**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

---

**JILL A. GRIFFIN**
*Supervisory Attorney*

**JOEL A. HELLER**
*Attorney*

***National Labor Relations Board***
**1015 Half Street SE**
**Washington, DC 20570**
**(202) 273-2949**
**(202) 273-1042**

**RICHARD F. GRIFFIN, JR.**
***General Counsel***
**JENNIFER ABRUZZO**
***Deputy General Counsel***
**JOHN H. FERGUSON**
***Associate General Counsel***
**LINDA DREEBEN**
***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.

Amici in support of petitioner are Associated Builders and Contractors, et al, Washington Legal Foundation, Microsoft Corp., et al., National Association of Manufacturers, et al., Governor Greg Abbott, and Chamber of Commerce, et al.

### 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 7th day of September, 2016

# TABLE OF CONTENTS

**Headings** **Page(s)**

# TABLE OF CONTENTS

**Headings-Cont'd** **Page(s)**

# TABLE OF AUTHORITIES

**Cases** **Page(s)**



---

* Authorities upon which we chiefly rely are marked with asterisks.

# TABLE OF AUTHORITIES

**Cases** **Page(s)**



---

* Authorities upon which we chiefly rely are marked with asterisks.

# TABLE OF AUTHORITIES

**Cases** **Page(s)**



---

* Authorities upon which we chiefly rely are marked with asterisks.

# TABLE OF AUTHORITIES

**Cases** **Page(s)**



---

* Authorities upon which we chiefly rely are marked with asterisks.

# TABLE OF AUTHORITIES

**Cases** **Page(s)**



* Authorities upon which we chiefly rely are marked with asterisks.

# TABLE OF AUTHORITIES

**Cases** **Page(s)**



**Statutes** **Page(s)**



---

* Authorities upon which we chiefly rely are marked with asterisks.

**Other Authorities** **Page(s)**



* Authorities upon which we chiefly rely are marked with asterisks.

## GLOSSARY

| | |
|---|---|
| Decision on Review (362 NLRB No. 186) | DR |
| Transcript | Tr. |
| Joint Exhibit | JX |
| Union Exhibit | UX |
| Decision and Order (363 NLRB No. 95) | D&O |
| Exhibit to General Counsel's Motion for Summary Judgment | MSJ Ex. |
| 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. |

**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**

---

# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

---

## 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.'" (DR 2 (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." (DR 11.) 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. (DR 2; Tr. 13-14, 121, 125.)[2]

[2] Record 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. (DR 3; JX 1, Tr. 16-17, 185-88.) 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. (DR 2-3 & n.11; Tr. 15-17, 23, 124, 186.)

### 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. (DR; JX 1, at 1.) 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." (DR 3; JX 1, at 2.) 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. (DR 3; JX 1, at 2.) In addition, Browning-Ferris "may reject any Personnel … for any or no reason." (DR 4; JX 1, at 4.)

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. (DR 6; JX 1, at 3-4.)

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." (DR 4; JX 1, at 1, 12.) The one sorter employed solely by Browning-Ferris receives five dollars per hour more than the sorters provided by Leadpoint. (DR 3 n.11; Tr. 152-53.) 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. (DR 4; UX 3, Tr. 60-61, 175-76.) Leadpoint maintains payroll and personnel records, and Browning-Ferris may examine those records at any time. (DR 6; JX 1, at 3, 7-8.) The Agreement provides that employees must obtain a Browning-Ferris representative's signature on their timesheet attesting to its accuracy. (DR 4; JX 1, at 4.)

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." (DR 4; JX 1, at 3-4.)

### 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. (DR 4; Tr. 36, 39, 140-41.) During shifts, Browning-Ferris determines when the streams stop for the sorters to take their breaks. (DR 4; Tr. 41, 87.) 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. (DR 4; Tr. 36-38.)

Each day, Browning-Ferris provides Leadpoint's on-site supervisors with a headcount of how many sorters it needs for each stream. (DR 4-5; Tr. 36.)

Pursuant to that information, Leadpoint supervisors assign individual sorters to their posts. (DR 5; Tr. 205, 211.) After the initial assignment, Browning-Ferris sometimes directs Leadpoint to move sorters from one stream to another. (DR 5; Tr. 210-11.) 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. (DR 5; Tr. 54, UX 1.)

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. (DR 5; Tr. 282-84.) 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. (DR 5; Tr. 217-20, 249, 270-71.)

Browning-Ferris sets the speed at which the streams run, and the volume of material placed on each stream for sorting. (DR 5; Tr. 41, 85-86, 109-11.) It

establishes productivity standards for the facility, and tracks how much material per hour is processed on each stream. (DR 5; Tr. 41-42, 109-10.) 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. (DR 5; Tr. 42, 110-11.) 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. (DR 4; Tr. 36-39, 87, 107-08.)

### 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. (DR 5; Tr. 39, 74, 79-80, 90, 209.) 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. (DR 5; Tr. 41, 103, 112.)

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. (DR 5; Tr. 31, 103-04.) 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. (DR 5; Tr. 75-76, 82, 127.)

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. (DR 5-6; Tr. 112-13, 136-37, 146-47, 246-48, 259.) 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. (DR 5; Tr. 221-23, 245-46.) 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. (DR 4; Tr. 296.) 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. (DR 4-6; Tr. 135, 296-97.)

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. (DR 5; Tr. 244-46, 282.) 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. (DR 5; Tr. 222, 245, 248.)

### 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. (DR 4; Tr. 58, 131-32, 170, 202-03, UX 2.)

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. (DR 4; Tr. 144, 198-200, UX 2.)

## 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. (D&O 2; MSJ Ex. 8, 9.)

### 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. (D&O 1-2; MSJ Ex. 10, 11.) 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. (D&O 2-3.)

## 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

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 law to the facts." *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). 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 whole." *Int'l Chem. Workers Local 483 v. NLRB*, 561 F.2d 253, 255 (D.C. Cir. 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" (DR 8), 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.'" (DR 2, 15 (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" (DR 2, 15) and the employer "possesses sufficient control over employees' essential terms and

conditions of employment to permit meaningful collective bargaining" (DR 2, 13, 15-16).[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." (DR 2.) As part of its analysis, the Board will consider both the employer's right to control and its actual exercise of control. (DR 2, 16.) As to the latter, the employer's control may be either direct or indirect, such as through the other joint employer as an intermediary. (DR 2, 15-16.)

In setting forth that approach, the Board demonstrated (DR 8-9) 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.'" (DR 15 (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" (DR 16), with only the latter indicative of joint-employer status. In addition, the Board made clear (DR 16) 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 (DR 9) 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 (DR 9) 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

(9th Cir. 1980). 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." *Int'l Trailer Co.*, 133 NLRB 1527, 1529 (1961), *enforced sub nom. NLRB v. Gibraltar Indus., Inc.*, 307 F.2d 428 (4th Cir. 1962); *see also Mobil Oil Corp.*, 219 NLRB 511, 514 (1975), *enforcement denied on other grounds sub nom. Alaska Roughnecks & Drillers Ass'n v. NLRB*, 555 F.2d 732 (9th Cir. 1977); *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. *Clayton B. Metcalf*, 223 NLRB 642, 643-44 (1976).

In chronicling those precedents, the Board recognized (DR 10-11) that a narrower approach had developed starting in *Laerco Transportation*, 269 NLRB 324, 325 (1984), and *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. *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); *Airborne Express Co.*, 338 NLRB 597, 597 n.1 (2002) (adding that "essential element" of joint-employer status is "direct and immediate" control over employment matters).[4] But the Board concluded (DR 10, 13) 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.* (DR 16.)

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." (DR 2.) 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." (DR 12); *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." (DR 15.) 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).[5] 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.[6]

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

---

[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." *Id.* § 220, cmt. l. 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. *Id.* §§ 5(2) & cmt. e, 220 cmt. f.[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. *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,

[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." *Dellums v. Powell*, 566 F.2d 216, 222 (D.C. Cir. 1977); *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.[8] 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*

[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. 22, 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. 22-26) 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. *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 *Hearst*.[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.[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

---

[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.

[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 *no* supervision—rather than with indirect or reserved control over the work.

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 *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. *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. 27-32; 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 *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" (DR 16), 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. (DR 16.) 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." *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 (DR 16), 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 (DR 13-14), 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 (DR 11), 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

Statistics, Economic News Release (2016), *available at* www.bls.gov/news.release/empsit.t17.htm; Tian Luo, et al., "The Expanding Role of Temporary Help Services from 1990 to 2008," Bureau of Labor Statistics, at 12 (2010). The types of contingent work have likewise expanded. Luo, at 5. As the facts of this case show, contingent work is not limited to temporary assignments or specialized functions, but extends to long-term work at the core of a company's business.[14]

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." (DR 14.) 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. 51-52) 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." (DR 21.)

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." (DR 20.) 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" (DR 20), 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 (DR 2)—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 (DR 16), "[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

[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.[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

---

that Board test "denied … certainty or guidance" and explaining that the Court "does not require that the Board establish standards devoid of ambiguity at the margins" that "will in time be narrowed through future adjudications"); *accord Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 499-500 (4th Cir. 2016) (upholding Board's "clarified" standard "on the facts before [the court]").

[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.[19] 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.

[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." (DR 17 (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." (DR 13 n.68.)[22]

Further, Taft-Hartley did not prohibit the Board, as Browning-Ferris suggests (Br. 38), from giving any consideration to the policies underlying the Act

---

[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.

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 (DR 9, 15) 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. 33-37; 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).

NLRA" not basis for reversal).[25] 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

[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.[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. (DR 17-18.) 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. (JX 1, at 2.) In placing conditions on whom Leadpoint can hire to work at Newby Island, Browning-Ferris "codetermines the outcome of that process." (DR 18.) 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

[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). *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." (JX 1, at 3-4); *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. (UX 2.) 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" (UX 1) 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

[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 (DR 19). 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." (DR 19 & 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 (DR 2) 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).[30]

[30] 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.

s/ Jill A. Griffin
JILL A. GRIFFIN
*Supervisory Attorney*

s/ Joel A. Heller
JOEL A. HELLER
*Attorney*
*National Labor Relations Board*
1015 Half Street SE
Washington, DC 20570
(202) 273-2949
(202) 273-1042

RICHARD F. GRIFFIN, JR.
*General Counsel*

JENNIFER ABRUZZO
*Deputy General Counsel*

JOHN H. FERGUSON
*Associate General Counsel*

LINDA DREEBEN
*Deputy Associate General Counsel*

National Labor Relations Board
September 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. | ) | Nos. 16-1028, 16-1063, 16-1064 |
| NATIONAL LABOR RELATIONS BOARD | ) | Board Case No. 32-CA-160759 |
| 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 13,986 words of proportionally spaced, 14-point type and the word-processing system used was Microsoft Word 2010.

/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 7th day of September, 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. | ) | Nos. 16-1028, 16-1063, 16-1064 |
| NATIONAL LABOR RELATIONS BOARD | ) | Board Case No. 32-CA-160759 |
| Respondent/Cross-Petitioner | ) | |
| and | ) | |
| TEAMSTERS LOCAL 350 | ) | |
| Intervenor | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that on September 7, 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:

Michael G. Pedhirney, Esquire
Littler, Mendelson, P.C.
650 California Street, Floor 20
San Francisco, CA 94108

FPR-II, LLC d/b/a Leadpoint Business Services
Attn: Vincent Haas, Supervisor
1601 Dixon Landing Road
Milpitas, CA 95035

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

Dated at Washington, DC
this 7th day of September, 2016

# 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 ….