the interest of productivity, against stopping the streams. Tellingly, there is no evidence that Leadpoint has had any say in these decisions. Indeed, given BFI’s “ultimate control” over these matters, it is difficult to see how Leadpoint alone could bargain meaningfully about such fundamental working conditions as break times, safety, the speed of work, and the need for overtime imposed by BFI’s productivity standards.  

BFI managers also assign the specific tasks that need to be completed, specify where Leadpoint workers are to be positioned, and exercise near-constant oversight of employees’ work performance. The fact that many of their directives are communicated through Leadpoint supervisors hardly disguises the fact that BFI alone is making these decisions. Further, in numerous instances, BFI has dispensed with the middleman altogether. BFI managers have communicated detailed work directions to employees on the stream; held meetings with employees to address customer complaints and business objectives, and to disseminate preferred work practices; and assigned to employees tasks that take precedence over any work assigned by Leadpoint. We find that all of these forms of control – both direct and indirect – are indicative of an employer-employee relationship.

In addition, BFI specifies the number of workers that it requires, dictates the timing of employees’ shifts, and determines when overtime is necessary. Although Leadpoint is responsible for selecting the specific employees who will work during a particular shift, it is BFI that makes the core staffing and operational decisions that define all employees’ work days. In turn, Leadpoint employees are required to obtain the signature of an authorized BFI representative attesting to their “hours of services rendered” each week; failure to do so permits BFI to refuse payment to Leadpoint for time claimed by a Leadpoint worker.

C. Wages

We find too that BFI plays a significant role in determining employees’ wages. Under the parties’ contract, Leadpoint determines employees’ pay rates, administers all payments, retains payroll records, and is solely responsible for providing and administering benefits. But BFI specifically prevents Leadpoint from paying employees more than BFI employees performing comparable work. BFI’s employment of its own sorter at $5 more an hour creates a de facto wage ceiling for Leadpoint workers. In addition, BFI and Leadpoint are parties to a cost-plus contract, under which BFI is required to reimburse Leadpoint for labor costs plus a specified percentage markup. Although this arrangement, on its own, is not necessarily sufficient to create a joint-employer relationship, it is coupled here with the apparent requirement of BFI approval over employee pay increases. Thus, after new minimum wage legislation went into effect, BFI and Leadpoint entered into an agreement verifying that BFI would pay a higher rate for the services of Leadpoint employees.

See Sun-Maid Growers, supra, 239 NLRB at 351 (finding indicia of control where the user “dictated employee’s ‘basic workweek’ and number of overtime hours available based on its production schedule); Floyd Epperson, supra, 202 NLRB at 23 (user established work schedules).

See CNN America, 361 NLRB No. 47 slip op. at 6 (2014) (relying on parties’ cost-plus arrangement as evidence of joint-employer status); Hoskins Ready-Mix Concrete, supra, 161 NLRB at 1493, and the cases cited in footnote 37.


See Hoskins Ready-Mix Concrete, supra, 161 NLRB at 1493 (relying on the fact that supplier was required to consult with user and obtain clearance before changing pay rates or hiring new employees at a rate above a specified level).

In addition to the factors stated, we rely on the fact that BFI, by the terms of the Agreement, compels Leadpoint and its employees to comply with BFI’s safety policy, and reserves the right to enforce its safety policy as to the workers. See Hamburg Industries, 193 NLRB at 67 (user requires all employees to follow its own safety rules); Man-
We find BFI’s role in sharing and codetermining the terms and conditions of employment establishes that it is a joint employer with Leadpoint. Accordingly, we reverse the Regional Director and find that BFI and Leadpoint are joint employers of the sorters, screen cleaners, and housekeepers at issue.

VIII. THE IMPLICATIONS OF TODAY’S DECISION

Today’s decision is grounded firmly in the common law, while advancing the policies of the National Labor Relations Act. In both respects, its approach is superior to prior law, which, as we have explained, imposed restrictions on the joint-employer standard that have no common-law basis and that foreclosed collective bargaining even in situations where it could be productive. Certainly, we have modified the legal landscape for employers with respect to one federal statute, the National Labor Relations Act. But “reevaluating doctrines, refining legal rules, and sometimes reversing precedent are familiar parts of the Board’s work—and rightly so.” As recognized by the Supreme Court:

The use by an administrative agency of the evolutionary approach is particularly fitting. To hold that the Board’s earlier decisions froze the development . . . of the national labor law would misconceive the nature of administrative decisionmaking.

power, 164 NLRB 287, 287–288 (1967) (user gives employees safety instruction and conducts periodic safety meetings). We also note that BFI and Leadpoint have jointly determined, also by terms of the Agreement, that employees cannot work at BFI for more than 6 months. We find that these terms are further indicative of BFI’s status as an employer of the employees at issue.

116 See Hamburg Industries, supra, 193 NLRB at 67 (finding user to be joint-employer, in substantially similar factual scenario, where user had “considerable control over [supplier’s] operations in such critical areas as work instructions, quality control and the right to reject finished work, work scheduling, and indirect control over wages”).

The dissent, in its brief discussion of the facts in this case, contends that “the majority’s evidence amounts to a collection of general contract terms or business practices . . . plus a few extremely limited actions that had some routine impact on Leadpoint employees.” In so doing, however, the dissent cannot avoid setting out a list of nine specific ways in which BFI has exercised or reserved control over Leadpoint employees. In our view, our colleagues’ accounting of these factors makes a persuasive case for BFI’s joint-employer status. Nonetheless, we note that the dissent’s analysis excludes or downplays several critical factors, including BFI’s control over the speed of the lines, productivity standards, and the use of the stop switches, as well as BFI’s direct and ongoing instruction of Leadpoint employees in the details of job performance.

118 The Board’s joint-employer standard, of course, does not govern joint-employer determinations under the many other statutes, federal and state, that govern the workplace and that use a variety of different standards to determine whether a particular business entity has legal duties with respect to particular workers.


Our colleagues’ long and hyperbolic dissent persistently mischaracterizes the standard we adopt today and grossly exaggerates its consequences, but makes no real effort to address the difficult issue presented here: how best to “encourag[e] the practice and procedure of collective bargaining” (in the Act’s words) when otherwise bargainable terms and conditions of employment are under the control of more than one statutory employer. Instead, the dissent puts the preservation of the current status quo far ahead of any cognizable statutory policy. Our colleagues never adequately explain why the Board should adhere to an approach that they essentially concede is not compelled by the common law and that demonstrably fails to fully advance the goals of the Act.

As a practical matter, the criticisms that our colleagues level at our joint-employer standard could be made about the concept of joint employment generally—which has been recognized under the Act for many decades and which has long been a familiar feature of labor and employment law. The law-school-exam hypothetical of doomsday scenarios that they predict will result from today’s decision is likewise based on an exaggeration of the challenges that can sometimes arise when multiple employers are required to engage in collective bargaining. The potential for these types of challenges to arise has existed for as long as the Board has recognized the joint-employer concept. Nonetheless, employers and unions have long managed to navigate these challenges, and the predicted disasters have not come to pass.
It is not the goal of joint-employer law to guarantee the freedom of employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace. Such an approach has no basis in the Act or in federal labor policy.

**DIRECTION**

It is directed that the Regional Director for Region 32 shall, within 14 days of this Decision on Review and Direction, open and count the impounded ballots cast by the employees in the petitioned-for unit, prepare and serve on the parties a tally of ballots, and thereafter issue the appropriate certification.

Dated, Washington, D.C. August 27, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS MISCMARRA AND JOHNSON, dissenting.

The National Labor Relations Act (the Act) establishes a comprehensive set of rules for industrial relations in this country, and a primary function of the Board is to foster compliance with those rules by employees, unions, and employers. To comply with these rules, as they have grown and evolved over the last eight decades, substantial planning is required. This is especially true in regard to collective bargaining, a process that is central to the Act. The Act’s bargaining obligations are formidable—as they should be—and violations can result in significant liability. When it comes to the duty to bargain, the resort to strikes or picketing, and even the basic question of “who is bound by this collective-bargaining agreement,” there is no more important issue than correctly identifying the “employer.” Changing the test for identifying the “employer,” therefore, has dramatic implications for labor relations policy and its effect on the economy.

Today, in the most sweeping of recent major decisions, the Board majority rewrites the decades-old test for determining who the “employer” is. More specifically, the majority redefines and expands the test that makes two separate and independent entities a “joint employer” of certain employees. This change will subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts, and picketing.

Our colleagues are driven by a desire to ensure that the prospect of collective bargaining is not foreclosed by business relationships that allegedly deny employees’ right to bargain with employers that share control over essential terms and conditions of their employment. However well intentioned they may be, there are five major problems with this objective.

First, no bargaining table is big enough to seat all of the entities that will be potential joint employers under the majority’s new standards. In this regard, we believe the majority’s new test impermissibly exceeds our statutory authority. From the majority’s perspective, the change in the joint-employer analysis is an allegedly necessary adaptation of Board law to reflect changes in the national economy. In making this change, they purport to operate within the limits of traditional common-law principles by restoring and clarifying what they claim to be the law applied by the Board prior to 1984. In actuality, however, our colleagues incorporate theories of “economic realities” and “statutory purpose” that extend the definitions of “employee” and “employer” far beyond the common-law limits of agency principles that Congress and the Supreme Court have stated must apply. Their decision represents a further expansion of revisions made in the majority decisions in *FedEx*, which similarly revised the Board’s longstanding definition of independent contractor status in a way that will predictably extend the Act’s coverage to many individuals previously considered to be excluded as independent contractors, and in *CNN*, which imposed after-the-fact joint-employer obligations contrary to the parties’ 20-year-bargaining history, applicable collective-bargaining agreements (CBAs), relevant services contracts and the Board’s own prior union certifications.

Second, the majority’s rationale for overhauling the Act’s “employer” definition—to protect bargaining from limitations resulting from third-party relationships that indirectly control employment issues—relies in substanc-

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1. The common-law agency principles are also known as “master-servant” principles in the older cases and literature, and these terms are used interchangeably both in the doctrine and here.

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tial part on the notion that these relationships are unique in our modern economy and represent a radical departure from simpler times when labor negotiations were unaffected by the direct employer’s commercial dealings with other entities. However, such an economy has not existed in this country for more than 200 years. Many forms of subcontracting, outsourcing, and temporary or contingent employment date back to long before the 1935 passage of the Act. Congress was obviously aware of the existence of third-party intermediary business relationships in 1935, when it limited bargaining obligations to the “employer,” in 1947, when it limited the definition of “employee” and “employer” to their common-law agency meaning, and in 1947 and 1959, when Congress strengthened secondary boycott protection afforded to third parties who, notwithstanding their dealings with the “employer,” could not lawfully be subject to picketing and other forms of economic coercion based on their dealings with that “employer.” This is not mere conjecture; it is the inescapable conclusion that follows from Supreme Court precedent recognizing that the Act did not confer “employer” status on third parties merely because commercial relationships made them interdependent with an “employer” and its employees.

Third, courts have afforded the Board deference in this context merely as to the Board’s ability to make factual distinctions when applying the common-law agency standard. However, our colleagues mistakenly interpret this as a grant of authority to modify the agency standard itself. This type of change is clearly within the province of Congress, not the Board. Thus, in Yellow Taxi Co. of Minneapolis v. NLRB, in which the D.C. Circuit denounced the Board majority’s “thinly veiled defiance” of controlling precedent regarding the “common law rules of agency,” the court of appeals stated that “[n]o court can overlook an agency’s defiant refusal to follow well established law,” and it observed:

The Board here is acting in an area where it is called upon to apply common law principles that have been established since 1800 and where the application of that law under the National Labor Relations Act has been declared by Congress and settled by the courts, including the Supreme Court, for some 36 years. In this area, there is no dispute as to the governing principles of law; what is involved is the application of law to facts. “[S]uch a determination of pure agency law involves special administrative expertise that a court does not possess.” [NLRB v. United Ins. Co. of America, 390 U.S. 254, 260 (1968).]

To be specific, we understand the common-law standard as codified by the Act to put a premium on direct control before making an entity the joint employer of certain workers. Our fundamental disagreement with the majority’s test is not just that they view indicia of indirect, and even potential, control to be probative of employer status, they hold such indicia can be dispositive without any evidence of direct control. Under the common law, in our view, evidence of indirect control is probative only to the extent that it supplements and reinforces evidence of direct control.

Fourth, the majority abandons a longstanding test that provided certainty and predictability, and replaces it with an ambiguous standard that will impose unprecedented bargaining obligations on multiple entities in a wide variety of business relationships, even if this is based solely on a never-exercised “right” to exercise “indirect” control over what a Board majority may later characterize as “essential” employment terms. This new test leaves employees, unions, and employers in a position where there can be no certainty or predictability regarding the identi-

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4 If our colleagues desired to return to a time when labor-management relations were insulated from third-party business relationships and competitive pressures, they would need to go back to our country’s origins. The work of labor economists John R. Commons and Selig Perlman, who are perhaps the two most authoritative historians of the American labor movement, indicates that unions expanded and contracted for the first several centuries of economic development in the United States, and the transition to national markets, combined with unprecedented business competition, caused extensive labor-management instability. See 1 John R. Commons, HISTORY OF LABOUR IN THE UNITED STATES 25–30 (1918); Selig Perlman, A HISTORY OF TRADE UNIONISM IN THE UNITED STATES 36–41 (1922); see also Philip S. Foner, THE HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: FROM COLONIAL TIMES TO THE FOUNDOING OF THE AMERICAN FEDERATION OF LABOR 338–340 (1947).

5 See, e.g., Secs. 8(b)(4) and (e).

6 See, e.g., NLRB v. Denver Building Trades Council, 341 U.S. 675, 692 (1951) (holding that construction industry general contractors have no “employer” relationship with the employees of subcontractors, notwithstanding the general contractor’s responsibility for the entire project). In Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964), an employer contracted out the maintenance work and “merely replaced existing employees with those of an independent contractor,” and even though the subcontractor’s employees continued “to do the same work under similar conditions of employment” and the “maintenance work still had to be performed in the plant,” id. at 213, Fibreboard ceased being the “employer.” Indeed, the premise of Fibreboard and comparable decisions is that the outsourcing of work may “quite clearly imperil job security, or indeed terminate employment entirely” for employees of the contracting employer. Id. at 223 (Stewart, J., concurring).

7 The Supreme Court’s decision in Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964), speaks directly only to the Board’s ability to make factual distinctions under the common-law agency standard. The determination of whether two entities are joint employers “is essentially a factual issue.” Id. at 481.

8 721 F.2d 366 (D.C. Cir. 1983). See also NLRB v. Town & Country Electric, Inc., 516 U.S. 85, 94 (1995) (“In some cases, there may be a question about whether the Board’s departure from the common law of agency with respect to particular questions and in a particular statutory context, renders its interpretation unreasonable.”).
ty of the “employer.” Just like the test of employee status rejected by the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 530 U.S. 318, 326 (1992), the majority’s new joint-employer standard constitutes “an approach infected with circularity and unable to furnish predictable results.” This confusion and disarray threatens to cause substantial instability in bargaining relationships, and will result in substantial burdens, expense, and liability for innumerable parties, including employers, employees, unions, and countless entities who are now cast into indeterminate legal limbo, with consequent delay, risk, and litigation expense. Nor can this type of fundamental uncertainty be positively regarded by the courts.\(^8\)

Fifth, to the extent the majority seeks to correct a perceived inequality of bargaining leverage resulting from complex business relationships, where some entities are currently nonparticipants in bargaining, the “inequality” addressed by the majority is the wrong target, and collective bargaining is the wrong remedy. As noted above, the inequality targeted by the new “joint-employer” test is a fixture of our economy—business entities have diverse relationships with different interests and leverage that varies in their dealings with one another. There are contractually “more powerful” business entities and “less powerful” business entities, and all pursue their own interests. The Board needs a clear congressional—and none exists here—before undertaking an attempt to reshape this aspect of economic reality. The Act does not redress imbalances of power between employers, even if those imbalances have some derivative effect on employees. As Justice Stewart observed 50 years ago:

> [I]t surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining. Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of the workers’ jobs. Yet it is hardly conceivable that such decisions so involve “conditions of employment” that they must be negotiated with the employees’ bargaining representative.

*Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964) (Stewart, J., concurring) (emphasis added); see also *First National Maintenance Corp. v. NLRB*, 452 U.S. at 676 (In adopting the NLRA, Congress “had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed.”). Requiring collective bargaining wherever there is some interdependence between or among employers is much more likely to thwart labor peace than advance it.

Indeed, on matters of economic power and relative inequality, the Board is not even vested with “general authority to define national labor policy by balancing the competing interests of labor and management.” *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965). “It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties.” *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107–108 (1970). Therefore, we are certainly not vested with general authority to define national economic policy by balancing the competing interests of different business enterprises.

The Act encourages collective bargaining, but only by an “employer” in direct relation to its employees. Our colleagues take this purpose way beyond what Congress intended, and the result unavoidably will be too much of a good thing. We believe the majority’s test will actually foster substantial bargaining instability by requiring the nonconsensual presence of too many entities with diverse and conflicting interests on the “employer” side. Indeed, even the commencement of good-faith bargaining may be delayed by disputes over whether the correct “employer” parties are present. This predictable outcome is irreconcilable with the Act’s overriding policy to “eliminate the causes of certain substantial obstructions to the free flow of commerce,”\(^9\)

In sum, today’s majority holding does not represent a “return to the traditional test used by the Board,” as our colleagues claim even while admitting that the Board has never before described or articulated the test they announce today. Contrary to their characterization, the new joint-employer test fundamentally alters the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships under the Act. In addition, because the commerce data applicable to joint employers is combined for jurisdictional purposes,\(^10\) the Act’s coverage will extend to small businesses whose separate operations and employees have until now not been subject to Board jurisdiction. As explained in detail below, we believe the majority impermissibly exceeds our statutory

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\(^8\) See, e.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679, 684–686 (1981), and other cases discussed in part V, subpart B of this opinion, emphasizing the need for certainty, predictability, and stability.

\(^9\) Section 1 (emphasis added)

authority, misreads and departs from prior case law, and subverts traditional common-law agency principles. The result is a new test that confuses the definition of a joint employer and will predictably produce broad-based instability in bargaining relationships. It will do violence as well to other requirements imposed by the Act, notably including the secondary boycott protection that Congress afforded to neutral employers. For all of these reasons, we dissent.

I. THE CURRENT JOINT-EMPLOYER TEST

The Act does not expressly define who is an employer, whether joint or sole. In relevant part, Section 2(2) states only that “[t]he term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly.” In cases decided prior to 1984, both the Board and courts occasionally confused resolution of the issue whether two entities are joint employers by, among other things, blurring the distinction between the test for determining “single employer”, and the test for determining “joint-employer” status. In two cases decided in 1984—Laerco Transportation and TLI, Inc.—the Board clarified the law by expressly adopting the Third Circuit’s joint-employer standard in NLRB v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117, 1124 (3d Cir. 1982): “The basis of the [joint-employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the ‘joint employer’ concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment.” Applying this test as to “essential terms” in both Laerco and TLI, the Board stated it would focus on whether an alleged joint employer “meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.”

Both TLI and Laerco were cases applying the joint-employer test to the relationship between a company supplying labor to a company using it, the same business relationship at issue in the present case. The Board found that evidence of the “user” employer’s actual but “limited and routine” supervision and direction would not suffice to establish joint-employer status. Subsequently, in AM Property Holding Corp., 350 NLRB 998, 1001 (2007), the Board further explained that it has “generally found supervision to be limited and routine where a supervisor’s instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work.”

In Airborne Express, 338 NLRB 597, 597 fn. 1 (2002), the Board explained that under the existing joint-employer test, “[t]he essential element in [the joint-employer] analysis is whether a putative joint employer’s control over employment matters is direct and immediate.” Consistent with this rationale, in AM Property the Board found that a contractual provision giving the user company (AM) the right to approve hires by the supplier company (PBS) to work at AM’s office building was not, standing alone, sufficient to show AM’s status as a joint employer. Instead, “[i]n assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties.”

The AM Property distinction between potential authority and the actual exercise of authority is a commonplace, well-established fixture in Board jurisprudence. For example, in the Board’s single-employer test, we have repeatedly required proof that “one of the entities exercises actual or active control [as distinguished from potential control] over the day-to-day operations or labor relations of the other.” In other contexts where a party bears the burden of proving that an entity falls within a particular statutory definition, members of today’s majority have endorsed this evidentiary distinction, giving weight only to the actual exercise of authority or control.

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15 Laerco, 269 NLRB at 325; TLI, 271 NLRB at 798.
16 Laerco, 269 NLRB at 326; TLI, 271 NLRB at 799. Laerco and TLI were decided by different 3-member panels of a Board then comprised of four sitting members. As such, they collectively represented the unanimous opinion of the full Board at that time.
17 We note that, although concurring Member Lieberman advocated revisiting the joint-employer standard represented by TLI, she expressly agreed with the majority that Board decisions applying this precedent “have required that the joint employer’s control over these matters be direct and immediate.” 338 NLRB 597, 597 fn. 1. The majority here is completely mistaken in asserting that the focus on “direct and immediate control” was a new addition to the Browning-Ferris joint-employer test in Airborne. Further, as we shall later explain, there is ample precedent in the common law for this requirement predating 1984.
18 350 NLRB at 1000.
20 E.g., FedEx Home Delivery, 361 NLRB No. 165, slip op. at 14 (2014) (“The Board has been careful to distinguish between actual opportunities, which allow for the exercise of genuine entrepreneurial
As discussed in section III below, the current test is fully consistent with the common-law agency principles that the Board must apply in determining joint-employer status. Further, as an administrative law judge has accurately summarized, the test reflects a commonsense, practical understanding of the nature of contractual relationships in our modern economy. “An employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for. It follows that the existence of such control, is not in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor’s employees.”

II. THE MAJORITY’S NEW JOINT-EMPLOYER TEST

The majority today expressly overrules TLI, Laerco, Airborne Express, AM Property, supra and related precedent, and purports to return to a joint-employer test that allegedly applied prior to this line of precedent. Their analysis begins in a manner that is consistent with the Board’s modern precedent: “The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment.” The “share or codetermine” language is the general statement of the joint-employer test in Browning-Ferris that was adopted and applied by the Board in both TLI and Laerco. Our colleagues go on to adopt TLI and Laerco’s description of essential terms and conditions of employment as “matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.” If this was the extent of the majority’s holding, there would be no need to overrule precedent.

However, the majority’s decision makes clear that the new test expands joint-employer status far beyond anything that has existed under current precedent and, contrary to the majority’s claim, under precedent predating TLI and Laerco. In a two-step progression, the first of which misleadingly depicts the limits of common law, the majority removes all limitations on what kind or degree of control over essential terms and conditions of employment may be sufficient to warrant a joint-employer finding:

[W]e will no longer require that a joint employer not only possess the authority to control employees’ terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a “limited and routine” manner. . . . The right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect.

Moreover, the new test will evaluate the exercise of control by construing “share or codetermine” broadly:

In some cases (or as to certain issues) employers may engage in genuinely shared decision-making, e.g., they confer or collaborate to set a term of employment. . . . Alternatively, employers may exercise comprehensive authority over different terms and conditions of employment. For example, one employer sets wages and hours, while another assigns work and supervises employees. . . . Or employers may affect different components of the same term, e.g. one employer defines and assigns work tasks, while the other supervises how those tasks are carried out. . . . Finally, one employer may retain the contractual right to set a term or condition of employment. [Emphasis added.]

Our colleagues concede “it is certainly possible 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.” However, the majority fails to provide any guidance as to what control, under what circumstances, would be insufficient to establish joint-employer status.

What do the preceding passages and the overruling of cited precedent indicate? First, in any particular case, the majority may consider evidence about virtually any aspect of employment and may give dispositive weight to an employer’s control over any essential term and condition of employment in finding a joint-employer relationship. Second, there will be no requirement that control over any essential term of employment be “direct and immediate” in order for it to be probative and potentially determinative. Indirect control, even a power reserved by contract but never exercised, will be considered and may suffice, standing alone, to find joint-employer sta-
The majority’s new test represents a major unexplained departure from precedent. This test promises to effect a sea change in labor relations and business relationships. Our colleagues presumably do not intend that every business relationship necessarily entails the joint employment of every entity’s employees, but there is no limiting principle in their open-ended multifactor standard. It is an analytical grab bag from which any scrap of evidence regarding indirect control or incidental collaboration as to any aspect of work may suffice to prove that multiple entities—whether they number two or two dozen—“share or codetermine essential terms and conditions of employment.”

III. THE MAJORITY’S NEW TEST IMPERMISSIBLY DEPARTS FROM THE COMMON-LAW AGENCY TEST AND RESURRECTS THE CONGRESSIONALLY-REJECTED ECONOMIC REALITY AND BARGAINING INEQUALITY THEORIES

A. The Majority’s Implicit Reliance on Economic Reality and Statutory Purpose Theory Directly Contravenes Congressional Intent

The threshold insurmountable problem with the majority’s reformulated joint-employer test is that it far exceeds the limits of our statutory authority. In fact, this is the third case decided recently where Board majorities have tested or exceeded those limits when dramatically expanding “employer” and “employee” status.

In *FedEx Home Delivery*, 361 NLRB No. 55 (2014), the majority claimed to be applying the common law when it broadened the Act’s definition of “employee,” which (based on language added in 1947 as part of the Taft-Hartley amendments) explicitly excludes any “independent contractor.” In altering the analysis for distinguishing employees from independent contractors, the majority distorted the common-law test to emphasize the perceived economic dependency of the putative employee on the putative employer. Member Johnson’s dissent explained that the majority’s treatment of “employee” and “independent contractor” status in *FedEx* was contrary to the Act and its legislative history, and the majority’s factual findings were contrary to the record.

In *CNN America, Inc.*, 361 NLRB No. 47 (2014), the majority concluded that a client (CNN) was a joint employer of technical employees supplied by a contractor (TVS), although CNN undisputedly had no direct role in hiring, firing, disciplining, discharging, promoting, or evaluating TVS’ employees, and CNN’s “employer” status was contrary to the TVS collective-bargaining agreements, the services agreement entered into between CNN and TVS, two decades of bargaining history and CBAs (all identifying the contractor as the only “employer”), and prior union certifications by the Board. The Board majority, though ostensibly applying the traditional joint-employer test, relied on factors similar to those emphasized by the majority here (e.g., finding that CNN’s services agreement gave it “considerable authority” over “staffing levels”). Member Miscimarra’s dissent explained that the Board and the courts had long dealt with situations where contractor employees worked at client locations, with substantial interaction between the client and contracting employer, without conferring “employer” status on the client. *CNN America, Inc.*, slip op. at 28, 31–32 (citing *NLRB v. Denver Building Trades Council*, supra, 341 U.S. at 692; and *Fibreboard Corp. v. NLRB*, supra, 379 U.S. at 203 (other citations omitted)).

In this case, our colleagues abandon the attempt to strain extant joint-employer law, which had already been strained beyond its rational breaking point in *CNN*. Instead, similar to what was done in *FedEx* for the definition of a statutory employee, they have announced a new test of joint-employer status that, notwithstanding their adamantine disclaimers, effectively resurrecits and relies, at least in substantial part, on intertwined theories of “economic realities” and “statutory purpose” endorsed by the Supreme Court in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), which Congress expressly rejected in the Taft-Hartley Amendments of 1947. In *Hearst*, the Court

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22 The majority cites the following passage from *American Trucking Assns. v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967), purporting to justify the change in the joint-employer standard: “[Regulatory agencies] are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation’s needs in a volatile, changing economy.” Id. (emphasis supplied). As hereafter discussed, the change in the joint-employer standard is neither within the limits of the law nor representative of fair and prudent administration.

23 Sec. 2(3).

24 Member Miscimarra did not participate in *FedEx*, but he agrees with Member Johnson’s criticism of the economic realities test applied by the majority and the analysis of “employee” and “independent contractor” issues addressed in Member Johnson’s dissent.

25 Member Johnson did not participate in *CNN*, but he agrees with the criticism of the majority’s joint-employer finding as expressed in Member Miscimarra’s dissent.
applied the same rationale for the definitions of employee and employer under the original Wagner Act.

To eliminate the causes of labor disputes and industrial strife, Congress thought it necessary to create a balance of forces in certain types of economic relationships. These do not embrace simply employment associations in which controversies could be limited to disputes over proper “physical conduct in the performance of the service.” On the contrary, Congress recognized those economic relationships cannot be fitted neatly into the containers designated “employee” and “employer” which an earlier law had shaped for different purposes. Its Reports on the bill disclose clearly the understanding that “employers and employees not in proximate relationship may be drawn into common controversies by economic forces, and that the very disputes sought to be avoided might involve “employees (who) are at times brought into an economic relationship with employers who are not their employers.” In this light, the broad language of the Act’s definitions, which in terms reject conventional limitations on such conceptions as “employee,” “employer,” and “labor dispute,” leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic forces rather than technically and exclusively by previously established legal classifications. 26

In reaction to Hearst, Congress expressly excluded “independent contractors” from the Act’s definition of a statutory employee in the Taft-Hartley Amendments of 1947. The purpose of this revision was manifest in the legislative history of the Amendments and repeatedly acknowledged thereafter by the Supreme Court, which stated in one case that

[in Hearst] the standard was one of economic and policy considerations within the labor field. Congressional reaction to this construction of the Act was adverse and Congress passed an amendment specifically excluding ‘any individual having the status of an independent contractor’ from the definition of ‘employee’ contained in s 2(3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act. . . . Thus there is no doubt that we should apply the common law agency test here in distinguishing an employee from an independent contractor. 27

Our colleagues nevertheless cling to the notion that economic and policy considerations may determine the definition of employee and employer. Even assuming that may be true in some cases not dealing with the right to control under common law, 28 the Supreme Court squarely rejected reliance on these considerations in Darden, stating that

Hearst and Silk, which interpreted “employee” for purposes of the National Labor Relations Act and Social Security Act, respectively, are feeble precedents for unmooring the term from the common law. In each case, the Court read “employee,” which neither statute helped define, to imply something broader than the common-law definition; after each opinion, Congress amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning. . . . To be sure, Congress did not, strictly speaking, “overrule” our interpretation of those statutes, since the Constitution invests the Judiciary, not the Legislature, with the final power to construe the law. But a principle of statutory construction can endure just so many legislative revisions, and Reid’s presumption that Congress means an agency law definition for “employee” unless it clearly indicates otherwise signaled our abandonment of Silk’s emphasis on construing that term “in the light of the mischief to be corrected and the end to be attained.” [503 U.S. at 324–325 (footnote and citations omitted)].

Accordingly, the inescapable conclusion to be drawn from the Taft-Hartley legislation repudiating the Hearst opinion is that Congress must have intended that common-law agency principles, rather than the majority’s much more expansive policy-based economic realities and statutory purpose approach, here govern the definition of employer as well as employee under the Act. Even if Congress had not been so clear, “it is . . . well established that ‘[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless a statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.’” Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989) (quoting NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981)).

26 322 U.S. at 128–129. See also United States v. Silk, 331 U.S. 704 (1947), applying the same economic realities and statutory purpose theories to the definition of employee under the Social Security Act.


Thus, the majority’s new joint-employer test is invalid if it does not comport with the common-law agency principles.

Nevertheless, our colleagues now expand the definition of employer by redefining the joint-employer doctrine in unstated—but unmistakable—reliance on the rationale of Hearst that was repudiated by Congress.\(^{29}\) Our colleagues are motivated by a policy concern that an imbalance of leverage reflected in commercial dealings between the undisputed employer and third-party entities prevents “meaningful bargaining” over each term and condition of employment and is therefore in conflict with the statutory policy of encouraging collective bargaining. This approach reflects a desire to ensure that third parties that have “deep pockets,” compared to the immediate employer, become participants in existing or new bargaining relationships, and that they will also be directly exposed to strikes, boycotts and other economic weapons, based on the most limited and indirect signs of potential control.\(^{30}\) Whether this is good or bad policy—and we think it is bad for numerous reasons discussed below—this fundamental balancing of interests has already been done by Congress. And the simple fact is that Congress has forbidden the Board from applying an economic realities or statutory purpose rationale in defining employer and joint-employer status under the Act.

B. The Majority’s New Test does not Comport with Common-Law Agency Principles

Our colleagues do not acknowledge the Congressional rejection of Hearst’s economic realities theory for defining “employee” and “employer” under the Act. Neither do they acknowledge their implicit reliance on this theory in announcing a new joint-employer test. Instead, they attempt, as they must, to persuade that their test of joint-employer status is consistent with common-law agency’s master-servant doctrine. The attempt fails.

The “touchstone” at common law is whether the putative employer sufficiently controls or has the right to control putative employees. See Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440, 448–449 (2003); Restatement (Second) of Agency §§ 2, 220 (1958). Without attribution, our colleagues state that the common law considers as potentially dispositive not only direct control, but also indirect control and even “reserved” control that has never been exercised. They would accordingly jettison the joint-employer test’s requirement of evidence that the putative employer’s control be “direct and immediate.” As explained below, however, “control” under the common-law principles requires some direct-and-immediate control even where indirect control factors are deemed probative. The Act, and its incorporation of the common law, does not allow the Board to broaden the standard to include indirect control or an inchoate right to exercise control, standing alone, as a dispositive factor, which the majority does today.

Long before Congress anchored “employer” in the common law, courts applying those principles focused on discerning whether the putative master had control over the details of the work (master) or only the results to be accomplished, or, in other words, “not only what shall be done, but how it shall be done.” (quoting New Orleans, M&CR Co. v. Hanning, 82 U.S. 649, 657 (1872)). Further, the Supreme Court has for over a century adhered to the proposition that “under the common law loaned-servant doctrine immediate control and supervision is critical in determining for whom the servants are performing services.”\(^{31}\) Lower courts as well implicitly limited their

\(^{29}\) An unacknowledged antecedent for the joint-employer theory adopted here is the concurring opinion of then-Member Lieberman in Airborne Express, supra, 338 NLRB at 597–599, who contended that “[g]iven business trends driven by accelerating competition, highlighted by this case, the Board’s joint-employer doctrine may no longer fit economic realities.” See also AM Property Holding Co., supra, 350 NLRB at 1012 (Member Lieberman, concurring in part and dissenting in part).

\(^{30}\) We note as well that the General Counsel relies on Hearst and economic reality theory in his amicus brief. The majority expressly rejects the General Counsel’s argument, but implicitly relies on much of it.

\(^{31}\) Shenker v. Baltimore & Ohio R. Co., 374 U.S. 1, 6 (1963), citing and applying the analysis in Standard Oil Co. v. Anderson, 212 U.S.
analysis to looking for direct-and-immediate control. See, e.g., Dimmitt-Richhoff-Bayer Real Estate Co. v. Finnegan, 179 F.2d 882 (8th Cir. 1950) (not attaching any importance to indirect control in finding real estate agents were not employees), cert. denied 340 U.S. 823 (1950); Glenn v. Standard Oil Co., 148 F.2d 51 (6th Cir. 1945) (not attaching any importance to indirect control in finding operators of Standard Oil’s bulk distribution plants were not employees); Spillson v. Smith, 147 F.2d 727 (7th Cir. 1945) (not attaching any importance to indirect control in finding the musicians of an orchestra were the employees of its leader and not the restaurant where they played).

As courts undoubtedly realized, anyone contracting for services, master or not, inevitably will exert and/or reserve some measure of indirect control by defining the parameters of the result desired to ensure he or she gets the benefit of his or her bargain. For example, Judge Learned Hand wrote, in a case applying common-law principles to decide a production company was not the employer of the entertainers in vaudeville acts under the Social Security Act, that

[in] the case at bar the plaintiff did intervene to some degree; but so does a general building contractor intervene in the work of his subcontractors. He decides how the different parts of the work must be timed, and how they shall be fitted together; if he finds it desirable to cut out this or that from the specifications, he does so. Some such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees. By far the greater part of [the putative employer’s] intervention in the ‘acts’ was no more than this. It is true, as we have shown, that to a very limited extent he went further, but these interventions were trivial in amount and in character; certainly not enough to color the whole relation.

Radio City Music Hall Corp. v. United States, 135 F.2d 715, 717–718 (2d Cir. 1943).

The Supreme Court subsequently addressed the same point in construing the coverage of the Act’s prohibition of coercive secondary activity against neutral construction employers by unions:

We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor’s work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.32

To aid in applying this well-established common law for employer-employee relationships, the Supreme Court largely adopted the Restatement (Second) of Agency § 220’s nonexhaustive list of factors to be considered. Community for Creative Non-Violence v. Reid, 490 U.S. at 751–752; see also Nationwide Mutual Insurance Co. v. Darden, 503 U.S. at 323–324. The Reid Court wrote:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Reid, 490 U.S. at 751–752. The inquiry remains the same. The factors provide useful indicia of the putative employer’s direct-and-immediate control, or its right to such control.

The comments to Section 220 of the Restatement clarify that the listed factors are not looking to indirect control. Comment j, on the duration of the relationship, provides: “If the time of employment is short, the worker is less apt to subject himself to control as to details and the job is more likely to be considered his job than the job of the one employing him.”33 Comment k, on the source of the instrumentalities and tools, states it is understandable that the owner would regulate such instrumentalities because “if the worker is using his employer’s tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the direction of the owner in their use.” The same should hold true where one employer establishes rules for the use of its property. Comment l, on the location of work, informs


33 We note here that Leadpoint is not supposed to keep its employees assigned long term to the BFI project.
that although the putative employer’s controlling the location of work usually raises an inference of employer status, “[i]f, however, the rules are made only for the general policing of the premises, as where a number of separate groups of workmen are employed in erecting a building, mere conformity to such regulations does not indicate that the workmen are” employees.

Recently, courts applying the common law have continued to make it unmistakably clear that the employer standard requires sufficient proof of direct-and-immediate control. In finding that the New York State Education Department was not the employer of teachers under Title VII, the United States Court of Appeals for the Second Circuit wrote: “[The common-law standard] focuses largely on the extent to which the alleged master has ‘control’ over the day-to-day activities of the alleged ‘servant.’ The Reid factors countenance a relationship where the level of control is direct, obvious, and concrete, not merely indirect or abstract. . . . Plaintiffs in this case could not establish a master-servant relationship under the Reid test. [The State Education Department] does have some control over New York City school teachers—e.g., it controls basic curriculum and credentialing requirements—but SED does not exercise the workday supervision necessary to an employment relationship.” Gulino v. N.Y. State Education Department, 460 F.3d 361, 379 (2d Cir. 2006) (emphasis added), cert. denied 554 U.S. 917 (2008). Similarly, the United States Court of Appeals for the Ninth Circuit found, applying common-law principles, that Wal-Mart was not the joint employer of its suppliers’ employees where Wal-Mart did not have the right to an “immediate level of ‘day-to-day’ control.” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 682–683 (9th Cir. 2009) (quoting Vernon v. State, 10 Cal. Rptr. 3d 121 (Cal. Ct. App. 2004)). A few years later, the Supreme Court of California used the same language in finding a franchisor not liable under the California Fair Employment and Housing Act for a franchisee-supervisor’s harassment of an employee: “[T]raditional common law principles of agency and respondeat superior supply the proper analytical framework. . . . This standard requires ‘a comprehensive and immediate level of ‘day-to-day’ authority’ over matters such as hiring, firing, direction, supervision, and discipline of the employee.” Patterson v. Domino’s Pizza, LLC, 333 P.3d 723, 740 (Cal. 2014) (quoting Vernon, supra).

Contrary to our colleagues’ characterization, the above-quoted language from Gulino and Wal-Mart cannot be dismissed as meaningless statements made “in cases where there was little if any relevant evidence of control of any sort.” This begs the question why either court felt the need to specifically mention the absence of immediate control. As for Patterson, the majority states (as do we) that the case was decided under a California statute, but they fail to acknowledge that the court’s opinion is founded on “traditional common law principles of agency and respondeat superior.” The salient point is that the cases we cite do indicate that evidence of direct and immediate control is essential to a finding of joint-employer status under the common law. By contrast, the majority does not and cannot cite a single judicial opinion that even implicitly affirms its concededly novel two-step version of an alternative common-law test or the proposition that a finding of a joint employer relationship under the common law can be based solely on indirect control.

In re Enterprise Rent-A-Car Wage & Employment Practices Litigation, 683 F.3d 462, 468–469 (3d Cir. 2012), provides a useful contrast between the common-law test of joint-employer status and the economic realities test that Congress expressly authorized by the unique language of the Fair Labor Standards Act (FLSA), but rejected in the Taft-Hartley Amendments of our Act. we discuss cases decided after TLI that did examine factors other than those enumerated in that case. However, evidence of control over the specific factors referred to in TLI is usually most relevant to the joint-employer analysis. It is no coincidence that the Supreme Court of California used a similar list in Patterson, as did the Ninth Circuit in EEOC v. Pacific Maritime Assn., 351 F.3d 1270 (9th Cir. 2003). Discussing the Supreme Court’s Clackamas decision in this Title VII case, the Court stated:

The Supreme Court seems to suggest that the sine qua non of determining whether one is an employer is that an “employer can hire and fire employees, can assign tasks to employees and supervise their performance.” Logically, before a person or entity can be a joint employer, it must possess the attributes of an employer to some degree. Numerous courts have considered the key to joint employment to be the right to hire, supervise and fire employees.

Id. at 1277. The Board’s task is to weigh all of the incidents of the relationship to determine the sufficiency of the control, and that analysis necessarily includes qualitative assessments of the general significance of specific factors. The new test discards this safeguard against overinclusion in favor of finding any sporadic evidence or tangential effect on working conditions to be potentially sufficient to prove joint-employer status.

The majority also distinguishes Patterson on the ground that it involves “the particularized features of franchisor/franchisee relationships, none of which are applicable here.” As we state elsewhere in this opinion, the Board has heretofore maintained a unitary joint-employer test for all types of employer relationships. The suggestion that the test will vary from one type of relationship to another is unprecedented, and certainly has no foundation in the common law.

\[34\] In TLI, supra, 271 NLRB at 798, the Board stated that “there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.” We read that passage to provide a nonexclusive list of direct-and-immediate control factors to consider, and hereafter
With respect to the economic realities test, the Third Circuit stated:

When determining whether someone is an employee under the FLSA, “economic reality rather than technical concepts is to be the test of employment,” Goldberg v. Whitaker House Co-op., Inc., 366 U.S. 28, 33, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961) (internal quotation marks omitted). Under this theory, the FLSA defines employer “expansively,” Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992), and with “striking breadth.” Rutherford Food Corp. v. McComb, 331 U.S. 722, 730, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947). The Supreme Court has even gone so far as to acknowledge that the FLSA’s definition of an employer is “the broadest definition that has ever been included in any one act.” United States v. Rosenwasser, 323 U.S. 360, 363 n. 3, 65 S.Ct. 295, 89 L.Ed. 301 (1945).

The issue in Enterprise was whether the district court below erred in granting summary judgment against the plaintiff employees’ claim that the parent company of their wholly owned rental car subsidiary was their joint employer with shared liability for alleged overtime wage violations. The district court had relied on a traditional common-law test developed under the ADEA and Title VII. However, the Third Circuit opined that

[b]ecause of the uniqueness of the FLSA, a determination of joint employment “must be based on a consideration of the total employment situation and the economic realities of the work relationship.” A simple application of the [district court’s] test would only find joint employment where an employer had direct control over the employee, but the FLSA designates those entities with sufficient indirect control as well. We therefore conclude that while the factors outlined today in [that test] are instructive they cannot, without amplification, serve as the test for determining joint employment under the FLSA.

It is readily apparent from the distinctions underscored by the Enterprise court that the new joint-employer test announced by our colleagues is rooted in economic reality and statutory purpose theory, not in the “technical concepts” of common-law agency. Indeed, their new definition of employer equals or exceeds the “striking breadth” of the FLSA standard, and it cannot stand in the face of express Congressional disapproval.

The majority’s explication of its new joint-employer test erases any doubt that the test is the analytical stepchild of Hearst, rather than being founded in common law. Our colleagues posit that as a first step they must determine whether an employment relationship exists at all between the alleged joint employer and an employee. Here, the majority does no more than acknowledge the obvious: an entity with no control whatsoever over a person performing services in that entity’s affairs cannot be that person’s employer. But the majority incorrectly sets this “zero control” state as the outer limit of common law master-servant agency, that is, if there is some control over any aspect of the performance of services, then common law would allegedly permit finding an employment relationship. Of course, if that were true, it would obliterate the common-law concept of an independent contractor and erase the distinction at common law between servant and nonemployee agent. The majority seems vaguely to recognize this, but as far as deciding whether it should find that a separate business is a joint employer with an undisputed employer of an undisputed employee, the majority nevertheless looks to whether it would serve the purposes of the Act to expand the joint-employer definition to serve the Act’s policy of “encouraging the practice and procedure of collective bargaining” (in the words of Sec. 1). In their view, it is necessary to do so because the current test’s “requirements—which serve to significantly and unjustifiably narrow the circumstances where a joint employment relationship can be found—leave the Board’s joint employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships. This disconnect potentially undermines the core protections of the Act for the employees impacted by these economic changes.”

Compare the majority’s reasoning to the following passages from Hearst concerning the test for determining whether newsboys were employees or independent contractors under the Wagner Act:

Congress had in mind a wider field than the narrow technical legal relation of “master and servant,” as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally ‘employment,’ by any appropriate test, and what is as clearly entrepreneurial enterprise and not em-

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36 Id. at 467-468.
37 Id. at 469. The court nevertheless affirmed the grant of summary judgment, finding insufficient proof that the parent company was a joint employer even under the expansive FLSA standard. It is not clear whether the same evidence considered under the majority’s test here would lead to the same result.
ployer stays well within the limits of that law. Clearly it
was the Board’s traditional joint-employer test accurately reflects
322 U.S. 124–127 (fns. omitted). The only significant dif-
ference between the majority’s reasoning here and the
Court’s reasoning in *Hearst* is that the Court at least candid-
lly recognized the “intermediate region” into which it ex-
tended the Wagner Act’s definition of covered employees
was beyond the scope of common law, while the majority
blandly and disingenuously assures that the intermediate
region into which they extend the definition of joint em-
ployer stays well within the limits of that law. Clearly it
does not. Contrary to our colleagues, we believe the
Board’s traditional joint-employer test accurately reflects
common law, and we disagree with any suggestion that their
new test constitutes an appropriate way under common law
to advance the statutory goal of promoting collective bar-
gaining. Indeed, as we discuss below in section V, we find
their test is more likely to destabilize collective bargaining
than to promote it.

IV. EVEN IF THE NEW TEST WERE PERMISSIBLE, THE
MAJORITY FAILS TO IDENTIFY SUFFICIENT REASONS TO
OVERRULE PRECEDENT AND ADOPT A NEW JOINT-
EMPLOYER TEST

A. The Majority’s Alleged Return to the Alleged “Tradi-
tional Standard” Relies on a Selective Misreading of
Precedent Before and After TLI and Laerco

The majority states that the *TLI* and *Laerco* decisions
“significantly and unjustifiably” narrowed the Board’s
“traditional” joint-employer standard. This standard al-
legedly encompassed far more factors, including those
related to indirect control and reserved contractual con-
trols, and more comprehensively analyzed employment
relationships to determine whether an entity was a joint
employer. However, in selecting only the few cases al-
legedly supporting this view of traditional practice, the
majority has neglected others where the Board found no
joint-employer relationship, despite the presence of the
“traditional” or “indirect control” factors that the majori-
ty claims justify a finding of such a relationship. Contra-
ry to the majority, the Board’s prior cases did not mani-
fest an intention to apply a broad analytical framework in
which indirect control played a determinative role in
joint-employer cases. We agree with the majority that the
Board has traditionally carried out a fact-intensive
assessment of whether a putative employer exercised
sufficient control over, or retained the right to control,
the employees at issue. We disagree, however, with the
notion that prior to *TLI* and *Laerco* the Board, as a rule,
gave much probative weight to evidence of “indirect con-
trol,” or that such evidence, standing alone, was routinely
determinative. 38 We will now turn to a discussion of
these factors of “indirect control.”

This sentence is emblematic of the majority’s attempt
to prove too much by the citation of the older cases:

Thus, the Board’s joint-employer decisions found it
probative that employers retained the contractual power
to reject or terminate workers; set wage rates; set work-
ing hours; approve overtime; dictate the number of
workers to be supplied; determine “the manner and
method of work performance”; “inspect and approve
work,” and terminate the contractual agreement itself at
will. [Footnotes omitted.]

The foregoing statement includes footnote citations to
precedent that allegedly shows that “the Board typically
treated the right to control the work of employees and
their terms of employment as probative of joint-employer
status. The Board did not require that this right be exer-
cised, or that it be exercised in any particular manner.”
The majority fails to mention that in many of the cited
cases there was evidence that the contractual rights *were
exercised*, and there was other evidence of direct control
over employees’ work. The majority’s statement also
fails to account for all the Board cases that reach the con-
trary result with similar contractual provisions. Thus, we
can paraphrase the majority’s statement, with appropriate
citations, that during the period preceding *TLI* and *Laerco*,
the Board found no joint-employer status where
putative “employers retained the contractual power to
reject or terminate workers;” 39 set wage rates; 40 set work-

38 Apart from our disagreement with the majority’s characterization
of the joint-employer tests that existed prior to 1984, we note that in
one major respect *TLI* and *Laerco* undisputedly broadened the circum-
cumstances in which a joint-employer relationship could be found. That is,
by adopting the Third Circuit’s *Browning-Ferris* joint-employer test, the
Board made clear that the more restrictive single-employer test,
requiring a showing of less than an arms-length relationship between
employers, did not apply.

39 Cabot Corp., 223 NLRB 1388, 1390 fn. 10 (1976), affd. sub nom.
*Chemical Workers Local 483 v. NLRB*, 561 F.2d 253 (D.C. Cir. 1977);
The majority also states that prior to TLI and Laerco “the Board gave weight to a putative joint employer’s ‘indirect’ exercise of control over workers’ terms and conditions of employment,” citing Floyd Epperson, 202 NLRB 23, 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974). However, it is readily apparent that, while the Board noted anecdotal evidence of the employer’s indirect control over wages and discipline in that case, its joint-employer finding was primarily based on evidence of direct and immediate supervision of the employees involved. Accordingly, in Fidelity Maintenance & Construction Co., supra, 173 NLRB at 1037, the Board emphasized direct control, saying that “the determinative factor in an owner contractor situation is whether the owner exercises or has the right to exercise sufficient direct control over the labor relations policies of the contractor, or over the wages, hours and working conditions” (emphasis added). Likewise, in The John Breuner Co., supra, 248 NLRB at 989, the Board affirmed without comment the administrative law judge’s observation that in prior truck delivery cases where the Board found joint-employer status, “there have always been supporting findings that the retailer or distributor by its supervisors, directly supervised and controlled the employees of his trucking contractor in the performance of their work” (emphasis added). Thus, contrary to the majority, Epperson and like precedent support the proposition that findings of joint-employer status in cases prior to TLI and Laerco that mention evidence of indirect control nevertheless turn on sufficient proof of direct control.

The majority also contends that “[c]ontractual arrangements under which the user employer reimbursed the supplier for workers’ wages or imposed limits on wages were also viewed as tending to show joint-employer status,” citing Hamburg Industries, 193 NLRB 67 (1971). Hamburg concerned a typical cost-plus contract where the user employer reimbursed the supplier employer for wages and then paid an additional fee. The Board has cited this factor in cases where the Board found joint-employer status. However, the Board has also found that this factor did not establish joint-employer status. In any event, as explained in a subsequent case, the facts in Hamburg clearly demonstrated significant direct and immediate control of essential terms was exercised by the disputed employer. Specifically, “one employer, a manpower supplier, furnished another employer’s entire work force, including first-level supervisors. That work force was subject to virtually complete control of the second employer. The second employer determined which tasks were to be performed and how they were to be performed. He also, in practice, set the wage rates.” Again, before TLI and Laerco, there was no established rule that cost-plus contracts should be given determinative weight in finding joint-employer status.

In sum, the precedent cited by the majority falls well short of showing that prior to TLI and Laerco there was a consistently applied “traditional joint-employer test” remotely equivalent to the one they announce today. The indirect control factors cited by the majority existed in many cases where the Board refused to find joint-employer status and thus were not frequently, much less routinely, determinative of joint-employer status. Evidence of direct and immediate control was far more often referenced as determinative in finding such status. The interpretive key to different outcomes in this precedent is not due to a markedly different legal test; it is simply that

40 See Hychem, supra at 276 (referring to controls under a cost-plus contract as a “right to police reimbursable expenses under its cost-plus contract and do not warrant the conclusion that [user] has hereby forged an employment relationship”); Westinghouse, supra at 915 (cost-plus contract and no joint-employer finding); Space Services, supra at 1232 (cost-plus and no joint-employer finding); Cabot, supra at 1389 (“[C]ost plus contracts merely insured that Cabot obtain a satisfactory work product at cost and protected it against unnecessary charges being incurred.”); International House, supra at 914 (cost-plus “purely arms length dealing”); John Breuner, supra at 988 (cost-plus insufficient to find joint employer).

41 Id. (“United establishes the work schedule of the drivers, has the authority to make changes in the drivers’ assignments, selects routes for the drivers, and generally supervises the drivers in the course of their employment.”).
“minor differences in the underlying facts might justify different findings on the joint-employer issue.” North American Soccer League v. NLRB (NASL), 613 F.2d 1379, 1382 (5th Cir. 1980), cert. denied 449 U.S. 899 (1980); see also Carrier Corp. v. NLRB, 768 F.2d 778, 781 fn. 1 (6th Cir. 1985) (distinguishing TLI and Laerco by noting that a slight difference between two cases can tilt one toward a joint-employer finding, and the court was not deciding those other cases).

B. There Is No Judicial Precedent Adverse to the Board’s Current Joint-Employer Standard or Supportive of the Majority’s New Standard

It is reasonable to assume that if TLI, Laerco, and progeny departed abruptly from Board precedent without explanation, reviewing courts would by now have had the opportunity to criticize those decisions and would certainly have done so. After all, the Supreme Court and various appellate courts have warned the Board against such unexplained changes. See Allentown Mack Sales & Services v. NLRB, 522 U.S. 359, 375 (1998) (“The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application . . . and . . . effective review of the law by the courts.”); NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 799 (1990) (Blackmun, J., dissenting) (finding the Board had departed from prior standard “without explanation”); Bath Marine Draftsmen’s Assn. v. NLRB, 475 F.3d 14, 25 (1st Cir. 2007) (stating that when “the Board has not been consistent in its choice of standard, as explained above . . . the Board is not entitled to the normal deference we owe it”); LeMoyne-Owen College v. NLRB, 357 F.3d 55, 61 (D.C. Cir. 2004) (“Requiring an adequate explanation of apparent departures from precedent thus not only serves the purpose of ensuring like treatment under like circumstances, but also facilitates judicial review of agency action in a manner that protects the agency’s predominant role in applying the authority delegated to it by Congress.”). As LeMoyne noted, courts are duty-bound to strike down Board decisions that lack explanation or are otherwise arbitrary and capricious in their exercise of statutory authority.

In this context, the Board’s direct and immediate control standard has held up well over the last 30 years. While some courts may vary from the Board as to the particulars of a joint-employer test, others have expressly approved or applied the Board’s test, and none have directly criticized that test or reversed a Board decision based on application of that test.

Significantly, two of the four Board decisions expressly overruled by the majority today were reviewed by a court of appeals, and both decisions were upheld. The decision in TLI was reviewed by a panel of the Third Circuit, the original Browning-Ferris circuit, and summarily affirmed in an unpublished decision. Likewise, the decision in AM Property was reviewed and affirmed by a panel of the Second Circuit. In accord with its own precedents, which date to before the issuance of TLI and Laerco, the court expressly endorsed the Board’s standard requiring that “an essential element of any joint-employer determination is ‘sufficient evidence of immediate control over the employees.’” The court specifically supported the Board’s finding that “limited and routine” supervision is insufficient to establish joint-employer status.

The cases the Board relied on broadly support the proposition that ‘limited and routine’ supervision, G. Wes Ltd., 309 NLRB at 226, consisting of ‘directions of where to do a job rather than how to do the job and the manner in which to perform the work,’ Island Creek Coal, 279 NLRB at 864, is typically insufficient to create a joint employer relationship. See also Local 254, Serv. Emps. Intern. Union, AFL-CIO, 324 N.L.R.B. 743, 746–49 (1997) (no joint employer relationship where employer regularly directed maintenance employees to perform specific tasks at particular times but did not instruct employees how to perform their work); S. Cal. Gas Co., 302 N.L.R.B. 456, 461–62 (1991) (employer’s direction of porters and janitors insufficient to establish joint employer relationship where employer did not, inter alia, affect wages or benefits, or hire or fire employees).

Id. at 443.

Thus, the Second Circuit has explicitly endorsed the Board’s joint-employer standard. Further, as noted in an earlier case from the same circuit, other courts of appeals have varying standards for determining joint-employer status, but “[w]e see no need to select among these approaches or to devise an alternative test, because we find that an essential element under any determination of joint-employer status in a sub-contracting case is distinctly lacking in the instant case—some evidence of immediate supervision or control of the employees.”

It is most noteworthy that, in addition to the absence of any circuit court precedent in conflict with the Board’s current legal test of joint-employer status, there also is no circuit court precedent in support of the new two-step

51 Teamsters Local 326 v. NLRB, 772 F.2d 894 (3d Cir. 1985).
52 Service Employees, Local 32BJ v. NLRB, 647 F.3d 435 (2d Cir. 2011), aff’d in relevant part, enf. in part and denying in part on other grounds 350 NLRB 998.
53 Id. at 443 (quoting Clinton’s Ditch Co-op Co. v. NLRB, 778 F.2d 132, 138 (2d Cir.1985)).
54 International House v. NLRB, 676 F.2d 906, 913 (2d Cir. 1982) (emphasis added).
legal test articulated by our colleagues. That test, without any requirement that an alleged joint employer’s control over those terms be significant or substantial, much less direct and immediate, most closely resembles a single Board decision’s bizarre distortion of dictum from an Eighth Circuit opinion in \textit{NLRB v. New Madrid Mfg. Co.}, 215 F.2d 908 (1954).

In \textit{New Madrid}, the court denied enforcement of a Board order to the extent that it relied on finding that a company selling its business to an individual remained a coemployer with him. Finding no substantial evidence to support the Board’s contrary finding, the court reasoned, inter alia, that provisions in the contract of sale did not demonstrate a retention of control over the successor’s operations. In particular, the court stated that the contract did not “either expressly or by implication, purport to give New Madrid any voice whatsoever in the selecting or discharging of Jones’ employees, in the fixing of wages for such employees, or in any other element of labor relations, conditions and policies in the plant purchaser’s business.” Id. at 913.

Thereafter, in \textit{Haskins Ready-Mix Concrete}, 161 NLRB 1492 (1966), a Board panel affirmed an administrative law judge’s finding that a cement company and a company leasing trucks and drivers to it were joint employers. In doing so, the Board focused on the lessee’s controls in the parties’ lease and operating agreements. In a footnote citation to \textit{New Madrid}, the Board converted the aforementioned dictum from negative to positive, incorrectly claiming that the court’s test of co-ownership was whether a contract gave the disputed employer “any voice whatsoever” over terms and conditions of employment.\footnote{Id. at 1493 fn. 2.} This was not then and is not now the joint-employer test of the Eighth Circuit\footnote{The Eighth Circuit uses a four-factor test similar to a single-employer analysis. E.g., \textit{Industrial Personnel Corp. v. NLRB}, 657 F.2d 226, 229 (8th Cir. 1981).} or any other court of appeals. It was not then the Board’s joint-employer test, and has not thereafter been the test. Until now, that is.

Of course, the Board is free to go its own way and determine its own standards, but only within the statutory framework and with adequate explanation of the reasons for departing from long-established precedent. The majority claims that 30 years ago the Board departed without explanation from prior precedent by drastically restricting its test in a way that denies many workers their Section 7 rights. However, the absence of any judicial criticism of the legal test consistently applied since then undermines this claim. It is simply impossible that all the courts of appeals would have missed this train wreck.

In any event, it remains the majority’s burden to rationalize its new test.

V. THE MAJORITY’S NEW JOINT-EMPLOYER TEST IS IMPERMISSIBLY VAGUE AND OVERBROAD AND WILL HAVE SUBSTANTIAL ADVERSE CONSEQUENCES

A. The New Test Is Fatally Ambiguous, Providing No Guidance as to When and How Parties May Contract for the Performance of Work Without Being Viewed as Joint Employers

Multifactor tests, like the common-law agency standard that we must apply here, are vulnerable to an analysis that can be impermissibly unpredictable and results-oriented. As then-Judge Roberts remarked about the standard for determining whether college faculty are managerial employees under the Act:

> The need for an explanation is particularly acute when an agency is applying a multi-factor test through case-by-case adjudication. The open-ended rough-and-tumble of factors on which \textit{Yeshiva} launched the Board and higher education can lead to predictability and intelligibility only to the extent the Board explains, in applying the test to varied fact situations, which factors are significant and which less so, and why. . . . In the absence of an explanation, the totality of the circumstances can become simply a cloak for agency whim—or worse.\footnote{\textit{LeMoyne-Owen College v. NLRB}, supra, 357 F.3d at 61 (citations and quotations omitted).}

Our colleagues’ new multifactor test, in which any degree of indirect or reserved control over a single term is probative and may suffice to establish joint-employer status, is woefully lacking the required explanation of “which factors are significant and which less so, and why.” They provide no meaningful guidelines as to the test’s future application. Further, they acknowledge no legitimate grounds for parties in a business relationship to insulate themselves from joint-employer status under the Act.

The new test stands in marked contrast to the current test’s focus on evidence of direct-and-immediate control of essential terms of employment, thereby establishing a discernible and rational line between what does and does not constitute a joint-employer relationship under the Act. The current longstanding test thereby recognizes that “[s]ignificant limits . . . exist upon what actions by an employer count as control over the means and manner of performance. Most important, employer efforts to monitor, evaluate, and improve the results or ends of the worker’s performances do not make the worker an em-

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\footnote{Id. at 1493 fn. 2.}
\footnote{The Eighth Circuit uses a four-factor test similar to a single-employer analysis. E.g., \textit{Industrial Personnel Corp. v. NLRB}, 657 F.2d 226, 229 (8th Cir. 1981).}
ployee. Such global oversight, as opposed to control over the manner and means of performance (and especially the details of that performance), is fully compatible with the relationship between a company and an independent contractor. 58

By comparison, our colleagues reference as probative all evidence of indirect control for such factors as the place of work, defining the work and how quickly it will need to be done, prescribing the hours when work will need to be performed, setting minimum qualifications for the individuals that the contractor provides and reserving the right to reject an individual (even though the contractor may assign its employee to a different job), inspecting the contractor’s work, giving results-oriented feedback to the contractor that the contractor’s supervisors use in their directions to the contractor’s employees, agreeing to a price for the services that happens to be in the form of a cost-plus formula, and reserving the right to cancel the arrangement. Under the majority’s test, the homeowner hiring a plumbing company for bathroom renovations could well have all of that indirect control over a company employee! By adopting such an overbroad, all-encompassing and highly variable test, our colleagues extend the Act’s definition of “employer” well beyond its common-law meaning, and beyond its ordinary meaning as well. Cf. Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co., supra, 404 U.S. at 168 (1971) (admonishing the Board for extending “employee” in the Act beyond its ordinary meaning by attempting to include retired employees in its scope).

The expansive nature of the new test is demonstrated by the evidence relied upon by the majority to find joint-employer status in this case, which involves a “cost-plus” arrangement that is common in user-supplier contracts between separate employers. 59 The sum total of this evidence is (1) a few contract provisions that indirectly affect the otherwise unfettered right of Leadpoint (the supplier-employer) to hire its own employees; (2) reports made by BFI representatives to Leadpoint of two incidents—one where a Leadpoint employee was observed passing a “pint of whiskey” at the jobsite, and another where a Leadpoint employee “destroyed” a drop box—that understandably resulted in discipline; (3) one contractually-established pay rate ceiling restriction for Leadpoint employees (obviously stemming from the cost-plus nature of the contract); (4) BFI’s control of its own facility’s hours and production lines; (5) a record-keeping requirement for Leadpoint employee hours (again, obviously stemming from the cost-plus nature of the contract); (6) a sole preshift meeting to advise Leadpoint supervisors of what lines will be running and what tasks they are supposed to do on those lines; (7) monitoring of productivity; (8) establishment of one type of generally applicable production assignment scheme for Leadpoint; and (9) “on occasion,” addressing Leadpoint employees about productivity directly. That is all there is, and the Regional Director correctly decided under extant law that it was not enough to show BFI was the joint employer of Leadpoint employees. 60

The majority’s evidence amounts to a collection of general contract terms or business practices that are common to most contracting employers (discussed below), plus a few extremely limited BFI actions that had some routine impact on Leadpoint employees. It would be hard 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. Again, we suppose that our colleagues do not intend that every business relationship necessarily entails joint-employer status, but the facts relied upon here demonstrate the expansive, near-limitless nature of the majority’s new standard.


59 The Board and the courts have uniformly concluded that cost-plus arrangements do not automatically render the contracting client an “employer” of the vendor’s employees. Therefore, our colleagues concede (as they must) that a cost-plus “arrangement, on its own, is not necessarily sufficient to create a joint-employer relationship.” Indeed, the Board and the courts have uniformly concluded that nothing in cost-plus arrangements necessarily renders the contracting client an “employer” of the vendor’s employees. In Fibreboard, for example, the contracting client (Fibreboard) arranged for employees of the contractor (Fluor) “to do the same [maintenance] work under similar conditions of employment,” where Fibreboard was committed to pay the “costs of the operation plus a fixed fee.” 379 U.S. at 206–207. As noted previously (see fn. 6, supra), Fibreboard was clearly treated as a distinct “employer” (having no employment relationship with the subcontractor’s employees), even though the reasons underlying the subcontracting decision were almost exclusively based on employment-related considerations. Indeed, the Supreme Court noted that Fibreboard “was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments.” Id. at 213 (emphasis added).

The majority nevertheless attempts to distinguish the instant case because there was an “apparent requirement of BFI approval over employee pay increases.” In this respect, the majority potentially confers “employer” status on every client/user company that enters into a cost-plus arrangement, because few, if any, clients will give a blank check to supplier-employers regarding wages when the full cost will be charged to the client. This is but one illustration of the multitude of ways that our colleagues fail to appreciate the “complexities of industrial life,” which is one of the Board’s most important functions and responsibilities. NLRB v. Insurance Agents, 361 U.S. 477, 499 (1960). 60 Although we might differ from the Regional Director as to the weight assigned to certain evidence, we find no need to do so where we agree with his ultimate finding. We note that the majority does not argue that the Regional Director erred in making this finding.
There is a further fundamental problem with the new joint-employer test. The majority states that its goal is to reach a large number of employees that they feel have been left unprotected by Section 7 because they work on a contingent or temporary basis. According to the majority, the number of workers so employed has dramatically risen since TLI and Laerco were decided and will predictably continue to rise. Further, the majority asserts that “[t]he Board’s current focus on only direct and immediate control acknowledges the most proximate level of authority, which is frequently exercised by the supplier firm, but gives no consideration to the substantial control over workers’ terms and conditions of employment of the user.”

Thus, not only is the majority’s legal justification for a new joint-employer test impermissibly based on economic reality theory, as previously discussed, but its factual justification is flawed as well. The majority focuses on facts limited to a particular type of business model—the user/supplier relationship involving the use of contingent employees—but they rely on these facts to justify a change in the statutory definition of employer, or joint employer, for all forms of business relationships between two or more entities.

The number of contractual relationships now potentially encompassed within the majority’s new standard appears to be virtually unlimited:

- Insurance companies that require employers to take certain actions with employees in order to comply with policy requirements for safety, security, health, etc.;
- Franchisors (see below);
- Banks or other lenders whose financing terms may require certain performance measurements;
- Any company that negotiates specific quality or product requirements;
- Any company that grants access to its facilities for a contractor to perform services there, and then continuously regulates the contractor’s access to the property for the duration of the contract;
- Any company that is concerned about the quality of the contracted services;
- Consumers or small businesses who dictate times, manner, and some methods of performance of contractors.

Our point is not that the majority intends to make all players in the economy, no matter how small, necessary parties at the bargaining table (although as discussed below, they may well become targets of economic protest in support of bargaining or other union causes), but that the majority’s new standard foreshadows the extension of obligations under the Act to a substantial group of business entities without any reliable limitations. This kind of overbroad and ambiguous government regulation is necessarily arbitrary and capricious. “In the absence of an explanation, the ‘totality of the circumstances’ can become simply a cloak for agency whim—or worse.” LeMoyne-Owen College v. NLRB, supra, 357 F.3d at 61.

Our colleagues make this sweeping change in the law without any substantive discussion whatsoever of significant adverse consequences raised by BFI, Leadpoint, and amici. Indeed, they profess to limit themselves to the issue of joint bargaining obligations in the user-supplier context, with a disclaimer that their decision “does not modify any other legal doctrine or change the way that the Board’s joint-employer doctrine interacts with other rules or restrictions under the Act.” However, such a disclaimer cannot possibly be valid, because applying different tests in other circumstances would mark an unprecedented and unwarranted break from the unitary joint-employer test under our Act that has applied to all types of business relationships, each of which is affected by changing the basic joint-employer test. We therefore believe it is necessary to specifically address these consequences, and we do so below.

B. The New Test Will Cause Grave Instability in Bargaining Relationships, Contrary to One of the Board’s Primary Responsibilities Under the Act

Our colleagues greatly expand the joint-employer test without grappling with its practical implications for real-world collective-bargaining relationships. They purport to be following the command in Section 1 of the Act to “encourag[e] the practice and procedure of collective bargaining.” Congress did not mean, however, to blindly expand collective-bargaining obligations whether or not they are appropriate. The Act aims to “achiev[e] industrial peace by promoting stable collective-bargaining relationships.” Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 790 (1996) (emphasis added). Indeed, one of the Board’s primary responsibilities under the Act is to foster labor relations stability. Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355, 362–363 (1949) (“To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.”); NLRB v. Appleton Electric Co., 296 F.2d 202, 206 (7th Cir. 1961) (“A basic policy of the Act [is] to achieve stability of labor relations.”). And the Supreme Court has stressed the need to provide “certainty before-

61 The majority correctly states that “the annals of Board precedent contain no cases that implicate the consumer services purchased by unsuspecting homeowners or lenders.” We hope that continues to be the case, but there is no guarantee that what is past is prologue under their new and impermissibly expansive test.
hand” to employers and unions alike. Employers must have the ability to “reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice,” and a union similarly must be able to discern “the limits of its prerogatives, whether and when it could use its economic powers . . . , or whether, in doing so, it would trigger sanctions from the Board.” First National Maintenance Corp. v. NLRB, supra, 452 U.S. at 678–679, 684–686 (emphasis added).

Collective bargaining was intended by Congress to be a process that could conceivably produce agreements. One of the key analytical problems in widening the net of “who must bargain” is that, at some point, agreements predictably will not be achievable because different parties involuntarily thrown together as the “bargainers” under the majority’s new test will predictably have widely divergent interests. Today’s marked expansion of bargaining obligations to other business entities threatens to destabilize existing bargaining relationships and complicate new ones. Even if one takes an extremely simplistic user-supplier scenario, the new standard’s conferral of joint-employer status—making many clients an “employer” of contractor employees, while making contractors an “employer” jointly with the clients—will produce bargaining relationships and problems unlike any that have existed in the Board’s entire 80-year history, which clearly were never contemplated or intended by Congress.

Consider the following diagram, which depicts a single cleaning company named “CleanCo,” which has cleaning contracts with three clients. CleanCo employees work at each client’s facilities in circumstances similar to the instant case, and CleanCo periodically adds future clients.

![Diagram of CleanCo and Clients A, B, and C] (Assuming circumstances like those presented here, the majority would find that CleanCo and Client A are a “joint employer” at the Client A location; CleanCo and Client B are a “joint employer” at the Client B location; and CleanCo and Client C are a “joint employer” at the Client C location. Such a situation—involving a single vendor and only three clients, each with only one location—creates all of the following problems under the majority’s test:

1. **Union Organizing Directed at CleanCo.** If CleanCo employees are currently unrepresented and a union seeks to organize them, this gives rise to the following issues and problems:

   - **What Bargaining Unit(s)?** Although CleanCo directly controls all traditional indicia of employer status, the new majority test establishes that three different entities—Clients A, B, and C—have distinct “employer” relationships with discrete and potentially overlapping groups of different CleanCo employees. It is unclear whether a single bargaining unit consisting of all CleanCo employees could be considered appropriate, given the distinct role that the new majority test requires each client to play in bargaining.

   - **Who Does the Bargaining?** If the union files a representation petition with the Board, the Act requires the Board to afford “due notice” and to conduct an “appropriate hearing” for the “employer.” Sec. 9(c)(1). Currently, the Board has no means of identifying—which less providing “due notice” and affording the right of participation to—“employer” entities like Clients A, B, and C, even though they would inherit bargaining obligations if CleanCo employees select the union.

   - **CleanCo-Client Bargaining Disagreements.** The majority standard throws into disarray the manner in which “employers” such as CleanCo and Clients A, B, and C can formulate coherent proposals and provide meaningful responses to union demands, when they will undoubtedly disagree among themselves regarding many, if not most, matters that are the subject of negotiation. Here, the majority disregards the fact that CleanCo’s client contract will most often

   62 We discuss this aspect of the “authority problem” in more detail below.
have resulted from equally difficult negotiations with Clients A, B, and C. Therefore, the “joint” bargaining contemplated by the majority will involve significant disagreements between each of the employer entities (i.e., Clean Co and Clients A, B, and C) with no available process for resolving such disputes.63

- **CleanCo “Confidential” Information—Forced Disclosure to Clients.** The most contentious issue between CleanCo and Clients A, B, and C is likely to involve the amounts charged by CleanCo, which predictably could vary substantially between Clients A, B, and C, depending on their respective leverage, the need for CleanCo’s services, the duration of their respective client contracts (i.e., whether short-term or long-term), and other factors. If a union successfully organizes all CleanCo employees, the resulting bargaining—since the majority test requires participation by Clients A, B, and C—will almost certainly require the disclosure of sensitive CleanCo financial information to Clients A, B, and C, which is likely to enmesh the parties in an array of disagreements with one another, separate from the bargaining between the union and the “employer” entities.

- **We have already found, in many prior cases,** that this information is sensitive and is not necessary to employees’ exercise of rights under the Act. See, e.g., *Flex Frac Logistics*, 360 NLRB No. 120 (2014) (detailing disruption occurring when contractor, which “was particularly concerned to maintain the confidentiality of the rates it charges its clients,” had rates disclosed to clients by employee). The majority’s new standard basically guarantees such economic disruption for no legitimate purpose.

- **How Many Labor Contracts?** If a single union organizes all CleanCo employees, the above problems might be avoided if CleanCo engages in three separate sets of bargaining—each devoted to Client A, Client B, and Client C, respectively—resulting in three separate labor contracts. However, this would be inconsistent with the CleanCo bargaining unit if it encompassed all CleanCo employees, and CleanCo would violate the Act if it insisted on changing the scope of the bargaining unit, which under well-established Board law is a nonmandatory subject of bargaining.

- **What Contract Duration(s)?** If a union represented all CleanCo employees, and if the Board certified each client location as a separate bargaining unit, then there presumably would be separate negotiations—and separate resulting CBAs—covering the CleanCo employees assigned to Client A, Client B, and Client C, respectively. In this case, however, the duration of each CBA might vary, depending on each side’s bargaining leverage, and a further complication would arise where CBA termination dates differ from the termination dates set forth in the various CleanCo client contracts.

- **Do Client Contracts Control CBAs, or Do CBAs Control Client Contracts?** Regardless of whether the CleanCo CBA(s) have termination dates that coincide with the expiration of the CleanCo client contracts, the majority’s new test leaves unanswered whether CleanCo and Clients A, B, and C could renegotiate their client contracts, or whether the “joint” bargaining obligations—and the CBA(s)—would effectively trump any potential client contract renegotiations, even though this would be contrary to the Supreme Court’s indication that Congress, in adopting the NLRA, “had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed.” *First National Maintenance*, supra, 452 U.S. at 676. Likewise, similar to what the majority held in CNN (see discussion infra), the majority would impose its new joint-employer bargaining obligations on Clients A, B, and C, even where the client contracts explicitly identified CleanCo as the only “employer” and stated that CleanCo had sole and exclusive responsibility for collective bargaining.

- **New Clients (Possibly With Their Own Union Obligations).** If a union represented all CleanCo employees, and if (under the majority’s new test) all CleanCo clients were deemed joint employers with CleanCo, what happens when Clean Co obtains new clients that previously had cleaning work performed by in-house employees or a predecessor contractor, and those in-house or contractor employees were unre presented or represented by a different union? If, based on CleanCo’s existing union commitments, CleanCo refused to consider hiring or retaining the employees who formerly did the new client’s cleaning work, the refusal could constitute antiunion discrimination in violation of Sec. 8(a)(3). If CleanCo hired the new client’s former employees (or the former employees of a predecessor contractor), then CleanCo could run afoul of its existing union obligations. See *Whitewood Maintenance Co.*, 292 NLRB

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63 We also discuss this aspect of the “authority problem” in more detail below.
tion petition seeking to add the new employees to the bargaining unit without an election under the Board’s accretion doctrine, or jurisdictionally, with Client C remaining nonunion, this gives rise to different unions, rather than targeting CleanCo, engage in organizing directed at Client(s). If two different unions, rather than targeting CleanCo, engage in organizing directed at Client A and Client B, respectively, with Client C remaining nonunion, this gives rise to additional issues and problems:

- **All of the Above Issues/Problems.** If the CleanCo employees at Client A are organized by one union, and if the CleanCo employees at Client B are organized by a different union, then the majority test would make CleanCo and Client A the “joint employer” of the CleanCo/Client A employees, and CleanCo and Client B the “joint employer” of the CleanCo/Client B employees. In both cases, the “joint employer” status would give rise to all of the above problems and issues, in addition to those described below.

- **Employee Interchange and Multilocation Assignments.** If different unions represent the employees of CleanCo/Client A and CleanCo/Client B, and if CleanCo/Client C employees were nonunion, this would create substantial potential problems and potential conflicting liabilities regarding CleanCo employees assigned to work at all three client locations or transferred from one client’s facility to another. This is a common situation, arising, for example, where one CleanCo client simply was unhappy with the productivity or attitude of the assigned employee.

- ** Strikes and Picketing—“Neutral” Secondary Boycott Protection Eliminated.** Sections 8(b)(4) and 8(e) of the Act protect neutral parties from being subject to “secondary” picketing and other threats, coercion and restraint that have an object of forcing one employer to cease doing business with another. Therefore, if the CleanCo/Client A and CleanCo/Client B employees were involved in a labor dispute, under the Board’s traditional joint-employer standard Clients A and B (as non-employees) would be neutral parties protected from “secondary” union activity. Under the majority’s standard, however, Clients A and B would be employers right along with CleanCo and thus subject to picketing.

- **Renegotiating or Terminating Client Contracts.** It is well established that “an employer does not discriminate against employees within the meaning of Section 8(a)(3) by ceasing to do business with another employer because of the union or nonunion activity of the latter’s employees.” However, to the extent that CleanCo and Clients A, B, and C are joint employers, then any client’s termination of CleanCo’s

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64 Such a resolution might result, for example, from a unit clarification petition seeking to add the new employees to the bargaining unit without an election under the Board’s accretion doctrine, or jurisdictional dispute proceedings pursuant to Sec. 10(k) of the Act.

65 The potential problems caused by multilocation assignments or employee interchange between locations could arise, for example, from CBA provisions restricting such assignments or transfers, from union-security provisions in different CBAs requiring dues payments based on a person’s employment without regard to where they were employed, or from conflicting wage rates and benefits applicable at each location. Although these issues might depend on what particular CBA or other policies were in effect, they would obviously cause significant burdens and potential confusion for the employees and each entity considered a joint employer under the majority’s new standards.

66 Plumbers Local 447 (Malbaff Landscape Construction), 172 NLRB 128, 129 (1968). See also Computer Associates International, Inc., 324 NLRB 285, 286 (1997) (“[F]inding a violation of Section 8(a)(3) on the basis of an employer’s decision to substitute one independent contractor for another because of the union or nonunion status of the latter’s employees is inconsistent with both the language of Section 8(a)(3) . . . and with legislative policies underlying Section 8(b) of the Act aimed at protecting the autonomy of employers in their selection of independent contractors with whom to do business.”).
services based on potential union-related considerations would create a risk that the Board would find—as it did in CNN, supra—that the contract termination constituted antiunion discrimination in violation of Sec. 8(a)(3). CNN, supra, slip op. at 40–42 (Member Miscimarra, dissenting).

3. Existing CleanCo-Union and/or Existing Client-Union Relationships. Additional issues and problems result from the impact of the majority’s new joint-employer test on existing union relationships and CBAs:

• All of the Above Issues/Problems. It is clear, under the majority’s test, that existing collective-bargaining agreements and union relationships involving CleanCo, with no mention of Clients A or B, do not prevent Clients A and B from having joint-employer status with CleanCo, which would give rise to all of the issues and problems described above. Again, in CNN, discussed infra, the Board majority found that the client (CNN) was a joint employer, even though any bargaining between CNN and the unions representing employees of contractor TVS would have departed from applicable labor contracts, prior Board certifications, the services agreements between CNN and its vendor (TVS), and 20 years of bargaining history in which the employer-party was always TVS (or its predecessor contractors), and not CNN.

• Existing CleanCo CBA: Prospective Four-Party Bargaining. If CleanCo was party to an existing company-wide collective-bargaining agreement, in which CleanCo was identified as the only “employer,” the majority’s new test clearly imposes an obligation to engage in bargaining on all joint-employer entities—i.e., CleanCo and Clients A, B, and C—even though such bargaining would depart from explicit CBA language and the past practice of CleanCo and the union.

• “Mandatory” Arbitration, Yet Never Agreed To? If CleanCo had an existing company-wide CBA, the majority’s imposition of “employer” status on Clients A, B, and C would not necessarily bind them to the terms of the existing CleanCo CBA. This would mean that, even though a particular grievance may pertain to essential employment terms that, in the majority’s view, Clients A, B, and C have the right to “share or codetermine,” the CBA’s grievance arbitration procedure would not necessarily bind Clients A, B, and C, since they had never agreed to submit to the procedure.

• Benefit Fund Contributions and Liabilities—Who Pays? Many existing collective-bargaining agreements contain extensive provisions regarding benefit fund contributions and benefit liabilities. If such provisions were contained in the CleanCo CBA, then Clients A, B, and C—when participating in the new four-way bargaining described above—would predictably be confronted with demands to assume liability for such provisions. Although the majority test suggests that Clients A, B, and C “will be required to bargain only with respect to such terms and conditions which it possesses the authority to control,” it appears clear that they would face economic demands and potentially be subject to a strike based on a refusal to agree to such demands.

• Joint Bargaining Versus “Add-On” CBAs. If CleanCo employees assigned to Clients A, B, or C were organized for the first time by one or more unions, the majority clearly imposes a new mandatory bargaining obligation on all joint employer entities. Although an existing collective-bargaining agreement generally suspends a party’s obligation to bargain for the agreement’s term, the majority’s new test, as noted above, imposes an independent duty to bargain on every joint employer “with respect to such terms and conditions which it possesses the authority to control,” which may result in separate sets of negotiations and potential “add-on” CBAs that deviate from the existing union agreements.

The foregoing is only a selection of the complications that may arise. And the example is obviously simplistic because it relates only to one service company, which has only three clients—and in the real world, by comparison, (i) many businesses, large and small, rely on services provided by large numbers of separate vendors, and (ii) many service companies have dozens or hundreds of separate clients. Time will no doubt reveal more as employers and unions attempt to apply the limitless joint-employer standard to even more complicated settings than the above example. The only thing that is clear at present is that the new standard does not promote stable collective-bargaining relationships. There is no way that it could, and simple mathematics shows us why.

On its face, the majority’s broad test can find up to 18 “joint” employers per work force. How? The majority

finds that there are at least six essential terms and conditions of employment (wages, hours, hiring, firing, discipline, and direction of work). According to the majority, an “employer” is an entity that exercises—even on a limited and routine basis—any one of three forms of putative control (direct control, indirect control, or potential control) over any one of these terms. Six times 3 is 18, which leaves us with a model where there could be up to 18 employers for a single workforce. See Appendix A (“Why There Are At Least 18 Potential Employers”). In truth, the test can find more than 18 employers because the majority has not limited itself to the specified 6 supposedly essential terms, and the majority has not unqualifiedly represented that there can be only one controller per category of control, e.g., there could be two “indirect controllers,” for example. We do not know the exact limit to the multiplicity of putative employers arising from the majority’s new joint-employer test. But it is surely common sense that placing 18 different cooks involuntarily in a single kitchen will lead to a terrible meal. That is the recipe for dyspeptic collective bargaining that the majority has cooked up.

The majority states that “a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control.” This does not temper the impact of the new standard; it only makes matters worse. The majority assumes these bargaining issues are severable, as if the resolution of one issue is not dependent on the resolution of another. This is not how contract negotiations work. And underscoring the irrationality of the majority’s rule here, the Board has traditionally denounced this type of segmented issue-by-issue negotiating, when unilaterally undertaken by a party, as unlawful “fragmented bargaining.”

Moreover, how exactly are joint user and supplier employers to divvy up the bargaining responsibilities for a single term of employment that they will be deemed under the new standard to codetermine, one by direct control and the other by indirect control? How does one know who has authority at all over a term and condition of employment, under the majority’s vague formulation? What if two putative employer entities get into a dispute over whether one has authority over a certain term or condition of employment? What if the putative employers are competitors? Taking the diagram above, what if Client A and Client B are competitors and have no real economic interest in the other client coming to a good-faith agreement with CleanCo on how much it pays employees working for that other client? Does it make sense for the law to attempt to create such an interest? What if there are too many entities to come to an agreement? How does bargaining work in this circumstance? Further, this purported division of bargaining responsibility creates conflicts between alleged violations of Section 8(a)(5), which requires employers to bargain in good faith with a certified or recognized union, and Section 8(a)(2), which makes such bargaining unlawful if the union lacks majority support among the entity’s employees. If multiple entities arguably constitute a “joint employer,” and one entity is alleged to have unlawfully failed to bargain over particular terms of employment, the majority’s standard effectively places the burden of proof on the respondent-employer to establish that it did not control those particular employment terms. So questions exist as to (i) which entities are the “employer,” (ii) which entities must (or must not) engage in bargaining over particular employment terms, and even (iii) what party—the respondent(s) versus the General Counsel—bears the burden of proof regarding this assortment of issues.

68 See, e.g., E.I. Du Pont de Nemours & Co., 304 NLRB 792, 792 fn. 1 (1991) (“What we find unlawful in the Respondent’s conduct was its adamant insistence throughout the entire course of negotiations that its site service operator and technical assistant proposals were not part of the overall contract negotiations, and, therefore, had to be bargained about totally separately not only from each other but from all the other collective bargaining agreement proposals. We find this evinced fragmented bargaining in contravention of the Respondent’s duty to bargain in good faith.”); see also NLRB v. Patent Trader, 415 F.2d 190, 198 (2d Cir. 1969), modified on other grounds 426 F.2d 791 (2d Cir. 1970) (When a party “removes from the area of bargaining . . . [the] most fundamental terms and conditions of employment (wages, hours of work, overtime, severance pay, reporting pay, holidays, vacations, sick leave, welfare and pensions, etc.),” it has “reduced the flexibility of collective bargaining, [and] narrowed the range of possible compromises with the result of rigidly and unreasonably fragmenting the negotiations.”).

69 The conflict between Sec. 8(a)(5) and Sec. 8(a)(2) results from the Hobson’s Choice that confronts multiple entities that control different aspects of employment for one or more different employee groups. Potential joint-employer entities risk violating Sec. 8(a)(5) if they fail or refuse to bargain over certain matters because Sec. 8(a)(5) obligations apply generally to “wages, hours, and other terms and conditions of employment.” See Sec. 8(d) (defining the phrase “to bargain collectively,” which is required under Sec. 8(a)(5)). Conversely, potential joint-employer entities risk violating Sec. 8(a)(2), which makes it unlawful for an employer to bargain with a union that does not validly represent its employees, if the Board determines that the entities engaged in bargaining when, in fact, they were not an “employer” as to employment terms not within their control. In other words, not only does the majority’s standard promise to create confusion about who is an “employer,” but the majority’s patchwork allocation making different entities responsible for different issues creates confusion about which “employer” entity may or must bargain over what particular employment terms. As with other aspects of the majority’s new standard, definitive answers will be available only after years of Board and court litigation.

70 See, e.g., Hobbs & Oberg Mining Co., 297 NLRB 575, 586 (1990) (General Counsel’s burden to prove joint-employer status), enf’d. 940 F.2d 1538 (10th Cir. 1991), cert. denied 503 U.S. 959 (1992).
This scenario is made all the worse by the need for years of Board litigation before third parties will actually learn whether (i) they unlawfully failed to participate in bargaining between another employer and its union(s), or (ii) the third parties unlawfully injected themselves into such bargaining when their commercial relationship was insufficient to make them a joint employer. Nor is the Board permitted to engage in the economic analysis needed to sort out the plethora of arm’s-length company-to-company relationships affected by the majority’s new joint-employer test. The Board’s Division of Economic Research was abolished 75 years ago, and Section 4(a) of the Act—adopted by Congress in 1947—prohibits the Board from having any agency personnel engage in “economic analysis.” Additionally, we note that the Board lacks the authority to impose labor contract terms on parties, and nothing in the Act authorizes the Board to impose requirements on companies regarding how they must arrange or rearrange themselves.

The majority even acknowledges some turmoil will result from its decision, but largely dismisses it as being outweighed by the need to protect contingent workers’ Section 7 rights.

Certainly any doctrinal change in this area will modify the legal landscape for employers with respect to the National Labor Relations Act. However, given the centrality of collective bargaining under the Act, we must ensure that the prospect of collective bargaining is not foreclosed by business relationships that effectively deny employees’ right to bargain with employers that share control over essential terms and conditions of their employment.

Contrary to our colleagues’ assertion, we are not slavish defenders of the status quo. We would support revisiting any Board doctrine that systemically fails to protect Section 7 rights, but we would not do so without evidence of that failure. The majority cites no evidence, and none has been presented, showing that employees in contingent or any comparable employment situations have been unable to bargain with their undisputed employer. The majority uses the phrase “meaningful bargaining” numerous times, but the majority’s premise is that bargaining fails to be “meaningful” whenever the employer’s business relationships influence the matters under negotiation. Our colleagues on this front simply cite the large number of employees whose terms and conditions of employment might be affected in some way by a user employer and Board cases finding no duty to bargain with these user employers, and assert that rights have been denied. How do we know that employees have been unable to engage in “meaningful bargaining” with the supplier employer? Under 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.

It is difficult, if not impossible, to reconcile this reasoning with the Board’s rationale in Management Training, 317 NLRB 1355 (1995), addressing whether to assert discretionary jurisdiction over a private employer contracting for business with an exempt governmental entity. The Board there modified prior caselaw and held that it would no longer decline to assert jurisdiction in circumstances where the private employer lacked control of what had been deemed essential terms of employment. It reasoned that “[b]ecause of commercial relationships with other parties, an inability to pay due to financial constraints, and competitive considerations which circumscribe the ability of the employer to grant particular demands, the fact is that employers are frequently confronted with demands concerning matters which they cannot control as a practical matter or because they have made a contractual relationship with private parties or public entities.” Id. at 1359 (emphasis added). Quite obviously, under Management Training, the Board believes that employees and their exclusive bargaining representative can still engage in meaningful bargaining under the Act even with an employer who lacks control over a substantial number of essential terms of employment.

C. The New Test Will Dramatically Change Labor Law

Sales and Successorship Principles, and Will Discourage

Efforts to Rescue Failing Companies and

Preserve Employment

Expanding the definition of employer will also alter the landscape of successorship law under the Act. It is well established that successor employers, although

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71 Sec. 4(a) states in part: “Nothing in this Act shall be construed to authorize the Board to appoint individuals . . . for economic analysis.”


72 Sec. 8(d); H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).
they must recognize and bargain with the union representing the predecessor’s employees in certain circumstances, are not obligated to adopt the preexisting collective-bargaining agreement and have the right to unilaterally set different initial terms and conditions of employment. NLRA v. Burns International Security Services, Inc., 406 U.S. 272, 287–288, 294–295 (1972). This rule “carefully safeguards the rightful prerogative of owners independently to rearrange their businesses.” Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 40 (1987) (internal quotations omitted). But the policy concerns behind the rule are even deeper than that:

[H]olding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.


Under the majority’s expansive joint-employer standard, many user employers will now be considered joint employers of their supplier employers’ employees. Rebidding contracts has been a common feature of the user—and supplier—employer market. Going forward, it may be less common because deeming the user employer to be a joint employer will make terminating or rebidding the contract with the supplier employer much more difficult. The user employer will often have a duty to bargain the decision to lay off the employees or to subcontract those jobs to another supplier employer. See Fibreboard Corp. v. NLRB, supra, 379 U.S. at 215 (1964); CNN, supra, 361 NLRB No. 47, slip op at 17. Assuming the user employer does contract with a new supplier employer that would otherwise be a Burns successor able to set its own terms, the user employer, under the broadened standard, will likely be deemed a joint employer with the new supplier employer as well. That user employer’s ongoing bargaining obligation spanning the two supplier employers prevents the new supplier employer from setting different terms and conditions of employment than its predecessor had. See Whitewood Maintenance Co., supra, 292 NLRB at 1168–1169 (contractor that substituted one subcontractor for another jointly employed both the old and new subcontractors’ employees, so the new subcontractor could not set its own initial terms), enf’d. 928 F.2d 1426 (5th Cir. 1991).

Similarly, when a predecessor’s union-represented employees apply for employment with a successor, the successor cannot lawfully extend recognition unless and until it has hired a “substantial and representative complement” of employees and has received a demand for recognition from the predecessor union(s). In CNN, supra, two unions already represented employees of CNN’s contractor, TVS, as part of a 20-year history in which unionized contractors supplied technical employees to CNN, where only the contractor—and not CNN—was considered the “employer.” When CNN decided to terminate its use of contractor employees and directly hire its own technical workforce, CNN as a successor would have violated the Act if it engaged in bargaining with the TVS unions before it hired a “substantial and representative complement” of its own employees. However, the majority’s expansive joint-employer finding converted CNN into an “employer” before it hired any of its own technical employees. And, based on its expansive joint-employer finding, the Board majority determined that CNN—even before it decided to terminate the TVS relationship (and before it notified TVS)—was required to notify the TVS unions and engage in bargaining with them over whether CNN might terminate the TVS relationship and hire its own workforce.

Member Miscimarra stated, in his CNN dissent, that employer status “does not arise as the result of spontaneous combustion,” and he explained that the expansive joint-employer finding—applied to CNN before it hired its own workforce—was irreconcilable with the parties’ understandings and existing agreements:

75 Fall River Dyeing Corp. v. NLRB, 482 U.S. at 47–48.
Nothing in such a scenario would promote stable bargaining relationships. Rather, CNN’s actions—taken as an “employer” of the TVS technical personnel—would have directly contradicted the then-existing TVS-NABET collective-bargaining agreements (which identified TVS, not CNN, as the employer). CNN’s actions would have violated the CNN-TV5 Agreements, which stated... that TVS employees “are not employees of [CNN], and shall not be so treated at any time”. Finally, CNN’s actions would have exhibited a total disregard for the elaborate body of law regarding “successorship” and related business changes that has been the subject of nearly a dozen Supreme Court cases and innumerable Board decisions.76

The inability of user employers to freely terminate or rebid client contracts and of new supplier employers to set different initial terms will inhibit our economy and lead to labor strife. The new standard sends a message to user employers to never contract with unionized firms in the first place to avoid being trapped in “permanent” client contracts that cannot be terminated without bargaining to agreement or impasse. On the other side, the supplier-employer market will become uncompetitive as potential bidders for contracts where the incumbent supplier employer is unionized will be unable to compete with the incumbent employer on labor costs, as the new supplier employer will likely be beholden to the same terms. The Act is being applied in a manner Congress could not conceivably have intended.

D. The New Test Threatens Existing Franchising Arrangements in Contravention of Board Precedent and Trademark Law Requirements

Of the thousands of business entities with different contracting arrangements that may suddenly find themselves to be joint employers, franchisors stand out. According to amicus International Franchise Association (IFA), “in 2012 there were 750,000 franchise establishments in the United States employing 8.1 million workers, generating a direct economic output of $769 billion. These businesses account for approximately 3.4 percent of America’s gross domestic product.”77

For many years, the Board has generally not held franchisors to be joint employers with franchisees, regardless of the degree of indirect control retained.78 The majority does not mention, much less discuss, the potential impact of its new standard on franchising relations, but it will almost certainly be momentous and hugely disruptive. Indeed, absent any discussion, we are left to ponder whether the majority even agrees with the statement of the General Counsel in his amicus brief that “[the Board should continue to exempt franchisors from joint employer status to the extent that their indirect control over employee working conditions is related to their legitimate interest in protecting the quality of their product or brand. See, e.g., Love’s Barbeque Rest., 245 NLRB 78, 120 (1978) (no joint-employer finding where franchisees were required to prepare and cook food a certain way because, inter alia, the franchisor established the requirements to ‘keep the quality and good will of [the franchisor’s] name from being eroded’ (internal quotations and citations omitted), enforced in rel. part, 640 F.2d 1094 (9th Cir. 1981)).” (Amicus Br. at 15–16 fn. 32). Given the breadth of the majority’s test and rationale, we are concerned that the majority effectively finds that a franchisor even with this type of indirect control would be deemed a joint employer.

The majority’s new test appears to require specific analysis of whether the franchisor shares or codetermines “the manner and method of performing the work.” However, in many if not most instances, franchisor operational control has nothing to do with labor policy but rather compliance with federal statutory requirements to maintain trademark protections. “It is required that the owner of the mark should set up the standards or conditions which must be met before another is permitted to use the certification mark and the owner should permit the use of the mark by others only when they meet those standards or conditions.” State of Fla. v. Real Juices, Inc., 330 F. Supp. 428, 432 (M.D. Fla. 1971). As one court explained:

Without the requirement of control, the right of a trademark owner to license his mark separately from the business in connection with which it has been used would create the danger that products bearing the same trademark might be of diverse qualities. If the licensor is not compelled to take some reasonable steps to prevent misuses of his trademark in the hands of others the public will be deprived of its most effective protection against misleading uses of a trademark. The public is hardly in a position to uncover deceptive uses of a trademark before they occur and will be at best slow to detect them after they happen. Thus, unless the licen-

76 CNN, supra, slip op. at 38–39 (Member Miscimarra, dissenting) (footnote and emphasis omitted).
77 Br. of IFA at 1.
78 See, e.g., Speedee 7-Eleven, 170 NLRB 1332 (1968) (franchisor not a joint employer despite a policy manual that described “in meticulous detail virtually every action to be taken by the franchisee in the conduct of his store”), and Tilden, S. G., Inc., 172 NLRB 752 (1968) (franchisor not a joint employer, even though the franchise agreement dictated “many elements of the business relationship,” because the franchisor did not “exercise direct control over the labor relations of [the franchisee]”).
sor exercises supervision and control over the operations of its licensees the risk that the public will be unwittingly deceived will be increased and this is precisely what the Act is in part designed to prevent. Clearly the only effective way to protect the public where a trademark is used by licensees is to place on the licensor the affirmative duty of policing in a reasonable manner the activities of his licensees.

Stanfield v. Osborne Indus., Inc., 839 F. Supp. 1499, 1504 (D. Kan. 1993), aff’d. 52 F.3d 867 (10th Cir. 1995), abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc., 134 S.Ct. 1377 (2014). If a franchisor fails to maintain sufficient control over its marks, it is considered to have engaged in “naked franchising” and thereby abandoned the mark. 79 “The critical question in determining whether a licensing program is controlled sufficiently by the licensor to protect his mark is whether the licensees’ operations are policed adequately to guarantee the quality of the products sold under the mark.” General Motors Corp. v. Gibson Chem. & Oil Corp., 786 F.2d 105, 110 (2d Cir. 1986). The necessity of the franchisor to police the “manner and method” of the franchisee is paramount. “ ‘The purpose of the Lanham Act . . . is to ensure the integrity of registered trademarks, not to create a federal law of agency.’ The scope of a licensor’s duty of supervision of a licensee who has been granted use of a trademark must be commensurate with this limited goal.” Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1018 (9th Cir. 1985) (quoting Oberlin v. Martin American Corp., 596 F.2d 1322, 1327 (7th Cir. 1979)).

These cases demonstrate that one important aspect of the franchising relationship is the franchisee’s ability to reap the benefits of manifesting to the customer the appearance of a seamless enterprise through the use and maintenance of the franchisor’s trademark. Federal franchise law recognizes this benefit and requires that the franchisor maintain the mark by maintaining enough control over the franchisee to protect consumers. However, even while franchise law requires some degree of oversight and interaction, it was never the intent of Congress, by that interaction, to make a franchisee the agent of its franchisor for any purpose. Thus, the new joint-employer standard portends unintended consequences for a franchisor’s compliance with the requirements of another Federal act that are totally unrelated to labor relations. The Board has been repeatedly reminded that it “has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that [we] may wholly ignore other and equally important Congressional objectives.” Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942). Rather than providing a “careful accommodation of one statutory scheme to another,” the majority’s new standard places “excessive emphasis upon [the Board’s] immediate task.” Id.

E. The New Test Undermines the Parent-Subsidiary Relationship in Contravention of Board Precedent

In most areas of the law, it is widely recognized that parent and subsidiary corporations are indeed separate entities. The Board, which has developed whole legal doctrines devoted to detecting ostensibly separate companies that are in truth either created to evade obligations under the Act (the alter ego doctrine) or so integrated that they function as one (the single employer doctrine), has recognized this principle repeatedly. For example, in Dow Chemical, 326 NLRB 288 (1998), a bipartisan Board majority reaffirmed the longstanding rule under the single employer doctrine that typical parents and subsidiaries are not considered a sole “employer” for bargaining purposes. See also, e.g., Western Union, 224 NLRB 274 (1976), aff’d. sub nom. United Telegraph Workers v. NLRB, 571 F.2d 665 (D.C. Cir. 1978). In fact, the presumption of separateness for purposes of the Act is so strong that it extends also to unincorporated divisions that are operated independently from the company as a whole. See, e.g., Los Angeles Newspaper Guild, Local 69 (Hearst Corp.), 185 NLRB 303, 304 (1970), enf’d. 443 F.2d 1173 (9th Cir. 1971). And here, the Board’s honoring of corporate separateness occurs even as the Board simultaneously recognizes that a subsidiary is, of course, under the potential control of its parent. In other words, potential control is not enough to find that a parent is the same employer with its subsidiary for purposes of labor law:

Common ownership by itself indicates only potential control over the subsidiary by the parent entity; a single-employer relationship will be found only if one of the companies exercises actual or active control over the day-to-day operations or labor relations of the other.

79 Id.; see 15 U.S.C. § 1064(5)(A). See also Barcamerica International USA Trust v. Tyfilled Importors, Inc., 289 F.3d 589, 596 (9th Cir. 2002) (‘It is well-established that ‘[a] trademark owner may grant a license and remain protected provided quality control of the goods and services sold under the trademark by the licensee is maintained.’ Moore Bus. Forms, Inc. v. Ryu, 960 F.2d 486, 489 (5th Cir.1992). But ‘[u]ncontrolled or “naked” licensing may result in the trademark ceasing to function as a symbol of quality and controlled source.’ McCarthy on Trademarks and Unfair Competition § 18:48, at 18–79 (4th ed. 2001). Consequently, where the licensor fails to exercise adequate quality control over the licensee, ‘a court may find that the trademark owner has abandoned the trademark, in which case the owner would be estopped from asserting rights to the trademark.’ Moore, 960 F.2d at 489.”.)
Dow, 326 NLRB at 288 (emphasis in original). The majority now turns this principle on its head, and its wholesale adoption of the “potential control” standard would treat parents and subsidiaries as joint-employing entities for purposes of labor law. To our reckoning, no Board has ever taken this leap before. Indeed, the majority’s new test—which applies to admittedly separate and independent companies—applies a more onerous “control” standard than the one that the Board uses to find control where a company is actually integrated with another. This makes no sense.

Whatever the contradiction in the majority’s logic, the result is serious. The upshot is that the majority’s new test threatens to automatically sweep every parent or affiliate company in America into being the “employer” of a subsidiary’s employees, with the concomitant bargaining obligations, the loss of secondary-employer protection from union strikes discussed below, and all the other deleterious results mentioned above. If this is the outcome intended, upending decades of precedent of labor law and probably centuries of precedent in corporate law, we need a mandate from Congress before we purport to “find” it in our decisional case law. The majority here identifies no such mandate, and its test should be invalidated on this basis alone. If Congress had wanted us to turn the world of corporate identity upside down, it would have expressly told us so.

VI. THE NEW TEST CONFLICTS WITH CONGRESSIONAL INTENT TO INSULATE NEUTRAL EMPLOYERS FROM SECONDARY ECONOMIC COERCION

Not only does the majority’s new test impermissibly expand and confuse bargaining obligations under Sections 8(a)(5) and 8(d), it also does violence to other provisions of the Act that depend on the “employer” definition. Chief among them is the Section 8(b)(4)(ii)(B) prohibition on secondary economic protest activity such as strikes, boycotts, and picketing. That section “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,” but it does not prohibit striking or picketing the primary employer, i.e., the employer with whom the union has the dispute. Teamsters Local 560 (County Concrete), 360 NLRB No. 125, slip op. at 1 (2014). Congress intended to “preserv[e] the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and . . . [to] shield[] unoffending employers and others from pressures in controversies not their own.” NLRB v. Denver Building Trades Council, supra, 341 U.S. at 692.

An entity that is a joint employer with the employer subject to a labor dispute is equally subject to economic protest. See Teamsters Local 688 (Fair Mercantile), 211 NLRB 496, 496–497 (1974) (union’s picketing of a retailer did not violate Section 8(b)(4)(ii)(B) because it was the joint employer of a delivery contractor’s employees). To put this in a practical terms, before today’s decision at least, a union in a labor dispute with a supplier employer typically could not picket a user employer urging clients to cease doing business with that user employer—the object there being that the user employer would in turn cease doing business with the supplier employer. Likewise, a union with a labor dispute with one franchisee typically could not picket the franchisor and all of its other franchisees.

Today’s expansion of the joint-employer doctrine will sweep many more entities into primary-employer status as to labor disputes that are not directly their own. Unions will be able to freely picket or apply other coercive pressure to either or both of the joint employers as they choose. This limits the Act’s secondary-boycott prohibitions in a manner Congress did not intend. The targeted joint employer may not have direct control or even any control over the particular terms or conditions of employment that are the genesis of the labor dispute. Here, the economic consequences are far reaching. For example, a union could picket all of the user employer’s facilities even though the supplier employer only provides services at one. Further, assuming that a franchisor exercises similar indirect control over each franchisee, as the majority here may often find to be the case, a union could picket the franchisor and all franchisees even though its dispute only involves the employees of one.

It does not end there. As previously stated, numerous provisions relied upon by the majority are typically included in a residential renovation contract—i.e., the contractor’s employees cannot start work before a certain hour, they must finish work by a certain hour, they cannot use the bathrooms in the house, they have to park their vehicles in certain locations. Suppose that the annual revenues of the company with whom the homeowners contract meet the Board’s discretionary standard for asserting jurisdiction, not an unlikely possibility. Then

80 Of course, the user- and supplier-employer scenario often raises common situs issues as addressed in Sailors Union (Moore Dry Dock), 92 NLRB 547 (1950), and its progeny, but explicitly targeting the secondary employer is blatantly unlawful.
81 Going back to the CleanCo diagram above for an example, Client A likely has no control over what goes on upon the premises of Client C. More importantly, there is no underlying economic relationship between the two that could supply even a remotely rational foundation for the Act to allow economic weapons like strikes, picketing, etc. at Client A to convince it to use its obviously nonexistent “power” over Client C in a labor dispute involving CleanCo employees posted at Client C.
suppose that a union initiates an area standards wage protest against this contractor. One day, the homeowners open their front door to discover pickets patrolling the sidewalk in front of their house. In the new joint-employer world, they are a lawful target for this protest activity. Unions may not have any interest in bringing them into any bargaining process, but they may be more than eager to maximize economic injury to the primary employer by expanding the cease-doing-business pressure to as many clients as possible. Congress did not intend that every entity with some degree of economic relationship with the employer-disputant be thrown into its labor dispute. The Act is supposed to encourage labor peace, and to this end Congress enacted Sections 8(b)(4) and 8(e), demonstrating its intent to avoid limitless economic warfare based on dealings between employers and other persons.

The majority’s expansive definition of joint-employer status poses particular questions about its applicability to common situs work in the construction industry. As previously stated, the Supreme Court has expressly held that the fact “the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor’s work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other.” We presume that our colleagues do not intend to act in direct contravention of an express holding of the Supreme Court, but the breadth of their test and their emphasis on contractual control as probative of joint-employer status seems to pose a dilemma: either they must articulate an exception to a statutory definition that seems to require uniform treatment of employers in all industries, or they must place limits on their test they obviously wish to avoid.

VII. CONCLUSION

The Board is not Congress. It can only exercise the authority Congress has given it. In this instance, our colleagues have announced a new test of joint-employer status based on policy and economic interests that Congress has expressly prohibited the Board from considering. That alone is reason enough why the new test should not stand. Even more troubling from an institutional perspective, however, is the nature of the new test. The negative consequences flowing from the majority’s new test are substantial. It creates uncertainty where certainty is needed. It provides no real standard for determining in advance when entities in a business relationship will be viewed as independent and when they will be viewed as joint employers.

Moreover, as noted previously, the resulting confusion will cause damage both ways: (i) too many parties will discover after the fact, following years of litigation, they were unlawfully absent from negotiations in which they were legally required to be participants; and (ii) countless other parties will discover they unlawfully injected themselves into collective bargaining involving another entity and its union(s), based on a relationship that was insufficient, after all, to result in joint-employer status. The majority essentially says that the Board will look at every aspect of a relationship on a case-by-case basis, in litigation, and then decide the limited issue presented. We owe 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.”

Accordingly, we here defend a standard that serves labor law and collective bargaining well, a standard that is understandable and rooted in the real world. It recognizes joint-employer status in circumstances that make sense and would foster stable bargaining relationships. Indeed, in the Board’s history of applying this traditional joint-employer test, there have been many cases where two or more employers were found to exercise sufficient control over a common group of employees to warrant joint bargaining obligations and shared liability for unfair labor practices. Our quarrel with the majority stems not...
from any disagreement about the concept of joint employment status but rather from their imposition of a test that we firmly believe cannot be reconciled with the common-law agency standard the Board is compelled to apply, based on a statute the Board is duty-bound to enforce.

The Supreme Court has recently cautioned that a federal agency must explain itself when departing from interpretation of well-established rules that have governed business practices for long periods, even when the rules are of the agency’s own making. In Christopher v. SmithKline Beecham Corp., 132 S.Ct. 2156 (2012), the Court reviewed the Department of Labor’s (DOL) new interpretation that pharmaceutical sales representatives would no longer be considered outside salesmen exempt from the FLSA’s overtime provisions. The Court emphasized that its usual deference to such an agency action was not warranted because of the “potentially massive” economic implications of the new interpretation “for conduct that occurred well before that interpretation was announced,” and because deference “would seriously undermine the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’”

The Court also noted that DOL’s “longstanding practice” of exempting detailers went back to the beginning of the FLSA, and that there were currently 90,000 detailers working for pharmaceutical companies with the understanding that they were exempt outside sales reps.

Because DOL’s new interpretation would be so disruptive to the regulated industry, the Court could not simply defer to it:

It is one thing to expect regulated parties to conform their conduct to an agency’s interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

Accordingly, whatever the general merits of . . . deference, it is unwarranted here. We instead accord the Department’s interpretation a measure of deference proportional to the “thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.” United States v. Mead Corp., 533 U.S. 218, 228, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).

What the majority has done here is far broader in scope than DOL’s invalidated interpretive change. Instead of overturning one discrete longstanding agency interpretation that affects a statutory exemption for a single category of employer, the Board has substantially altered its interpretation of joint-employer status across the spectrum of private business relationships subject to our jurisdiction. Despite the majority opinion’s description, this case is not merely about whether the Board should overturn thirty years of precedent based on the TLI and Laerco decisions. That would be serious enough.

Our greater concern is the impact of the majority’s re-formulation on a much broader body of law, affecting multiple doctrines central to the Act that have been developed and refined through decades of work by bipartisan Boards, the courts, and Congress. As in Christopher, the majority here gives insufficient consideration to the “potentially massive” economic implications of its new joint-employer standard, and it requires innumerable parties to “divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding.” We believe that the Board should adhere to the “joint-employer” test that has existed for 30 years without a single note of judicial criticism. In our view, the Regional Director correctly applied that test in concluding that Leadpoint was the sole employer of employees in the petitioned-for unit.

Accordingly, we respectfully dissent.

Dated, Washington, D.C. August 27, 2015

Philip A. Miscimarra, Member

Harry I. Johnson, III, Member

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83 Id. at 2167.
84 Id. at 2168–2169.
85 Id. at 2168.
86 Id. (quoting Gates & Fox Co. v. Occupational Safety and Health Review Comm’n, 790 F.2d 154, 156 (D.C. Cir. 1986)).
87 Id. at 2167–2168.
88 Id. at 2168.
Appendix A: “Why There Are At Least 18 Potential Employers”

- (1) wages
- (2) hours
- (3) hiring
- (4) firing
- (5) discipline
- (6) direction of work, including the manner and method of performing the work

“Limited” and “routine” interaction is enough to show “control” by...

Entity that has “direct control”

Entity that has “potential control”

Entity that has “indirect control”
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

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

MOTION FOR SUMMARY JUDGMENT

Comes now the General Counsel for the National Labor Relations Board (“the Board”) and alleges as follows:

1. On July 22, 2013, Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters (“the Union”) filed a petition under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, in Case 32-RC-109684, seeking to represent certain employees of Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery (Respondent) and FPR-II, LLC d/b/a Leadpoint Business Services (Leadpoint) at Respondent’s facility located at 1601 Dixon Landing Road, Milpitas, CA 95035. [A copy of the petition has been marked as Exhibit 1 and attached hereto and made a part hereof, as are all of the documents marked as Exhibits and referred to hereinafter.]

2. On August 16, 2013, the Acting Regional Director for the Thirty-Second Region of the Board (Acting Regional Director) issued and served a Regional Director’s Decision and
Direction of Election in Case 32-RC-109684 in which he directed that an election be held in the following unit of employees:

All full time and regular part-time employees employed by FPR-II, LLC d/b/a Leadpoint Business Services at the facility located at 1601 Dixon Landing Road, Milpitas, California; excluding employees currently covered by collective-bargaining agreements, office clerical employees, guards and supervisors as defined in the Act. [Exhibit 2]

3. On August 30, 2013, the Union filed a Request for Review of the Regional Director’s Decision and Direction of Election in Case 32-RC-109684 with the Board [Exhibit 3]. In its Request for Review, the Union argued that the Acting Regional Director had incorrectly found that the employees in the unit found appropriate by the Acting Regional Director were solely employed by Leadpoint and that these employees were instead jointly employed by Leadpoint and Respondent. The Union also argued that the Board should reconsider its standard for assessing joint employer status.

4. On September 10, 2013, Respondent filed its Opposition to the Union’s Request for Review. [Exhibit 4].

5. On September 10, 2013, Leadpoint filed its Opposition to the Union’s Request for Review. [Exhibit 5].

6. On April 25, 2014, in Case 32-RC-109684, an election by secret ballot was conducted under the supervision of the Regional Director among the employees in the unit found appropriate by the Acting Regional Director. The ballots that were cast were impounded pending the Board’s ruling on the Union’s Request for Review.

7. On April 30, 2014, the Board issued an Order in Case 32-RC-109684 granting the Union’s Request for Review of the Acting Regional Director’s Decision and Direction of Election. [Exhibit 6].
8. On August 27, 2015, the Board issued its Decision on Review and Direction in Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery and FPR-II, LLC, d/b/a Leadpoint Business Services, 362 NLRB No. 186 (2015). [Exhibit 7]. In its Decision on Review and Direction, the Board found that Respondent and Leadpoint constituted joint employers of the employees at issue and directed that the ballots cast by these employees be opened and counted.

9. On September 4, 2015, the parties were furnished with a Tally of Ballots which showed that of approximately 205 eligible voters, 73 cast ballots for the Union and 17 cast ballots against the Union, with 29 challenged ballots. [Exhibit 8].

10. On September 14, 2015, the Regional Director issued a Certification of Representative in which he certified the Union as the exclusive collective-bargaining representative of the employees in the following unit of employees, herein called the Unit:

All full time and regular part-time employees employed by FPR-II, LLC d/b/a Leadpoint Business Services and Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery, joint employers, at the facility located at 1601 Dixon Landing Road, Milpitas, California; excluding employees currently covered by collective-bargaining agreements, office clerical employees, guards and supervisors as defined in the Act. [Exhibit 9]

11. At all times since April 25, 2014, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the employees in the Unit.

12. On September 9, 2015, the Union, by letter, requested that Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the employees in the Unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. [Exhibit 10].

13. On September 21, 2015, Respondent, by letter, declined to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit, and since that
time, Respondent has failed and refused to recognize and bargain with the Union as the exclusive
collective-bargaining representative of the employees in the Unit. [Exhibit 11].

14. On September 25, 2015, the Union filed an unfair labor practice charge in Case
32-CA-160759, alleging that Respondent has failed and refused to bargain in good faith with the
Union as the exclusive collective-bargaining representative of the employees in the Unit, as a
means of testing the Board’s decision in Browning-Ferris Industries of California, Inc. d/b/a BFI
Newby Island Recyclery and FPR-II, LLC, d/b/a Leadpoint Business Services, 362 NLRB No.
186 (2015) [Exhibit 12]. The charge was served on Respondent on or about September 25, 2015.
[Exhibit 13].

15. On October 5, 2015, the Union filed a first amended unfair labor practice charge
in Case 32-CA-160759 correcting the name of the Respondent from Republic Services to
Browning-Ferris Industries of California, Inc. [Exhibit 14]. The first amended charge was
served on Respondent on or about October 5, 2015. [Exhibit 15].

16. On October 21, 2015, the Union filed a second amended unfair labor practice
charge in Case 32-CA-160759. [Exhibit 16] The second amended charge was served on
Respondent on or about October 21, 2015. [Exhibit 17].

17. On October 23, 2015, the Regional Director issued and served a Complaint and
Notice of Hearing in Case 32-CA-160759 alleging that since on or about September 21, 2015,
and continuing to date, Respondent has failed and refused to recognize or bargain with the
Union, in violation of Section 8(a)(1) and (5) of the Act. [Exhibits 18 and 19]

18. On November 5, 2015, Respondent filed an Answer to the Complaint, admitting,
as alleged in the Complaint, that Respondent is refusing to bargain with the Union as the
exclusive collective-bargaining representative of the employees in the Unit. [Exhibit 20].

19. On November 6, 2015, Leadpoint filed an Answer to the Complaint. [Exhibit 21].
20. In support of this Motion for Summary Judgment, the undersigned notes the following regarding the Complaint and Respondent’s Answer herein:

(a) Respondent’s Answer effectively admits the following paragraphs of the Complaint:

1. Paragraph 1. Filing and receipt of the charge, the first amended charge, and the second amended charge.

2. Paragraph 2(a) and 2(b): Jurisdictional facts.

3. Paragraph 3: The conclusion that Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

4. Paragraph 4: The Union’s status as a statutory labor organization.

5. Paragraph 5: That the person to whom the Union’s demand to bargain was directed (Mike Caprio) and the person who sent the September 21, 2015 letter to the Union refusing to bargain (Catharine D. Ellingsen) were each agents of Respondent within the meaning of Section 2(13) of the Act.

6. Paragraph 6(b): That a majority of the employees in the Unit who voted in the September 4, 2015 election in Case 32-RC-109684 selected the Union to be their exclusive collective-bargaining representative and that the Union was thereafter certified as the exclusive collective-bargaining representative of the employees in the Unit.

7. Paragraph 7: That on September 9, 2015 the Union by letter requested that Respondent recognize and bargain with it.

8. Paragraph 8: That Respondent, by and since its letter dated September 21, 2015, has declined to recognize or bargain with the Union as the exclusive collective-bargaining representative of the employees in the Unit.

(b) Respondent’s Answer denies the following paragraphs of the Complaint:
Paragraph 3: That Respondent is an employer of the employees in the Unit.

Paragraph 5: That the person to whom the Union’s demand to bargain was directed (Mike Caprio) was a supervisor of the employees in the Unit within the meaning of Section 2(11) of the Act.

Paragraph 5: That the person who sent the September 21, 2015 letter to the Union refusing to bargain (Catharine D. Ellingsen) was a supervisor of Respondent within the meaning of Section 2(11) of the Act.

Paragraph 6(a): The appropriateness of the Unit.

Paragraph 6(c): That the Union at all times since April 25, 2014 based on Section 9(a) of the Act has been the exclusive collective-bargaining representative of the employees in the Unit.

The legal conclusion that Respondent has engaged in, and is engaging in, conduct violative of Section 8(a)(1) and 8(a)(5) of the Act.

Respondent’s Answer does not raise any bona fide issues of fact and, in essence, denies only the legal conclusions to be drawn from the factual allegations pleaded in the Complaint and admitted in Respondent’s Answer thereto. Concerning the Complaint, it is noted that each factual allegation therein is either directly admitted in Respondent’s Answer or is indirectly but indisputably established by the attached Exhibits, as to which no doubt as to authenticity has been raised. Thus, Respondent concedes in its Answer that it has refused, and is refusing, to recognize and bargain with the Union, and Respondent’s correspondence with the Union [Exhibit 11] makes it clear that Respondent is merely challenging the Regional Director’s action certifying the Union as the exclusive collective-bargaining representative of the employees in the Unit pursuant to the Board’s previous decision [Exhibit 7] finding Respondent
to be a joint employer of the employees in the Unit, which issues are not properly litigable in this unfair labor practice proceeding. *Terrace Gardens Plaza, Inc.*, 315 NLRB 749 (1994).

Where, as here, there are no factual issues warranting a hearing, it has long been the practice of the Board to grant Summary Judgment. *Henderson Trumbull Supply Corporation*, 205 NLRB 245 (1973); *Richmond, Division of Pak-Well*, 206 NLRB 260 (1973); *Tri-City Linen Supply*, 226 NLRB 669 (1976). In this regard, issues that have been or could have been raised at various stages of a representation proceeding may not be relitigated in a subsequent and related unfair labor practice case. See, e.g., *Terrace Gardens Plaza, Inc.*, *supra*; *Keydata Systems, Inc.*, 313 NLRB 636 (1994); *Seder Foods Corporation*, 286 NLRB 215 (1987); *Tri-City Linen Supply, supra*; *Ken Lee, Inc.*, 137 NLRB 1642 (1962); *O.K. Van & Storage, Inc.*, 127 NLRB 1537 (1960). In connection therewith, administrative notice is taken of official records in the underlying representation and unfair labor practice cases [*Frontier Hotel*, 265 NLRB 343 (1982); *LTV Electrosystems, Inc.*, 166 NLRB 938, enf’d. 338 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151, enf’d. 415 F.2d 26 (5th Cir 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (W.D. Va. 1967); *Follett Corp.*, 164 NLRB 378, enf’d. 397 F.2d 91 (7th Cir. 1968); Section 9(d) of the Act], and of correspondence between the parties in interest indicating that a bargaining demand has been made and refused (*Richmond, Division of Pak-Well, supra*).

In this case, it is clear that Respondent fully raised its objections to the validity of the April 25, 2014 election held in Case 32-RC-109684 at various stages during the proceedings in that case. These issues were considered and decided by the Board, and thus may not be relitigated in a subsequent unfair labor practice hearing. Respondent has not presented any newly discovered or previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the underlying representation proceeding. In addition, since all of Respondent’s affirmative defenses involve
matters that have already been resolved in the underlying representation case, they are not proper defenses to the unfair labor practice allegations involved herein. Accordingly, summary judgment is appropriate.

**WHEREFORE**, in view of the matters set forth above, and upon consideration of the documents attached hereto and incorporated in this Motion, and as Respondent’s Answer raises no issues of fact or law requiring a hearing in this proceeding, the undersigned prays that the Board find and conclude that Respondent has violated Sections 8(a)(1) and (5) of the Act and that it issue a Decision and Order in conformity with the allegations of the Complaint. To ensure that the employees are accorded the services of their selected bargaining representative for the period provided by law, the undersigned requests that the initial period of the certification be construed as beginning on the date Respondent begins to bargain in good faith with the Union, as provided in *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

DATED AT Oakland, California this 13th day of November 2015.

D. Criss Parker  
Counsel for the General Counsel  
National Labor Relations Board  
Region 32  
Oakland Federal Building  
1301 Clay Street, Suite 300N  
Oakland, CA 94612-5224
Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery and FPR-II, LLC d/b/a Leadpoint Business Services and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters. Case 32–CA–160759

January 12, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge and amended charges filed by Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters (the Union), the General Counsel issued the complaint on October 23, 2015, alleging that Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery (BFI) and FPR-II, LLC d/b/a Leadpoint Business Services (Leadpoint), a joint employer (collectively the Respondent), have violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to recognize and bargain following the Union’s certification in Case 32–RC–109684.1

(Official notice is taken of the record in the representation proceeding as defined in the Board’s Rules and Regulations, Secs. 102.68 and 102.69(d). Frontier Hotel, 265 NLRB 343 (1982).) BFI and Leadpoint each filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On November 13, 2015, the General Counsel filed a Motion for Summary Judgment. On November 16, 2015, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. BFI filed a response.

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

Ruling on Motion for Summary Judgment

BFI admits its refusal to bargain, but contests the validity of the certification of representation on the basis of its contention, raised and rejected in the representation proceeding, that it is not an “employer” under the Act of the unit employees. Thus, in its answer, BFI asserts that it has no obligation to bargain with the Union.

Leadpoint denies that the Respondent refused to bargain, asserting a lack of knowledge or information. As affirmative defenses, Leadpoint asserts that the complaint does not state facts sufficient to constitute an unfair labor practice in violation of the Act, and that the complaint does not state a claim upon which relief can be granted. In addition, Leadpoint asserts that relief cannot be granted based on the doctrines of laches, waiver, and/or unclean hands;2 that the requested remedy is inappropriate as a matter of law; that the complaint is constitutionally vague and violates the Act and the Board’s Rules and Regulations by providing insufficient facts to show that the Board fully investigated the charges before issuing the complaint; and that the complaint is improperly pled, because it does not provide Leadpoint enough information to answer the allegations.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.3

On the entire record, the Board makes the following

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1 362 NLRB No. 186 (2015).

2 The Respondent has not offered any explanation or evidence to support these bare assertions. Thus, we find that these affirmative defenses are insufficient to warrant denial of the General Counsel’s Motion for Summary Judgment in this proceeding. See, e.g., George Washington University, 346 NLRB 153 fn. 2 (2005), enf’d 2006 WL 4539237 (D.C. Cir. 2006); Circus Circus Hotel, 316 NLRB 1235 fn. 1 (1995). In addition, the Board and the courts have long held that the defense of laches does not lie against the Board as an agency of the United States Government. Energy Mississippi, Inc., 361 NLRB No. 89, slip op. at 2 fn. 5 (2014), aff’d in relevant part --- F.3d --- (5th Cir. Dec. 7, 2015), citing NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258 (1969); see NLRB v. Quinn Restaurant Corp., 14 F.3d 811, 817 (2d Cir. 1994).

3 Member Miscimarra dissented from the Board’s Decision on Review and Direction in the underlying representation proceeding reported at 362 NLRB No. 186. He would have adhered to the joint employer test that had existed for 30 years without judicial criticism prior to the issuance of that case. While Member Miscimarra remains of that view, he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice case. See Pittsburgh Plate Glass Co. v. NLRB, supra. In light of this, Member Miscimarra agrees with the decision to grant the motion for summary judgment.
FINDINGS OF FACT

I. JURISDICTION

At all material times, BFI, a corporation with an office and place of business in Milpitas, California, has been engaged in the business of providing waste removal. During the 12-month period ending September 30, 2015, BFI, in conducting its operations described above, purchased and received at its Milpitas, California facility goods and services valued in excess of $50,000 directly from points outside the State of California.

We find that BFI is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following named individuals held the positions set forth opposite their respective names and have been agents of BFI within the meaning of Section 2(13) of the Act:

Mike Caprio  President
Catharine D. Ellingsen  Senior Vice President, Human Resources

A. The Certification

Following the representation election held on April 25, 2014, the Union was certified on September 14, 2015, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time employees employed by FRP-II, LLC d/b/a Leadpoint Business Services and Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery, joint employers, at the facility located at 1601 Dixon Landing Road, Milpitas, California, excluding employees currently covered by collective-bargaining agreements, office clerical employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated September 9, 2015, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees. By letter dated September 21, 2015, the Respondent refused to do so.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(a)(5) and (1) of the Act.

The Respondent’s unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has failed and refused to bargain with the Union, we shall order it to bargain on request with the Union and, if an agreement is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. Mar-Jac Poultry Co., 136 NLRB 785 (1962); accord Burnett Construction Co., 149 NLRB 1419, 1421 (1964), enf’d. 350 F.2d 57 (10th Cir. 1965); Lamar Hotel, 140 NLRB 226, 229 (1962), enf’d. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery (BFI) and FRP-II, LLC d/b/a Leadpoint Business Services (Leadpoint), a joint employer, Milpitas, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from
   (a) Failing and refusing to recognize and bargain in good faith with Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters as the exclusive collective-bargaining representative of the employees in the bargaining unit.
   (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.
   (a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

      All full-time and regular part-time employees employed by FRP-II, LLC d/b/a Leadpoint Business Services and Browning-Ferris Industries of California, Inc.
d/b/a Newby Island Recyclery, joint employers, at the facility located at 1601 Dixon Landing Road, Milpitas, California, excluding employees currently covered by collective-bargaining agreements, office clerical employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Milpitas, California, copies of the attached notice marked “Appendix.” 4 Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 21, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., January 12, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(Seal) National Labor Relations Board

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a written agreement:

All full-time and regular part-time employees employed by us at our facility located at 1601 Dixon Landing Road, Milpitas, California, excluding employees currently covered by collective-bargaining agreements, office clerical employees, guards and supervisors as defined in the Act.

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC., D/B/A BFI NEWBY ISLAND RECYCLERY AND FPR-II, LLC, D/B/A LEADPOINT BUSINESS SERVICES

4 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”
The Board’s decision can be found at www.nlrb.gov/case/32-CA-160759 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC.
D/B/A BFI NEWBY ISLAND RECYCLING

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

TEAMSTERS LOCAL 350

Intervenor

_______________________

ON PETITION FOR REVIEW AND CROSS-APPLICATIONS FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

_______________________

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

_______________________

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Deputy Associate General Counsel

National Labor Relations Board
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 16-1028, 16-1063, 16-1064

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC.
D/B/A BFI NEWBY ISLAND RECYCLING

Petitioner/Cross-Respondent
v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

TEAMSTERS LOCAL 350

Intervenor

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

A. Parties and Amici

Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery (“Browning-Ferris”) is the petitioner before the Court and was respondent before the Board. The Board is respondent before the Court; its General Counsel was a party before the Board. Sanitary Truck Drivers and
Helpers Local 350, International Brotherhood of Teamsters is an intervenor before the Court, and was the charging party before the Board.


**B. Rulings Under Review**

This case is before the Court on Browning-Ferris’s petition to review a Board Order issued on January 12, 2016, and reported at 363 NLRB No. 95. The Board seeks enforcement of that Order. The Decision on Review in the underlying representation case issued on August 27, 2015, and is reported at 362 NLRB No. 186.

**C. Related Cases**

The case on review was not previously before this Court and or any other court. Board counsel is unaware of any related cases pending in this Court or any other court.

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

Dated at Washington, DC
this 15th day of November, 2016
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<td>Federal Rule of Appellate Procedure 15</td>
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* Authorities upon which we chiefly rely are marked with asterisks.
GLOSSARY

Joint Appendix JA
Opening Brief of Browning-Ferris Br.
Amicus Brief of Associated Builders and Contractors, et al. ACC Br.
Amicus Brief of Washington Legal Foundation WLF Br.
Amicus Brief of Microsoft Corp., et al. Microsoft Br.
Amicus Brief of National Association of Manufacturers, et al. NAM Br.
Amicus Brief of Chamber of Commerce, et al. Chamber Br.
STATEMENT OF JURISDICTION

This case is before the Court on the petition of Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery (“Browning-Ferris”) to review, and the cross-applications of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against Browning-Ferris and FPR-II, LLC d/b/a Leadpoint Business Services (“Leadpoint”) on January 12, 2016, and reported at 363 NLRB No. 95. The Board had jurisdiction over the proceeding below
pursuant to Section 10(a) of the National Labor Relations Act ("the Act"). 29 U.S.C. § 160(a). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), which provides that petitions for review of final Board orders may be filed in this Court and allows the Board, in that circumstance, to cross-apply for enforcement. The petition and applications were timely, as the Act provides no time limits for such filings.\(^1\) Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters ("Local 350") intervened on behalf of the Board.

Because the Board’s unfair-labor-practice order is based partly on findings made in the underlying representation proceeding, the record and the Board’s Decision on Review in that case (reported at 362 NLRB No. 186) are also before the Court pursuant to Section 9(d) of the Act. 29 U.S.C. § 159(d). Section 9(d) authorizes judicial review of the Board’s actions in a representation proceeding solely for the purpose of “enforcing, modifying, or setting aside in whole or in part the [unfair-labor-practice] order of the Board.” Id. The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the Court’s ruling in the unfair-labor-practice case. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

\(^1\) Leadpoint did not answer the Board’s application for enforcement and no attorney has filed a notice of appearance on Leadpoint’s behalf. Accordingly, the Board is entitled to a default judgment against Leadpoint. FRAP 15(b)(2).
STATEMENT OF THE ISSUES

I. Is the Board’s revised standard for finding a joint-employer relationship reasonable and consistent with the Act?

II. Does substantial evidence support the Board’s finding that Browning-Ferris and Leadpoint are joint employers, and therefore that Browning-Ferris violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Local 350 as the certified representative of the employees?

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions appear in the Addendum to this brief.

STATEMENT OF THE CASE

In this test-of-certification case, Browning-Ferris refused to bargain in order to seek review of the Board’s determination that it is a joint employer with Leadpoint. In the underlying representation case, the Board invited the parties and interested amici to file briefs on the question of whether to adopt a new standard for finding a joint-employer relationship. Thereafter, the Board decided to revisit and revise its joint-employer standard with the purpose of putting the standard “on a clearer and stronger analytical foundation, and, within the limits set out by the Act, to best serve the Federal policy of ‘encouraging the practice and procedure of collective bargaining.’” (JA 370 (quoting 29 U.S.C. § 151.)) In doing so, the Board reaffirmed the longstanding core of its standard that was recognized and
endorsed in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982), and restored aspects of the analysis that had thereafter been dropped without explanation. The Board noted that additional requirements for finding joint-employer status had been imposed in subsequent Board cases, and, as the standard had “narrowed, the diversity of workplace arrangements … ha[d] significantly expanded.” (JA 379.) Accordingly, in revising the standard, the Board exercised its duty to develop reasoned policies consistent with the Act, and its “responsibility to adapt the Act to changing patterns of industrial life,” *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

I.  THE BOARD’S FINDINGS OF FACT

A.  Browning-Ferris Contracts with Leadpoint To Provide Employees at the Newby Island Recyclery

Browning-Ferris provides waste and recycling services nationwide. It owns and operates the Newby Island Recyclery in Milpitas, California—the largest recycling facility in the world. The facility receives approximately 1,200 tons of material per day, which is sorted into separate commodities and sold to other businesses. Browning-Ferris solely employs 60 employees at Newby Island, who are represented by Local 350. (JA 370; JA 55-56, 163, 167.)

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2 Joint Appendix cites preceding a semicolon are to the Board’s findings; cites following a semicolon are to supporting evidence.
Since 2009, Browning-Ferris has contracted with Leadpoint to provide employees to work as sorters, screen cleaners, and housekeepers at Newby Island. At the time of the events in this case, Leadpoint provided approximately 240 such employees. (JA 371; JA 17-31, 58-59, 227-30.) Sorters work at four conveyer belts, or “streams,” each of which carries a separate category of material—residential mixed recyclables, commercial mixed recyclables, wet waste, and dry waste. Depending on which stream they work, sorters remove either recyclable or prohibited waste material as it passes. Leadpoint provides all but one sorter; the remaining sorter is employed solely by Browning-Ferris. Screen cleaners clear jams from the screens that are positioned at the end of each stream. Housekeepers clean the areas around the streams. Both Browning-Ferris and Leadpoint have on-site supervisors. (JA 370-71 & n.11; JA 47-49, 65, 166, 228.)

B. Browning-Ferris Reserves Rights Under the Temporary Labor Services Agreement Regarding Hiring, Safety and Training, Wages, and Discharge

The Temporary Labor Services Agreement (“the Agreement”) governing the relationship between Browning-Ferris and Leadpoint is terminable at will by either party, but otherwise continues in effect indefinitely. (JA 371; JA 17.) Under the Agreement, Leadpoint hires employees, but Browning-Ferris “shall have the right to request that the Personnel supplied by [Leadpoint] meet or exceed [Browning-Ferris’s] own standard selection procedures and tests.” (JA 371; JA 19.) For
example, the Agreement requires that all workers pass a urinalysis screen or other
drug test agreed to by Browning-Ferris. Leadpoint also must make “reasonable
efforts” to avoid providing any employees who previously worked for Browning-
Ferris and whom Browning-Ferris had deemed ineligible for rehire. (JA 371; JA
19.) In addition, Browning-Ferris “may reject any Personnel … for any or no
reason.” (JA 372; JA 21.)

The Agreement provides that employees must “comply with any and all of
[Browning-Ferris’s] applicable safety policies, procedures and training
requirements.” If a job requires specific knowledge or ability, Browning-Ferris
will provide training. In addition, Browning-Ferris “reserves the right to enforce”
its safety policy and to request what personal protective equipment employees
must wear. Accidents “must be reported immediately” to Browning-Ferris
management. (JA 374; JA 20-21.)

Browning-Ferris pays Leadpoint for the cost of each employee’s wages, plus
a percentage mark up. Leadpoint sets wage rates, but “shall not, without
[Browning-Ferris’s] prior approval, pay a pay rate in excess of the pay rate for full-
time employees of [Browning-Ferris] who perform similar tasks.” (JA 372; JA 17,
29.) The one sorter employed solely by Browning-Ferris receives five dollars per
hour more than the sorters provided by Leadpoint. (JA 371 n.11; JA 194-95.)

When Leadpoint gave employees a raise following an increase in the local
minimum wage, Browning-Ferris agreed to an addendum to the wage schedule increasing the fee it paid Leadpoint. (JA 372; JA 36-38, 102-03, 217-18.) Leadpoint maintains payroll and personnel records, and Browning-Ferris may examine those records at any time. (JA 374; JA 20, 24-25.) The Agreement provides that employees must obtain a Browning-Ferris representative’s signature on their timesheet attesting to its accuracy. (JA 372; JA 21.)

The Agreement invests Leadpoint with the authority to evaluate, discipline, and terminate employees. “Notwithstanding” that authority, Browning-Ferris “maintains the right to” and “may discontinue the use of any Personnel for any or no reason.” (JA 372; JA 20-21.)

C. Browning-Ferris Sets Shifts and Hours, Productivity Standards, the Pace of Work, and the Number of Employees; Both Browning-Ferris and Leadpoint Make Assignments

Browning-Ferris establishes working hours at Newby Island, and schedules the three daily shifts. It also decides which streams will run on a given day. (JA 372; JA 78, 81, 182-83.) During shifts, Browning-Ferris determines when the streams stop for the sorters to take their breaks. (JA 372; JA 82, 129.) It decides on a day-to-day basis whether the streams will continue running past the end of a shift, and thus whether employees will work overtime. (JA 372; JA 78-80.)

Each day, Browning-Ferris provides Leadpoint’s on-site supervisors with a headcount of how many sorters it needs for each stream. (JA 372-73; JA 78.)
Pursuant to that information, Leadpoint supervisors assign individual sorters to their posts. (JA 373; JA 247, 253.) After the initial assignment, Browning-Ferris sometimes directs Leadpoint to move sorters from one stream to another. (JA 373; JA 252-53.) In an email to Leadpoint Site Manager Vincent Haas, for example, Browning-Ferris Operations Manager Paul Keck instructed Haas to reduce the number of sorters on a particular stream by two per shift. Keck also directed Haas as to where some of the remaining sorters on that stream should stand and what material they should prioritize for removal. (JA 373; JA 32, 96.)

Browning-Ferris sometimes also assigns employees directly. From the control room overlooking the streams, the Browning-Ferris sort-line equipment operator will direct sorters from one stream to another. Browning-Ferris supervisor John Sutter has sent sorters to work on different streams if those streams need additional help. (JA 373; JA 324-26.) On one occasion, Browning-Ferris supervisor Augustine Ortiz took sorter Andrew Mendez off the stream, gave him a broom, and directed him to clean a nearby loading area instead. Housekeeper Clarence Harlin receives instructions from Browning-Ferris supervisors multiple times a week. Browning-Ferris supervisors also tell screen cleaners which machines need cleaning. (JA 373; JA 359-62, 291, 312-13.)

Browning-Ferris sets the speed at which the streams run, and the volume of material placed on each stream for sorting. (JA 373; JA 83, 127-28, 151-53.) It
establishes productivity standards for the facility, and tracks how much material per hour is processed on each stream. (JA 373; JA 83-84, 151-52.) Browning-Ferris sets the speed of the streams for a given shift or a given load based in part on whether productivity standards are being met. If the sorters have trouble keeping up, Browning-Ferris will adjust the speed of the stream or the angle of the screen. (JA 373; JA 84, 152-53.) The decision whether to run the streams into overtime is based on the volume of material left to be sorted that day and the productivity goals. If Browning-Ferris determines that overtime is necessary, Leadpoint decides which employees will work those extra hours. (JA 372; JA 78-81, 129, 149-50.)

D. Browning-Ferris and Leadpoint Coordinate Daily Plans; Browning-Ferris Monitors, Meets With, and Directs Employees

Browning-Ferris holds daily pre-shift meetings with Leadpoint supervisors to coordinate the plan for the day, as well as to discuss specific tasks that need to get done. Leadpoint supervisors then relay that information to the employees. Browning-Ferris and Leadpoint supervisors remain in contact throughout the day via walkie-talkies that Browning-Ferris provides for that purpose. Browning-Ferris supervisor Ortiz spends approximately forty percent of his day speaking with Leadpoint supervisors, for example. Leadpoint manager Haas also attends weekly Browning-Ferris staff meetings. (JA 373; JA 81, 116, 121-22, 132, 251.) Along with the regular meetings, Browning-Ferris gives general instructions to
Leadpoint supervisors to pass along to the employees, such as to clean their work areas before going on break and when to use the emergency switch to stop a stream. (JA 373; JA 83, 145, 154.)

Browning-Ferris also monitors the employees’ work performance. The Browning-Ferris sort-line equipment operator observes all of the streams from the control room, where he tracks, among other matters, how many times the sorters use the emergency-stop switch. (JA 373; JA 73, 145-46.) In addition, Browning-Ferris supervisors spend part of each day in the area where Leadpoint-provided employees work. They report to Leadpoint supervisors any quality or performance issues that they observe while monitoring the streams. (JA 373; JA 117-18, 124, 169.)

In addition to interacting with Leadpoint supervisors, Browning-Ferris managers and supervisors also meet directly with employees. On several occasions, Browning-Ferris manager Keck and supervisor Ortiz pulled sorters off the stream and brought them into the control room to discuss the objectives for their work and what material to target for removal. Those meetings were held in response to Keck’s and Ortiz’s observations about the quality of the sorters’ performance. At one such meeting, Keck instructed the sorters as to the technique for removing plastic from the wet-waste stream. (JA 373-74; JA 154-55, 178-79, 188-89, 288-90, 301.) At other meetings, Keck and Browning-Ferris supervisor
Sutter told the sorters to stop using the emergency-stop switch as often and to work more efficiently. When sorter Clarence Harlin once responded that the sorters could not remove all the material without stopping the stream, Sutter told him to work harder. (JA 373; JA 263-65, 287-88.) Another time, Keck informed the sorters of a “condition change” at Newby Island in which they would have to clean their work areas before going on break. (JA 372; JA 338.) He previously had instructed Leadpoint supervisors to direct the sorters to complete that task, but spoke directly to the employees when he felt that the message was not being conveyed. Browning-Ferris also held a meeting with all Leadpoint-provided employees to discuss emergency-evacuation procedures. (JA 372-74; JA 177, 338-39.)

Along with the group meetings, employees receive instructions from Browning-Ferris supervisors while working. During the day, Keck, Ortiz, and Sutter sometimes stand by the streams next to the sorters and tell them what items to remove. (JA 373; JA 286-88, 324.) The Browning-Ferris supervisors also have directed sorters not to press the emergency-stop switch, but instead to let missed material go through. When a Leadpoint supervisor subsequently told a group of sorters to slow down the stream to remove more material, they told him that Keck had said to let it go through; the Leadpoint supervisor thereafter left them alone. (JA 373; JA 264, 287, 290.)
E. Browning-Ferris Requests that Leadpoint Discipline Employees, and Leadpoint Complies

On two occasions, Browning-Ferris manager Keck reported to Leadpoint CEO Frank Ramirez and on-site managers Vincent Haas and Carl Mennie that he had witnessed Leadpoint-provided employees engaging in misconduct. After observing two employees in possession of a pint of whiskey at the jobsite, Keck summoned Haas on the walkie-talkie and asked to speak with him immediately so that Haas could follow up on the incident. Keck told Haas that Keck could not tolerate such actions. Later that day, Keck wrote to Ramirez and Mennie about the two employees and stated that “I request their immediate dismissal.” Leadpoint sent both employees for an alcohol screen, then discharged one and reassigned the other to a different worksite. (JA 372; JA 34, 173-74, 212, 244-45.)

Regarding a separate incident, Keck reported seeing a Leadpoint-provided employee punch a paperwork dropbox in the break room. Keck informed Haas, and later wrote to Ramirez and Mennie that, “I hope you’ll agree—this Leadpoint employee should be immediately dismissed.” After Haas conducted an investigation, Leadpoint discharged the employee. (JA 372; JA 34, 186, 240-42.)
II. PROCEDURAL HISTORY

A. The Representation Proceeding: The Board Finds That Browning-Ferris and Leadpoint Are Joint Employers of the Employees in the Petitioned-For Unit

On July 22, 2013, Local 350 filed a petition to represent all employees at Newby Island employed by Leadpoint and Browning-Ferris as joint employers. After a hearing, the Board’s Regional Director applied the Board’s then-existing joint-employer standard and issued a decision and direction of election finding that Leadpoint was the sole employer of employees in the petitioned-for unit. An election was held on April 25, 2014, and the ballots were impounded.

The Board granted Local 350’s request for review of the direction of election. In granting Local 350’s request, the Board invited briefing on the questions of whether it should adopt a new standard for determining joint-employer status and, if so, what factors should be examined under the standard. On August 27, 2015, the Board issued a Decision on Review and Direction, in which it articulated a revised joint-employer standard. 362 NLRB No. 186 (2015) (Chairman Pearce, Members Hirozawa and McFerran; Members Miscimarra and Johnson, dissenting). Applying that standard, the Board found that Browning-Ferris and Leadpoint were joint employers. The ballots were tallied on September 4, and revealed a 73-17 vote in favor of representation. On September 14, the
Board certified Local 350 as the representative of the petitioned-for unit. (JA 425; JA 419-20.)

B. The Unfair-Labor-Practice Proceeding: Browning-Ferris Refuses To Bargain

On September 9, 2015, Local 350 wrote to Browning-Ferris to request bargaining. On September 21, Browning-Ferris refused to bargain, contending that no employment relationship existed between it and the employees in the petitioned-for unit. (JA 424-25; JA 421-23.) The Board’s General Counsel issued an unfair-labor-practice complaint alleging that Browning-Ferris and Leadpoint violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to bargain with Local 350 as the certified collective-bargaining representative of their employees. In response, Browning-Ferris admitted that it refused to bargain with Local 350, and reasserted its argument that it had no bargaining obligation.

III. THE BOARD’S CONCLUSIONS AND ORDER

On January 12, 2016, the Board (Chairman Pearce, Members Miscimarra and Hirozawa) issued a Decision and Order finding that Browning-Ferris and Leadpoint, a joint employer, violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 350. The Order directs Browning-Ferris and Leadpoint to cease and desist from that unfair labor practice. Affirmatively, the Order requires Browning-Ferris and Leadpoint to bargain with Local 350 on
request, embody any understanding that the parties reach in a written agreement, and post a remedial notice. (JA 425-26.)

**STANDARD OF REVIEW**

The Board “has the primary responsibility for developing and applying national labor policy.” *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 786 (1990). In general, the Court gives “considerable deference” to a Board rule if it is “rational and consistent with the Act, regardless [of] whether the Board’s rule departs from its prior policy” or whether the Court “think[s] a different rule would be preferable.” *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1459 (D.C. Cir. 1997) (internal quotations omitted). When the Board overrules prior decisions and adopts a revised course, the Court “will not upset its new standard” so long as the Board “provide[s] a reasoned justification for departing from precedent.” *W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1346-47 (D.C. Cir. 2008); see also *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (explaining that “[a]n agency’s view of what is in the public interest may change, either with or without a change in circumstances,” so long as the agency “suppl[ies] a reasoned analysis” (internal quotations omitted)). The Court also will “defer to the Board’s policy choice[s]” that are based on reasonable interpretations of the Act. *Local 702, IBEW v. NLRB*, 215 F.3d 11, 17 (D.C. Cir. 2000).
The Court likewise will “defer to the Board’s interpretation of the Act if it is reasonable.” *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1075 (D.C. Cir. 2002). For example, “the task of defining the term ‘employee’ is one that has been assigned primarily to the [Board as the] agency created by Congress to administer the Act” and, if it is consistent with the common law, “the Board’s construction of that term is entitled to considerable deference.” *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) (internal quotations omitted). The Court also will uphold the Board’s “reasonable” decision as to which factors should be the focus in determining if an individual is an employee. *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002).

Although the Court does not afford the same degree of deference to the Board’s findings on common-law agency issues as on purely labor-law questions, the “standard of review is not *de novo*.” *Int’l Longshoremen’s Ass’n v. NLRB*, 56 F.3d 205, 212 (D.C. Cir. 1995); *see also Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563, 566 (D.C. Cir. 2016) (same). Instead, the Court “give[s] due weight to the Board’s judgment to the extent that it made a choice between two fairly conflicting views,” as the Court is “sensitiv[e] to the particular circumstances of industrial labor relations.” *Atrium of Princeton, LLC v. NLRB*, 684 F.3d 1310, 1315 (D.C. Cir. 2012) (internal quotations omitted). In the labor-law context, “even common law agency questions are ‘permeated at the fringes by conclusions

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drawn from the factual setting of the particular industrial dispute.”” Int’l

Longshoremen’s Ass’n, 56 F.3d at 212 (quoting N. Am. Van Lines, Inc. v. NLRB,
869 F.2d 596, 599 (D.C. Cir. 1989)).

The Board’s factual findings “shall be conclusive” if they are “supported by
substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e);
Bally’s Park Place, Inc. v. NLRB, 646 F.3d 929, 935 (D.C. Cir. 2011). The Court
also “applies the familiar substantial evidence test to the Board’s … application of
The Board’s determination as to whether a joint-employer relationship exists,
which is “essentially a factual issue,” Boire v. Greyhound Corp., 376 U.S. 473, 481
(1964), “must be affirmed if supported by substantial evidence in the record as a
1977); see also Dunkin’ Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB, 363 F.3d
437, 441 (D.C. Cir. 2004) (upholding Board’s joint-employer finding as supported
by substantial evidence).
SUMMARY OF ARGUMENT

Courts and the Board have long recognized that two or more entities can serve as joint employers of a group of employees for purposes of collective-bargaining obligations under the Act. Revisiting and restating its joint-employer standard, the Board in this case reaffirmed the established principle that joint employers “share or codetermine … essential terms and conditions of employment,” and clarified that it would consider evidence of direct, indirect, and reserved control as part of that analysis.

The Board’s revised standard is reasonable and consistent with the Act. It is consistent with the common-law definition of an employment relationship, which focuses on control or right to control. The standard also furthers the policies of the Act by encouraging meaningful collective bargaining and ensuring the continued vitality of the Act’s protections. Further, the Board provided a reasoned explanation for restoring indirect and reserved control to the analysis, explaining that the limits it previously had imposed, without explanation, were not required by the common law or the Act and risked undermining the right to bargain. Browning-Ferris’s and amici’s arguments to the contrary rely on inapposite sources and fail to acknowledge various settled labor-law principles, and serve largely as cover for what ultimately are policy disagreements with the Board’s standard.
Substantial evidence supports the Board’s finding that Browning-Ferris and Leadpoint are joint employers of the petitioned-for unit of employees. Browning-Ferris reserves significant control for itself over issues like hiring, discipline, and wages. And it exercises both direct and indirect control over daily operations and employee work performance, through actions such as setting productivity standards and the pace of work, meeting with and directing employees, engaging in detailed monitoring, and regularly communicating instructions to employees through the intermediaries of Leadpoint supervisors.
ARGUMENT

I. The Board’s Revised Joint-Employer Standard Is Reasonable and Consistent with the Act

The Board’s revised joint-employer standard is entitled to deference from the Court because it is reasonable and consistent with the Act, furthers the Act’s policy of encouraging meaningful collective bargaining, and is supported by reasoned analysis. Exercising its ongoing obligation to serve the Act’s purposes, and based on a survey of prior cases and the state of the contemporary workforce, the Board found that the previously imposed limits on its standard were not mandated by the Act or applicable common-law principles, and did not best foster collective bargaining. Browning-Ferris and amici challenge the revised standard, but their arguments are based on inapposite sources, overbroad contentions, and simple policy disagreements.

A. The Board Revised and Restated Its Joint-Employer Standard

Employers have an obligation under the Act to bargain with the representative of their employees. 29 U.S.C. § 158(a)(5), (d). Courts and the Board have long recognized that, for purposes of that bargaining obligation, more than one entity can constitute an employer of a group of employees. Boire, 376 U.S. at 481; cf. 29 U.S.C. § 152(3) (“The term ‘employee’ … shall not be limited to the employees of a particular employer ….”). For example, a second entity will qualify as a “joint employer” for purposes of the Act if it “possesse[s] sufficient
control over the work of the employees.” *Boire*, 376 U.S. at 481. In accordance with that principle, it has long been established that two legally separate entities will constitute a joint employer if they “share, or codetermine, those matters governing essential terms and conditions of employment.” *Greyhound Corp.*, 153 NLRB 1488, 1495 (1965), *enforced*, 368 F.2d 778 (5th Cir. 1966); accord *Dunkin’ Donuts Mid-Atlantic*, 363 F.3d at 440; *NLRB v. Browning-Ferris Indus. of Penn., Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982). The well-established joint-employer doctrine thus ensures that control over employees in the workplace carries with it responsibility to them under the Act.

In this case, the Board revised and restated its joint-employer standard within the parameters of those settled principles. It acknowledged that it “has never offered a clear and comprehensive explanation for its joint-employer standard” (JA 376), and thus took the opportunity to do so. First, the Board “reaffirm[ed]” that the standard for joint-employer status is that two employers “share or codetermine those matters governing the essential terms and conditions of employment.” (JA 370, 383 (quoting *Browning-Ferris*, 691 F.2d at 1124.)) The Board then explained that an employer will meet that standard if “there is a common-law employment relationship with the employees in question” (JA 370, 383) and the employer “possesses sufficient control over employees’ essential
terms and conditions of employment to permit meaningful collective bargaining” (JA 370, 381, 383-84).³

The Board also clarified what specific factors it will take into account in determining if that standard has been met. The key consideration for the Board’s inquiry is “the existence, extent, and object of the putative joint employer’s control.” (JA 370.) As part of its analysis, the Board will consider both the employer’s right to control and its actual exercise of control. (JA 370, 384.) As to the latter, the employer’s control may be either direct or indirect, such as through the other joint employer as an intermediary. (JA 370, 383-84.)

In setting forth that approach, the Board demonstrated (JA 376-77) that it has considered those factors as part of the joint-employer analysis in longstanding caselaw that has never been overruled. The Board here revisited and reaffirmed those principles in repudiating an unexplained change that narrowed the factors the Board would take into account in determining joint-employer status.

³ Regarding the latter, the Board explained that it would “adhere to [its] inclusive approach in defining ‘essential terms and conditions’” to include matters “‘such as hiring, firing, discipline, supervision, and direction.’” (JA 383 (quoting TLI, Inc., 271 NLRB 798, 798 (1984), enforced mem., 772 F.2d 894 (3d Cir. 1985)).) And it drew a distinction between control over the “results” of work and “the means or manner of employees’ work” (JA 384), with only the latter indicative of joint-employer status. In addition, the Board made clear (JA 384) that a joint employer’s bargaining obligation is limited to the terms and conditions that it has the authority to control.
Thus, the Board emphasized (JA 377) its holdings that “an operative legal predicate for establishing a joint-employer relationship is a reserved right … to exercise … control.” *Jewel Tea Co.*, 162 NLRB 508, 510 (1966); *see also* *Stouffer’s Cincinnati Inn*, 225 NLRB 1196, 1198 (1976) (“It is immaterial whether this control is actually exercised so long as it may potentially be exercised by virtue of the agreement under which the parties operate.”); *Taylor’s Oak Ridge Corp.*, 74 NLRB 930, 932 (1947) (same). For example, the Board found joint-employer status in *Jewel Tea* when one entity had the contractual right to approve, supervise, and discharge employees, and to set wages and hours, even though it “had not exercised its powers under the … agreements.” 162 NLRB at 510 & n.5; *see also* *Hoskins Ready-Mix Concrete, Inc.*, 161 NLRB 1492, 1493 & n.2 (1966) (same).

The Board also demonstrated (JA 377) that it has found joint-employer status when an entity had “indirect control” over matters such as wages and discipline. *Floyd Epperson*, 202 NLRB 23, 23 (1973), enforced mem., 491 F.2d 1390 (6th Cir. 1974); *Hamburg Indus., Inc.*, 193 NLRB 67, 67-68 (1971); *see also* *Sun-Maid Growers of California*, 239 NLRB 346, 350-51 (1978) (joint employer had “effective control” when it made assignments and “occasionally provided specifications and instructions,” even though it “had not directed [employees] in the precise steps to follow” (internal quotations omitted)), enforced, 618 F.2d 56
Further indicative of a joint-employer relationship was one employer’s practice of conveying instructions to employees through the intermediary of the other employer’s supervisors; such employers “did not directly supervise the employees” but “exercise[d] ultimate control over them.” \textit{Int’l Trailer Co.}, 133 NLRB 1527, 1529 (1961), \textit{enforced sub nom. NLRB v. Gibraltar Indus., Inc.}, 307 F.2d 428 (4th Cir. 1962); see also \textit{Mobil Oil Corp.}, 219 NLRB 511, 514 (1975), \textit{enforcement denied on other grounds sub nom. Alaska Roughnecks & Drillers Ass’n v. NLRB}, 555 F.2d 732 (9th Cir. 1977); \textit{Hamburg Indus.}, 193 NLRB at 67. Likewise, an entity that had “day-to-day responsibility for … overall operation[s]” and ensured that “operations were performed in accordance with [its] … plan” could be a joint employer even though it “did not exercise direct supervisory authority” over employees. \textit{Clayton B. Metcalf}, 223 NLRB 642, 643-44 (1976).

In chronicling those precedents, the Board recognized (JA 378-79) that a narrower approach had developed starting in \textit{Laerco Transportation}, 269 NLRB 324, 325 (1984), and \textit{TLI}, 271 NLRB at 798-99, under which it would find joint-employer status only when an employer “meaningfully affects matters relating to the employment relationship” and exercises more than “limited and routine” supervision and direction. \textit{See also AM Prop. Holding Corp.}, 350 NLRB 998, 1000 (2007) (stating that Board would “not rely merely on the existence of …
contractual provisions,” but would “look[] to the actual practice of the parties”),
affirmed sub nom. SEIU, Local 32BJ v. NLRB, 647 F.3d 435 (2d Cir. 2011);
element” of joint-employer status is “direct and immediate” control over
employment matters).4 But the Board concluded (JA 378, 381) that those limits on
the joint-employer analysis had been adopted without explanation, were not
dictated by the common law or the Act, and did not serve the Act’s underlying
policies. Accordingly, to the extent that they were inconsistent with its decision,
the Board overruled TLI, Laerco Transportation, Airborne Express, and AM
Property Holding Corp. (JA 384.)

The Board’s revised joint-employer standard thus retains the core “share or
codetermine” standard, while restoring the factors of reserved and indirect control
that had been dropped without explanation. After articulating the revised standard,
the Board explained why adopting it would “put the Board’s joint-employer
standard on a clearer and stronger analytical foundation” and “best serve the
Federal policy of encouraging the practice and procedure of collective bargaining.”
(JA 370.) As detailed below, that explanation is well-founded and amply supports
the Board’s decision.

4 Airborne Express cited to TLI for that proposition, but TLI does not contain the
phrase “direct and immediate control.”
B. The Revised Standard Is Consistent with the Applicable Common Law

As the Board explained, “[i]n determining whether an employment relationship exists for purposes of the Act, the Board must follow the common-law agency test.” (JA 380); cf. NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968) (describing Congress’s purpose “to have the Board and the courts apply general agency principles”). Here, one inquiry in the revised standard is whether the putative joint employers are “employers within the meaning of the common law.” (JA 383.) And the Board’s analysis under its standard follows from, and is consistent with, that meaning.

The common-law definition of an employment relationship centers on the ability to control. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 448 (2003). And, as in the Board’s analysis under the revised joint-employer standard, that control need not be actively exercised, but can be reserved or potential. The Restatement (Second) of Agency defines “servant” as “a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.” Restatement (Second) of Agency § 220(1); see also id. § 2(2) (same). In turn, a master is defined as someone who “controls or has the right to control the physical conduct” of the servant in the performance of his service. Id.
§ 2(1). The recently published Restatement of Employment Law likewise highlights whether “the joint employers each control or supervise … rendering of services” and notes that an entity is not an employer of a group of employees if it “does not have the power to direct and control their work.” Restatement of Employment Law § 1.04(b) & cmt. c.

The Restatement of Agency also demonstrates that, as in the Board’s joint-employer analysis, the control necessary to establish an employment relationship need not be direct. Indeed, “the control or right to control … may be very

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5 Although the Restatement of Agency uses the word “servant,” the comments note that “[u]nder the … Labor Relations Act, there is little, if any, distinction between employee and servant as here used.” Restatement (Second) of Agency § 220 cmt. g; see also Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24 (1992) (citing the Restatement for the common-law meaning of “employee”). As particularly relevant here, the Supreme Court has noted that § 220 is “instructive in analyzing the three-party relationship between two employers and a worker,” Kelley v. S. Pac. Co., 419 U.S. 318, 324 (1974), which undermines amicus Chamber of Commerce’s contention (Chamber Br. 21-24) that the Restatement has no bearing on the joint-employer analysis.

6 Amicus Chamber of Commerce’s assertion (Chamber Br. 27) that the Restatement of Employment Law “squarely rejects the Board’s approach” is based on a single illustration in the comments. But, by stating that an entity that only “tell[s] [employees] what work … to accomplish” is not a joint employer, Illustration 5 simply articulates the same distinction between control over results and control over means that the Board’s standard recognizes, supra p.22. Restatement of Employment Law § 1.04 cmt. c, illus. 5. Nor, as amicus claims (Chamber Br. 27-28), is Illustration 5 a per se rejection of indirect control just because the entity’s ability to “request that [the other employer] assign another [employee]” did not lead to joint-employer status. Id. Indeed, in Illustration 4, an entity’s ability to “reject as unsatisfactory any [employee] assigned to it” is indicative of joint-employer status. Id. § 1.04 cmt. c, illus. 4.
attenuated.” Restatement (Second) of Agency § 220, cmt. d. It can be enough that, like at Newby Island, the “work is done upon the premises of the employer with his machinery” by workers who are subject to “general rules for the regulation of the conduct of employees.” \textit{Id.} § 220, cmt. 1. The Restatement also recognizes the concept of a “subservant” who is subject to the control of both an intermediary servant who directs and bears primary responsibility for him and “the superior power of control which the master may exercise,” and thus is a servant of both. \textit{Id.} §§ 5(2) & cmt. e, 220 cmt. f.\textsuperscript{7}

Court decisions reflect a similar understanding of the employment relationship. The Supreme Court long ago explained that “the relation of master and servant exists whenever the employer retains the right to direct” the manner of work, and the Court looked to what authority “the company reserves to itself” under the contract. \textit{Singer Mfg. Co. v. Rahn}, 132 U.S. 518, 523 (1889). This Court, too, has stated that “it is the right to control, not control or supervision itself, \textsuperscript{7}

\textsuperscript{7} Browning-Ferris and amicus Chamber of Commerce contend (Br. 24-26; Chamber Br. 18-19) that the common-law loaned-servant doctrine requires direct control, but that is a distinct concept. Unlike in the joint-employer context, where both employers share a role, the loaned-servant doctrine “conceives of … control vesting in one master to the exclusion of the other.” \textit{Dellums v. Powell}, 566 F.2d 216, 222 (D.C. Cir. 1977); \textit{accord Williams v. Shell Oil Co.}, 18 F.3d 396, 400 (7th Cir. 1994) (distinguishing “the loaned servant doctrine, requiring total power of control” from “dual employment which allows for shared control”). In any event, the test for whether one employer’s “loaned” employee is an employee of the other employer depends on “[m]any of the factors stated in Section 220,” which includes the “right to control.” Restatement (Second) of Agency § 227 cmts. a, c.
which is most important.” *Dovell v. Arundel Supply Corp.*, 361 F.2d 543, 545 (D.C. Cir. 1966) (internal quotations omitted). And in the context of the Act, it has held that an individual is an employee if he receives compensation for his work and the employer “has the power or right to control and direct the person in the material details of how such work is to be performed.” *Seattle Opera v. NLRB*, 292 F.3d 757, 762 (D.C. Cir. 2002) (citing *Town & Country Elec.*, 516 U.S. at 90).

That understanding extends to the joint-employer context as well. In *International Chemical Workers Local 483*, for example, this Court explained that whether two entities constitute joint employers “depends upon the amount of actual and potential control” they have over employees. 561 F.2d at 255. Accordingly, the Court will consider the control that a putative joint employer “was authorized to exercise under the contract,” not just “actual operations.” *Id.* at 255-56. Other courts have taken a similar view, explaining that “[t]he existence of a joint employer relationship depends on the control which one employer exercises, or potentially exercises, over the labor relations policy of the other.” *N. Am. Soccer*

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8 In upholding the Board’s finding of no joint-employer status in *International Chemical Workers Local 483*, the Court emphasized that one of the putative joint employers neither had the authority to direct, nor actually directed, the details of the employees’ work. 561 F.2d at 257-58. It also relied largely on the fact that the arrangement between the two entities was for temporary replacement workers during a strike. *Id.* at 254-56. Although one entity retained the right to remove employees from the job, for example, any probative value of that factor was tempered by “the emergency aspects of the employment and the emotional considerations [of] … the strike situation.” *Id.* at 256.
League v. NLRB, 613 F.2d 1379, 1382 (5th Cir. 1980); see also Ref-Chem Co. v. NLRB, 418 F.2d 127, 129 (5th Cir. 1969) (looking to joint employer’s rights under “[t]he terms of the agreements” as well as the control it exercised “[i]n practice”).

The Third Circuit in Browning-Ferris likewise stated that the basis for a joint-employer finding is when “one employer … has retained for itself” or “possessed” sufficient control over terms and conditions of employment. 691 F.2d at 1123-24 (quoting Boire, 376 U.S. at 481).9

Courts have found a variety of types of indirect or reserved control to support joint-employer status. A factor supporting such a finding in Browning-Ferris, for example, was that, as here, one employer set shift times while the other scheduled individual workers within those shifts. 691 F.2d at 1120. Courts have also recognized as “particularly support[ive]” of joint-employer status contracts that, like the Agreement, give one joint employer “authority to reject” or to “direct [the other joint employer] to remove” employees provided by the other joint employer. Carrier Corp. v. NLRB, 768 F.2d 778, 781 (6th Cir. 1985); accord Ace-

9 Browning-Ferris and amici Washington Legal Foundation and Chamber of Commerce contend (Br. 32-33; WLF Br. 19-20; Chamber Br. 16-17) that the Board’s revised standard is inconsistent with the Third Circuit’s Browning-Ferris decision. But the Third Circuit expressly adopted the “share or co-determine … essential terms and conditions of employment” standard, 691 F.2d at 1123-24, that the Board reaffirmed as the core of its joint-employer test. Moreover, the Third Circuit’s reference to a joint-employer’s “retained” or “possessed” control undermines Browning-Ferris’s suggestion (Br. 32) that the court required direct or exercised control just because it elsewhere used the verb “exert.”
Alkire Freight Lines, Inc. v. NLRB, 431 F.2d 280, 282 (8th Cir. 1970) (considering that entity “retained the right to reject” employees in finding joint-employer status). Board decisions finding that joint-employer status can be established through reserved or indirect control, in addition to actual exercise of direct control, have likewise met court approval. See supra pp.23-24.

The Restatement and court precedent thus support the Board’s conclusion that indirect and reserved control are part of the common-law definition of employment. The Board’s consideration of those factors in its joint-employer analysis is thus “reasonable,” Corp. Express Delivery, 292 F.3d at 780, and in line with Congress’s instruction to apply the common-law test.

By contrast, Browning-Ferris’s insistence (Br. 21, 27, 41) that the only basis for a common-law employment relationship is “direct and immediate control” is premised on inapposite sources. Browning-Ferris points (Br. 21-26) to the 1947 Taft-Hartley amendments to the Act, and its rejection of the Supreme Court’s decision in NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). In that case, the Court refused to consider the common law in determining whether an individual was covered as an “employee” under the Act. Id. at 124-26. Because Hearst expressly disclaimed reliance on the common law’s “so-called ‘control test’”—and thus did not view control of any sort as the key criterion for employee status—it did not purport to consider reserved or indirect control as part of its
analysis. \textit{Id.} at 120-21 \& n.19, 128-29 \& n.27. Accordingly, Congress did not, as Browning-Ferris suggests (Br. 41-43), reject those factors when repudiating \textit{Hearst}.\textsuperscript{10}

Browning-Ferris nonetheless relies heavily (Br. 25, 41) on a single line of legislative history from the Taft-Hartley amendments stating that “[e]mployees work for wages or salaries under direct supervision.” But that statement was made in the context of distinguishing employees from independent contractors, not determining whether a joint-employer relationship exists.\textsuperscript{11} The two issues are distinct. Without any direct supervision on the work at issue, an individual may be an independent contractor and no employment relationship of any kind exists. But once it is established that individuals are employees—as the sorters, screen

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\textsuperscript{10} Contrary to Browning-Ferris’s characterization (Br. 41) of Taft-Hartley as a general “narrow[ing]” of the relationships covered by the Act, its only such “limiting function” was excluding independent contractors and supervisors. Pub. L. 80-101, 61 Stat. 136, 137-38 (1947). It said nothing about joint employers.
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\textsuperscript{11} In context, the statement appears as follows:

“In the law, there always has been a difference, and a big difference, between ‘employees’ and ‘independent contractors.’ ‘Employees’ work for wages or salaries under direct supervision. ‘Independent contractors’ undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits.”

H.R. Rep. No. 80-245, at 18 (1947). The Committee Report thus contrasts “direct supervision” with the ability to decide for oneself how the work is done—that is, with \textit{no} supervision—rather than with indirect or reserved control over the work.

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cleaners, and housekeepers at Newby Island indisputably are (Br. 31 n.14)—there remains a separate question of whether they are employees of more than one employer. And the nature of those inquiries are different. The employee versus independent contractor question is binary—an entity either controls the work (employee) or does not (independent contractor). But in the joint-employer analysis, the question is whether the entity \textit{shares or codetermines} control, an inquiry that requires a greater range of considerations than just direct supervision; indeed, the animating principle of the joint-employer concept is that an entity not in complete control can still be an employer. \textit{See Boire}, 376 U.S. at 481 (entity is joint employer if control is “sufficient”). Moreover, because independent contractors are expressly exempted from the Act’s coverage, 29 U.S.C. § 152(3), the question of whether an individual is an independent contractor, unlike the joint-employer analysis, goes to the Board’s jurisdiction.

For the same reasons, Browning-Ferris’s and amici’s reliance (Br. 27-31; WLF Br. 17-18, 26) on this Court’s independent-contractor cases is misplaced. Even if, as Browning-Ferris claims (Br. 27), those cases suggest that “direct and immediate control” is necessary to distinguish employees from independent contractors, they do not impose the same requirement in the joint-employer context. Moreover, Browning-Ferris and amici ignore the Court’s pronouncement in \textit{International Chemical Workers Local 483}—a joint-employer case—that it
would consider “potential control” and would “look to the terms of the contract” to see what control a contracting entity “was authorized to exercise” when determining joint-employer status. 561 F.2d at 255-56.12

Browning-Ferris also claims support for its position by noting (Br. 10, 43) that the Supreme Court in Hearst acknowledged “[c]ontrol of ‘physical conduct in the performance of the service’” as “the traditional test of the ‘employee relationship’ at common law.” 322 U.S. at 128 n.27. But Browning-Ferris shifts the meaning of that phrase by characterizing it (Br. 10, 43, 46) as a requirement of “direct and immediate control.” The Court was quoting the Restatement of

12 Browning-Ferris and amici also overlook the fact that, even in the independent-contractor context, the Court has held that “it is well established that the ‘control’ test not only contemplates the degree of control actually exercised, but the degree to which the principal may intervene in the control of an employee’s performance” and that a worker “may be deemed an employee, rather than an independent contractor, if the principal explicitly or implicitly reserves the right to supervise the details of his work.” Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d 1322, 1327 (D.C. Cir. 1971); accord Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 994 (9th Cir. 2014) (explaining that “[i]t is not essential that the right of control be exercised or that there be actual supervision,” so long as “the right exists” (internal quotations omitted)).

Similarly misplaced is amicus Washington Legal Foundation’s suggestion (WLF Br. 17) that the Board’s revised joint-employer standard will result in “independent contractors … be[ing] classified as employees.” As even Browning-Ferris recognizes (Br. 31 n.14), the independent-contractor analysis contains a host of other factors—including degree of skill and entrepreneurial opportunity—that the Board’s revised joint-employer standard does not affect. See, e.g., Lancaster Symphony Orchestra, 822 F.3d at 565-66 (listing independent-contractor factors).
Agency, which, then as now, defined servant as someone “who, with respect to his physical conduct in the performance of the service, is subject to the other’s control or right to control.” Restatement (First) of Agency § 220(1) (emphasis added).\(^{13}\)

Finally, because, like the common law, the Board’s analysis focuses on the ability to control “the means or manner of employees’ work” (JA 384), Browning-Ferris is wrong to suggest that every “lone strand” (Br. 51) of control or right to control will lead to joint-employer status. For example, there is no basis for Browning-Ferris’s assertion (Br. 24-25, 43-44), that the Board would find joint-employer status based only on an entity’s control over “agreed-upon ends” or ability to guard against “interfer[ence] with the [entity’s] operations.” To the contrary, the Board made clear that an entity’s “bare rights to dictate the results of a contracted service or to control or protect its own property” were not probative indicia. (JA 384.) As the facts of this case show, the Board instead will find joint-employer status when an entity’s control extends to a wider range of employment terms and conditions, such as Browning-Ferris’s combination of direct, indirect, and reserved control over multiple aspects of employment at Newby Island.

\(^{13}\) At most, Browning-Ferris has shown that it and the Board have identified two “fairly conflicting views” of the common law. In such situations, and especially given the authority cited above, the Board’s choice between such views is owed “due weight.” \textit{Atrium of Princeton}, 684 F.3d at 1315.
In sum, the Board’s revised joint-employer standard is consistent with the common-law principles recognized as the basis for an employment relationship. The revised standard is not only consistent with those principles, moreover, but, as the Board properly found, it also better serves the purposes and policies of the Act than did the limits previously placed on the standard.

C. The Revised Standard Furthers the Policies of the Act

The Board’s revised joint-employer standard furthers the policies of the Act by fostering meaningful collective bargaining and ensuring the continued vitality of the Act’s protections. Browning-Ferris and amici contend otherwise, but their overbroad arguments protest too much.

One of the Act’s stated purposes is to “encourag[e] the practice and procedure of collective bargaining” and “protect[] the exercise by workers of full freedom of … designation of representatives of their own choosing.” 29 U.S.C. § 151. And it protects employees’ “right … to bargain collectively through representatives of their own choosing,” 29 U.S.C. § 157, over “wages, hours, and other terms and conditions of employment,” 29 U.S.C. § 158(d). The Board’s revised standard preserves that right by ensuring that entities with effective control over employees’ terms and conditions of employment are at the bargaining table.

Entities with indirect or reserved control can be key bargaining partners. For example, if one entity indirectly exercises control by regularly “communicat[ing]
precise directives” for the other to convey and implement (JA 384), control over that aspect of employment is so intertwined that neither entity may have the ability by itself to change it. Or, as the Board noted (JA 381-82), any control that one entity may appear to have over employment matters would be incomplete (and perhaps illusory) if the other entity reserves the right to control and thus may intervene at any point. Cf. S.S. Kresge Co. v. NLRB, 416 F.2d 1225, 1231 (6th Cir. 1969) (finding joint-employer status when “many decisions with respect to … essential aspects of labor relations which [one employer] might make would be ephemeral at best, since [the other employer] could overrule them”). In either of those scenarios, if the entity with indirect or reserved control does not participate in bargaining, such bargaining that does take place will not be meaningful.

Further, when bargaining parties cannot actually change terms and conditions that are the source of workplace tension, such disputes will not face “the mediatory influence of negotiation” that Congress intended. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964). Left unresolved in bargaining, those disputes may be channeled into more disruptive forms of conflict such as strikes or boycotts, contrary to the Act’s goal of “minimizing industrial strife.” Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 62 (1975). Such a situation also would make the bargaining process appear ineffective to employees, further undermining the policies of the Act. Cf. Int’l Paper Co. v. NLRB, 115 F.3d
1045, 1049 (D.C. Cir. 1997) (noting that actions that “foster[] the belief in employees that collective bargaining is futile” can violate the Act). As described below, infra p.55, Browning-Ferris’s sole, day-to-day control over the speed of the streams—a source of ongoing tension at Newby Island—poses the potential for such a situation if Browning-Ferris is not at the bargaining table.

Adopting the revised standard also fulfills the Board’s responsibility to respond to changed circumstances—“to adapt the Act to changing patterns of industrial life”—in order to ensure that the Act’s protections remain vital. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975); see also American Trucking Ass’ns, Inc. v. Atchison, Topeka & Santa Fe Ry. Co., 387 U.S. 397, 416 (1967) (“Regulatory agencies … are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation’s needs in a volatile, changing economy.”) Here, the Board reasonably took changing work patterns, and the ensuing impact on collective bargaining, into account in considering the joint-employer standard. As the Board detailed (JA 379), the contingent workforce—including employees who work under outsourcing, subcontracting, and temporary-staffing arrangements—has expanded significantly in the past three decades. As just one example, the number of American workers employed by staffing agencies like Leadpoint more than doubled from 1990 to 2008, and by 2015 that number had reached 2.8 million. Bureau of Labor

An entity that retains the ability to control terms and conditions of employment yet evades the obligations that accompany such control seeks to have its proverbial cake and eat it, too. Acquiescing in such an arrangement would be contrary to the Board’s duty to enforce the Act and promote its policies. Further, the Board reasonably noted that an entity’s decision to retain such power for itself is a purposeful one, and thus that “[t]here is no unfairness … in holding that legal consequences may follow from this choice.” (JA 382.) Indeed, as the Board explained, “[i]t is not the goal of joint-employer law to guarantee the freedom of

14 Browning-Ferris’s and amici’s focus on “fluid” arrangements (Br. 51) with “niche” firms (WLF Br. 30-31) thus does not capture the full scope of the contingent-workforce phenomenon. The facts of this case similarly render beside the point amicus National Association of Manufacturers’ assertion (NAM Br. 11-12 n.1) that some of the increase in contingent work has involved higher-wage or skilled workers.
employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace.” (JA 389.)

Browning-Ferris’s contention (Br. 47-53) that the Board’s revised standard will destabilize collective bargaining exaggerates the scope of the Board’s decision and ignores a variety of settled labor-law principles. As an initial matter, Browning-Ferris and amici fail to acknowledge that the core of the joint-employer standard—“share or codetermine … essential terms and conditions of employment”—remains the same. Browning-Ferris hypothesizes (Br. 48-52) as to the types of questions that could arise in a joint-employer case regarding the scope, allocation, and duration of bargaining responsibilities among the various employers. But those questions are present in any situation in which multiple parties are bargaining, and thus would arise under any joint-employer test; as the Board noted, such criticisms “could be made about the concept of joint employment generally.” (JA 388.) But Browning-Ferris does not challenge the general joint-employer doctrine—nor could it, given that doctrine’s longstanding and court-approved status as a feature of labor law. And even though “[t]he potential for these types of challenges to arise has existed for as long as the Board has recognized the joint-employer concept” (JA 388), joint-employer obligations
under the Act have existed for over fifty years without the kind of chaos and instability that Browning-Ferris and amici predict.¹⁵

Moreover, questions regarding the collective-bargaining process are particularly within the Board’s expertise as the agency tasked with overseeing the contours of that process.  See Ford Motor Co. v. NLRB, 441 U.S. 488, 496 (1979) (describing Congress’s “delegation to the Board of the primary responsibility of marking out the scope … of the statutory duty to bargain”); Dallas Gen. Drivers v. NLRB, 355 F.2d 842, 844-45 (D.C. Cir. 1966) (noting that, “in the whole complex of industrial relations[,] few issues are … better suited to the expert experience of a board which deals constantly with such problems” than “evaluation of bargaining processes”).  For example, the question of whether an employer has sufficient control over terms and conditions of employment to permit meaningful collective bargaining—an inquiry core to the Board’s standard (JA 370)—is not a new one under federal labor law, or one that the Board lacks experience answering.  See, e.g., Herbert Harvey, Inc. v. NLRB, 424 F.2d 770, 778-79 (D.C. Cir. 1969) (upholding Board finding that one joint employer “is able to bargain effectively”);

¹⁵ Indeed, courts long ago dismissed some of the same concerns that Browning-Ferris now resurrects.  See S.S. Kresge Co. v. NLRB, 416 F.2d 1225, 1231 (6th Cir. 1969) (rejecting argument that Board’s joint-employer finding would “disrupt the collective bargaining process because each [employer] may have independent ideas about appropriate labor policy”); Gallenkamp Stores Co. v. NLRB, 402 F.2d 525, 531 (9th Cir. 1968) (same).
Volt Tech. Corp., 232 NLRB 321, 322 (1977) (finding that employer “sufficiently controls the employer-employee relation to enable effective and meaningful collective bargaining to take place” over terms it controls). ¹⁶

Browning-Ferris’s and amici’s claim (Br. 49, 53-55; WLF Br. 28) that the Board’s standard is “impermissibly vague” and “open-ended” is similarly overstated. The Board has set forth what factors it will consider as part of its joint-employer analysis: direct, indirect, or reserved control over essential terms and conditions of employment. What remains is application of the standard, a process that necessarily will proceed case by case. As the Board explained (JA 384), “[i]ssues related to the nature and extent of a putative joint-employer’s control over particular terms and conditions of employment … are best examined and resolved in the context of specific factual circumstances.” Indeed, joint-employer status is a fact-intensive inquiry under any standard. See, e.g., N. Am. Soccer League, 613 F.2d at 1382-83 (recognizing that “minor differences in the underlying facts might

¹⁶ Browning-Ferris makes the unfounded suggestion (Br. 50-51) that an employer has no bargaining obligation unless it is capable of bargaining over all mandatory subjects. To the contrary, the Board has long held that the fact that an employer lacks “the full panoply of powers … that an employer can exercise does not, of itself, serve to render it any the less a joint employer.” Sun-Maid Growers, 239 NLRB at 350-51; cf. All-Work, Inc., 193 NLRB 918, 919 (1971) (holding that “the fact that the Employer does not exercise control over the entire employment relationship” is not grounds “for failing to grant [employees] their statutory right to engage in collective bargaining”). Rather, employers can “engage in effective bargaining over terms and conditions of employment within their control.” Mgmt. Training Corp., 317 NLRB 1355, 1358 n.16 (1995).
justify different findings on the joint employer issue”); cf. Restatement (Second) of Agency § 220, cmt. c (“The relation of master and servant is one not capable of exact definition.”); Darden, 503 U.S. at 327 (noting that “the traditional agency law criteria offer no paradigm of determinacy”).

Further, multifactor tests with case-by-case application are a standard and accepted feature of labor law. As the Supreme Court has recognized, an issue that recurs across a variety of factual scenarios may “require[] ‘an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer.’” Eastex, Inc. v. NLRB, 437 U.S. 556, 574-75 (1978) (quoting Local 761, Elec. Workers v. NLRB, 366 U.S. 667, 674 (1961)). The Board is not required to detail, at the outset, how a standard will apply in every possible situation. Rather, as this Court has observed, the Board’s duty to explain “which factors are significant and which less so, and why” in a multifactor test comes through “applying the test to varied fact situations.” LeMoyne-Owen College v. NLRB, 357 F.3d 55, 61 (D.C. Cir. 2004). It is such application that “allow[s] relevant distinctions between different factual configurations [to] emerge.” Id. (internal quotations omitted).17 And, as detailed below, the facts of this case provide

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17 Accordingly, courts have upheld other Board decisions revising or clarifying its standards—often against similar parade-of-horribles arguments as offered by Browning-Ferris and amici—without requiring a prolix accounting of how they will apply in circumstances not presented by the case at bar. See, e.g., UFCW, Local No. 150-A v. NLRB, 1 F.3d 24, 32-33 (D.C. Cir. 1993) (rejecting argument
guidance as to the situations in which the Board will find joint-employer status under its revised standard.\textsuperscript{18}

Finally, Browning-Ferris and amici characterize the status quo as having “establish[ed] an understandable line” (Br. 48) that “provided certainty and predictability” (WLF Br. 28), and warn (Br. 52) that the revised standard will bring a “shadow of open-ended Board litigation.” But their paean to the pre-revision limits on the joint-employer standard ignores the fact that litigation continued to arise under those limits as well. See, e.g., Am. Fed’n of Teachers N.M., 360 NLRB No. 59, 2014 WL 808096, at *36-37 (2014) (litigating joint-employer status under TLI and Laerco Transportation). Because any standard would engender litigation, the need for future cases to work out the details of the Board’s revised standard is

\textsuperscript{18}Browning-Ferris and amici present a series of hypotheticals (Br. 44-45; ABC Br. 11, 23; NAM Br. 27) that they contend would not or should not constitute a joint-employer relationship, but the Board has not held that they would—those questions are not presented by this case, which is essentially a facial challenge to the Board’s standard. In contending that corporate social responsibility initiatives should not be evidence of a joint-employer relationship, for example, amicus Microsoft argues a point that is not at issue in this case, and asks the Court for an advisory opinion on the matter. (Microsoft Br. 17, 32.)
not grounds to reject it. Browning-Ferris and amici also fail to acknowledge that the limits on the joint-employer standard were a source of controversy at the Board for more than a decade before the revised standard was announced. Indeed, the Board requested briefing on the issue of whether to revise its standard as early as 1996. *M.B. Sturgis, Inc.*, 331 NLRB 1298, 1299, 1301 (2000); *see also AM Prop. Holding Corp.*, 350 NLRB at 1011-12 (Member Liebman, concurring in part) (calling for reexamination of joint-employer standard); *Airborne Express*, 338 NLRB at 597-99 (Member Liebman, concurring) (same).

In sum, the Board reasonably concluded that its revised joint-employer standard would best serve the purposes of the Act and the goals of collective bargaining. Because continuing to ignore indirect and reserved control posed the risk that employees would be deprived of their bargaining rights, and the revised standard is consistent with the Act, the Board had not only the ability but the “responsibility” to adopt it. *Weingarten*, 420 U.S. at 266.

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19 Amicus National Association of Manufacturers’ belief (NAM Br. 9, 16-17) that the status quo was sufficiently protective of employees’ right to bargain, like other instances of “an employer’s benevolence as its workers’ champion,” can be viewed with “suspicion.” *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996). In any event, its belief does not outweigh the Board’s expert judgment to the contrary.
D. Browning-Ferris’s Remaining Challenges Are Without Merit

Browning-Ferris and amici raise several additional challenges to the Board’s revised joint-employer standard, but they are either insufficient to set aside the Board’s reasoned judgment or not properly before the Court.

Contrary to Browning-Ferris’s contention (Br. 37-47), the Board’s revised standard is distinct from the approach in *Hearst* that Congress rejected in the Taft-Hartley amendments. Rather than applying the common law to determine if an individual was an employee under the Act, the Court held in *Hearst* that it would look to the “underlying economic facts” of an individual’s particular situation—for example, whether he was “dependent … on his daily wage” or “unable to leave the employ” of the putative employer, or whether he faced “[i]nequality of bargaining power” or otherwise “require[d] protection” under the Act. 322 U.S. at 127-29 (internal quotations omitted).

By contrast, the Board’s joint-employer standard looks to the common-law concept of control, and “not the wider universe of all underlying economic facts.” (JA 385 (internal quotations omitted).) The Board expanded the factors it would consider, but indirect and reserved authority are types of control, not the more amorphous factors in *Hearst*.20 Indeed, the Board’s standard does not look to

20 To the extent Browning-Ferris argues (Br. 41-43) that anything other than direct and immediate control is a forbidden “economic fact,” that contention is misguided for the reasons explained above.
whether an individual “require[s] protection” regardless of his putative employer’s control, 322 U.S. at 129, but whether an employee who is subject to an entity’s control or right to control is able meaningfully to exercise her rights under the Act. Nor does joint-employer status under the Board’s standard hinge on an individual’s economic “dependen[ce]” on a putative employer. 322 U.S. at 116, 127, 131-32.21 And, contrary to Browning-Ferris’s contention (Br. 41-42, 44), the Board’s standard does not cover situations in which an entity simply influences the workplace generally. The Board expressly disclaimed any such intent, explaining that “influence is not enough … if it does not amount to control.” (JA 381 n.68.)22

Further, Taft-Hartley did not prohibit the Board, as Browning-Ferris suggests (Br. 37-38), from giving any consideration to the policies underlying the

21 In contexts where an “economic facts” or “economic realities” test does apply, such as the Fair Labor Standards Act, this Court has explained that “[i]t is dependence that indicates employee status” under that test, and that “the final and determinative question” is whether workers are “dependent upon the business with which they are connected.” Morrison v. Int’l Programs Consortium, Inc., 253 F.3d 5, 11 (D.C. Cir. 2001) (internal quotations omitted); accord Antenor v. D&S Farms, 88 F.3d 925, 933 (11th Cir. 1996) (asking “whether the putative employee is economically dependent upon the alleged employer” (internal quotations omitted)).

22 Congress criticized Hearst’s refusal to use the common-law test, but, contrary to Browning-Ferris’s suggestion (Br. 42-43), did not discuss whether any of the specific facts that the Court considered would be probative evidence of control under a proper common-law analysis. Thus, the fact that Hearst referred to an entity’s prescription of “broad terms and conditions of work” in finding newsboys to be employees does not, as Browning-Ferris contends (Br. 42-43), rule out control over big-picture operations as one consideration among others in the joint-employer analysis.
Act when determining if an employment relationship exists. Indeed, the Supreme Court subsequently has approved Board findings that individuals are employees when those findings “further[] the purposes of the NLRA” and are “consistent with the Act’s avowed purpose of encouraging and protecting the collective-bargaining process.” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984); see also *Town & Country Elec.*, 516 U.S. at 91 (same); *Allied Chem. & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971) (“In doubtful cases resort must still be had to economic and policy considerations to infuse § 2(3)”—which defines “employee”—“with meaning.”).

Nor, as Browning-Ferris claims (Br. 37-41), was the Board’s reference to changed economic circumstances such as the rise in contingent employment a return to *Hearst*. The rejected *Hearst* approach involved examining the “economic facts” of an individual worker’s situation to determine his status as an employee, not, as here, recognizing broad macroeconomic trends to ensure that the Board fulfills its obligations under the Act. Moreover, the Board did not, as Browning-Ferris contends (Br. 37-38, 40), rely on changed circumstances to invent a new definition of employee. Changed circumstances were part of the Board’s reason for revisiting the joint-employer standard, but they were not the genesis of the factors that it adopted; indirect and reserved control were otherwise permissible considerations that the Board had previously considered and, without explanation,
abandoned. And the current economic landscape was not the Board’s only reason for its revision; it also surveyed prior cases and common law and determined (JA 377, 383) that the standard had been unnecessarily narrowed. Including indirect and reserved control in the analysis thus will not work a “change in the ambit of cognizable employment relationships” (Br. 38 n.15)—such control was already recognized as the basis for joint-employer relationships.23

Browning-Ferris’s and amici’s other arguments fare no better. They contend (Br. 33-36; ABC Br. 29) for the first time on appeal that the revised joint-employer standard will undermine the Act’s protections against secondary boycotts. Browning-Ferris did not make that argument to the Board, however, and therefore cannot do so now. Under Section 10(e) of the Act, “[n]o objection that has not been urged before the Board … shall be considered by the court” absent “extraordinary circumstances.” 29 U.S.C. § 160(e); see also New York & Presbyterian Hosp. v. NLRB, 649 F.3d 723, 733 (D.C. Cir. 2011) (“[S]ection 10(e) prevents us from considering the argument raised for the first time on appeal.”); cf. Am. Dental Ass’n v. Shalala, 3 F.3d 445, 448 (D.C. Cir. 1993) (explaining that the Court “do[es] not address … contentions raised by amicus curiae … [that] are

23 Moreover, the Board is not required, as Browning-Ferris would have it (Br. 38 n.15), to blind itself to the circumstances of the contemporary workforce just because it does not conduct in-house economic analysis. 29 U.S.C. § 154(a). The rise in contingent work is a well-documented phenomenon that Browning-Ferris does not challenge, and the Board cited external sources.
beyond the scope of the issues raised below by the appellants”). Browning-Ferris identifies no such circumstances for its failure to raise the issue below, either in its response to the Board’s request for briefing on the joint-employer standard or in a motion for reconsideration.24

Finally, Browning-Ferris’s and amici’s claims (Br. 44-45; ABC Br. 4-5; NAM Br. 24-29) that the Board’s standard will negatively affect business are, at bottom, policy disagreements. Such disagreements are insufficient grounds for reversal, however, as the Court will “defer to the Board’s policy choice” so long as “[the Board’s] interpretation of what the Act requires is reasonable.” Local 702, IBEW, 215 F.3d at 15, 17 (internal quotations omitted); see also Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (explaining that, when challenge “is merely an attack on the wisdom of the agency’s policy, … the challenge must fail”); Chamber of Commerce v. NLRB, 118 F. Supp. 3d 171, 178 (D.D.C. 2015) (employer’s “disagreement with choices made by the agency entrusted by Congress with broad discretion to implement the provisions of the

24 The fact that the dissenting Board members addressed the secondary-boycott issue sua sponte does not suffice to preserve it for review by the Court. To satisfy Section 10(e), an issue must have been actively presented to the Board, not just discussed by it. See HealthBridge Mgmt., LLC v. NLRB, 798 F.3d 1059, 1069 (D.C. Cir. 2015) (explaining that “it is insufficient to invoke our jurisdiction” that “the dissenting member explicitly” raised an issue); Contractors’ Labor Pool, Inc. v. NLRB, 323 F.3d 1051, 1061 (D.C. Cir. 2003) (same).
Given the deference afforded the Board regarding national labor policy and the duty to bargain, Curtin Matheson Sci., 494 U.S. at 786; Ford Motor Co., 441 U.S. at 496, the Court will “respect [the Board’s] policy choices” on such matters, when, as here, those choices are permissible. Local 702, IBEW, 215 F.3d at 15.

Moreover, such arguments ignore countervailing interests such as the benefits to both employees and industrial relations of meaningful collective bargaining. Congress’s determination that workplace disputes should be channeled through collective bargaining is ill-served by a regulatory framework that risks rendering such bargaining ineffective. When the employment relationship is fractured, and power over terms and conditions dissipated, a vital joint-employer standard thus ensures that employee rights do not fall through the cracks.

II. Browning-Ferris and Leadpoint Are Joint Employers under the Revised Standard, and the Board’s Bargaining Order Thus Should Be Enforced

Applying its revised standard, the Board found that Browning-Ferris is a joint employer with Leadpoint of the bargaining-unit employees at Newby Island, and thus that Browning-Ferris violated Section 8(a)(5) of the Act by admittedly

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25 Browning-Ferris’s dire warning (Br. 44) that the Board’s standard will “eliminate third-party arrangements” is also undermined by the fact that the Board has found joint-employer relationships in the staffing-agency or employee-leasing context before, and that sector remains vibrant. See, e.g., Dunkin’ Donuts Mid-Atlantic, 363 F.3d at 438-41; Hamburg Indus., 193 NLRB at 67.
refusing to bargain with Local 350.\textsuperscript{26} Substantial evidence supports that finding. Based on “multiple examples of reserved, direct, and indirect control” over the employees and their work performance, the Board found that Browning-Ferris is an employer under common-law principles. (JA 385-86.) And that ability to control extends to such essential terms and conditions of employment as hiring, discipline, wages, hours, direction, and supervision.

Browning-Ferris has reserved the right in the Agreement to determine which employees can work at Newby Island. As an initial matter, Browning-Ferris “shall have the right” to require that any employee that Leadpoint provides meet Browning-Ferris’s own selection criteria and that Leadpoint avoid providing any employees whom Browning-Ferris had deemed ineligible for rehire. (JA 19.) In placing conditions on whom Leadpoint can hire to work at Newby Island, Browning-Ferris “codetermines the outcome of that process.” (JA 386.) And once those employees are on the job, Browning-Ferris reserves the right to compel them to comply with its own safety policies and training requirements.

Even if an employee meets the qualifications that it establishes, Browning-Ferris retains ultimate veto power over whether she can work at Newby Island. It

\textsuperscript{26} An employer violates Section 8(a)(5) of the Act by “refus[ing] to bargain collectively with the representatives of [its] employees.” 29 U.S.C. § 158(a)(5). A refusal to bargain in violation of Section 8(a)(5) also derivatively violates Section 8(a)(1). \textit{Exxon Chem. Co. v. NLRB}, 386 F.3d 1160, 1164 (D.C. Cir. 2004).
can reject any employee that Leadpoint provides, and can end her tenure at any
time. Indeed, Browning-Ferris’s contractual right to control the makeup of the
workforce is unqualified; it can reject or discontinue the use of any employee “for
any or no reason.” (JA 20-21); cf. Ace-Alkire Freight Lines, 431 F.2d at 282; Ref-
Chem, 418 F.2d at 129. And Browning-Ferris has exercised that right. The record
shows two occasions in which Browning-Ferris manager Keck reported
misconduct to Leadpoint and “request[ed] the[] immediate dismissal” of the
employees involved. (JA 34.) Leadpoint dismissed each employee from Newby
Island, and discharged two of them outright.

Browning-Ferris and Leadpoint also codetermine the wages paid to
employees. Leadpoint sets the rates, but Browning-Ferris effectively sets an upper
limit by preventing Leadpoint from paying more than Browning-Ferris pays its
own full-time employees who perform similar work. Cf. Ref-Chem Co., 169
NLRB 357, 379 (1968); Hoskins Ready-Mix, 161 NLRB at 1493.

Further, Browning-Ferris has a significant role in establishing conditions of
employment at Newby Island, through its exercise of both direct and indirect
control over daily operations and work performance. Leadpoint and Browning-
Ferris codetermine the plans for each day, including the specific tasks to be
performed, at pre-shift meetings, and remain in contact throughout the day.
Browning-Ferris sets productivity goals and shift schedules, and decides which
streams will run, how many employees will work on each stream, and whether
overtime is necessary. *Cf. Sun-Maid Growers*, 239 NLRB at 350-51; *Greyhound*,
153 NLRB at 1492-93. Leadpoint implements those directives by assigning
particular employees to particular shifts or tasks. Even so, Browning-Ferris can
reassign employees, either by instructing Leadpoint to adjust the number of
employees on a stream via a “staffing change” (JA 32) or by directing individual
employees on an ad hoc basis during a shift. *Cf. Clayton B. Metcalf*, 223 NLRB at
643-44.27

Browning-Ferris also controls the details of work performance. It exercises
indirect control by using Leadpoint supervisors as intermediaries to communicate
its instructions to employees. *Cf. Mobil Oil*, 219 NLRB at 514; *Int’l Trailer*, 133
NLRB at 1529. Similarly, it reports concerns with job performance to those
supervisors, with the expectation that Leadpoint will address them. Browning-
Ferris also meets with employees directly to discuss issues ranging from job duties
to performance issues to overall objectives to proper technique for specific tasks.
In addition to the meetings, Browning-Ferris directs individual employees in their
duties, such as by standing next to sorters while they work and telling them what

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27 Thus, as in the Restatement of Agency’s description of an employment
relationship, “work is done upon the premises of [Browning-Ferris] with [its]
machinery by workmen who agree to obey general rules for the regulation of the
conduct of employees.” Restatement (Second) of Agency § 220, cmt. l.
material to remove. Directions from Browning-Ferris take precedence over directions from Leadpoint, as when Browning-Ferris reassigns employees to different tasks and when a Leadpoint supervisor backed off of his instruction to sorters to remove certain material from the stream once he learned that Browning-Ferris manager Keck had told them to let it go.

One key example of Browning-Ferris’s authority over working conditions is its sole control over the speed of the streams. The speed of work has been a source of tension for the sorters, with some employees insisting that they are unable to satisfy Browning-Ferris’s directions unless the streams are slowed or occasionally stopped. Another sore point is how often sorters use the emergency-stop switch, with Browning-Ferris frequently instructing them (both directly and through Leadpoint supervisors) to reduce the number of stops. Despite the importance to employees of matters related to productivity standards and the speed of work, “it is difficult to see how Leadpoint alone could bargain meaningfully” over such terms and conditions of employment (JA 387). Browning-Ferris, by contrast, clearly could.28

Employees also work under Browning-Ferris’s constant and detailed monitoring. Cf. Hamburg Indus., 193 NLRB at 67. Browning-Ferris managers

28 It is thus not the case, as Browning-Ferris suggests (Br. 43 n.18), that Leadpoint “indisputably would be capable of carrying out all statutory obligations” related to bargaining over terms and conditions of employment.
and supervisors observe the employees’ work performance both from the panopticon control room and by standing next to the sorters as they work on the stream. From those various vantage points, they keep tabs on, for example, what material is removed and how often the emergency-stop switch is used. Browning-Ferris also collects data on worker productivity by tracking how many tons of material are processed per hour on each stream. Based on all of its observations, Browning-Ferris may adjust the speed of the streams, direct an individual employee to make changes, meet with the full group, or report to Leadpoint. Directly and indirectly, Browning-Ferris thus exercises control over both what employees do and how they do it.²⁹

Finally, Browning-Ferris’s two-sentence challenge (Br. 57-58) to retroactive application of the revised standard is unavailing in light of the Board’s settled practice of applying new or revised policies “to all pending cases in whatever stage.” Aramark School Servs., 337 NLRB 1063, 1063 n.1 (2002) (internal quotations omitted); see also Am. Tel. & Tel. Co. v. FCC, 454 F.3d 329, 332 (D.C. ²⁹ Browning-Ferris’s only substantive challenge to the Board’s application of its revised standard is the incorrect assertion (Br. 56-57) that the Board relied on the ability to ensure compliance with government regulations and the cost-plus nature of the Agreement. The Board instead noted Browning-Ferris’s contractual right to require compliance with its own safety standards, and explained that a cost-plus contract “is not necessarily sufficient to create a joint-employer relationship.” (JA 87 & n.115.) Browning-Ferris also argues (Br. 56) that it “is not a joint employer under the Board’s prior test,” an issue that the Board did not decide.
Cir. 2006) (“Retroactivity is the norm in agency adjudications ….”). And, in particular, the Board explained (JA 370) that it has a presumption of retroactively applying such policies in representation cases like this one. UGL-UNICCO Serv. Co., 357 NLRB 801, 808 & n.28 (2011). Browning-Ferris did not attempt to rebut that presumption before the Board, and its abbreviated argument to the Court fares no better.

The Court will “bar retroactive application of a new rule only when such application would work a manifest injustice.” Gen. Am. Transp. Corp. v. ICC, 872 F.2d 1048, 1061 (D.C. Cir. 1989) (internal quotations omitted). Browning-Ferris has made no effort to show such a result. It adverts generally (Br. 58) to “settled expectations,” but, as noted, supra p.25, the core of the joint-employer standard remains the same. Although the Board added to that established principle by restoring consideration of reserved and indirect control to the analysis, the Court has held that “retroactive effect is appropriate for adjudicatory rules … that are … additions” rather than wholesale “substitution[s] of new law.” HealthBridge Mgmt., 798 F.3d at 1069 n.6 (internal quotations omitted).

Moreover, any reliance interests were diminished by the fact that the status quo was a known source of controversy, supra p.45, for the entire period of Browning-Ferris’s contractual relationship with Leadpoint. See, e.g., Local 900, Int’l Union of Elec., Radio & Mach. Workers v. NLRB, 727 F.2d 1184, 1195 (D.C. Cir. 1984) (retroactive application proper when party “had notice that [prior Board policy] w[as] under attack”).
Further, courts must balance the effect of retroactively applying agency action with “the mischief of producing a result which is contrary to a statutory design” by not doing so. Sec. & Exch. Comm’n v. Chenery Corp., 332 U.S. 194, 203 (1947); see also Consol. Freightways v. NLRB, 892 F.2d 1052, 1059 (D.C. Cir. 1989) (proper for Board “to conclude that complete vindication of employee rights should take precedence over the employer’s reliance on prior Board law”). Here, the mischief of failing to apply the Board’s revised joint-employer standard to this case is the risk of an ineffective collective-bargaining relationship for the sorters, screen cleaners, and housekeepers who voted for union representation, contrary to the fundamental goals and principles of the Act. 29 U.S.C. § 151. Moreover, Local 350 successfully convinced the Board to revisit the standard and, as the Court has recognized, “to deny the benefits of a change in the law to the very parties whose efforts were largely responsible for bringing it about might have adverse effects on the incentive of litigants to advance new theories or to challenge outworn doctrines.” Retail, Wholesale & Dep’t Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972). Accordingly, under the facts of this case, retroactive application of the Board’s revised joint-employer standard was appropriate.
CONCLUSION

The Board respectfully requests that the Court deny Browning-Ferris’s petition for review and enforce the Board’s Order in full.

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National Labor Relations Board  
November 2016
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC. D/B/A BFI NEWBY ISLAND RECYCLING
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

TEAMSTERS LOCAL 350
Intervenor

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,955 words of proportionally spaced, 14-point type and the word-processing system used was Microsoft Word 2010.

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Dated at Washington, DC
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JA-408
CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. The following participants will be served by first-class mail:

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Dated at Washington, DC  
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STATUTORY ADDENDUM

29 U.S.C. § 151
… It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 152(3)
The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, … but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. § 157
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection …
29 U.S.C. § 158(a)
It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title

…

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 158(d)
For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment ….

29 U.S.C. § 160(e)
… No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances ….
new joint-employer standard in this case would be manifestly unjust. We therefore vacate our prior Decision and Order in the Section 8(a)(5) test-of-certification proceeding, dismiss the complaint in that case, reopen the underlying representation case, and amend the Certification of Representative to remove BFI as a joint employer.

1. BACKGROUND

On August 16, 2013, the Acting Regional Director for Region 32 issued a Decision and Direction of Election wherein he found that BFI did not jointly employ Leadpoint’s employees and directed an election in the following unit:

All full time and regular part-time employees employed by FPR-II, LLC, d/b/a Leadpoint Business Services at the facility located at 1601 Dixon Landing Rd., Milpitas California; excluding employees currently covered by collective bargaining agreements, office clerical employees, guards, and supervisors as defined in the Act.

The Union filed a timely request for review of the decision not to include BFI as a joint employer of the Leadpoint employees. On April 25, 2014, while the request for review was pending before the Board, the election was held, and the ballots were impounded pending the Board’s ruling.

On August 27, 2015, the Board reversed the Acting Regional Director’s decision. Browning-Ferris, 362 NLRB at 1599–1619. In so doing, the Board overruled cases holding that an entity must exercise direct-and-immediate control over essential terms and conditions of employment of another entity’s employees in order to be a joint employer under the Act.4 Id. at 1599–1600, 1604, 1606–1614 (emphasis added). In place of the direct-and-immediate control test, the Board adopted a new two-step test. Id. at 1599–1600, 1613–1614. Under this test, the Board would first determine “whether there is a common-law employer-employee relationship with the employees in question.” Id. at 1600. Second, “[i]f this common-law employment notified the parties to this proceeding that it had accepted the court’s remand and invited them to file statements of position. Respondent Browning-Ferris, the General Counsel, and the Charging Party each filed a statement of position. The Charging Party also filed a motion to strike Browning-Ferris’s, the General Counsel’s, and the Charging Party’s statements of position. The Board denied this motion.”

The Board has since issued a final rule that reinstated and clarified the joint-employer standard in place prior to Browning-Ferris. Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11184 (Feb. 26, 2020). The final rule, which applies only prospectively from its effective date of April 28, 2020, does not control this proceeding.

In New Process Steel v. NLRB, 560 U.S. 674 (2010), the Supreme Court held that the Board’s test-of-certification proceeding is before the National Labor Relations Board4 on remand from the United States Court of Appeals for the District of Columbia Circuit. This case follows from the Board’s announcement in the underlying representation case, Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recycler, 362 NLRB 1599 (2015) (Browning-Ferris), of a new joint-employer standard that the Browning-Ferris majority retroactively applied to conclude that BFI Newby Island Recycler (BFI) and Leadpoint Business Services (Leadpoint) were joint employers of the Leadpoint employees in the petitioned-for unit.1 The court affirmed in part and reversed in part the Board’s decision and remanded the case with directions to clarify the new standard and how it was applied to the facts of this case. The court further suggested that the Board should “keep in mind” that retroactive application of a rearticulated new test might be inappropriate in the circumstances of this case. 911 F.3d at 1222. Consistent with this admonition, we find no need to clarify and refine the joint-employer standard announced in the Board’s original representation-case decision. Upon careful consideration, we find that retroactive application of any clarified variant of the

1 Member Emanuel is a member of the panel but did not participate in this decision on the merits. Accordingly, the Charging Party’s motion to recuse Member Emanuel is denied as moot, without addressing its merits.

In New Process Steel v. NLRB, 560 U.S. 674 (2010), the Supreme Court left undisturbed the Board’s practice of deciding cases with a two-member quorum when one of the panel members has recused himself. Under the Court’s reading of the Act, “the group quorum provision of Sec. 3(b) still operates to allow any panel to issue a decision by only two members if one member is disqualified.” New Process Steel, 560 U.S. at 688; see also, e.g., NLRB v. New Vista Nursing & Rehabilitation, 870 F.3d 113, 127–128 (3d Cir. 2017); D. R. Horton, Inc., 357 NLRB 2277, 2277 fn. 1 (2012), enf’d. in relevant part 737 F.3d 344 (5th Cir. 2013); 1621 Route 22 West Operating Co., 357 NLRB 1866, 1866 fn.1 (2011), enf’d. 725 Fed. Appx. 129 (3d Cir. 2018).

2 Browning-Ferris Industries of California, Inc. v. NLRB, 911 F.3d 1195 (D.C. Cir. 2018). Subsequent to the court’s decision, the Board notified the parties to this proceeding that it had accepted the court’s remand and invited them to file statements of position. Respondent Browning-Ferris, the General Counsel, and the Charging Party each filed a statement of position. The Charging Party also filed a motion to strike Browning-Ferris’s, the General Counsel’s, and the Charging Party’s statements of position. The Board denied this motion.

3 The Board has since issued a final rule that reinstated and clarified the joint-employer standard in place prior to Browning-Ferris. Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11184 (Feb. 26, 2020). The final rule, which applies only prospectively from its effective date of April 28, 2020, does not control this proceeding.

relationship exists, the inquiry would then turn to whether the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.” Id. For both parts of the test, the Board substantially redefined the nature of employer control required to prove joint-employer status, holding that indirect or unexercised contractually reserved control could alone be dispositive. Id. at 1600, 1613–1614. Applying its new joint-employer standard retroactively to the facts at hand, the Board concluded that BFI and Leadpoint were joint employers of the petitioned-for employees and directed the Regional Director for Region 32 to open and count the ballots and issue the appropriate certification.

On September 14, 2015, after the ballots revealed that a majority of voters had opted for union representation, the Regional Director issued a Certification of Representative. Consistent with the Board’s decision, the unit description in the Certification of Representative was amended, postelection, to add BFI as a joint employer:

> All full time and regular part-time employees employed by FPR-II, LLC d/b/a Leadpoint Business Services and Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery, joint employers, at the facility located at 1601 Dixon Landing Road, Milpitas, California; excluding employees currently covered by collective-bargaining agreements, office clerical employees, guards and supervisors as defined in the Act.

BFI thereafter refused to recognize and bargain with the Union. On January 12, 2016, the Board granted the General Counsel’s motion for summary judgment, found that the refusal to bargain violated Section 8(a)(5) and (1) of the Act, and ordered BFI to bargain with the Union. Browning-Ferris Industries of California, Inc., 363 NLRB No. 95 (2016). BFI refused to comply with the Board’s Order and filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit. The Board filed a cross-application for enforcement.

On December 28, 2018, the court granted BFI’s petition for review in part, denied the Board’s cross-application for enforcement, and remanded this proceeding to the Board. Browning-Ferris Industries of California, 911 F.3d at 1200. Reviewing the Board’s new joint-employer standard, the court agreed with the Board that unexercised reserved control and indirect control can be relevant factors in determining whether an additional entity is a common-law joint employer. However, the court did not address whether such evidence can have conclusive weight. See id. at 1209–1213, 1216–1221. Further, the court found that the Board erred in analyzing whether BFI had indirect control over Leadpoint’s employees. The court found that the Board “fail[ed] 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. Even if the Board had sufficiently explained its finding that BFI was a joint employer at common law, the court added, the Board failed to apply the second step of its standard, which asks whether the entity has “sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.” Id. at 1221–1222 (quoting Browning-Ferris, 362 NLRB at 1600).

The court then addressed the possibility that the Board’s retroactive application of its new standard to BFI was manifestly unjust:

> Because we conclude that the Board insufficiently explained the scope of the indirect-control element’s operation and how a properly limited test would apply in this case, it would be premature for us to decide Browning-Ferris’s challenge to the Board’s retroactive application of its test. We do not know whether, under a properly articulated and cabined test of indirect control, Browning-Ferris will still be found to be a joint employer. In addition, the lawfulness of the retroactive application of a new decision cannot be evaluated reliably without knowing with more precision what that new test is and how far it departs (or does not) from reasonable, settled expectations.

Nevertheless, we note that the Board in this case “carefully examined three decades of its precedents,” “concluded that the joint-employer standard they reflected required ‘direct and immediate’ control,” and “[t]hereafter . . . forthrightly overruled those cases and set forth . . . ‘a new rule.’” [NLRB v. CNN America, 865 F.3d [740], 749–750 [(D.C. Cir. 2017)] (quoting Browning-Ferris, 362 [NLRB at 1600]). In rearticulating its joint-employer test on remand, then, the Board should keep in mind that while retroactive application may be “appropriate for new applications of [existing] law,” it may be unwarranted or unjust “when there is a substitution of new law for old law that was reasonably clear,” and on which employers may have relied in organizing their business relationships. Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (alteration in original; internal quotation marks omitted) (quoting Public Serv. Co. of Colo. v. FERC, 91 F.3d 1478, 1488 (D.C. Cir. 1996)); cf. American Tel. & Tel. Co. v. FCC, 454 F.3d 329, 333–334 (D.C. Cir. 2006) (finding retroactive application “not manifestly unjust” where the agency’s previous rulings “reflect[ed] a highly fact-
specific, case-by-case style of adjudication” that did not establish “a clear rule of law exempting” certain conduct).

Id. at 1222. Similarly, Judge Randolph, writing in dissent, warned about retroactive application: “On remand and in light of what the Board learned during the rulemaking, the Board might reconsider that aspect of its decision. Case law in this circuit . . . strongly suggests that it should.” Id. at 1225.

II. ANALYSIS

In its position statement, BFI first and foremost contends that this case should be dismissed on the basis that retroactively applying the new joint-employer standard was inequitable. We find merit in this contention.

The Board majority in the original Browning-Ferris decision offered no more explanation for applying its new standard retroactively than to state summarily that “[t]he Board’s established presumption in representation cases like this one is to apply a new rule retroactively.” 362 NLRB at 1600 (citing UGL-UNICCO Service Co., 357 NLRB 801 (2011)). In UGL-UNICCO, however, the Board explained that although there is a presumption that new rules will be applied retroactively, the presumption “is overcome . . . where retroactivity will have ill effects that outweigh the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.” 357 NLRB at 808 fn. 28 (quoting Crown Bolt, Inc., 343 NLRB 776, 779 (2004)) (internal quotation marks omitted). In light of the court’s expressed concerns, which we accept as the law of the case, we now reconsider the retroactivity issue and find that any presumption favoring retroactive application in this case is significantly outweighed by its potential ill effects.

In determining whether to apply a change in law retroactively, the Board balances any ill effects of retroactivity against “the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.” SNE Enterprises, 344 NLRB 673, 673 (2005) (quoting Securities & Exchange Commission v. Chenery Corp., 332 U.S. 194, 203 (1947)). In other words, the Board will apply a new rule “to the parties in the case in which the new rule is announced and to parties in other cases pending at the time so long as [retroactivity] does not work a manifest injustice.” Id. (internal quotations omitted). In determining whether retroactive application will work a manifest injustice, the Board typically considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application. Id. Here, however, we do not write on a blank slate. We are guided in our retroactivity analysis by the court’s decision, which is law of the case. And the court clearly emphasized the centrality of reliance interests to the retroactivity determination, stating that retroactive application “may be unwarranted or unjust when there is a substitution of new law for old law that was reasonably clear, and on which employers may have relied in organizing their business relationships.” Browning-Ferris Industries of California, 911 F.3d at 1222 (internal quotation marks omitted).

As the court noted, the Board majority in the underlying representation case decision acknowledged and expressly overruled three decades of Board precedent requiring proof of direct and immediate control by one employer over another employer’s employees in order to establish a joint-employer relationship. Absent that showing of direct and immediate control, proof of indirect and/or unexercised reserved control, regardless of the nature of such control or to what terms and conditions of employment it applied, would not warrant finding a joint-employer relationship for purposes of the National Labor Relations Act under pre-Browning-Ferris precedent.

In other words, for at least 30 years preceding the Board’s 2015 decision in the underlying representation case, there was a clear rule of law requiring proof of direct and immediate control under the applicable joint-employer test. It is reasonable to assume that parties would rely on this law when organizing their business relationships. Indeed, numerous comments filed in our recent joint-employer rulemaking proceeding made abundantly clear that many businesses did rely on that legal standard and that the new standard adopted in the 2015 decision would substantially affect reasonable, settled expectations for relationships established on the basis of the prior standard.

Although the court’s remand sought clarification and redress of two critical shortcomings in the Board’s discussion of its new joint-employer standard, we find there is no variation or explanation of that standard that would not incorporate its substantial departure from the prior direct and immediate control legal standard. Retroactive application of that new standard would mean that entities such as BFI would be suddenly confronted with the new reality that preexisting business relationships with other entities, such as Leadpoint—relationships formed in reliance on a decades-old direct-and-immediate-control standard for determining joint-employer status—trust upon them unanticipated and unintended duties and liabilities under the Act. In accord with the legal principles cited by the court in its remand opinion, such a change represents a substitution of “new law for old law that was reasonably clear.” 911 F.3d at 1222 (internal citations omitted). As such, it would be manifestly unjust to fail to give BFI and
similarly affected businesses reasonable warning before imposing such significant new duties and liabilities.

Also counseling against retroactive application of the Browning-Ferris standard in this case is the fact that the election was held, and the employees voted, on the basis that Leadpoint was the sole employer, not BFI and Leadpoint as joint employers. The Board has refused to give effect to election results where the election was held on the premise that a joint-employer relationship existed, and the Board later reversed that finding. H&W Motor Express, 271 NLRB 466 (1984) (“As the employees herein cast their ballots based on the Regional Director’s finding that a joint employer relationship existed, we direct that the impounded ballots be discarded and that a new election be conducted should the Petitioner desire to proceed to an election.”). Here, the reverse situation exists, but the principles stated in H&W Motor Express militate against retroactivity all the same with respect to imposition of a bargaining obligation on BFI when the employees here cast their ballots on the assumption that a joint-employer relationship did not exist.

Accordingly, we conclude that the new joint-employer test announced in the underlying representation case should not have been applied in this litigation to determine whether BFI was a joint employer. The joint-employer issue must be resolved under the prior longstanding standard requiring proof of direct and immediate control. The Acting Regional Director applied that standard in his Decision and Direction of Election and found that BFI was not a joint employer of Leadpoint’s employees. As the dissenting opinion in the subsequent Board case noted, “the majority does not argue that the Regional Director erred in making this finding.” 362 NLRB at 1634 fn. 60. We agree and now affirm the Acting Regional Director’s finding that BFI is not a joint employer as dispositive of the joint-employer issue in the present unfair labor practice case. Based on that finding, BFI did not violate Section 8(a)(5) by refusing to bargain with the Union. We will vacate the prior Decision and Order and dismiss the complaint in that proceeding. We will also reopen Case 32–RC–109684 for the limited purpose of amending the Certification of Representative to remove BFI as a joint employer, which restores the unit description to the language in place at the time that the employees voted.

ORDER

IT IS ORDERED that the Board’s prior Decision and Order in Case 32–CA–160759, reported at 363 NLRB No. 95, is vacated and the complaint is dismissed.

IT IS FURTHER ORDERED that Case 32–RC–109684 is reopened and the Certification of Representative issued on September 14, 2015, is amended as follows:

UNIT: All full time and regular part-time employees employed by FPR-II, LLC, d/b/a Leadpoint Business Services at the facility located at 1601 Dixon Landing Rd., Milpitas California; excluding employees currently covered by collective bargaining agreements, office clerical employees, guards, and supervisors as defined in the Act.

Dated, Washington, D.C. July 29, 2020

____________________________________
John F. Ring, Chairman

____________________________________
Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROWNING-FERRIS INDUSTRIES
OF CALIFORNIA, INC., D/B/A/ BFI NEWBY
ISLAND RECYCLERY,

Employer,

and

FPR-II, LLC, D/B/A LEADPOINT
BUSINESS SERVICES,

Employer,

and

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

Charging Party.

____________________________________________________
TEAMSTERS LOCAL 350’S
MOTION FOR RECONSIDERATION

____________________________________________________

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Charging Party Teamsters Local 350, files this Motion for Reconsideration of the Board’s Supplemental Decision and Order issued in this matter on July 29, 2020, on the grounds that the Board materially erred by failing to comply with the D.C. Circuit Court’s remand order and abandoning the law of the case and the common law legal principles underpinning the joint-employer analysis outlined by the Court.

The Court ordered the Board to clarify the indirect control indicia appropriately considered in the joint-employer analysis, and if it were to still find Browning-Ferris Industries (BFI) to be a joint employer under that clarification, to apply and clarify the second prong of the test articulated in *Browning-Ferris*, 362 NLRB 1599 (2015). The Board did not do this. Instead, the Board prematurely applied its retroactivity analysis to circumvent the Court’s order and overturn the joint-employer standard that was the law of this case. The D.C. Circuit clearly indicated that retroactivity balancing was not possible until the Board rearticulated its standard. The Board ignored this too.

The Board compounded its material error by erroneously applying the retroactivity analysis. Because the Board applied its retroactivity analysis without first articulating the joint-employer standard, it could not appropriately weigh the impacts on the parties.

Layering on top of these two material errors, the Board then purported to apply the prior joint-employer standard to this case. However, it did not actually do so. It summarily adopted the Acting Regional Director’s Decision and Direction of Election (DDE) by reasoning that the prior Board majority did not argue that the Acting Regional Director (ARD) erred in finding that BFI was not a joint employer under the old standard. But, the Charging Party properly raised and preserved its argument that the DDE was
wrong under the old standard. The prior Board cannot waive the Charging Party’s rights.

Thus, reconsideration of this part of the opinion is warranted because the Board neglected to consider the issue at all. More fundamentally, the Board cannot simply apply the prior standard because it was inconsistent with the common law. The D.C. Circuit was clear that any applicable standard must be consistent with the common law, and that the Board’s prior standard was not.

This series of cascading material errors present extraordinary circumstances justifying the instant Motion for Reconsideration.

I. THE BOARD FAILED TO COMPLY WITH THE COURT’S REMAND

The D.C. Circuit held that the common law joint-employer standard encompasses both reserved and indirect control and that evidence of either cannot be categorically excluded from consideration.

The Court’s remand instructed the NLRB to “erect some legal scaffolding” around the indirect-control factor that “keeps the inquiry within traditional common-law bounds and recognizes that ‘[s]ome such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees.’” *Browning-Ferris Indus. of Cal. v. NLRB, 911 F.3d 1195, 1220 (D.C. Cir. 2018)* (citation omitted).

The D.C. Circuit’s decision explained its remand as follows.

We conclude that the Board’s right-to-control standard is an established aspect of the common law of agency. The Board also correctly determined that the common-law inquiry is not woodenly confined to indicia of direct and immediate control; an employer’s indirect control over employees can be a relevant consideration. The Board in *Hy-Brand*, in fact, agreed that both reserved and indirect control are relevant considerations recognized in the common law. *See Hy-Brand, 365 NLRB No. 156 at 4.* In applying the indirect-control factor in this case, however, the Board failed to confine it to indirect control over the essential terms and conditions of the workers’ employment. We accordingly remand that aspect of the decision
to the Board for it to explain and apply its test in a manner that hews to the common law of agency.

*Browning-Ferris*, 911 F.3d at 1209.

Because we cannot tell from this record what facts proved dispositive in the Board’s determination that Browning-Ferris is a joint employer, and we are concerned that some of them veered beyond the orbit of the common law, we remand for further proceedings consistent with this opinion.

*Id.* at 1221.

In sum, we uphold as fully consistent with the common law the Board’s determination that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis. We reverse, however, the Board’s articulation and application of the indirect-control element in this case to the extent that it failed to distinguish between indirect control that the common law of agency considers intrinsic to ordinary third-party contracting relationships, and indirect control over the essential terms and conditions of employment.

*Id.* at 1222-23.

Additionally, on remand, the Court expected that, if the Board were to find that BFI was a joint employer under the first prong of the *Browning-Ferris* standard, then it would apply the second prong of that standard, and “explain which terms and conditions are essential to permit meaningful collective bargaining.” *Id.* at 1222.

The remand required the Board to define the parameters of the indirect control factor, clarify the second prong of the *Browning-Ferris* standard and apply that standard. The Board’s Supplemental Decision defies that order. It does not even follow the first instruction -- to rearticulate the parameters of the indirect control factor.
Significantly, the D.C. Circuit did not make a determination regarding whether the “new” joint-employer standard should be applied retroactively because the Court did not know what limits the Board would impose on the indirect-control factor. It explicitly held that an appropriate retroactivity analysis required further articulation of the new standard. The Court held that “the lawfulness of the retroactive application of a new decision cannot be evaluated reliably without knowing with more precision what that new test is and how far it departs (or does not) from reasonable, settled expectation.” *Browning-Ferris*, 911 F.3d at 1222. This Board ignored that binding instruction.

In its Supplemental Decision in this case on remand, the Board cites to the D.C. Circuit’s statement on retroactivity, but turns it on its head. It ignores the clear directive to rearticulate the indirect control standard bypassing that step entirely and jumping to the retroactivity analysis. *See id.* (“In rearticulating its joint-employer test on remand, the Board should keep in mind” certain retroactivity considerations (emphasis added).) The Board justified its premature retroactivity analysis by accepting the Court’s “expressed concerns as the law of the case” while ignoring the actual law of the case dictating that it first rearticulate an indirect-control standard.

The Circuit Court was clear that retroactivity could not be assessed before the indirect-control aspect of the test was clarified, and, if necessary, the second prong of the test clarified and applied. Had the Court believed that the retroactivity was properly ripe for consideration, it would have proceeded to address the issue; instead, it found the issue “premature.” What was premature for the Court, is no less premature for the Board on remand. In bypassing the standard and jumping to the retroactivity analysis, the Board exceeded the scope of the remand and substituted its judgment for the Court’s in this
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); see also Dubuque Packing Co., Inc., 303 NLRB No. 66 n. 19 (1991). The Board’s premature retroactivity application defied the Court’s mandate in this case. This comprises material error warranting reconsideration.¹

Furthermore, because the Board members did not rearticulate the joint-employer test, as instructed by the D.C. Circuit, its decision on retroactivity simply amounts to overruling the earlier majority’s decision on the same issue. The Board has long applied a rule that three Board members must vote to overrule a prior Board decision. Only two Board members participated in the Supplement Decision, and the Board provided no explanation for why it was departing from its prior three-vote rule. This comprises another material error warranting reconsideration.

II. THE BOARD MATERIALLY ERRED IN APPLYING ITS RETROACTIVITY ANALYSIS

Assuming, arguendo, that the Board appropriately reached the retroactivity analysis, it erred in its application. This Board acknowledged the presumption of retroactivity. 369 NLRB No. 139, at *10; see also Cristal USA, Inc., 368 NLRB No. 137, slip op. at 2 (2019) (“The Board’s usual practice is to apply new policies and standards retroactively to all pending cases in whatever stage.”) The Board will not apply a new rule retroactively only if it would work a “manifest injustice” considering the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the

¹ The Board’s assertion that there “is no variation or explanation” of the Browning-Ferris test that would not constitute manifest injustice to apply retroactively, sl. op. 3, is no less a contradiction of the Court’s order. Had the Court found that no rearticulation of the standard would satisfy a retroactivity challenge, it would have decided the issue. Instead, it specifically said that “the lawfulness of the retroactive application of a new decision cannot be evaluated reliably without knowing with more precision what the new test is and how far it departs (or does not) from reasonable, settled expectations.” Browning-Ferris, 911 F.3d at 1222. The Court clearly understood that some articulation of the test could be lawfully applied retroactively.
purposes of the Act, and any particular injustice arising from retroactive application.

Here, the Board erroneously found that retroactivity would work a manifest injustice because of material errors in applying this standard. The Board erred in addressing retroactivity without first articulating the standard to determine the reliance interest and, then, the Board erroneously presumed the reliance interest. Further, the Board failed to consider the other factors.

A. The Board Erred in its Analysis of the Reliance of the Parties

The Board reached its “manifest injustice” conclusion largely based on its characterization of the D.C. Circuit’s statement that retroactivity “may” be unwarranted after the Board clarified the indirect control factor. 369 NLRB No. 139 at *11. But, the D.C. Circuit did not weigh the factors or balance the interests in a retroactivity analysis. The Court was clear that it could not. The Board’s reliance on the Court’s characterization of the reliance interest was material error. The Board was required to balance the interests. A closer look at these interests reveals that the Board’s conclusion was erroneous.

The reliance interests of the parties is significantly reduced here by the clear common law supporting the new standard. “Under Supreme Court and circuit precedent, the National Labor Relations Act’s test for joint-employer status is determined by the common law of agency.” Browning-Ferris, 911 F.3d at 1206; NLRB v. United Insurance Co. of America, 390 U.S. 254, 256 (1968). The Act’s definition of “employer” is based in the common law and the Board is given no deference in interpreting the content and meaning of the common law. Browning-Ferris, 911 F.3d at 1206. The D.C. Circuit’s opinion repeatedly emphasized that reserved and indirect control are part of the common
law of agency citing case law and the Restatement (Second) of Agency. *Browning-Ferris*, 911 F.3d at 1209-1213, 1216-1219 (citations omitted). Thus, the reliance interest of BFI and other employers on Board holdings that reserved and indirect control would not be considered by the Board is reduced given the common law and Supreme Court precedent. *Cf. MV Transportation, Inc.*, 368 NLRB No. 66, at *52 (2019) (applying new rule retroactively in part because the new rule followed D.C. Circuit precedent). In other words, these entities set up their business arrangements knowing that the common law would consider reserved and indirect control in determining joint employment.

Additionally, the reliance interest is lessened because of the highly fact-specific inquiry into joint-employer status. Indeed, in this case, the D.C. Circuit cited to *AT&T v. FCC*, 454 F.3d 329, 333-334 (D.C. Cir. 2016) for the proposition that retroactive application was not unjust where the agency’s previous rulings “reflect[ed] a highly fact-specific, case-by-case style of adjudication” that did not establish “a clear rule of law exempting” certain conduct. *Browning-Ferris*, 911 F.3d at 1222. Courts reviewing joint employer cases have repeatedly recognized that under the old standard, “a slight difference between two cases might tilt a case toward a finding of a joint employment.” *Holyoke Visiting Nurses Assn. v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993), quoting *Carrier Corp.*, 768 F.2d 778, 781, n.1 (6th Cir. 1985); accord *North American Soccer League v. NLRB*, 613 F.2d 1379, 1382-83 (5th Cir. 1980) (“minor differences in the underlying facts might justify different findings on the joint employer issue”). The highly fact-specific nature of the standard lessens the reliance interest.

Further, the term “direct and immediate” is vague and ambiguous. For example, in *Holyoke Visiting Nurses Assn.*, 310 NLRB 684 (1993), *enf’d*. 11 F.3d 302 (1st Cir.
1993), the Board found that a visiting nurse association was a joint employer with its referral agency even though the nurses were professionals who did not need to be told how to do their jobs. In *G. Heileman Brewing Co., Inc.*, 290 NLRB 991 (1988), the Board found that the supervision provided by the lead firm supported a finding that it was the joint employer of maintenance electricians even though “the maintenance electricians were skilled personnel who were capable of performing their work as needed, without supervisory direction.” *Id.* at 996. These cases implicitly recognize that the term “direct and immediate” is elastic and applies differently depending on the type of work and other highly contextualized facts. Given the ambiguity in the preexisting joint employer standard, reliance interests are lessened.

Additionally, the Board’s usual practice of applying new policies and standards to all pending cases in whatever stage is strengthened in representation cases because the relief is prospective. There is no issue of backpay, reinstatement or any other retrospective relief of substantial reliance on prior law, only the prospective obligation to bargain with the union.

Reliance interests of potential joint employers here are further minimized because the parties to the business relationship can renegotiate their relationship at any time in order to re-distribute control over terms and conditions of employment. The joint-employer standard is intended to ensure that those entities that control terms and conditions of employment participate in bargaining. If the Board applies a standard that unexpectedly finds an entity to be a joint employer due to certain controls it retains or exercises over terms and conditions of employment, that entity can renegotiate the relationship with the other employer to diminish its control over those terms and
conditions. As the joint employer must only bargain over the terms and conditions it controls, that re-distribution would of control would relieve the entity of any bargaining obligation and return the parties to their settled expectations.

Thus, overall, the reliance interests are weak and do not support overcoming the presumption of retroactivity.

B. The Board Failed to Consider the Effect of Retroactivity on the Purposes of the Act

“In determining whether to apply a change in law retroactively, the Board must balance any ill effects of retroactivity against ‘the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.’” Valley Hospital Medical Center, Inc., 368 NLRB No. 139 (2019) (emphasis added) (applying retroactively new rule privileging employers to cease dues checkoff upon contract expiration).

In analyzing retroactivity, the Board ignored this factor and failed to weigh it in its analysis. The purpose of the NLRA is effectuated when the employer who controls the terms and conditions of employment is at the bargaining table.2 Pursuant to the D.C. Circuit’s decision, BFI will only be ordered to the table if it is a joint employer under the common law. If BFI is a common-law employer then, by definition, it exercises significant control over employees’ terms and conditions of employment and bargaining will be benefitted by that employer’s presence. Conversely, permitting a common law

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2 See, e.g., In re Airborne Freight Co., 338 NLRB 597 (2002) (Liebman, concurring) (noting that purpose of Act frustrated if employees prevented “from bargaining with the company that, as a practical matter, determines the terms and conditions of their employment.”) Particularly relevant here is the fact that 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), enf’d in relevant part, 790 F. 3d 816, 820-22 (8th Cir. 2015).
joint employer to refuse to come to the bargaining table will not effectuate the purposes of the Act.3

The Board reasoned that the fact that the election was held naming the labor-supply company as the sole employer counsels against retroactive application. In support of this theory, the Board cited *H&W Motor Express*, 271 NLRB 466 (1984). That case did not address the retroactivity issue much less provide any legal analysis of it. Here, the Board reasoned, in this case, “the reverse situation exists, but the principles stated in *H&W Motor Express* militate against retroactivity all the same[].” But, the Board failed to identify such “principles” and *H&W* is likewise silent. Moreover, the case is inapposite. The situation is reversed. In *H&W*, the employees voted to unionize with joint employers named on the ballot and, on appeal, the Board overturned the Regional Director’s decision on joint employment and ordered the uncounted impounded ballots to be discarded and a new election conducted with just one employer. The removal of an employer may limit bargaining ability and impact the union’s ability to negotiate. Here, in contrast, the employees voted to unionize for the purposes of bargaining with their employer and including their joint employer serves to effectuate that desire.

C. The Board’s Retroactivity Application Was Inconsistent with its Jurisprudence

This Board has consistently applied its decisions changing the law retroactively. It has done so even when it has changed Board law that has been in place for decades and even in cases when it has provided no notice or public participation on the question of whether it should abandon precedent.

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3 This highlights the Board’s error in not rearticulating and applying its standard prior to engaging in a retroactivity analysis. The Board cannot possibly perform the balancing required by the retroactivity analysis without first determining whether BFI is a joint employer to fully and fairly evaluate the countervailing interest in denying employee rights to bargain with BFI.
In *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), this Board overruled 70 years of unequivocal precedent applying the “clear and unmistakable” standard for evaluating the effect of a management right’s clause in a collective bargaining agreement. The Board dramatically changed the standard to a “contract coverage” standard empowering employers to unilaterally change terms and conditions of employment by denying any obligation to bargain if the topic is covered in the contract accompanied with a broad management’s rights clause. This Board applied *MV Transportation* retroactively despite its application to existing collective bargaining agreements negotiated by parties with a specific understanding of the governing law. The reliance interest was much more pronounced given the long-standing nature of the precedent and the clarity of the standard and retroactivity’s impact in undoing terms of existing collective bargaining agreements, when the Act is designed to give effect to such bargains.

Indeed, the Union is unable to find any case in which the two members of the instant panel participated in which the Board did not apply a change in law retroactively. *See, e.g., UPMC*, 368 NLRB No. 2 (2019) (overruling *Ameron Automotive Centers*, 265 NLRB 511 (1982) and *Montgomery Ward*, 256 NLRB 800 (1981) and applying a narrower standard for nonemployee organizer access to employer premises that are open to the public retroactively); *Providence Health & Services – Oregon d/b/a/ Providence Portland Medical Center*, 369 NLRB No. 78 (2020) (overruling *Thiele Industries*, 325 NLRB 1122 (1998) and applying a rule rendering ballots with markings in more than one box void retroactively); *Kroger Limited Partnership*, 368 NLRB No. 64 (2019) (overruling *Sandusky Mall Co.*, 329 NLRB 618 (1998) and applying a new standard for
nonemployee union organizer access to employer property retroactively); *The Boeing Co.*, 365 NLRB No. 154 (2017) (overruling *Lutheran Heritage*, 343 NLRB 646 (2004) and applying new framework for analyzing work rules retroactively).

This Board should take the same approach in this case as it has in all other cases involving new rules and apply it retroactively.

### III. THE BOARD ERRED IN SUMMARILY AFFIRMING THE ACTING REGIONAL DIRECTOR’S FINDING THAT BFI WAS NOT A JOINT EMPLOYER

#### A. The Board Must Address the Union’s Arguments that the Acting Regional Director Erred in Finding that BFI was not a Joint Employer

After improperly engaging in a retroactive application analysis prior to clarifying the joint employer standard, the Board’s Supplemental Decision contains no reasoned basis for affirming the ARD’s finding that BFI was not a joint employer under the prior standard. In reaching its conclusions, the Board simply writes:

The Acting Regional Director applied that standard in his Decision and Direction of Election and found that BFI was not a joint employer of Leadpoint’s employees. As the dissenting opinion in the subsequent Board case noted, “the majority does not argue that the Regional Director erred in making this finding.” 362 NLRB at 1634 fn. 60. We agree and now affirm the Acting Regional Director's finding that BFI is not a joint employer as dispositive of the joint-employer issue in the present unfair labor practice case.

*Browning Ferris*, 369 NLRB No. 139, at *15.

Whether BFI is a joint employer does not turn on the current Board’s “agree[ment]” that the earlier majority did not “argue” that the ARD erred in not finding BFI to be a joint employer. The prior majority’s failure to reach the issue of whether the ARD erred in its finding is irrelevant; the Union, which is a party to the case, did argue that the ARD erred in finding that BFI was not a joint employer under the prior standard. The Union made that argument extensively in its Request for Review from the Decision
and Direction of Election as acknowledged by the prior majority. *See Browning-Ferris, 362 NLRB 1599, 1605 (2015)* (“The Union argues first that, under the Board's current joint-employer standard, BFI constitutes a joint employer of the Leadpoint employees because it shares or codetermines the following essential terms and conditions of employment: employment qualifications, work hours, breaks, productivity standards, staffing levels, work rules and performance, the speed of the lines, dismissal, and wages. BFI's direct control over employees is evinced by its regular oversight of the employees and its constant control of their work. BFI, it argues, demands compliance with "detailed specifications, including the number of employees on each line, where they stand, what they pick, and at what rate they sort. BFI also trains and instructs employees as to how to do their jobs, directing them on picking techniques, what to prioritize, how to clear jams, and when to use the emergency stop.”)

The fact that the Board majority in 2015 did not reach the application of the old standard, because doing so was unnecessary to its holding, cannot act as a waiver of the Charging Party’s, now necessary, argument. Indeed, the Charging Party reasserted this argument on remand. See, e.g. Charging Party’s Statement of Position on Remand, at pp. 21-24.

The Board re-opened the underlying representation case in order to “affirm the Acting Regional Director’s finding” in the DDE, but neither addressed nor provided any indication that it even considered the Union’s arguments in its Request for Review, or its brief on remand. Instead, the Board treated any argument that the ARD erred as waived.

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4 It is not at all clear whether the earlier majority did not find that the Acting Regional Director erred in finding that BFI was not a joint employer under the pre-*Browning-Ferris* standard. The majority found BFI to be a joint employer based on control it exercised “directly and indirectly.” *Browning-Ferris, 362 NLRB at 1616.*
because the earlier majority failed to address the issue. By doing so, the Board committed material error. The Board must grant the Union’s motion for reconsideration and, for the first time, consider and rule on the Union’s arguments that the ARD erred in finding that BFI was not a joint employer.

B. The Board Cannot Summarily Affirm the ARD’s Finding that BFI was not a Joint Employer Because the Acting Regional Director Improperly Applied a Standard that is Inconsistent with the Common Law

The Board further committed material error when it summarily affirmed the ARD’s finding that BFI was not a joint employer, as the ARD applied a standard that did not comport with the common law as the D.C. Circuit held in this case.

The D.C. Circuit was absolutely clear that the Board must apply common law principles when determining whether an entity is a joint-employer: “Under Supreme Court and circuit precedent, the National Labor Relations Act’s test for joint-employer status is determined by the common law of agency.” *Browning-Ferris*, 911 F.3d at 1206. Indeed, the Court held that the Board is accorded no deference in determining its joint-employer standard, because the Board does not have “the power to recast traditional common-law principles of agency in identifying covered employees and employers.” *Id.* at 1207; see also *id.* at 1208 (“we review *de novo* whether the Board’s joint-employer test comports with traditional common-law principles of agency”). The Board, “in other words, must color within the common-law lines identified by the judiciary.” *Id.* at 1208.

The D.C. Circuit held that the prior joint-employer standard was not consistent with the common law. The Court held that reserved control “is an established aspect of the common law of agency.” *Id.* at 1209. According to the Court, that “joint-employer status considers not only the control an employer actually exercises over workers, but
also the employer’s reserved but unexercised right to control the workers and their essential terms and conditions of employment[ ] finds extensive support in the common law of agency.” *Id.* Indeed, the Court indicated that its precedent “already squarely addressed that common-law question[,]” quoting *Int’l Chem. Workers Union Local 483 v. NLRB*, 561 F.2d 253, 255 (D.C. Cir. 1977), as stating that “whether two entities are joint employers under the National Labor Relations Act depends upon the amount of actual and potential control that the putative joint employer has over the employees.” *Id.* (emphasis in original; internal quotation marks, brackets, and ellipsis omitted). Such control may be determinative under the common law. *Id.* at 1211 (explaining that under analogous “dual master doctrine” “right of the putative masters to control the conduct of the servant is determinative of whether the servant has two masters at the same time” (internal quotation marks and emphasis omitted)). Thus, 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 1213.

Similarly, the D.C. Circuit held that “[t]he Board [ ] correctly discerned the content of the common law” when it held that “indirect control can be a relevant factor in the joint-employer inquiry.” *Id.* at 1216; *see id.* at 1218 (“There is [ ] broad agreement that the common law factors indirect control into the analysis of employer status.”). Any “rigid distinction between direct and indirect control has no anchor in the common law.” *Id.* The Court explained that “the common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship[,]” and that the Circuit’s “cases too have considered indirect control relevant to employer status.” *Id.* at 1217. Again, the Court indicated that such control may be
determinative under the common law. *Id.* at 1219 (expressing that common law cannot be at war with common sense, which a rule against indirect control, “no matter how extensively the would-be employer exercises determinative or heavily influential pressure and control over all of the worker’s working conditions,” would require). Accordingly, accounting for indirect control in the joint-employer analysis “is consonant with established common law.” *Id.* at 1217

“In sum, [the Court] upheld as fully consistent with the common law the Board’s determination that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis.” *Id.* at 1222. Neither of these holdings were subject to the Court’s remand. Thus, the law of case is that 1) “the National Labor Relations Act’s test for joint-employer status is determined by the common law of agency”; and 2) “both reserved authority to control and indirect control” are “fully consistent with the common law.” Yet both reserved and indirect control were rejected as evidence under the prior joint-employer standard that the Board applied on remand.

The ARD applied the prior “direct and immediate” standard, which did not include consideration of reserved authority or any form of indirect control. Sl. op. 4 (ARD applied “prior longstanding standard requiring proof of direct and immediate control”), *Browning-Ferris*, 911 F.3d at 1201 (describing direct and immediate control standard as relying “only on evidence of (i) actual control, as opposed to the right to control, and (ii) direct and immediate control, not indirect control”). By summarily affirming the ARD’s finding that BFI was not a joint employer pursuant to this standard, the Board did not apply a standard that is “fully consistent with the common law.” The law of the case does not allow the Board to apply such a standard. The Board committed
material error, and must grant this motion for reconsideration to apply, either itself or by
remanding to the Region, a joint-employer standard consistent with the common law.

While the D.C. Circuit did state that “[i]n rearticulating its joint-employer test on
remand,” “the Board should keep in mind” that retroactive application may be
inappropriate in certain circumstances, it did not mean that the Board was free to apply a
standard inconsistent with the common law. Such an intention would be nonsensical, as
the Court would not defer to the Board’s application of such a standard. See id. 1208
(“we review de novo whether the Board’s joint-employer test comports with traditional
common-law principles of agency”). Even if the Board is correct in not applying
Browning-Ferris’s two-step analysis retroactively, it must still apply a standard that
comports with the common law. It has not done so, which is material error.

For the foregoing reasons, the Charging Party, submits this Motion for
Reconsideration and respectfully requests that the Board Reconsider the Supplemental
Decision in this matter to conform with the D.C. Circuit’s remand Order and the common
law.

Dated this 9th day of October 2020 at San Francisco, California.

Respectfully submitted,

By: /s/ Susan K. Garea

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 9, 2020, a copy of the foregoing TEAMSTERS LOCAL 350’S MOTION FOR RECONSIDERATION in NLRB Cases 32-CA-160759 and 32-RC-109684 was served by electronic mail and by United States first-class mail on the following case participants:

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JA-439
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,

and

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

RESPONSE TO TEAMSTERS LOCAL 350'S
MOTION FOR RECONSIDERATION

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October 29, 2020
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Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery ("BFI") submits the following response to Teamsters Local 350's ("Local 350" or "Union") Motion for Reconsideration. The Motion should be denied because it does not establish grounds for reconsideration under Board Rules and Regulations §102.48(c)(1).

I. THE MOTION FAILS TO SPECIFY THE RECORD RELIED UPON THAT PURPORTEDLY MANDATES A JOINT EMPLOYER FINDING CONSISTENT WITH THE COURT'S OPINION

To the extent the Motion argues that the Board failed to find BFI exercised sufficient alleged indirect (or other) control over Leadpoint's employees, such an argument should be rejected because Local 350 did not "specify the page of the record relied upon" purportedly establishing such control. *Id.* See Motion *passim.* "As always, the burden of proving joint-employer status rests with the party asserting that relationship." *Browning-Ferris Industries of California, Inc.,* 362 NLRB 1599, 1616 (2015) (footnote omitted). The Motion does not identify specific facts not already raised before the Board which allegedly would mandate a joint employer finding within the boundaries recognized by the Court.

The Court held that indirect control does not include "those types of employer decisions that set the objectives, basic ground rules, and expectations for a third-party contractor" and the other "quotidian aspects of common law third-party contract relationships." *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recycling v. NLRB,* 911 F.3d 1195, 1220 (D.C. Cir. 2018). Local 350 does not show how any indirect control evidence falls outside of those exclusions and should be considered relevant, much that dispositive control exists.
The only references in the Motion to alleged control facts appear without record citations at p. 9 n.2 (line speed) and p. 13. The Union describes the facts alleged on p. 13 as purported incidents of direct – not indirect – control. Notably, the Court did not enforce the Board's joint employer determination based upon the existence of sufficient direct control.

As for line speed, it does not constitute indirect control consistent with the Court's opinion. Leadpoint was engaged to perform services for a segment of BFI's integrated recycling operation. As the RD found, Decision and Direction of Election, p. 13, line speed is a function of volume coming into the facility, i.e., a background condition. Moreover, any impact of line speed in the facility is not limited to only Leadpoint's employees.

Working on a volume-influenced line is part of the ground rules and expectations -- the "basic contours of contracted-for service" -- the Court found were irrelevant to joint employer analysis.\(^1\) 911 F.3d at 1221. Indeed, if line speed somehow could be subject to collective bargaining; then, as BFI argued in its position statement on remand, pp. 26-27, it would violate the Act by governing employment terms of non-unit employees whose work also is affected.

\(^1\) See also Southern California Gas Co., 302 NLRB 456, 461 (1991)("An employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for. It follows that the existence of such control, is not in and of itself, sufficient justification for finding that the customer employer is a joint employer of its contractor's employees.").
II. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER IS CONSISTENT WITH THE COURT'S REMAND

A. The Board’s Intertwined Common-Law Findings Were Held Unsound And Could Not Be Relied Upon On Remand

In remanding the case to the Board, the Court explained that it did so “[b]ecause we cannot tell from this record what facts proved dispositive in the Board’s determination that Browning Ferris is a joint employer, and we are concerned that some of them veered beyond the orbit of the common law[.]” 911 F.3d at 1221.

As the Court found the Board’s intertwined common-law findings to be unsound, it could not rely upon them on remand to determine what is dispositive. After evaluating the record and the parties’ filings, the Board adopted the Regional Director’s (“RD”) identification of evidence relevant to an assessment of alleged common-law control. Browning-Ferris Industries of California, Inc., 369 NLRB No. 139 at *4 (2020). The Board ultimately applied the pre-2015 joint employer standard to those facts for the reasons discussed below.2

The Union does not identify other control evidence not referenced by the RD that is relevant consistent with the Court’s opinion – much less show that such other evidence warrants a different outcome.

2 Contrary to Local 350’s argument, Motion pp. 1, 12-13, nowhere did the Board suggest that the Union “waived” its arguments concerning the RD’s findings, or that the Board did not consider them. BFI and the Union both argued the facts in their position statements following remand, and throughout the case. See, e.g., id., pp. 12-13. The Board simply indicated that in its 2015 decision, the majority did not contend that the RD’s application of the pre-2015 joint employer standard to the evidence was inaccurate. 369 NLRB No. 139 at *4.
B. The Court Did Not Dictate A Joint Employer Test To The Board

In assessing the law of the case, the Court did not purport to dictate a joint employer test to the Board. Nor did the Court: (1) require that the Board assign any particular or relative weight to indirect control evidence; or (2) determine that indirect (or reserved) control may be dispositive to a joint employer analysis. See id. at *2.

All the Court found is that indirect control evidence “can” be “relevant,” while underscoring that “[t]he policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law’s definition of a joint employer.” 911 F.3d at 1208.

The Board’s pre-2015 joint employer standard considered indirect and reserved control to be “relevant” in supplementing and reinforcing substantial direct control evidence, but neither could be dispositive. See, e.g., 369 NLRB No. 139 at *3. Thus,

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3 See also AM Property Holding Corp., 350 NLRB 998, 1002 (2007) (“We find that the contractual provision giving AM the right to approve PBS hires, standing alone, is insufficient to show the existence of a joint employer relationship. In assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties . . . [.]”); J. P. Mascaro & Sons, 313 NLRB 385, 389 (1993) enf’d. sub nom. NLRB v. Solid Waste Services, Inc., 38 F.3d 93 (2d Cir. 1994) (“Respondent of necessity may exercise some implicit or indirect control over the operations of [the subcontractor] at the facility to ensure against disruption of its own operations or to assure it secures the services promised, but this is no basis to find the customer-employer is a joint employer of its contractor’s employees.”); Le Rendezvous Restaurant, 332 NLRB 336 (2000) (considering evidence of contractually reserved authority in conjunction with user employer’s exercise of direct and immediate control over hiring and discipline); M.B. Sturgis, Inc., 331 NLRB 1298, 1301–1302 (2000) (finding that the contract’s broad grant of authority to the user employer over supervision and direction supported evidence of exercised direct control over supervision, direction, and discipline).
contrary to Local 350's argument, Motion pp. 2,14, the Board's prior test was not inconsistent with the common law. The common law is judicially developed, and the Union does not cite a single decision over its 30-year existence in which a court invalidated the Board's former joint employer standard as contrary to the common law.4

C. The Board Reasonably Concluded That No Indirect Control Standard Consistent With The Court’s Opinion Required A Joint Employer Finding

Here, “upon careful consideration” of the record and the parties' filings, the Board concluded that the Court’s opinion did not compel it to impose any “clarified variant” of the 2015 joint employer standard in this case. Id. at *1.

Having evaluated the range of permissible formulations consistent with the common law, the Board concluded that any variant weighing indirect (or reserved) control factors above insufficient “relevance” — as under the pre-2015 test — would constitute a manifestly unjust “substitution of new law for old law that was reasonably clear,” and on which employers may have relied in organizing their business relationships. Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (alteration in original; internal quotation marks omitted) (quoting Public Serv. Co. of Colo. v. FERC, 91 F.3d 1478, 1488 (D.C. Cir. 1996)).” 911 F.3d at 1222. See also 369 NLRB No. 139 at *2 (same).

4 Indeed, the core of what the Court described as relevant indirect control is circumstances which conceptually could be considered direct control. See 911 F.3d at 1219; Chairman Ring January 17, 2019 letter to Members of Congress, p. 4.
Nowhere in Local 350's Motion does it show the existence of -- much less the frequency and quantum -- of indirect (or other) control the Court indicated could suffice to establish a joint employer relationship. See 911 F.3d at 1219 ("If, for example, a company entered into a contract with Leadpoint under which that company made all of the decisions about work and working conditions, day in and day out, with Leadpoint supervisors reduced to ferrying orders from the company's supervisors to the workers, the Board could sensibly conclude that the company is a joint employer. This is especially so if that company retains the authority to step in and exercise direct authority any time the company's indirect mandates are not followed.") (emphasis supplied). The record does not remotely reflect that BFI "made all of the decisions about [Leadpoint's] work and working conditions, day in and day out."

D. The Board's Decision To Not Apply The 2015 Browning-Ferris Standard Retroactively To BFI Is Sound

When BFI and Leadpoint organized their business relationship years prior to the Board's 2015 Browning-Ferris decision, as a matter of established Board law no amount of indirect control -- even if "relevant" -- was sufficient to establish joint employer status. Further, the Board was clear that substantial direct and immediate control was required. See 369 NLRB No. 139 at *3.

In contrast, in its 2015 decision, not only did the Board conclude that some quantum of indirect and/or reserved control alone could be dispositive in the absence of substantial direct and immediate control -- a formulation the Court emphasized it did not address -- but also that it was sufficient for control to be possessed rather than
actually exercised. *Browning-Ferris*, 362 NLRB at 1600. Additionally, the Board overruled (*id.* at 1614) prior decisions which excluded consideration of “limited and routine” control, *e.g.*, often precisely the “quotidian aspects of common law third-party contract relationships” that the Court found of no relevance in assessing joint employer status. See 911 F.3d at 1220. Those are fundamental, existential, categorical differences from what had been the settled law when BFI and Leadpoint entered into their service arrangement.

The Board on remand followed the Court in finding that the touchstone for eschewing retroactive application of a new rule is the substitution of “new law for old law that was reasonably clear.” *Id.* at 1222 (citations omitted). Such plainly are the circumstances here.

As the Court further noted, the primary reason such a substitution is manifestly unjust is because of “reasonable, settled expectation.” *Id.* (cited in Motion, p. 4). Contrary to Local 350’s contention, Motion p. 6, the Board considered the universe of “reasonable, settled expectation.”

The Union, of course, had none. It was seeking to overturn a 30-year joint employer doctrine that no court had refused to enforce as contrary to the common law. In the event, Local 350 could not even rely on the Board’s 2015 common-law formulation which the Court then rejected.

Even if *arguendo* BFI and Leadpoint should have contemplated that indirect (or reserved) control could be “relevant” to their relationship, and even if the outcome of joint employer analysis often is fact dependent (Motion, pp. 6-8), there is a
conceptual chasm between the pre-2015 standard and the subsequent one. It makes all the difference if indirect (or reserved) control evidence is "relevant" in a supplementary capacity but insufficient and non-dispositive, or whether not only is the opposite true, dispositive control need not actually have been exercised, and even "limited and routine" control can be a factor.⁵

Likewise, there is no indication that the Board failed to consider the effects of retroactivity on the purposes of the Act. Id., p. 9. Local 350 just disagrees with the Board's conclusion. The Union bootstraps that "if BFI is a common-law employer then, by definition, it exercises significant control over employees' terms and conditions of employment and bargaining will be benefitted by that employer's presence." Id. But nowhere in its Motion does the Union recite alleged "significant control" facts consistent with the Court's opinion mandating joint employer status here. As noted, the Court was unwilling to find joint employment based upon any alleged direct control evidence, and Local 350 does not identify indirect (or reserved) control -- as understood by the Court -- that would be dispositive.⁶

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⁵ Local 350's other "reliance" arguments warrant little attention. The Union argues without support that protections against retroactivity are lessened in representation cases. See Motion, p. 8. The Union completely ignores the costs of being haled into an unanticipated bargaining relationship where a fundamental purpose of engaging a service provider is to rely upon their management.

⁶ Further along those lines, as BFI argued in its position statement on remand (pp. 12, 23-24): (1) as the Board's bottom line inquiry in a representation case is whether the petitioned-for employees share a community of interest, as a matter of labor policy, the Board can give little if any recognition and weight to alleged control factors that are not equally applicable to all of the workers in a proposed bargaining unit; and (2) consistent with the text of Section 8(d), to be a joint employer under the Act, an entity must have sufficient control over, at least, "wages" and "hours," i.e., must be capable of meaningful bargaining over those
As Local 350 indicates (id., p. 10), one of the Board’s policy reasons for abjuring retroactivity here is that the employees in question “cast their ballots on the assumption that a joint-employer relationship did not exist.” 369 NLRB No. 139 at *4 (citing H&W Motor Express, 271 NLRB 466 (1984)). H&W stands for the unremarkable proposition that if employees vote for bargaining with a particular employer, it cannot be gainsaid from the result that they also desire bargaining with some other entity. Employee desires in such a situation cannot be presumed -- the vote simply does not authorize a different relationship.

The Union’s argument (Motion, pp. 10-12) that its retroactivity determination here was inconsistent with its jurisprudence is equally meritless. The Board’s adoption of a “contract coverage” standard to evaluate management rights in a labor agreement followed the District of Columbia Circuit’s consistent application of such a test for close to 30 years. See, e.g., NLRB v. United States Postal Service, 8 F.3d 832 (D.C. Cir. 1993). In contrast, as noted, Local 350 fails to identify any court decision in the pre-2015 test’s 30-year history in which the Board’s standard was invalidated. Moreover, unlike in the other retroactivity evaluations referenced by the Union, here there was comprehensive prospective rulemaking.

Accordingly, the Board reasonably concluded that subjecting BFI to a new joint employer standard would be manifestly unjust. The reliance interests assessed in a retroactivity analysis are those of the party against whom a new rule might be subjects “and” (not “or”) other terms. There is no evidence that BFI has cognizable control over the wages and hours of Leadpoint employees.
applied, i.e., BFI. Moreover, the Union has no reliance interests here. The pre-2015 rule and its weighting of common-law control factors were well established and settled. Departing from a requirement of substantial direct and immediate control in this case would constitute a fundamental change in the law. Further, imposing a bargaining requirement on BFI would be burdensome as the essence of a contractor arrangement is to obtain services from another entity instead of maintaining employment responsibilities. Such an outcome does not deprive employees of a bargaining relationship with Leadpoint.

E. The Board’s Approach To Retroactivity Is Reinforced By Its Rulemaking

The Board’s approach to retroactivity here is reinforced by its rulemaking. Every Board decision has an adjudicative function for the parties. Some decisions also establish a policy standard. Alternatively, the Board can utilize rulemaking to implement policy. See, e.g., NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (holding that “the choice between rulemaking and adjudication lies in the first instance within the Board’s discretion”); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 772 (1969) (“[S]o long as the matter involved can be dealt with in a way satisfying the definition of either ‘rulemaking’ or ‘adjudication’ under the Administrative Procedure Act, that Act, along with the Labor Relations Act, should be read as conferring upon the Board the authority to decide, within its informed discretion, whether to proceed by rulemaking or adjudication.”).

Here, the Board completed extensive rulemaking to address joint employer policy. Its rulemaking supersedes and abandons the 2015 Browning-Ferris decision prospectively, while emphasizing that the resulting rules are consistent with the
Court's opinion in this case. In its rules, the Board assigned a weight to relevant indirect (and reserved) control evidence permitted by the opinion.\(^7\)

To the extent the Court's remand encompassed the Board's policymaking function regarding the role of indirect control, the Board satisfied it by developing comprehensive rules. The Board duly "rearticulate[d] the parameters of the indirect control factor." Motion, p. 3. Having done so, it would make no sense to have a competing policy strand applicable only here and in a handful of other pre-rule matters.

That leaves the Board's adjudicative function and the limited needs of this case. Having had to discard the 2015 Board's flawed common-law findings, and after reviewing the record and filings, the Board reasonably concluded that no matter how indirect (or reserved) control are conceived of here consistent with the Court's opinion, it would be categorically and irreconcilably different from the Board's pre-2015 joint employer standard. As a result, and given the other considerations noted above, it would be manifestly unjust in this case to depart from such a previously well-settled test.

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\(^7\) Contrary to the Union's argument, Motion, p. 5, n. 1, the Court's retroactivity discussion was premised on the notion that the Board conceivably could utilize adjudication instead of rulemaking to articulate a "new [joint employer] test[]." 911 F.3d at 1222. At the time of the Court's opinion, the Board's joint employer rulemaking had not been finalized, and it was uncertain whether or when this might occur. Thereafter, the Board promulgated its comprehensive "new test" through prospective rulemaking.
Local 350's Motion for Reconsideration should be denied for the foregoing reasons.

Respectfully submitted,

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October 29, 2020
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 29, 2020 he caused a copy of the foregoing RESPONSE TO TEAMSTERS LOCAL 350’S MOTION FOR RECONSIDERATION in NLRB Cases 32-CA-160759 and 32-RC-109684 to be served by electronic mail and by United States first-class mail on the following case participants:

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February 11, 2021

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND RING

ORDER DENYING MOTION FOR RECONSIDERATION

The Charging Party’s motion for reconsideration of the Board’s Supplemental Decision and Order reported at 369 NLRB No. 139 (2020) is denied. The Charging Party has not identified any material error or demonstrated extraordinary circumstances warranting reconsideration under Section 102.48(c)(1) of the Board’s Rules and Regulations.

Dated, Washington, D.C. February 11, 2021

Marvin E. Kaplan, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MCFERRAN, dissenting.

As today’s(678,357),(976,832) decision illustrates, the current Board majority simply can’t pass up any opportunity to insulate employers from joint-employer status under the National Labor Relations Act, even when it means ignoring an explicit directive from a court of appeals and dramatically departing from its own past views on retroactivity issues.

As most observers of the Board are well aware, in this case, a prior Board had broadened the joint-employer standard by eliminating restrictions that had no basis in the common-law principles that we are bound to follow.1 The United States Court of Appeals for the District of Columbia Circuit largely upheld the prior Board’s decision,2 but remanded the case to the Board to clarify certain issues related to the new standard, including the question of retroactivity. The majority chose not to comply with the court’s clear instructions on remand.

Instead, it determined that no iteration of the new standard could be applied retroactively and so applied the old finding, without allowing a remand for the Board to realize its own error, if retroactive application could never have been appropriate. We understood the court to very much doubt the propriety of retroactive application and to be modeling judicial restraint in respecting the Board’s role under the Act.

Second, our colleague falsely states that the D.C. Circuit found that the Board’s old joint-employer standard was contrary to the controlling common law, and thus the Act, because it did not consider putative joint employers’ indirect and reserved control over employees. The D.C. Circuit no more than agreed that indirect and reserved control can be relevant considerations in the common law, not that they must be given weight independent of direct-and-immediate control. As explored in existing detail in the Board’s recent final rule, the Board’s old standard fell within the boundaries of the common law as applied in the particular context of the Act. Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11184 (Feb. 26, 2020).

Third, our colleague argues our retroactive-application analysis fails to weigh the reliance interests we cite against the damage to the administration of the Act of not applying the new standard retroactively. As was at least implicit in our Supplemental Decision and Order, we disagree that applying the prior standard that was well-grounded in the common law, the policies of the Act, and our precedent—instead of applying the sharp departure represented by the new standard—does any damage to the administration of the Act at all.

1 Browning-Ferris Industries of California, Inc. v NLRB, 911 F.3d 1195 (D.C. Cir. 2018).

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1 The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. Member Emanuel took no part in the consideration of this motion or the merits of the underlying Supplemental Decision and Order.

2 The Charging Party asserts that language in the Supplemental Decision and Order indicates that the Board’s decision to affirm the Acting Regional Director’s conclusion that BFI Newby Island Recyclery was not a joint employer with Leadpoint Business Services was not based on a full review of the Charging Party’s arguments challenging that conclusion. Rather, citing this language, the Charging Party argues that the Board's finding was based on the fact that the Board majority in the original representation-case decision had not argued that the Acting Regional Director erred.

We disagree with the Charging Party’s assertion that the cited language establishes that the Board failed to consider its arguments. Nevertheless, we clarify that, in the Supplemental Decision and Order, the Board fully considered the Charging Party’s arguments challenging the Acting Regional Director’s Decision and Direction of Election and that the Board affirmed that decision for the reasons the Acting Regional Director stated therein.

Our dissenting colleague alleges our Supplemental Decision and Order materially erred in holding any form of the new joint-employer standard introduced in Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery, 362 NLRB 1599 (2015), would be manifestly unjust to apply retroactively. First, our colleague accuses us of defying the United States Court of Appeals for the District of Columbia Circuit’s remand instructions by not first curing the new standard’s defects before analyzing retroactive application. We do not share our colleague’s view that the D.C. Circuit necessarily would have made that
standard, without ever clarifying the new standard. But the District of Columbia Circuit has already effectively held that the old, narrower standard is contrary to the Act because it is inconsistent with the common law of agency. Meanwhile, there is no legal or factual basis for concluding that the new standard (as appropriately clarified) could not be applied retroactively, consistent with established principles. Because the Union has compellingly shown the material errors in the Board’s decision on remand, I would grant its motion for reconsideration. Put simply, the Board must comply with the court’s remand instructions, however much the majority may wish to eliminate the joint-employer standard adopted in this case.

I.

There is nothing ambiguous about what the District of Columbia Circuit held in this case or what it told the Board to do on remand.

In crucial respects, the court upheld the prior Board’s decision here. Thus, the court observed that “under Supreme Court and circuit precedent, the National Labor Relations Act’s test for joint-employer status is determined by the common law of agency.” 911 F.3d at 1206.

The question presented, the court explained, was “whether the common-law analysis of joint-employer status can factor in both (i) an employer’s authorized but unexercised forms of control, and (ii) an employer’s indirect control over employees’ terms and conditions of employment.” Id. at 1209. The Board’s old test had held that neither factor could be considered; the Board’s new test deemed both factors relevant. The new test, the court concluded, reflected the correct understanding of common law agency principles, but with respect to indirect control, the Board’s test required refinement. The court summarized its holding this way:

[W]e uphold as fully consistent with the common law the Board’s determination that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis. We reverse, however, the Board’s articulation and application of the indirect-control element in this case to the extent that it failed to distinguish between indirect control that the common law of agency considers intrinsic to ordinary third-party contracting relationships, and indirect control over the essential terms and conditions of employment.

Id. at 1222–1223. Accordingly, it “remand[ed] [the case] for further proceedings consistent with [its] opinion.” Id. at 1223.

An important part of the court’s opinion addressed the issue of the retroactive application of the Board’s new joint-employer test. In its entirety, the court’s discussion of retroactivity follows:

In this case the Board both refined its joint-employer standard and immediately applied it retroactively to conclude that Browning-Ferris and Leadpoint were joint employers of the workers in the petitioned-for unit. Browning-Ferris challenges that retroactive application as manifestly unjust. Because we conclude that the Board insufficiently explained the scope of the indirect-control element’s operation and how a properly limited test would apply in this case, it would be premature for

I dissented from the original decision in Hy-Brand (see 365 NLRB No. 156, slip op. at 35), then joined in the unanimous decision to vacate that decision, following a report by the Board’s Inspector General and a determination by the Designated Agency Ethics Official. I dissented from the notice of proposed rulemaking, 53 Fed Reg. 46687 (dissent). I was not a member of the Board when the final rule was issued.

The judgment issued by the District of Columbia Circuit tracked this language, reciting that it was:

ordered and adjudged that the Board’s articulation of the joint-employer test as including consideration of both an employer’s reserved right to control and its indirect control over employees’ terms and conditions of employment be affirmed; however, the Board’s articulation and application of the indirect-control element in this case to the extent that it failed to distinguish between indirect control that the common law of agency considers intrinsic to ordinary third-party contracting relationships, and indirect control over the essential terms and conditions of employment be reversed; that Browning-Ferris’s petition for review be granted in part, the Board’s cross-application be denied, and the Board’s application for enforcement as to Leadpoint be dismissed without prejudice, and the case is remanded for further proceedings, in accordance with the opinion of the court filed herein this date.


3 Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery, 369 NLRB No. 139 (2020). I was not a member of the Board when the decision was issued. 4 See Board’s Rule and Regulations, Sec. 102.48(c). Even apart from the Union’s motion, the Board retains the authority to reconsider its earlier decision, as Sec. 10(d) of the Act contemplates. 29 U.S.C. §160(d) (“Until the record shall have been filed in a court, . . . the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.”). In cases too numerous to cite, the Board has reconsidered a decision sua sponte. E.g., Cordua Restaurants, Inc., 2018 WL 3914703 (Aug. 15, 2018). 5 Eliminating the broadened joint-employer standard is a goal that the majority has pursued relentlessly, as described in the District of Columbia Circuit’s decision. See 911 F.3d at 1205–1206. The majority: (1) attempted to overrule the new standard in a decision that the Board was then required to vacate on ethics grounds; (2) proposed a return to the old standard in rulemaking, even before the Circuit had ruled in this case; and (3) finally adopted a joint-employer standard even more restrictive than the old standard. See Hy-Brand Industrial Contractors, Ltd., 366 NLRB No. 26 (2018), granting reconsideration in part and vacating order reported at 365 NLRB No. 156 (2017); National Labor Relations Board, Notice of Proposed Rulemaking, The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46681 (Sept. 14, 2018); National Labor Relations Board, Final Rule, Joint Employer Status under the National Labor Relations Act, 85 Fed. Reg. 11184 (Feb. 26, 2020).
us to decide Browning-Ferris’s challenge to the Board’s retroactive application of its test. We do not know whether, under a properly articulated and cabined test of indirect control, Browning-Ferris will still be found to be a joint employer. In addition, the lawfulness of the retroactive application of a new decision cannot be evaluated reliably without knowing with more precision what that new test is and how far it departs (or does not) from reasonable, settled expectations.

Nevertheless, we note that the Board in this case “carefully examined three decades of its precedents,” “concluded that the joint-employer standard they reflected required ‘direct and immediate’ control,” and “[t]hereafter . . . forthrightly overruled those cases and set forth . . . ‘a new rule.’” [NLRB v.] CNN America, Inc., 865 F.3d 740, 749–750 ((D.C. Cir. 2017)) (quoting Browning-Ferris, 362 NLRB at 1600). In rearticulating its joint-employer test on remand, then, the Board should keep in mind that while retroactive application may be “appropriate for new applications of [existing] law,” it may be unwarranted or unjust “when there is a substitution of new law for old law that was reasonably clear,” and on which employers may have relied in organizing their business relationships. Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (alteration in original; internal quotation marks omitted) (quoting Public Serv. Co. of Colo. v. FERC, 91 F.3d 1478, 1488 (D.C. Cir. 1996)); cf. American Tel. & Tel. Co. v. FCC, 454 F.3d 329, 333–334 (D.C. Cir. 2006) (finding retroactive application “not manifestly unjust” where the agency’s previous rulings “reflect[ed] a highly fact-specific, case-by-case style of adjudication” that did not establish “a clear rule of law exempting” certain conduct). Id. at 1222 (emphasis added).

In short, the District of Columbia Circuit’s remand required the Board to do two things: (1) in “rearticulating its joint-employer test,” explain the scope of “the indirect-control element’s operation” in the test; and (2) explain “how a properly limited test would apply in this case,” including whether the revised standard would be applied retroactively, if Browning-Ferris were found to be a joint employer.

Rather than comply with the court’s remand, the Board sought to evade it. It did not rearticulate the new joint-employer standard, addressing the proper scope of the indirect-control element. Nor did it explain how the rearticulated test would apply in this case to Browning-Ferris, the potential joint employer.

Instead, after acknowledging that the “the court’s remand sought clarification and redress of two critical shortcomings in the Board’s discussion of its new joint-employer standard,” the Board on remand asserted that “there is no variation or explanation of that standard that would not incorporate its substantial departure from the prior direct and immediate control legal standard.” Given this “departure,” the new joint-employer standard could never be applied retroactively, consistent with the principles set out in the court’s decision, which the Board acknowledged as “law of the case.”

According to the Board, the “court clearly emphasized the centrality of reliance interests to the retroactivity determination.” It was also “abundantly clear that many businesses did rely on [the old] legal standard and that the new standard . . . would substantially affect reasonable, settled expectations for relationships established on the basis of the prior standard.”

The result, according to the Board, was that “the joint-employer issue must be resolved under the prior longstanding standard requiring proof of direct and immediate control,” as the Regional Director had done originally, before the prior Board had announced the new joint-employer standard. Affirming the Regional Director’s finding that Browning-Ferris was not a joint-employer, the Board “vacate[d] the prior Decision and Order and dismiss[ed] the complaint in that proceeding.”

II.

There can be no question that the Board was required to comply with the terms of the District of Columbia Circuit’s remand. As that court has explained, the “decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority,” including an administrative agency, which “is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of (the) court deciding the case.” Under this standard, it is clear that the Board’s decision on remand cannot stand. It is contrary to both the letter and the spirit of the mandate here, construed in light of the court’s opinion.

Contrary to the court’s direction, the Board did not rearticulate the new joint-employer standard, explaining the operation of the indirect-control element in a way that conformed to common-law principles. Nor did the Board

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1 Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery, supra, 369 NLRB No. 139, slip op. at 3.
2 Id. The Board examined the agency’s own precedent addressing retroactivity, but stated that it did “not write on a blank slate,” but rather was “guided in [its] retroactivity analysis by the court’s decision, which [was] law of the case.” Id.
explain how the rearticulated standard would apply in this case. Instead, as shown, the Board treated these steps as somehow optional or unnecessary, based on its assertion that a new joint-employer standard—whatever form it might have taken in response to the court’s remand—could never be applied retroactively in this case, leaving only the old standard to apply. The opinion of the District of Columbia Circuit, however, rules out this remarkable approach, for three reasons. Re-articulating the new standard was made an explicit precondition to determining retroactivity, applying the old standard would violate the requirement that the Board conform to common-law agency principles, and established law in any case supports retroactive application of a new standard that was consistent with those principles. The Board was not permitted to go backward to the old standard, nor could it refuse to go forward to a new standard.

A. To begin, the court’s opinion made clear that the retroactivity analysis here depended on the re-articulation of the joint-employer standard on remand. The court explained, in language already quoted, that “it would be premature for [the court] to decide Browning-Ferris’s challenge to the Board’s retroactive application of its test,” because (1) the court did “not know whether, under a properly articulated and cabined test of indirect control, Browning-Ferris will still be found to be a joint employer;” and (2) “the lawfulness of the retroactive application of a new decision cannot be evaluated reliably without knowing with more precision what that new test is and how far it departs (or does not) from reasonable, settled expectations.”

The District of Columbia Circuit never imagined that the Board would fail to rearticulate the new joint-employer standard and would fail to decide whether, under the rearticulated test, Browning-Ferris was a joint employer. If, as the Board insisted on remand, no re-articulation of the new standard could properly be applied retroactively to find that Browning-Ferris was a joint employer, then the court would have decided the retroactivity issue itself, instead of leaving it to the Board. But the court expressly stated that such a decision was “premature” prior to the Board’s re-articulation of the new standard, consistent with the court’s opinion. Put another way, with respect to the issue of retroactivity, it was an explicit premise of the remand that the Board would re-articulate the new standard, as the court had directed it to do. Obviously, the court contemplated the possibility that a rearticulated new standard, in some form, could be applied retroactively in this case. Otherwise, a remand would have been largely pointless.

B. The Board’s attempt to evade the remand has another obvious and fatal flaw. It necessarily resulted in the application of the old joint-employer standard. But that standard, as the District of Columbia Circuit’s opinion necessarily implied, was not viable under the National Labor Relations Act, because it was contrary to the common-law agency principles that the Board is required to apply, as well as contrary to the Circuit’s own joint-employer decisions under the Act.

As the court recognized, under the old standard (dating to 1984), the “Board, would rely in analyzing joint-employer claims only on evidence of (i) actual control, as opposed to the right to control, and (ii) direct and immediate control, not indirect control,” while the Board’s “decision in this case changed both of those factors by making the right to control and indirect control relevant considerations in determining joint employer status.”

The Board’s new standard—not the old one—reflected a correct understanding of common-law agency principles. Thus, the court held “that the right-to-control element of the Board’s [new] joint-employer standard has deep roots in the common law” and that the “common law also permits consideration of those forms of indirect control that play a relevant part in determining the essential terms and conditions of employment.”

“Accordingly,” the court explained, it “affirm[ed] the Board’s articulation of the joint-employer test as including consideration of both an employer’s reserved right to control and its indirect control over employees’ terms and conditions of employment.”

The necessary implication of the court’s opinion is that the Board’s old joint-employer standard—insofar as it prevented the Board from considering both the reserved right to control and indirect control—was contrary to common-law agency principles and thus contrary to the Act. The court explained that the “policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law’s definition of a joint employer.”

The Board’s old standard, as reflected in its decisions, simply ignored the common-law’s definition of a joint employer. With

14 911 F.3d at 1222.
15 Id. at 1201.
16 Id. at 1199–1200.
17 Id. at 1200.
18 Id. at 1208.
19 As the prior Board correctly pointed out, “the Board ha[d] never articulated how these additional requirements [that control be exercised, directly] are compelled by the Act or by the common-law definition of the employment relationship.” Browning-Ferris, supra, 362 NLRB at 1599. Defenders of the old standard have not even attempted to refute this observation.
respect to the right to control, the court observed that the “common-law rule”—at the time the Act was passed and still today—was that “unexercised control bears on employer status,” 20 although it was excluded from consideration by the Board’s old joint-employer standard. And, as the court’s opinion illustrates, the Board’s old approach was contrary to the District of Columbia Circuit’s own joint-employer decisions under the Act, which recognized that the right to control was an element of the proper standard. 21 In requiring direct control, too, the old standard was contrary to common-law agency principles. The court quoted with approval the Board’s statement that “[t]raditional common-law principles of agency do not require that ‘control . . . be exercised directly and immediately’ to be ‘relevant to the joint-employer inquiry.’” 22 The court pointed out, in turn, that its own “cases too have considered indirect control relevant to employer status.” 23

In remanding the case to the Board, after affirming the key aspects of the Board’s new joint-employer standard as consistent with common-law agency principles, the court could not have contemplated that the Board would definitively revert to the old standard as the default, without at least first having complied with the court’s direction to rearticulate the new standard, to determine whether Browning-Ferris was a joint employer under that standard, and then to address the issue of retroactivity. Surely applying a joint-employer test that was contrary to the common law and to Circuit precedent would be a last resort, not a first option—if it could ever be proper for the Board to apply a standard inconsistent with the National Labor Relations Act, as the old standard manifestly was.

C.

Even assuming that the Board could somehow be excused for proceeding directly to the issue of retroactivity, the Board’s retroactivity holding was wrong. It cannot be squared with what the Board described as the law of the case (the court’s statement on retroactivity, quoted earlier), with established principles governing retroactivity, with the record in this case, and with the goals of federal labor law.

The Supreme Court’s decision in SEC v. Chenery Corp., 24 often cited by the Board 25 and by the District of Columbia Circuit, 26 sets out the bedrock principles governing retroactivity. There, the Court rejected the argument that the Securities and Exchange Commission was precluded from retroactively applying a new legal rule, developed through adjudication, to prohibit stock purchases by managers during a company reorganization. It made clear that the supposed impact of retroactivity on a claimed reliance interest was not the only consideration, observing:

[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

And so in this case, the fact that the Commission’s order might retroactively prevent Federal’s management from securing the profits and control which were the objects of the preferred stock purchases may well be outweighed by the dangers inherent in such purchases from the statutory standpoint. If that is true, the argument of retroactivity becomes nothing more than a claim that the Commission lacks power to enforce the standards of the [Public Utility Holding Company] Act in this proceeding. Such a claim deserves rejection.

332 U.S. at 203–204 (citations omitted; emphasis added).

Here, as will become clear, the Board’s categorical refusal to apply any new joint-employer standard retroactively produces a result that is contrary to the statutory design of the National Labor Relations Act.

1.

Any analysis of the retroactivity issue must start with what the court told the Board in its opinion:

20 911 F.3d at 1210.

21 Id. at 1209, citing International Chemical Workers Union Local 483 v. NLRB, 561 F.2d 253 (D.C. Cir. 1977).

22 Id. at 1216 (emphasis omitted), citing Browning-Ferris, supra, 362 NLRB at 1600.

23 Id. at 1217, citing Dunkin’ Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB, 363 F.3d 437, 440 (D.C. Cir. 2004).


25 See, e.g., General Motors LLC, 369 NLRB No. 127, slip op. at 11 (2020). On remand, the Board here cited an earlier Board decision quoting SEC v. Chenery Corp., but then failed to apply its balancing test, on the apparent view that the court’s opinion somehow made it unnecessary to do so. 369 NLRB No. 139, slip op. at 3, citing SNE Enterprises, Inc., 344 NLRB 673, 673 (2005). In SNE Enterprises, the Board explained that “[i]n determining whether the retroactive application of a Board rule will cause manifest injustice, the Board will consider the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application.” 344 NLRB at 673. Accordingly, the Board retroactively applied a new rule of law with respect to pro-union supervisory conduct, setting aside a union’s election victory, despite the fact that the challenged conduct was unobjectionable at the time it occurred. It concluded that “the statutory interest in protecting employees’ Sec. 7 rights under the Act and assuring free and fair elections outweigh any injustice resulting from the retroactive application of the [new] standard.” Id. at 674.

In rearticulating its joint-employer test on remand, the Board should keep in mind that while retroactive application may be “appropriate for new applications of [existing] law,” it may be unwarranted or unjust “when there is a substitution of new law for old law that was reasonably clear,” and on which employers may have relied in organizing their business relationships.27

That statement, however, was followed immediately by a citation to American Telephone & Telegraph, supra,28 a decision that the court described (in a parenthetical) as “finding retroactive application ‘not manifestly unjust’ where the agency’s previous rulings ‘reflect[ed] a highly fact-specific, case-by-case style of adjudication’ that did not establish ‘a clear rule of law exempting’ certain conduct.”29

The court’s statement identified relevant, and possibly competing, considerations for the Board. On the one hand, the court observed that if there had been “a substitution of new law for old law that was reasonably clear,” then the Board must consider the potential reliance interest of employers in the old standard “when organizing their business relationships.”30 On the other hand, the court contrasted the situation where the prior legal standard “reflected a highly fact-specific, case-by-case style of adjudication that did not establish a clear rule of law exempting certain conduct” and so there could be no true reliance.31

The court’s statement was not offered as a comprehensive articulation of the law on retroactivity, which (as SEC v. Chenery illustrates) requires balancing the effect of retroactive application on the losing party with the harm done to statutory administration if a new rule of law is applied only prospectively.32 Rather, the court’s statement is better read as indicating when a reliance interest might exist, requiring a balancing of that private interest with the public, statutory interest.

On remand, the Board asserted that the “court clearly emphasized the centrality of reliance interests to the retroactivity determination.”33 It concluded that the Board’s old joint-employer standard represented a “clear rule of law” and that “[i]t is reasonable to assume that parties would rely on this law when organizing their business relationships,” referring generally to comments filed in the joint-employer rulemaking proceeding that followed the Board’s original decision in this case.34 According to the Board, retroactive application of the new joint-employer standard “would mean that entities such as Browning-Ferris would be suddenly confronted with the new reality that preexisting business relationships with other entities . . . thrust upon them unanticipated and unintended duties and liabilities under the Act.”35 The Board cited no actual evidence of reliance by Browning-Ferris or other entities on the old standard. It gave no consideration to the impact of its decision on the effective administration of the Act and on the statutory rights of employees seeking to collectively bargain with the statutory employers that control their terms and conditions of work.36

Nevertheless, a retrospective application can properly be withhold when to apply the new rule to past conduct or prior events would work a “manifest injustice.”

The Retail, Wholesale court set forth a non-exhaustive list of five factors to assist courts in determining whether to grant an exception to the general rule permitting “retroactive” application of a rule enunciated in an agency adjudication:

1. whether the particular case is one of first impression, 2. whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, 3. the extent to which the party against whom the new rule is applied relied on the former rule, 4. the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id. at 390.

826 F.2d at 1081–1082 (case citations omitted).

33 369 NLRB No. 139, slip op. at 3.

34 Id.

35 Id.

36 The Board did cite the (irrelevant) “fact that the election was held, and the employees voted, on the basis that Leadpoint was the sole employer, not [Browning-Ferris] and Leadpoint as joint employers.” Id. at 4. This fact is simply a function of the Regional Director’s determination that under the old Board standard, Browning-Ferris was not a joint employer, despite the Union’s contrary argument. The decision cited by the
Each of the Board’s assertions on remand was incorrect. First, although the District of Columbia Circuit certainly identified the potential reliance interest of employers as a relevant consideration, it hardly made reliance dispositive as a matter of law where it is difficult to say whether a particular individual is an employee or an independent contractor. Board, H&W Motor Express, 271 NLRB 466 (1984), is easily distinguishable, both factually and legally. It did not present an issue of retroactivity. Rather, it involved a situation where employees voted on the joint-employer standard (no matter how the standard was articulated) has always been a “flexible, rather than a fixed, concept—flexible enough to reflect different factual settings in American workplaces.”

And, as already suggested, the fact that the Board’s old joint-employer standard was contrary to common-law agency principles (and thus contrary to the Act) is a powerful reason to conclude that employer reliance on the Board’s old standard could never be justified. Indeed, inasmuch as the joint-employer standard must be based on common-law agency principles, the standard is always subject to de novo judicial review. For this reason, too, employers could never safely rely on the Board’s standard. The court’s opinion, meanwhile, pointed to District of Columbia Circuit decisions that demonstrated that the old Board standard was incorrect. No federal appellate decision had ever upheld the old standard in the face of a direct challenge to its validity. In short, the old standard was always on borrowed time. The Board has relied on this and similar considerations in dismissing the significance of parties’ reliance on a Board rule far older than the joint-employer standard at issue here.

The Supreme Court itself has pointed to the complexity of making employment-status decisions under the common law, given the variety of factual settings in American workplaces. The Court did not simply codify existing decisions. See National Labor Relations Board, Final Rule, Joint Employer Status under the National Labor Relations Act, 85 Fed. Reg. 11184, 11235–11236 (Feb. 26, 2020).

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See, e.g., NLRB v. United Insurance Co. of America, 390 U.S. 254, 258 (1968) (“There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor.”). See also NLRB v. Hearst Publications, 322 U.S. 111, 120–123 (1944) (examining complexity of common-law test for establishing employment relationship and concluding that Congress could not have intended Board to apply test under Act).


911 F.3d at 1207–1208. Those decisions have already been cited.

Id. at 1209, 1217.

See MV Transportation, Inc., 368 NLRB No. 66, slip op. at 12 (2019). There, the Board abandoned the 70-year-old “clear and unmistakable” waiver standard, thus making it easier for employers to make unilateral changes in employees’ working conditions by invoking certain provisions in collective-bargaining agreements. The Board applied its new approach retroactively, affecting every contract provision that had been negotiated under the old, stricter standard and creating a windfall for employers. To justify this result, the Board cited the District of Columbia Circuit’s relatively recent rejection of the waiver standard, beginning in 1993. See id. (“[T]he parties could not have justifiably relied on the Board continuing to adhere to that standard, nor could the parties in any pending case.”) (emphasis in original). I dissented, but, of course, my position did not prevail. See id., slip op. at 37–38 (dissenting opinion).

See, e.g., SNE Enterprises, supra, 344 NLRB at 674 (dismissing asserted reliance interest as “pure speculation”). As noted, the Board cited this decision here. 369 NLRB No. 139, slip op. at 3.

Significantly, Browning-Ferris exercised direct and immediate control over the speed of work, counseled Leadpoint workers about productivity, communicated detailed work directions to Leadpoint workers, assigned tasks to Leadpoint workers, and requested that Leadpoint fire specific individuals. 362 NLRB at 1616–1617. Accordingly, there is certainly an argument to be made that Browning-Ferris would be a joint employer under any variation of the joint-employer test, old, new,
the Board identify a single specific comment in the joint-employer rulemaking where an employer asserted (much less proved) that it had relied on the old standard in establishing its business relationships. It should be obvious that there is a shifting constellation of considerations—economic, financial, legal, and practical—that inform such business decisions. It is hard to imagine that the possible application of the National Labor Relations Act is routinely considered, much less a driving factor. Even if avoiding an employment relationship were a crucial consideration for a company, the fact is that other federal statutory schemes have utilized joint-employer standards far broader than even the Board’s new standard, never mind the tests used by the statutes and common law of the 50 states to determine the existence of an employment relationship, with its wide-ranging consequences.

Fourth, and perhaps most important, the Board inaccurately described the consequences for employers of applying the new standard retroactively. The Board asserted that that employers would face a “new reality that preexisting business relationships with other entities . . . thrust upon them unanticipated and unintended duties and liabilities under the Act.”46 There are no automatic consequences when, in a representation proceeding, an employer is found to be a joint employer. Those consequences follow if and only if a majority of employees vote to be represented by a union in an election conducted by

or new and rearticulated. In these circumstances, any reliance interest that Browning-Ferris might claim in having assertedly structured its business relationships based on the old joint-employer standard is a weak interest at best.

45 See Restatement of Employment Law §1.04, “Employees of Two or More Employers,” Reporter’s Note (2015) (discussing various joint-employer standards under statutory and common law). See, e.g., Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 141 (4th Cir. 2017) (defining the “fundamental question” under the Federal Labor Standards Act as “whether two or more persons or entities are ‘not completely disassociated’ with respect to a worker such that the persons or entities associated, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of the worker’s employment.”); Butler v. Drive Automotive Industries of America, Inc., 793 F.3d 404, 414 (4th Cir. 2015) (setting forth a nine-factor “hybrid test” for joint-employer liability under Title VII that “allows for the broadest possible set of considerations in making a determination of which entity is an employer” and that “correctly bridges the control test and the economic realities test.”); Antenor v. D & S Farms, 88 F.3d 925, 932–933 (11th Cir. 1996) (describing joint-employer factors under the Migrant and Seasonal Agricultural Worker Protection Act as “aids-tools to be used to gauge the degree of dependence of alleged employees on the business to which they are connected. It is dependence that indicates employee status.”). See also Restatement (Second) of Agency §21(1) (“A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.”) (emphasis added); id., §220(1) (“A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to
but also permissible, view. The better analogy to this case, rather, is the Supreme Court’s decision in *Bell Aerospace*, which held that the Board could reconsider, in an adjudication (as opposed to a rulemaking), the employee status under the Act of buyers who had sought union representation, notwithstanding the “possible reliance of industry on the Board’s past decisions with respect to buyers.”53

3.

What the Board said on remand is incorrect, but what it did *not* say is most telling. Focusing on the supposed reliance interest of employers in the old joint-employer standard, the Board failed to address the impact of its holding on the effective administration of the Act. This omission reflects a failure to engage in reasoned decision-making, because the Board simply neglected “an important aspect of the problem,” in the words of the Supreme Court.54

Apparently, the Board intended to require that the old (and statutorily impermissible) joint-employer standard apply to every potential joint-employer relationship established before the new standard was adopted, no matter how long those relationships continued to exist. This means that employees across the country would be denied the statutory right to bargain collectively with companies that are joint employers under the new standard, but not under the old—perhaps for many years to come.55 But, in fact, the Board was required to take employees’ interests into account. The District of Columbia Circuit has pointed out that “as is common with comprehensive regulatory schemes, often ‘every loss that retroactive application . . . would inflict on [one party] is matched by an equal and opposite loss that non-retroactivity would inflict on [another].’”56

Of course, this is not just a matter of competing private interests, but of an overriding public interest. In passing the National Labor Relations Act, Congress declared that it is “the policy of the United States to encourage[e] the practice and procedure of collective bargaining and [to] … protect[] the exercise by workers of . . . designation of representatives . . . for the purpose of negotiating the terms and conditions of their employment.”57 The Board’s remand decision, in effect, determined that the reliance interests of employers on the old joint-employer standard, standing alone, outweighed the need to fully achieve the goals of the statute that the Board enforces. To paraphrase the Supreme Court in *SEC v. Chenery Corp.*, supra, this is nothing more than a claim that the Board lacks power to enforce the standards of the Act. For that reason alone, the Board’s decision cannot stand.

III.

For all of the reasons explained, the Board’s decision to defy the District of Columbia Circuit was unjustified. Viewed solely in light of the Board’s approach to retroactivity, it is also anomalous. The current Board has overruled precedent many times, reversing legal rules that are far older than the joint-employer standard at issue here,58 and it has virtually always chosen to apply its new rule of law retroactively.59 This case stands in sharp, inexplicable contrast—now the Board’s position, quite literally, is that retroactive application of the new joint-employer standard is inconceivable. That conclusion seems driven by the Board’s determination to erase the new standard from the books, resulting in a tangled web of adjudication and rule-making which perhaps only Congressional action can sort out definitively. And the long saga of this case may not


> It has not been shown that the adverse consequences ensuing from such reliance are so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding. Furthermore, this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements. Nor are fines or damages involved here.

Id.


55 Given the Board’s adoption of a joint-employer rule after the court’s remand of this case, of course, I acknowledge that it is not clear what cases besides this one might be affected by the Board’s decision here to continue to apply the old standard. But insofar as the Board’s restrictive approach to retroactivity in this case might be precedential, it threatens broad harm to the effective administration of the Act in future cases, whenever some change in Board law might be argued to upset a supposed reliance interest of employers.


58 See, e.g., *MV Transportation*, supra, 368 NLRB No. 66, slip op. at 12 (retroactive application of new rule supplanting “clear and unmistakable” waiver standard, first adopted in *Tide Water Associated Oil Co.*, 85 NLRB 1096 (1949)).

59 A partial list of decisions, covering both unfair labor practice cases and representation cases, in which the current Board has reversed precedent and applied a new rule retroactively, includes *NBC Universal Media LLC*, 369 NLRB No. 134 (2020); *General Motors LLC*, 369 NLRB No. 127 (2020); *800 River Road Operating Co., LLC*, 369 NLRB No. 109 (2020); *Providence Health & Services Oregon*, 369 NLRB No. 78 (2020); *Green JobWorks, LLC*, 369 NLRB No. 20 (2020); *United Parcel Service Inc.*, 369 NLRB No. 1 (2019); *Caesars Entertainment d/b/a Rio All-Suites Hotel & Casino*, 368 NLRB No. 143 (2019); *Cristal USA, Inc.*, 368 NLRB No. 141 (2019); *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139 (2019); *MV Transportation*, supra, 368 NLRB No. 66; *Kroger Limited Partnership Mid-Atlantic*, 368 NLRB No. 64 (2019); *Bexar County Performing Arts Center*, 368 NLRB No. 46 (2019); *Johnson Controls, Inc.* 368 NLRB No. 20 (2019); *UPMC*, 368 NLRB No. 2 (2019); *United Nurses & Allied Professionals (Kent Hospital)*, 367 NLRB No. 94 (2019); *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017); *Boeing Co.*, 365 NLRB No. 154 (2017); *UPMC*, 365 NLRB No. 153 (2017).
be over, even now. The Board’s order, which dismisses an unfair labor practice complaint, is judicially reviewable under Section 10(f) of the Act. Because I believe that the Board should have adhered to the basic joint-employer standard adopted in this case and affirmed by the District of Columbia Circuit, and that the Board should have rearticulated that standard in compliance with the court’s remand, I dissent today.

Dated, Washington, D.C. February 11, 2021

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Lauren McFerran, Chairman

NATIONAL LABOR RELATIONS BOARD

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60 Sec. 10(f) of the Act provides in relevant part that “[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order” in the appropriate federal court of appeals. 29 U.S.C. §160(f).
CERTIFICATE OF SERVICE

I, Susan K. Garea, counsel for Petitioner and a member of the Bar of this Court, certify that on January 13, 2022, I caused a copy of the Joint Deferred Appendix to be filed with the Clerk through the Court’s electronic filing system. I further certify that all parties required to be served by other means have been served.

/s/ Susan K. Garea
SUSAN K. GAREA
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 13, 2022, a copy of
the foregoing Joint Deferred Appendix was served by electronic mail on the
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