UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC., D/B/A BFI NEWBY ISLAND RECYCLERY

Employer &

Case 32-RC-109684

FPR-II, LLC, D/B/A LEADPOINT BUSINESS SERVICES

Employer &

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

Petitioner

AMICUS BRIEF OF THE GENERAL COUNSEL

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On April 30, 2014, the Board granted Petitioner's Request for Review of the Acting Regional Director's Decision and Direction of Election and thereafter, on May 10, 2014, the Board issued a Notice and Invitation to File Briefs, which invited the parties and *amici* to address one or more of the following questions:

1. Under the Board's current joint-employer standard, as articulated in *TLI, Inc.*, 271 NLRB 798 (1984), *enforced mem.*, 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984), is Leadpoint Business Services the sole employer of the petitioned-for employees?

2. Should the Board adhere to its existing joint-employer standard or adopt a new standard? What considerations should influence the Board's decision in this regard?

3. If the Board adopts a new standard for determining joint-employer status, what should that standard be? If it involves the application of a multifactor test, what factors should be examined? What should be the basis or rationale for such a standard?

We have not addressed Question 1, for the reasons explained in Section 1 of the Argument section of our brief. We address Question 2 in Section 2 and Question 3 in Section 3 of our Argument.

I. Summary of Argument

The Board should abandon its existing joint-employer standard because it undermines the fundamental policy of the Act to encourage stable and meaningful collective bargaining. The Board's current standard is significantly narrower than the traditional standard, under which an entity could be a joint employer if it exercised direct or indirect control over working conditions, had the unexercised potential to control working conditions, or where "industrial realities" otherwise made it essential to meaningful bargaining. The current standard also ignores Congress's intent that the term "employer" be construed broadly in light of economic realities and the Act's underlying goals, and has particularly inhibited meaningful bargaining with respect to the contingent workforce and other nontraditional employment arrangements.

The General Counsel urges the Board to adopt a new standard that takes account of the totality of the circumstances, including how the putative joint employers structured their commercial dealings with each other. Under this test, if one of the entities wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence, joint-employer status would be established. In essence, this would mark a return to the Board's traditional approach prior to *Laerco Transportation* and *TLI, Inc.*, and would better effectuate the Act's underlying purposes and policies.

II. Argument

1. The General Counsel Maintains an Interest in this Proceeding, But Expresses No View on the Merits of this Case.

Representation proceedings are non-adversarial in nature, and the General Counsel does not take a position on the merits in representation cases. Therefore, he expresses no view on what decision should be reached in this case.

But, while not formally a party to representation proceedings, the General Counsel maintains an interest in this proceeding for three reasons. First, the General Counsel shares the Board's concerns that "questions preliminary to the establishment of the bargaining relationship be expeditiously resolved," *NLRB v. O.K. Van Storage*, 297 F.2d 74, 76 (5th Cir. 1961), and that representation proceedings must also serve the goals of resolving questions of representation accurately and fairly. *See, e.g., NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330-31 (1946). Second, the General Counsel has a direct involvement and a substantial interest in the processing of representation cases because of his supervisory authority over the activities of the Regional Directors and their staffs, to whom the Board delegated the authority to process representation cases. Third, the General Counsel maintains an interest in this proceeding because he is responsible for prosecuting unfair labor practice charges which allege interference with, or restraint or coercion of, the exercise of Section 7 rights of employees of alleged joint employers, as well as those which allege refusals to bargain by alleged joint employers in an appropriate unit. Accordingly, the General Counsel believes that his views, set forth below, of the appropriate test to be used in determining whether entities constitute joint employers, can be of assistance to the Board in resolving issues raised by this case.

2. The Board Should Not Adhere to its Existing Joint-Employer Standard Because it Undermines the Fundamental Principles of the Act.

The Board should not adhere to its existing joint-employer standard and should instead adopt a new standard, which will be explained in Section 3, below. The Board's current standard, which is significantly narrower than the prior "traditional" standard the Board had applied from the inception of the Act, is inconsistent with the purposes and policies of the Act.

a. The Board's current joint-employer standard is significantly narrower than the Board's prior standard.

Determining joint-employer status has always been a factual issue regardless of how the Board has defined the standard. Prior to 1984, however, the Board consistently held, with court approval, that an entity was a joint employer where it exercised direct *or* indirect control over significant terms and conditions of employment of another entity's employees;[1] where it possessed the unexercised potential to control such terms and conditions of employment;[2] or

[1] *See, e.g., Indus. Personnel Corp. v. NLRB*, 657 F.2d 226, 229 (8th Cir. 1981) (reasoning that shipper with a cost-plus lease terminable on thirty days' notice "presumably has some control over [the] wages" that could be paid under any collective-bargaining agreement the lessor negotiated with the union, even absent evidence of direct involvement in the negotiation of that agreement), *enforcing B.F. Goodrich Co.*, 250 NLRB 1139 (1980); *Floyd Epperson*, 202 NLRB 23, 23 (1973) (user firm dairy company had indirect control over employee discipline and wages where it informed the supplier firm trucking company that a particular driver was consistently late to a transport station and thereafter the trucking company removed the employee from that route, and where trucking company increased drivers' wages when it received an increased contractual rate from the dairy company), *enforced mem.*, 491 F.2d 1390 (6th Cir. 1974).

[2] *See, e.g., Hoskins Ready-Mix Concrete*, 161 NLRB 1492, 1493 n.2 (1966) (actual exercise of control set forth in a contract and power retained in a contract but not exercised are separate indicia "of coemployership," and are each sufficient to find that an entity is a joint employer).

where "industrial realities" otherwise made it an essential party to meaningful collective bargaining.[3] This "traditional" standard had been applied since the inception of the Act.[4]

The Board's current joint-employer standard was first applied in *Laerco Transportation*, 269 NLRB 324 (1984), and *TLI, Inc.*, 271 NLRB 798 (1984). Although the Board in those cases purported to apply the traditional standard for finding a joint employer, it did not in fact do so. In *TLI*, for example, the Board refused to find a client that leased drivers from a separate agency was a joint employer, even though the client had the authority and responsibility under the lease agreement for maintaining operational control, direction, and supervision over the drivers, including "scheduling and dispatching of the drivers, routing instructions, loading and unloading procedures, and all other matters relating to day-to-day" delivery operations; the drivers reported daily to the client's facility for instructions on deliveries, returned their trucks to the client's premises when they finished their routes, and reported mechanical problems or other problems on the road to the client; the client's foremen notified the drivers when they were required to work during their vacations; the client took the initial step in many disciplinary matters by giving the leasing agency an "incident report" when the driver engaged in "conduct adverse to" the

[3] *Jewell Smokeless Coal Corp.*, 170 NLRB 392, 393 (1968) ("industrial realities" made coal company a "necessary party to meaningful collective bargaining," even though it played no role in hiring, firing, or directing employees, and retained no right under the parties' oral contract to affect those matters), *enforced mem.*, 435 F.2d 1270 (4th Cir. 1970).

[4] *See, e.g.*, *San Marcos Tel. Co.*, 81 NLRB 314, 316-18 (1949) (client was a joint employer of accountants' clerks when it reimbursed accountants for the wages paid to and expenses incurred by the clerks); *Solvay Process Co.*, 26 NLRB 650, 653-56 (1940) (finding that a company which hired a contractor on a cost-plus basis was a joint employer because it "maintained control over employment to the extent that it sent men out of the plant if their work was unsatisfactory," "owned and managed the plant in which the employees worked [,] [and] was the sole source of money with which [the contractor] paid them."); *Sierra Madre-Lamanda Citrus Ass'n*, 23 NLRB 143, 150 (1940) (finding that a fruit grower who controlled the packing houses in which the employees worked, and "supplied the money with which they were paid" was a joint employer).

client's operations, and the leasing agency investigated the incident and determined whether disciplinary action should be taken against the driver; the client kept driver logs and records; drivers worked exclusively for the client; and in collective-bargaining sessions between the leasing agency and the drivers' union, the client participated and made clear that without transportation cost savings of a certain amount, the lease agreement would be jeopardized and alternatives were being considered. 271 NLRB at 798-99.[5]

The indicia of control in *Laerco* and *TLI* was clearly greater than what previously had been required to find joint-employer status. For example, the Board had found the following to be indicative of joint-employer status: veto power over hiring or the right to reject the supplier firm's employees;[6] retaining the contractual right to direct or supervise the contractor's employees;[7] requiring employees to abide by the user firm's rules;[8] dealing with employee

[5] *See also Laerco Transportation*, 269 NLRB at 325-26 (finding no joint-employer relationship where driver service agreement provided that drivers were to perform trucking services under the client's direction and comply with its safety regulations and that client could refuse to accept any driver that did not meet its qualifications; drivers' assignment to client's facility was usually permanent; and, because the contractor had no supervisors at the client's facility, the client attempted to resolve minor personnel problems, the drivers reported to the client's warehouse to receive initial directions regarding deliveries and routes to be followed, and sometimes the client's customers would tell a driver to prioritize one order over another).

[6] *See, e.g., Jewel Tea Co.*, 162 NLRB 508, 509-10 (1966) (licensor retained the right to approve licensee's employees, even though it never exercised that right); *Manpower, Inc.*, 164 NLRB 287, 287-88 (1967) (user firm retained the right to refuse supplier firm's drivers and supplier firm would try to accommodate user firm's request for certain drivers).

[7] *See, e.g., Jewel Tea Co.*, 162 NLRB at 510 (license agreement provided that licensee's "employees shall be subject to the general supervision" of the licensor, even though licensor never exercised that right).

[8] *See, e.g., Hamburg Industries*, 193 NLRB 67, 67 (1971) (user firm required supplier firm's employees to follow its plant safety rules and regulations); *Jewell Smokeless Coal Corporation*, 170 NLRB at 392-93 (coal mine owner performed safety inspections and had previously terminated contracts with mine operators for safety practices).

grievances and personnel issues;[9] affecting employees' work schedules or work hours;[10] affecting employee discipline;[11] making recommendations to the supplier firm during the collective-bargaining process or otherwise retaining the right to give such input;[12] and giving employees daily assignments.[13] Thus, the *Laerco/TLI* Board established a new standard under which evidence that had been considered very strong indicia of joint-employer status under extant Board law became the *minimum* standard for finding joint-employer status.

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[9] *See, e.g., American Air Filter Co.*, 258 NLRB 49, 50 (1981) (supplier firm's employees reported their absences to user firm and scheduled their vacations with user firm); *Syufy Enterprises*, 220 NLRB 738, 740 (1975) (occasional handling of personnel problems, such as approving an employee's request to permit his girlfriend to work the second half of his shift in his stead); *Manpower, Inc.*, 164 NLRB at 287-88 (user firm was entity that received supplied drivers' complaints).

[10] *See, e.g., Sun-Maid Growers of California*, 239 NLRB 346, 350 (1978) (user firm's production schedule controlled supplier firm employees' schedules, and user firm required employees to change their schedules and work weekends when its production schedule so required), *enforced mem.*, 618 F.2d 56, 59 (9th Cir. 1980).

[11] *See, e.g., Floyd Epperson*, 202 NLRB at 23 (user firm informed supplier firm that it had learned that a particular driver was consistently late to a transport station, and the supplier firm subsequently removed the driver from that run).

[12] *See, e.g., U.S. Pipe & Foundry Co.*, 247 NLRB 139, 140 (1980) (user firm frequently consulted with supplier firm about bargaining proposals during collective-bargaining negotiations with union, and supplier firm often followed user firm's recommendations); *Jackson Manor Nursing Home*, 194 NLRB 892, 893 (1972) (where the leasing agreement gave nursing home "the right to be present and to fully participate in any and all collective-bargaining sessions that may occur during the term of the lease," and further provided that the lessee must obtain its consent before entering into any labor agreement or contract, nursing home was a joint employer because the contractual provision gave it the "potential for influencing most drastically the lessee's labor policies").

[13] *See, e.g., Syufy Enterprises*, 220 NLRB at 740 (user firm required supplier firm's janitors to occasionally perform "non-routine" work, non-janitorial tasks when work was "heavy," and work not covered by the scope of the cleaning contract); *Teamsters Local No. 688*, 211 NLRB 496, 496 (1974) (user firm assigned supplier firm's drivers their routes based on seniority and "other historical considerations").

Following these decisions, the Board made clear that the essential element in its current analysis is "whether a putative joint employer's control over employment matters is *direct and immediate*." *See, e.g., Airborne Express*, 338 NLRB 597, 597 n.1 (2002) (emphasis added). For example, in *Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 9 & n.23 (Aug. 26, 2011), the Board found no joint-employer relationship where, *inter alia*, the putative joint employer only recommended individuals for hire rather than directly hiring them; the primary employer retained final authority over hiring decisions; and there was no evidence that the putative employer hired or discharged an employee without the primary employer's approval.

Further, under the current standard, the Board "looks to the actual practice of the parties," and will not find that an entity is a joint employer based on its potential, contractually-retained control.[14] For example, in *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 677-78, 687-90 (1993), the Board found that a chemical company was not a joint employer of leased drivers notwithstanding its contractual right to maintain operational control, direction, and supervision of the contractor's drivers and the fact that its cost-plus contract set forth the formula by which the drivers were paid.

Additionally, the Board's current standard requires the putative joint employer's control to be "substantial" rather than "limited and routine," and the Board has defined "limited and routine" as including "where a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work." *AM Property Holding Corp.*, 350 NLRB at 1001 (citing cases). The Board in *AM*

[14] *See AM Property Holding Corp.*, 350 NLRB 998, 1000 (2007) (employer's actual role in supervising and directing employees insufficient to establish joint employer relationship despite provision in lease agreement that employer would maintain "operational control, direction, and supervision" of employees).

Property Holding Corp applied this standard and concluded that a building owner was not a joint employer of its cleaning contractor's employees where it instructed employees what cleaning tasks to perform, but not how to perform their tasks; distributed keys and cleaning products to employees at the beginning of their shifts; prepared and signed employees' timecards; and required employees to redo work if it determined that they did not initially properly perform the work. *Id.*

b. The Board's current joint-employer standard is inconsistent with the purposes and policies of the Act.

(1) The term "employer" in the Act was intended to be construed broadly.

The Act's definition of "employer" encompasses more than the technical and traditional common law definition of "employer"; it also "draw[s] substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life." *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403 (1947); *see also NLRB v. Hearst Publications*, 322 U.S. 111, 129 (1944) (definition of employer "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship[.]").[15] The Act was premised on Congress's "explicit findings that strikes and industrial strife . . . result in large measure from the refusal of employers to bargain collectively and the inability of individual workers to bargain successfully for improvements in their 'wages, hours, or other working conditions' with employers. . . ." *Hearst*, 322 U.S. at 126.

[15] *Cf. NLRB v. Town & Country Elec.*, 516 U.S. 85, 91 (1995) (the Board's "broad, literal interpretation of the word 'employee' is consistent with several of the Act's purposes, such as protecting 'the right of employees to organize for mutual aid without employer interference,' and 'encouraging and protecting the collective-bargaining process'") (citations omitted).

Although the Act's definition of "employer" expressly was intended to incorporate "an appreciation of economic realities [and] a recognition of the aims which Congress sought to achieve" through the Act, *see Atkins*, 331 U.S. at 403, the Board's current joint-employer standard construes "employer" relatively narrowly. Indeed, the federal courts generally apply a broader joint-employer standard under other federal remedial statutes that contain narrower definitions of "employer" than in the Act. For example, Title VII defines the term "employer" relatively narrowly as a person "who has fifteen or more employees," 42 U.S.C. § 2000e (b), but every United States Court of Appeals that has considered how the term should be applied has determined that it should be construed broadly.[16] The federal courts have applied that broad construction by utilizing either a "hybrid" right-to-control/economic realities test or the Board's traditional joint-employer standard to assess joint-employer status under Title VII and other federal anti-discrimination statutes that Congress modeled after it.[17] Each of these standards requires less actual or direct control than the Board's current joint-employer standard.

[16] *See, e.g.*, Brief for the EEOC as Amicus Curiae, *Browning-Ferris Industries d/b/a BFI Newby Island Recyclery*, Case 32-RC-109684 (June 15, 2014), at 10 (citing cases and discussing how the federal courts have determined that the term "employer" should be construed broadly in Title VII cases).

[17] *See, e.g., Lopez v. Johnson*, 333 F.3d 959, 963-64 (9th Cir. 2003) (per curiam) (applying both the hybrid test and the traditional joint-employer test from *NLRB v. Browning-Ferris Indus. of Penn.*, 691 F.2d 1117, 1123 (3d Cir. 1982) in a Rehabilitation Act case); *Bristol v. Bd. of County Comm'rs*, 312 F.3d 1213, 1218 (10th Cir. 2002) (en banc) (applying NLRB's traditional joint-employer test in an Americans with Disabilities Act case); *Graves v. Lowery*, 117 F.3d 723, 727 (3d Cir. 1997) (applying the traditional joint-employer standard from *NLRB v. Browning-Ferris Indus. of Penn.*, 691 F.2d at 1123 in a Title VII case); *Magnuson v. Peak Technical Servs.*, 808 F.Supp. 500, 508-10 (E.D. Va. 1992) (minimal indicia of control, when viewed against economic reality of the actual working relationship, sufficient to find joint-employer status); Brief for the EEOC as Amicus Curiae, *supra* note 16, at 7-10 (discussing the totality-of-the-circumstances common law of agency test or "hybrid test," which is often utilized in determining whether an entity is a joint employer under Title VII); EEOC, EEOC ENFORCEMENT GUIDANCE:

(2) The Board's current joint-employer standard inhibits meaningful collective bargaining.

Joint employer questions typically arise in two situations: (1) contingent or temporary employment, including employee leasing; and (2) commercial relationships structured so that one entity is in a position to influence the labor relations policies of the other, such as outsourcing of functions integral to the employer's business or franchising. Both types of work arrangements "alter who is the employer of record or make the worker-employer tie tenuous and far less transparent."[18]

The contingent workforce has steadily increased in prominence in the U.S. economy over the past several decades. The principal defining feature of contingent work arrangements is the triangular employment relationship, where the temporary help firm "assigns" workers to a user firm, which utilizes the labor provided, while the temporary help firm "place[s] these workers for legal purposes on [its] own payroll, billing client firms in an amount covering wages, overhead, and profit." [19] This "pushes liability for adherence to a range of workplace statutes . . . outward

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APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS (1997), *available at* http://www.eeoc.gov/policy/docs/conting.html (last accessed June 23, 2014) (discussing, *inter alia*, the standard used in assessing whether an entity is a joint employer under Title VII, which ordinarily involves application of the "control test" from the RST (SECOND) OF AGENCY § 220, and specifically discussing the standard for finding joint-employer status in situations where businesses utilize temporary help agencies and employee leasing firms).

[18] David Weil, *Enforcing Labor Standards in Fissured Workplaces: The U.S. Experience*, 22 THE ECON. & L. REL. REV. 33, 36-37 (2011).

[19] George Gonos, *The Contest Over "Employer" Status in the Postwar United States: The Case of Temporary Help Firms*, 31 L. & SOC'TY REV. 81, 84-85 (1997). *See also* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 68 (2004) ("[w]hat characterizes a temporary employment agency job is not the duration of the job, but the relations of power and the locus of legal responsibility," since "even though the individual employee works on the user firm's worksite and utilizes the user firm's tools, the

to other businesses."[20] Before the 1970s, temporary employment agencies generally only offered short-term secretarial help, day laborers, and nursing services, and did not represent a statistically significant portion of private sector employment. Around 1975, however, "temporary employment agencies began to provide workers for many different types of jobs, including maintenance work, custodial services, legal services, and computer programming," and thereafter began to experience tremendous growth.[21] The temporary help services industry grew from 518,000 to 1,032,000 workers during the 1980s, and reached over 1% of total employment by 1990. The percentage doubled to 2% by 2000.[22] In February 2005, there were 1.2 million temporary help agency workers and 813,000 workers provided by contract leasing firms.[23]

The current joint-employer standard inhibits meaningful collective bargaining under contingent workforce arrangements, because user firms typically have only "limited and routine" direct supervision of the employees (as that term has been defined by the Board since 1984) and only indirect or potential control over other terms and conditions of employment. But a user

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temporary agency is, legally speaking, the employer."); Edward A. Lenz, *Co-Employment - A Review of Customer Liability Issues in the Staffing Services Industry*, 10 THE LAB. LAW. 195, 196-99 (1994) (describing various contingent employment arrangements).

[20] Weil, *supra* note 18, at 37.

[21] *See* STONE, *supra* note 19, at 67.

[22] *See Id. See also* U.S. Bureau of Labor Stat., Luo, et al., *The Expanding Role of Temporary Help Services from 1990 to 2008*, MONTHLY LAB. REV., August 2010, at 3, 4.

[23] U.S. BUREAU OF LABOR STATISTICS, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS FEBRUARY 2005, at 1 (July 2005). Luo, Mann, & Holden, who are economists at the BLS, provide statistics through 2008, which show a decrease in the percentage of employees working in the temporary help services industry around 2007-2008. Their analysis indicates this decrease was caused by the recession and the fact that temporary workers shouldered a higher share of overall job loss because they were easier to dispose of. *See* Luo, et al., *supra* note 22, at 4. The BLS has not conducted any more recent surveys of contingent and alternative employment arrangements, and we are unaware of any other sources with updated statistics.

firm that owes no bargaining obligation can still influence the supplier firm's bargaining posture by threatening to terminate its contract with the supplier firm, and therefore eliminate supplied employees' jobs, if their wages and benefits are not below a certain cost threshold. Indeed, in *TLI, Inc.*, 271 NLRB at 798-99, a paper products firm attended collective-bargaining sessions between a truck-driver leasing firm and the drivers' union and made clear that the driver-leasing contract would be jeopardized absent a significant reduction in its transportation expenses. Yet the Board found that the paper company was not a joint employer because "the specific savings . . . were left entirely to [the leasing firm] and the [u]nion to work out." *Id.* at 799. It is difficult to envision how the union and the driver leasing firm could have meaningfully bargained about wages, under those circumstances, without the bargaining obligation also attaching to the paper company. Indeed, "[s]ervice contractors rarely have room to grant wage increases without renegotiating their own contracts with their clients," and therefore, "the clients effectively control the economic terms of employment for the contractors' employees."[24] This drives supplier-contractors to reduce their costs, particularly labor costs, which is "the most sizeable cost and the one most easily controlled,"[25] leaving little room for employees to achieve better wages and benefits through collective bargaining, a fundamental purpose of the Act.

A user firm that, as in the typical case, is found not to be a joint employer can also thwart collective bargaining by simply terminating its agreement with the contractor and, therefore, its

[24] Jonathan P. Hiatt & Lynn Rhinehart, *The Growing Contingent Work Force: A Challenge for the Future*, 10 THE LAB. LAW. 143, 155 (1994). *See also Airborne Express*, 338 NLRB at 599 (Member Liebman, concurring) (questioning how meaningful bargaining could occur between union and local carriers without Airborne's participation, where Airborne's operational requirements "effectively determine [the employees'] conditions of employment that are subject to the Act's bargaining requirements. . . . ").

[25] Weil, *supra* note 18, at 36-37.

employees. Even if a successor contractor retains the employees, the successor is generally free to cast aside any collectively-bargained terms between the employees and the predecessor contractor. This permits the user firm to retain the benefits of an experienced workforce while dismantling any contractual commitments that the workers secure from their direct employers.[26] The current standard also renders employee freedom of choice in a bargaining representative illusory if the bargaining obligation does not attach to one of the entities that is necessary for meaningful bargaining.[27]

Franchising (and outsourcing arrangements that triangulate employment relationships) also illustrates how the current joint-employer standard undermines meaningful collective bargaining. In these commercial arrangements, an employer inserts an intermediary between it and the workers and designates the intermediary as the workers' sole "employer."[28] But notwithstanding the creation of an intermediary, franchisors typically dictate the terms of franchise agreements and "can exert significant control over the day-to-day operations of their franchisees," *id.*, including the number of workers employed at a franchise and the hours each employee works. Although franchisors generally claim that they have no influence over the wages franchisees pay to their employees, some franchisors effectively control such wages "by

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[26] *See* Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B.C. L. REV. 329, 345-46 (1998); Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1542-43 (1996).

[27] *See* Harper, *supra* note 26, at 345-46 (positing that contracted employees are unlikely to form a union because their employer will tell them that the contract would likely be cancelled; and, even if they do unionize, their employer will not be able to negotiate effectively with them over many terms and conditions of employment, including wages, because the client firm controls those items).

[28] *See* CATHERINE RUCKELSHAUS, ET AL., WHO'S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK 7-8 (National Employment Law Project) (2014).

controlling every other variable in the business except wages."[29] Some franchisors even keep track of data on sales, inventory, and labor costs; calculate the labor needs of the franchisees; set and police employee work schedules; track franchisee wage reviews; track how long it takes for employees to fill customer orders, accept employment applications through the franchisor's system; and screen applicants through that system.[30] Thus, current technological advances have permitted franchisors to exert significant control over franchisees, e.g., through scheduling and labor management programs that go beyond the protection of the franchisor's product or brand.[31] Some scholars have posited that franchisors consider avoidance of unionization and the collective-bargaining process to be the "prime advantage of franchising," and "[i]n some cases, the driving force behind the conversion of fully integrated, employee-operated businesses to franchised operations is an attempt to prevent or remove the supposedly harmful effects of unionization and thereby increase profits."[32]

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[29] *Id.* at 11.

[30] *Ibid.*

[31] *See, e.g., Dana Tanyeri, High Tech Takes on Big Labor: The Stuff You Can Use Right Now to Ease Your Restaurant Woes*, RESTAURANT BUSINESS, December 2007, at 35-36 (describing various types of software programs available to help manage schedules and labor costs); Kerry Pipes, *Fast Food Franchise Industry is Rushing to Acquire Technology Tools that Will Help it Stay, Well, Fast*, Franchising.com, *available at* http://www.franchising.com/articles/fast_food_franchise_industry_is_rushing_to_acquire_technology_tools_that_wi.html (last accessed June 20, 2014) ("[F]rom ordering buns and burgers to scheduling shifts, more and more day-to-day operational issues are being orchestrated via technology tools….[and] software programs can handle scheduling employees, tracking their hours . . . ."); Kerry Pipes, *Point of Contact: CMO Terri Miller on Great Clips' Innovative POS System*, Franchising.com, *available at* http://www.franchising.com/articles/point_of_contact_cmo_terri_miller_on_great_clips_innovative_pos_system.html (last accessed June 20, 2014) (discussing Great Clips Hair Salon's technology "that helps managers schedule the right number of stylists at the right time," while managing "a franchisee's biggest cost item: payroll").

[32] Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 VAND. L. REV. 1503, 1528 (1990). The Board should continue to exempt franchisors from joint-employer status

With respect to both the contingent workforce and employees working under an outsourcing or franchising model, the current joint-employer standard also undermines meaningful bargaining by precluding employees from exerting traditional economic pressure on a company that effectively controls many of their working conditions.[33] This is because where no joint-employer status can be found under the current restrictive joint-employer standard, each entity is considered a "neutral" in the other's labor dispute for Section 8(b)(4) purposes.[34] Therefore, a union representing the company's employees cannot lawfully utilize pickets or other economic pressure directed at the other company, even if the other company is necessary for meaningful collective bargaining.

3. The Board Should Adopt a New Standard for Determining Joint-Employer Status Based on the Overarching Principle that the Bargaining Obligation Covers Entities that are Essential for Meaningful Bargaining.

The General Counsel urges the Board to abandon the current joint-employer standard, as articulated in *TLI* and *Laerco* (and *Airborne*), and to instead find joint-employer status where,

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to the extent that their indirect control over employee working conditions is related to their legitimate interest in protecting the quality of their product or brand. *See, e.g., Love's Barbeque Rest.*, 245 NLRB 78, 120 (1978) (no joint-employer finding where franchisees were required to prepare and cook food a certain way because, *inter alia*, the franchisor established the requirements to "keep the quality and good will of [the franchisor's] name from being eroded") (internal quotations and citations omitted), *enforced in rel. part*, 640 F.2d 1094 (9th Cir. 1981). The "traditional standard" cases finding that franchisors were not joint employers preceded the advent of new technology that has enabled some franchisors to exercise indirect control over employee working conditions beyond what is arguably necessary to protect the quality of the product/brand.

[33] *See* Harper, *supra* note 26, at 345-46.

[34] *See, e.g., Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 82 (1988) (because the primary employer and the entity it contracted with were not joint employers under the Act, the union's picketing at the other entity's facility "manifested an unlawful object violative of Section 8(b)(4)(i) and (ii)(B) of the Act").

under the totality of the circumstances, including the way the separate entities have structured their commercial relationship, the putative joint employer wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence.[35] Under this approach, the Board would return to its traditional standard and would make no distinction between direct, indirect, and potential control over working conditions and would find joint employer status where "industrial realities" make an entity essential for meaningful bargaining.

The Act provides that employees have the right "to bargain collectively through representatives of their own choosing," and defines the bargaining obligation as "meet[ing] at reasonable times and confer[ring] in good faith with respect to wages, hours and other terms and conditions of employment . . ." Accordingly, employees should expect that their bargaining representative be capable of addressing their employment conditions with the entity that realistically has the power to implement those terms. Otherwise, the bargaining is not meaningful; it is an exercise in futility. *See Airborne Express*, 338 NLRB at 599 (Member Liebman, concurring) (questioning how meaningful bargaining could occur between union and local carriers without Airborne's participation, where Airborne's operational requirements "effectively determine [the employees'] conditions of employment that are subject to the Act's bargaining requirements. . . . ").

[35] The view that joint-employer status turns on the putative joint employer's influence over terms and conditions of employment as to be an essential participant in bargaining does not implicate the Board's decision in *Oakwood Care Center*, 343 NLRB 659 (2004), which held that bargaining units that combine employees who are solely employed by a user employer with employees who are jointly employed by the user employer and a supplier employer are multiemployer units and are statutorily permissible only with the parties' consent.

When applying its traditional joint-employer standard, the Board considered that control over the following terms and conditions of employment would make an employer an essential party to collective bargaining: wages;[36] employee personnel issues;[37] the number of employees needed to perform a job or task;[38] establishing employee work hours, schedules, work week length, and shift hours;[39] employee grievances, including administration of a collective-bargaining agreement;[40] authorizing overtime;[41] safety rules and standards;[42] production

[36] *See, e.g., Floyd Epperson*, 202 NLRB at 23 (user firm had indirect control over supplier firm's employees' wages where the evidence established that when the supplier firm received a raise from the user firm, he raised the wages of the drivers); *Hoskins Ready-Mix Concrete*, 161 NLRB at 1493 (because contract provided that user firm would reimburse supplier firm for payroll expenses, the user firm was "the ultimate source of any wage increase for [the supplier's] employees that might be negotiated with a union").

[37] *See, e.g., Mobil Oil Corp.*, 219 NLRB 511, 514, 516 (1975) (approving employees' requests for vacation and time off), *enforcement denied on other grounds* 555 F.2d 732 (9th Cir. 1977).

[38] *See, e.g., Carillon House Nursing Home*, 268 NLRB 589, 591 (1984) (determining the number of employees employed); *Trend Construction Corp.*, 263 NLRB 295, 299 (1982) (determining the number of unit employees to be employed on the job); *General Electric Corp.*, 256 NLRB 753, 753 (1981) (determining that employees should be laid off because of lack of work); *The Greyhound Corp.*, 153 NLRB 1488, 1491 n.8, 1492-44 (1965) (determining the exact number of employees needed for any shift), *enforced*, 368 F.2d 778 (5th Cir. 1966).

[39] *See, e.g., Carillon House*, 268 NLRB at 591 (user firm established the length of the work week and shift hours); *Browning-Ferris Industries of Pennsylvania, Inc.*, 259 NLRB 148, 149 (1981) (user firm established the shift starting times), *enforced*, 691 F.2d 1117 (3d Cir. 1982); *Floyd Epperson*, 202 NLRB at 23 (user firm determined employees' work schedules and had the authority to modify drivers' schedules by calling the drivers directly).

[40] *See, e.g., Carillon*, 268 NLRB at 591 (supplier firm was required to comply with user firm's collective-bargaining agreement and administered the first step of the grievance process); *U.S. Pipe & Foundry Co.*, 247 NLRB at 140 (putative joint employer administered the grievance provision of the collective-bargaining agreement between the employees and their employer).

[41] *See, e.g., Mobil Oil*, 219 NLRB at 514 (user firm's production foreman authorized employees' overtime); *Hamburg*, 193 NLRB at 67 (user firm had authority to veto employees' overtime).

[42] *See, e.g., Hamburg*, 193 NLRB at 67 (user firm required supplier firm's employees to follow its plant safety rules and regulations).

standards; [43] break and/or lunch periods;[44] assignment of work and determination of job duties;[45] work instructions relating to the means and manner to accomplish a job or task;[46] training employees or establishing employee training requirements;[47] vacation and holiday leave and pay policies;[48] discipline;[49] discharge;[50] and hiring.[51] The Board correctly did not label control over

[43] *See, e.g., Jewell Smokeless Coal Corp.*, 175 NLRB 57, 59 n.3 (1969) (coal mine operator had required mine operator to buy additional equipment to increase productivity), *enforced mem.*, 435 F.2d 1270 (4th Cir. 1970); *Jewell Smokeless Coal Corporation*, 170 NLRB at 392-93 (coal mine owner had previously terminated contracts with coal operators for low productivity).

[44] *See, e.g., Carillon*, 268 NLRB at 591 (user firm established rules for employee break and lunch periods).

[45] *See, e.g., id.* (user firm specified supplier firm's employees' job duties in the parties' contract).

[46] *See, e.g., Hamburg*, 193 NLRB at 67 (user firm instructed supplier firm on what work needed to be performed and user firm's three superintendents constantly checked "the performance of the workers and the quality of the work."); *Greyhound*, 153 NLRB at 1492 (parties' contract specified the cleaning method employees would use in various areas of user firm's bus terminals (e.g., scrubbing and scouring)).

[47] *See, e.g., Carillon*, 268 NLRB at 591 (nursing home set training requirements for housekeeping contractor's employees); *Moderate Income Management Co.*, 256 NLRB 1193, 1194 (1981) (property management company trained the housing project's superintendent); *Mansion House Center*, 195 NLRB 250, 256 (1972) (user firm required supplier firm's security guards to complete training program with local police department).

[48] *See, e.g., Jewel Tea Co.*, 162 NLRB at 510 (license agreement required licensee to follow licensor's policies regarding paid vacations and holidays).

[49] *See, e.g., Carillon*, 268 NLRB at 591 (user firm established rules setting forth the grounds for discharge and discipline); *Checker Cab Co.*, 141 NLRB 583, 586 (1963) (cab association's board of review suggested disciplinary action against association members' employees), *enforced*, 367 F.2d 692 (6th Cir. 1966).

[50] *See, e.g., Trend Construction*, 263 NLRB at 297 n.13 (user firm discharged supplier firm's employee); *Spartan Department Stores*, 140 NLRB 608, 610 (1963) (license agreement gave licensor the preemptory right to discharge licensee's employees).

[51] *See, e.g., Mobil*, 219 NLRB at 515-16 (user firm's production foremen conducted applicant interviews and instructed supplier firm regarding which applicants it should hire); *Manpower, Inc.*, 164 NLRB at 287-88 (user firm retained the right to refuse supplier firm's drivers and supplier firm would try to accommodate user firm's request for certain drivers); *Jewel Tea Co.*, 162 NLRB at 509-10 (licensor retained the right to approve licensee's employees, even though it never exercised that right).

such terms and conditions as "limited and routine."[52] Thus, even if the putative joint employer only controls work assignments, this implicates bargainable topics such as what criteria to use (e.g., seniority or how to assess the quality of employees' performance), and other important terms and conditions of employment that substantially affect employees' work life.

Furthermore, under the Board's traditional test, indirect control over certain terms and conditions of employment was sufficient to find joint-employer status. For example, in *Floyd Epperson*, 202 NLRB at 23, the Board found a user firm to be a joint employer based, in part, on "some indirect control over [the supplied drivers'] wages," where the evidence established that the supplier firm raised drivers' wages when it received a raise from the user firm. And in *Hamburg Industries*, 193 NLRB at 67, a user firm that was party to a cost-plus contract was found a joint employer where it had indirect control over supplied employees' wages, even though the supplier firm could institute unilateral pay raises, because "unless the pay increases [we]re presented to and accepted by [the user firm], the increased labor costs [we]re absorbed by [the supplier firm] alone." In both cases, the user firm's commercial relationship with the supplier firm granted indirect control over supplier firm wages and effectively inhibited the supplier firm from independently agreeing to a collectively-bargained wage increase.

[52] *Compare AM Property Holding*, 350 NLRB at 1001 (applying the current joint-employer standard and finding that a firm was not a joint employer where it told supplied cleaning employees "what work to perform, or where and when to perform the work, but not how to perform the work," because this oversight was "limited and routine"), *with Trans-State Lines, Inc.*, 256 NLRB 648, 649 (1981) (applying the traditional joint-employer standard and finding that a trucking company was joint employer of fleet owner's drivers where trucking company screened applicants applying for jobs with fleet companies and referred applicants it approved to the fleet owners, handled dispatching from certain locations, and handled substantial amount of dispatching for "backhauls" (pickups for return trips)).

Meaningful bargaining over wages, under such circumstances, could not occur without the user firm's participation.[53]

Additionally, the Board's traditional standard treated *potential* control—typically the unexercised ability to control employment conditions reserved in license, lease, or other commercial agreements—as sufficient to find joint-employer status. For example, in *Hoskins Ready-Mix Concrete*, 161 NLRB at 1493 & n.2, a user firm that had the contractual authority to exercise "overall supervision and direction" of the supplier's leased employees was deemed a joint employer because it had the "power to control basic aspects" of the supplied employees' working conditions, even though it had not exercised that power. And in *Globe Discount City*, 171 NLRB 830, 830-32 (1968), a licensor was found to be the joint employer of its licensee's employees where the licensor retained substantial contractual power "to control or influence the labor policies of the licensees," and retained "the right to terminate either license for default," thereby insuring "that its wishes in regard to labor relations matters will be carried out by the licensees." In these cases, the Board implicitly recognized that potential control over working conditions renders an entity essential for meaningful bargaining.

Finally, the traditional standard recognized the potential to control terms and conditions of employment based not on specific contractual privileges but rather on the "industrial realities" of certain business relationships. Thus, in *Jewell Smokeless Coal Corporation*, 170 NLRB at 392-93, the Board found that a coal processor was a joint employer with operators that mined

[53] *See also Sun-Maid Growers of California*, 239 NLRB at 350-51 (finding company to be a joint employer and noting that its control over employees' working conditions, including indirect control over their work schedules, made it the only party that "could have bargained effectively with the [union] regarding the indicia of employment over which it possessed control").

coal on its properties, even though it played no role in hiring, firing, or directing operators' employees and there was no contract granting the coal processor the right to control terms and conditions or employment. The coal processor unilaterally set the reimbursement rate for the coal mined on its properties, without regard to the difficulty and time required to mine the coal, and required that coal removal comply with its engineering plans and "well established mining practices," including safety standards; the contracts between the coal processor and the various coal mine operators were oral and terminable at will; and the processor exercised its right to terminate contracts when, for example, it determined that the operator had low production or had failed "to operate safely in an orderly and prescribed manner." *Id.* In finding joint-employer status, the Board recognized that the nature of the commercial relationship between the coal processor and the operators effectively granted the processor significant control over operator employees' terms and conditions of employment, and made the processor "a necessary party to meaningful collective bargaining . . . . " *Id.* at 393.[54]

The Board's traditional joint-employer standard better effectuates the policies and purposes of the Act than the Board's current, narrow standard, and the Board should return to it.

[54] *Compare American Air Filter Co.*, 258 NLRB at 52 (because user firm provided all of employees' work, user firm effectively discharged supplier firm's employees when it terminated its contract with the supplier firm), and *U.S. Pipe & Foundry Co.*, 247 NLRB at 140 (noting that because the user employer provided eighty percent of the supplier employer's business, the user employer could effectively terminate the supplied employees' employment, notwithstanding that the user could not directly discharge one of the supplier's employees) *with Hychem Constructors, Inc.*, 169 NLRB 274, 274-76 & n.4 (1968) (finding that a manufacturer and a contractor it engaged on a *short-term* cost-plus basis were not joint employers of the contractor's employees under the "traditional" joint-employer standard, notwithstanding the manufacturer's retained right to control wage increases and aspects of daily working conditions, where this retained control was only "consistent with [the manufacturer's] right to police reimbursable expenses under its cost-plus contract" and to "control and protect its premises," rather than "giving it veto power over any collective bargaining in which [the contractor] may engage").

See Bartlett-Collins Co., 237 NLRB 770, 773 (1978) (the Board has the "statutory responsibility to foster and encourage meaningful collective bargaining"), *enforced*, 639 F.2d 652 (10th Cir. 1981). That standard would broadly construe the term "employer," as intended by Congress. It would allow employees to bargain over their working conditions with the entities that control those working conditions based on economic reality. Collective bargaining involves a give-and-take between the parties, and employees should expect that their union have that give-and-take directly with the employers that have control of whatever employment terms are being negotiated.[55] Moreover, the broader standard would allow employees to use traditional economic weapons to exert lawful economic pressure on those parties who realistically control the economics of the relationship—even if they do not "directly" control working conditions. Allowing for collective bargaining and the legitimate use of economic weapons, vis-à-vis the entity that in reality controls working conditions, will in turn foster one of the Act's primary goals—achieving industrial and labor peace.[56]

III. Conclusion

For the reasons discussed above and because the Board, as the agency Congress entrusted to administer the NLRA, has the power to make rational changes in the interpretation and

[55] This does not mean that either joint employer is restricted in who it chooses to represent it in bargaining. Indeed, it could choose as its agent the same individual who will represent the other employer as well.

[56] *See* 29 U.S.C. § 151 (noting industrial strife and unrest and inequality of bargaining power among the reasons for enacting the NLRA, which was intended to "encourag[e] practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions," and to "restor[e] equality of bargaining power between employers and employees[.]"); *Hearst*, 322 U.S. at 125 ("Congress. . . sought to find a broad salutation, one which would bring industrial peace by substituting, so far as its power could reach, the rights of workers to self organization and collective bargaining for the industrial strife which prevails where these rights are not effectively established.")

application of the Act in light of evolutions in employment relationships and the American economy,[57] the General Counsel believes that the Board should modify its joint-employer standard to take into account the economic and industrial realities of employment relationships, which is consistent with the policies and purposes of the Act.

Respectfully submitted,

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[57] *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Brief of the General Counsel in Case 32-RC-109684 was served in the manner indicated to the parties listed below on this 26th of June, 2014.

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