Case Nos. 16-1028, 16-1063, 16-1064

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

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 350,
Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATIONS
FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR
RELATIONS BOARD

FINAL BRIEF OF INTERVENOR INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 350

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Intervenor, Teamsters Local 350 ("Union" or "Intervenor"), certifies the following:

A. Parties, Intervenors, and Amici

Except for the following, all parties, intervenors and amici appearing in this Court are listed in the brief of Respondent National Labor Relations Board ("Board"): Amicus Equal Employment Opportunity Commission (EEOC) in support of Respondent.

B. Rulings Under Review

The rulings under review are described in the Petitioner's brief.

C. Related Cases

The case on review was not previously before this Court or any other court. Counsel for Intervenor is unaware of any related cases pending in this Court or any other court.

Dated at Oakland, California,
this 15th day of November, 2016

/s/ Susan K. Garea
Susan K. Garea
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BRIEF OF INTERVENOR, TEAMSTERS LOCAL 350

STATUTES AND REGULATIONS

Except for the following, all applicable statutes, etc., are contained in the Brief for Respondent NLRB: Section 2(11) of the National Labor Relations Act (NLRA or the "Act"), 29 U.S.C. section 152(11):

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

FACTS

The particular facts in this case are undisputed and Browning-Ferris Industries of California, Inc. (BFI) does not challenge the Board's factual findings on appeal. The totality of circumstances presented by those undisputed facts demonstrate that it is appropriate to require both Leadpoint Business Services (Leadpoint) and BFI to bargain with the representative chosen by the bargaining unit employees. Because BFI and its amici have attempted to narrow the focus of this case to particular aspects of the employment relationship, we begin with an overview of the totality of circumstances before addressing the BFI's legal arguments.

BFI provides solid waste and recycling services, and owns and operates a

recycling facility. Leadpoint is in the business of supplying employees to other employers for use in conducting their enterprises. BFI has contracted with Leadpoint to supply employees for certain, BFI-specified, unskilled positions at the facility.

BFI owns the facility and maintains it and all of the conveyors, screens, and other equipment required for sorting waste and recyclable materials. JA-57. BFI determines the days on which the facility operates, hours of operation, shift times and which conveyers will be run. JA-372. It decides when the material streams start running at the beginning of each shift, and when they will stop during and at the end of that shift. JA-372-372; JA-93, 219-221. BFI's sort line operators and shift supervisors determine the productivity goals for the streams, and the speed at which the streams will run. JA-373; JA-83-84. Only BFI can adjust the speed, and it does so continuously. *Id.*

BFI contracts with Leadpoint to provide a BFI-specified number of unskilled employees to stand at the workstations that BFI positions along the conveyors. JA-371. The employees manually sort the material (sorters), clear jams and clean the screens on the sorting equipment (screen cleaners), and clean the facility (housekeepers). *Id*. Employees at each workstation have different responsibilities, established by BFI, e.g., manually picking out categories of recyclables or prohibited materials. JA-370; JA-57-58, 197.

BFI continuously monitors and closely manages the employees, either in concert with Leadpoint-supplied front-line supervisory employees, or through its own shift supervisors and managers. Further, BFI sets various terms and conditions of employment, both directly and indirectly, and retains the right to control many others.

BFI contends that Leadpoint is "a typical service provider." Pet. Br. at 11. But that is not the case. If it was, BFI would have hired Leadpoint to provide a service, *i.e.*, to operate the recycling plant. BFI would have deposited the waste materials at the appropriate entrance to the facility, set specifications for the quality and timeliness of the sorted materials exiting the facility, and merely inspected the final product to determine if it met those specifications. That is not what BFI does. Rather, BFI, not Leadpoint, operates the plant, using Leadpoint-supplied employees.

The undisputed facts establish that BFI is a joint employer under any formulation of the proper standard.

STANDARD OF REVIEW

This Court accords a degree of deference to the Board's determination that particular workers are employees under the common law and, thus, are covered by the NLRA. *See, e.g.*, *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563, 566 (D.C. Cir. 2016). The basis for that deference is strong here, as it is undisputed

that the Leadpoint-supplied employees are protected by the NLRA and that both BFI and Leadpoint are covered employers. In other words, this case does not present a question of coverage because no party argues that the workers are independent contractors.

For that reason, there is no question that BFI had certain statutory duties toward the Leadpoint-supplied employees whether or not it is their joint employer. "[T]he Act clearly regulates the relationship between an employer . . . and employees of other employers." *New York New York, LLC*, 356 NLRB 907, 911 (2011), *enf'd*, 676 F.3d 193 (D.C. Cir. 2012). Indeed, "An employer 'may violate Section 8(a) not only with respect to its own employees but also by actions affecting employees who do not stand in such an immediate employer/employee relationship.'" *DirectTV, Inc. v. NLRB*, __ F.3d __, No. 11-1273, slip op. at 39 (D.C. Cir. 2016). The question in this case is only whether the Board reasonably concluded that in addition to its other statutory duties to the employees, BFI had a duty to bargain over those terms and conditions of employment that BFI controls under NLRA section 8(a)(5), 29 U.S.C. § 158(a)(5).

In making decisions about whether a unit of employees is "'appropriate for the purposes of collective bargaining' . . . . the Board is accorded broad discretion." *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 171–72 (1971). The Board possesses "special expertise" in determining if

bargaining between an "employer" and "employees" as defined by the Act would further the statute's purposes. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979). Thus, the Board is entitled to significant deference in applying Section 8(a)(5) in this instance

SUMMARY OF THE ARGUMENT

The Board applied the traditional test for determining whether two employers jointly employ a single set of employees. The test, early articulated by the Third Circuit, asks whether the employers "share or codetermine those matters governing the essential terms and conditions of employment." *NLRB v. Browning-Ferris Industries of Pennsylvania*, 691 F.2d 1117, 1123 (3d Cir. 1982). This Court has "recognized" the Third Circuit's test is appropriate for identifying joint-employer status. *Al-Saffy v. Vilsack*, 827 F.3d 85, 96-97 (D.C. Cir. 2016). The Board's holding affirms this standard by reconciling inconsistencies in its own precedent and conforming its analysis to the common law concept of employment which requires considering "all of the incidents of the relationship" within "the total factual context." *NLRB v. United Insurance Co. of Am.*, 390 U.S. 254, 258 (1968). The Board held that, consistent with the common law and its application in the Supreme Court, it would return to considering all evidence of the employment relationship, including whether a putative joint employer has a right to control employees' terms and conditions of employment as well as all evidence

of the putative joint employer's actual control, including evidence of "limited and routine" direction and "indirect" control. The Board merely held that such evidence was relevant, it did not hold that any one example is controlling in this case or would be in any future, hypothetical case.

The record establishes BFI's extensive and pervasive control over the employees through its express right to control significant terms and conditions of their employment, through numerous examples of BFI managers' and supervisors' direction of employees' work, BFI's continuous oversight of the employees, and its ongoing and detailed direction of Leadpoint's supervisors. However, the Board did not rest its conclusion solely on this evidence. Rather, the Board's conclusion also rests on uncontested findings that BFI directly controls other central terms and conditions of employment that are mandatory subjects of bargaining, including, among others, work load, the speed of work, work hours, the timing and duration of breaks, overtime, and wage rate. Those uncontested findings alone are sufficient to support the Board's holding.

It is conceded that the Leadpoint-supplied employees are employees, not independent contractors. There is no dispute that the right to control the "manner and means" of their work is vested in an employer. The dispute is whether BFI has joint control – not necessarily exclusive control -- over the manner and means of the work and/or whether BFI controls other important terms of conditions of

employment sufficient to be a joint employer for the purposes of the Act. The Board's decision considers both questions and the extent of BFI's right of control in each. The Board's approach is not novel, as the Board and the courts often find joint employment where an entity has no involvement or say in the work, for example, when a temporary agency supplies employees to a client but controls only their wages and benefits.

BFI and its amici misstate and exaggerate the implications of the Board's holding in potential future cases. The Board's holding applies to the unique facts of this case and is not determinative of other types of economic relationships, such as service contracts. The only implication of the Board's holding in this case is that BFI has a duty to bargain with the Leadpoint-supplied employees' chosen representative over the terms and conditions of employment controlled by BFI.

ARGUMENT

I. Consistent with the Common Law the Board Considered All Indicia of BFI's Control Over Leadpoint-Supplied Employees' Terms and Conditions of Employment

BFI and its amici contend that the Board adopted a "new test." Pet. Br. at 1. In fact, the Board did not adopt a new test. Its holding in this case concerns only what evidence is relevant to the traditional joint employer inquiry.

Under the Board's decision, the object of the inquiry remains exactly what the Supreme Court and this Court have instructed it should be: to determine if an

alleged joint employer "possesse[s] sufficient control over the work of the employees to qualify as a joint employer" together with a conceded employer. *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). The Board relied expressly on the Third Circuit's articulation of the standard: "the Board may find that two or more statutory employers are joint employers of the same statutory employees if they 'share or codetermine those matters governing the essential terms and conditions of employment.'" JA-370 (*quoting NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982)). This Court recognizes this formulation as an appropriate "test for identifying joint-employer status." *Al-Saffy*, 827 F.3d at 96-97.

Rather than altering the test, the Board merely observed that several of its decisions had, without explanation or citation to authority and in a manner inconsistent with extant Board precedent, deviated from the common law by wholly ignoring or discounting certain types of evidence of control over employees' terms and conditions of employment.[1] Therefore, the Board held that

[1] The Board in its decision and in its Brief, demonstrates that the decisions overturned in this case were inconsistent with Board precedent that had never been overturned or even acknowledged. JA-369, 378, 379, 381; NLRB Br. at 24-25; *compare, e.g., AM Property Holding Corp.*, 350 NLRB 998, 1000 (2007), *with Jewel Tea Co.*, 162 NLRB 508, 510 (1966). This Court's precedent therefore *required* that the Board do exactly what the Board did here – square its precedent and explain its choice among the prior, inconsistent decisions. *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 60 (D.C. Cir. 2004) ("the Board cannot ignore its own relevant precedent but must explain why it is not controlling").

it would return to an inquiry that considers *all* relevant evidence of control, overruling earlier decisions to the extent they were inconsistent, *i.e.*, if they required the Board to "refuse[] to assign *any* significance" to those categories of evidence or rendered such evidence "irrelevant" or gave it "no weight." JA-378 (emphasis added). In sum, the Board held only that the right to control terms and conditions of employment, "limited and routine" supervision, and "'indirect' exercise of control" are each "probative of joint-employer status." JA-377, 378, 381.

The general principle animating the Board's holding – that it must consider all relevant evidence of control – is consistent with Supreme Court precedent and the common law. The Supreme Court has instructed that "*all of the incidents* of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the *total factual context* is assessed." *United Insurance*, 390 U.S. at 258 (emphasis added). Under the common law, the test has always been a multi-factor test that considers all evidence of control of terms and conditions of employment. *See Restatement (Second) of Agency* § 220(2) ("In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, *among others*, are considered.") (emphasis added).[2] The Board's decision simply corrected its jurisprudence to

[2] The Board properly relied on the *Restatement* section 220 as BFI concedes. "In determining whether a hired party is an employee under the general common law of agency, [courts] have traditionally looked for guidance to the *Restatement of*

again require a full inquiry.

The Board did not hold that any of the forms of evidence it has previously deemed irrelevant was, alone, determinative of BFI's joint employer status or that such evidence would be determinative in any hypothetical, future case. Rather, it merely held that "[t]he right to control, in the common-law sense, is *probative* of joint-employer status, as is the actual exercise of control, whether direct or indirect." JA-384 (emphasis added). BFI contends that the Board "concluded that indirect control or even an unexercised potential right to control are enough to show a joint-employer relationship." Pet. Br. at 20. But nowhere did the Board so hold, nor was it required to in order to conclude that BFI is a joint employer in light of the ample evidence of BFI's actual, significant, and direct control of Leadpoint-supplied employees' terms and conditions of employment.

The Board's decision to once again consider all evidence of control and of a right to control is consistent with the common law.

Agency." *Cmty for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 n. 31 (1989). *See, e.g.*, *Lancaster Symphony*, 822 F.3d at 565; *Dovell v. Arundel Supply Corp.*, 361 F.2d 543, 546 (D.C. Cir. 1966). Courts have specifically relied on the *Restatement* to determine whether a joint employer relationship exists. *See, e.g.*, *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324 (1974) ("While that section [*Restatement (Second) Agency* §220] is directed primarily at determining whether a particular bilateral arrangement is properly characterized as a master-servant or independent contractor relationship, it can also be instructive in analyzing the three-party relationship between two employers and a worker.").

A. Consideration of the "Right to Control" Was Not Erroneous

BFI and its amici argue that the Board erred in considering BFI's right to control employees' terms and conditions of employment rather than limiting its inquiry to BFI's exercise of control. But the Board's holding is supported by controlling precedent as well as the *Restatement*.

Both Sections 2(2) and 220 of the *Restatement (Second) of Agency* define a master as someone who "controls *or has the right to control*" another and a servant as "subject to the [employer's] control or *right to control*." Emphasis added. In distinguishing between employees and independent contractors, Section 220(2) directs courts to consider the "extent of control which, *by the agreement*, the master *may* exercise." § 220 (emphasis added). The comments also specify that either control "or right to control" is sufficient to establish an employment relationship. § 220, comment d.

Both the Supreme Court and this Court have held that the right to control is a relevant factor in assessing whether an employment relationship exists. In *Nationwide Mut. Ins. Co. v. Darden*, the Supreme Court stated, "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's *right to control* the manner and means by which the product is accomplished." 503 U.S. 318, 323 (1992) (quotation marks omitted and emphasis added). This Court has similarly held that "[i]t is the right and not the

exercise of control which is the determining element." *Local 777, Democratic Union Org. Comm., Seafarers Int'l Union of N. Am., AFL-CIO v. NLRB*, 603 F.2d 862, 874 (D.C. Cir. 1978). *See also Al-Saffy*, 827 F.3d at 97-98 (citing statutes granting right of control as relevant to joint employer status); *Joint Council of Teamsters No. 42 v. NLRB*, 450 F.2d 1322, 1326 (D.C. Cir. 1971); *Dovell v. Arundel Supply Corp.*, 361 F.2d 543, 545 (D.C. Cir. 1966). Other courts agree. *See, e.g., Schmidt v. Burlington Northern and Santa Fe Railway Co.*, 605 F.3d 686, 691 (9th Cir. 2014); *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal.4th 522, 535 (2014). [3]

For these reasons, the Board properly considered the right of control BFI retained under its agreement with Leadpoint. Specifically, the agreement gives BFI the right to "instruct[]" Leadpoint concerning the "appropriate qualifications" of employees and Leadpoint was obligated to "ensure" that employees had those qualifications; and to insist that Leadpoint-supplied employees "meet or exceed" BFI's selection procedures and tests. The agreement further specifies that

[3] Contrary to BFI's contention, considering right of control is consistent with the definition of supervisor in the NLRA. Section 2(11) of the NLRA defines a supervisor to include "any individual *having authority*, in the interest of the employer, *to* hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them . . . ." 29 U.S.C. § 152(11) (emphasis added). The Board has consistently held that an employee is a supervisor if he or she has such authority even if it has not been exercised. *See, e.g., Yamada Transfer*, 115 NLRB 1330, 1332 (1956).

Leadpoint-supplied employees must pass a specific drug test ("at a minimum, a five-panel urinalysis drug screen"); must not have been deemed ineligible for rehire by BFI; must comply with all BFI's safety policies and procedures and receive training required by BFI; must wear personal protective equipment as specified by BFI; may not make any statement that would injure BFI's reputation; must keep confidential information related to BFI's operations; and all Leadpoint-supplied employees' hours must be approved by BFI, and their personnel records be subject to BFI-inspection. Finally, the agreement provides that BFI can exclude any specific Leadpoint-supplied employee from BFI's facility "for any or no reason"[4] and that Leadpoint-supplied employees may not work at the BFI facility for more than six months. JA-17-31 at ¶¶ 4, 5, 7. Each of these contractually-reserved rights vested in BFI control over the Leadpoint-supplied employees' terms and conditions of employment that it could exercise at any time, and in many instances, did exercise.

In addition, as is necessary for BFI to conduct its operations, the agreement contemplates BFI's right to direct the work of Leadpoint-supplied employees through BFI's supervisors and managers at any time. In practice, BFI did so. For example, the employees have had to cut short their Leadpoint-led stretching

[4] *See Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993) (user "demonstrated its joint control over the referred employees by, *inter alia*, its unfettered power to reject any person referred").

exercises because BFI started the streams running. JA-372; JA-248. Leadpoint-supplied sorters similarly testified that they received assignments from BFI that "took priority" over Leadpoint directions. JA-373; JA-290 (when Leadpoint supervisor told sorters they needed to pick certain materials off the stream, sorter responded that BFI Operations Manager Paul Keck instructed them to let it go, and Leadpoint supervisor did not countermand the instruction). The Board found that BFI managers "assigned to employees tasks that take precedence over *any* work assigned by Leadpoint." JA-387 (emphasis added). *See also* Subsection B (other evidence of BFI direction).

The Board correctly considered evidence of BFI's right to control Leadpoint-supplied employees' terms and conditions of employment as probative of BFI's joint-employer status.

B. Consideration of "Limited and Routine" Control Was Not Erroneous

While BFI and its amici argue that only exercised control over employees is relevant to joint employer status, at the same time they argue the Board erred in considering evidence of exercised control that, they contend, was "limited and routine." However, the Board's holding that all evidence of control is probative is consistent with the common law. Nothing in the *Restatement* or Supreme Court jurisprudence requires the Board to wholly discount evidence of direct control simply because the control is "limited and routine." To the contrary, as this Court

has explained, *Restatement* factor one ("the extent of control") "requires that [a court] examine *the extent of* the actual supervision exercised by a putative employer over the means and manner of the workers' performance." *Lancaster Symphony Orchestra*, 822 F.3d at 566 (emphasis added). The Seventh Circuit has found the type of control BFI exercises here probative of "shared control," noting that while a contractor employer primarily supervised supplied employees, "Shell supervisors kept a close eye on the work and . . . were not hesitant to take command at times and direct the contractor's workers." *Williams v. Shell Oil Co.*, 18 F.3d 396, 400 (7th Cir. 1994).

To evaluate the "extent" of control, even "limited" supervision must be examined and not simply ignored. If control is "limited," that might suggest that limited weight is due the evidence, but it would not suggest the evidence is entitled to *no* weight. Further, the fact that direction is "routine" does not make it irrelevant to the existence of an employment relationship, as BFI contends. Unskilled workers, such as those at issue here, are more likely to receive "routine" direction and lack of skill or expertise is a factor weighing in favor of employee status under section 220(2) of the *Restatement*. As the Ninth Circuit explained, "The right to control contemplated by . . . the common law as an incident of employment requires only such supervision as the nature of the work requires." *McGuire v. United States*, 349 F.2d 644, 646 (9th Cir. 1965). To wholly discount

evidence of direct control because it is exercised in a "limited" or "routine" manner contravenes the common law and the requirement to weigh "all of the incidents of the relationship." *United Insurance*, 390 U.S. at 258.[5]

The overruled decisions that discounted evidence of "limited and routine" control did not explain the source or rationale for discounting such evidence. *See Laerco Transp. and Warehouse*, 269 NLRB 324, 326 (1984); *TLI, Inc.*, 271 NLRB 798, 799 (1984); *Southern California Gas Co.*, 302 NLRB 456, 462 (1991). Moreover, the overruled decisions do not define the terms "limited" and "routine" or explain the relationship between them. The primary definition of the word "routine" is "regular." *Webster's New World Dictio*nary (2d Collegiate Ed. 1972). The two terms "limited" and "routine" are, in fact, contradictory. In the absence of clear definitions, in subsequent decisions, the Board expanded the meaning of the

[5] BFI cites *Restatement* § 227 and *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1 (1963), to argue that there must be a heightened degree of supervision. Pet. Br. at 24-26. However, those authorities concern the loaned servant doctrine, which is inapplicable here. "The loaned servant doctrine is a principle of agency law in which the first principal 'loans' his agent to a second principal, giving the second principal a heightened degree of control over the agent, along with the corresponding responsibility for the agent's acts and omissions." *Williams*, 18 F.3d at 400. Thus, the loaned servant is "wholly free from the control of the first employer and wholly subject to the control of the second employer." *Id.* (internal quotations and citations omitted). As a consequence, only the borrowing employer is liable for the torts of the loaned servant. That is why a heightened degree of control is necessary in the loaned servant context, which is different from the joint employer situation. *See Restatement (Second) of Agency* §226 ("Servant acting for two masters"); *Kelley*, 419 U.S. at 324 (distinguishing between borrowed servant and servant acting for two masters).

terms far beyond their ordinary meaning. *See, e.g.*, *AM Property Holding Corp.*, 350 NLRB 998, 1001 (2007) ("The Board has generally found supervision to be limited and routine where a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work.") With no foundation in the common law or any articulated rationale, the overruled decisions wholly discounted such critical direct control as assignment of tasks and work locations, and direction concerning the sequencing of tasks.

The soundness of the Board's decision not to wholly discount evidence of direct supervision labeled "limited and routine" is well illustrated by the facts of this case. The Board found that BFI managers "exercise near-constant oversight of employees' work performance." JA-387. From the control room, BFI's sort-line equipment operators monitor the Leadpoint-supplied employees. JA-373; JA-73, 145-146. As found by the Board and explained in Subsection C below, when BFI managers observe a problem "including problems with the job performance of a Leadpoint employee, they communicate their concerns to a Leadpoint supervisor." JA-373. But BFI also often skips the intermediary Leadpoint supervisors and directly assigns tasks to or directs Leadpoint-supplied employees. On occasion, BFI managers will change the sorters assignment from one stream to another. JA-373; JA-324-326. Leadpoint-supplied employees receive work directions or

assignments directly from BFI personnel which take priority over Leadpoint instructions. JA-373; JA-271, 283-285. On Saturdays, all work directives throughout the day came from BFI. JA-290-291. At times, BFI supervisors intervene by directly urging Leadpoint-supplied employees to work faster or minimize stops or give specific work instructions. JA-153, 286, 324. At times, BFI engages in lengthier interventions by shutting down a production line and conducting meetings with Leadpoint-supplied employees. JA-373-374; JA-125-127, 178-179. In these meetings, BFI managers have directed Leadpoint workers to reduce their use of the emergency stop on the streams. *Id.*; JA-263-265, 287-289. BFI managers have held several meetings with Leadpoint employees to address quality control issues, train employees on "technique" and to direct employees regarding what items to prioritize. JA-373-374; JA-125-127, 178-179, 289-290, 301-302. BFI Operations Manager Paul Keck held several meetings with Leadpoint-supplied employees working on the wet and commercial single stream lines, instructing them how to remove plastic. JA-154-155, 187-189. Additionally, after attempting to enforce a directive through Leadpoint supervisors, a BFI manager directly instructed all Leadpoint-supplied sorters to clean their workstations during breaks, thereby shortening their break time. JA-372; JA-315, 338-339. On occasion, BFI provides safety training directly to Leadpoint employees. JA-374; JA-125-127, 315-316.

The extent of control that BFI exercises over the Leadpoint-supplied employees is not limited to designating or explaining its desired results, but involves the "means and manner" in which employees complete the work. For instance, the instruction that sorters must clean their workstations prior to going on break was not directly related to the end result of properly sorted materials. JA-372. *Cf. Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 990 (9th Cir. 2014) (insuring "results" of timely and professional delivery of packages cannot be reasonably understood to encompass control over things such as dressing and grooming and thus [] is evidence of employee status).

The Board correctly considered all this evidence as indicative of BFI's direct control of the Leadpoint-supplied employees.

C. Consideration of Indirect Control Was Not Erroneous

BFI and its amici argue finally that the Board should have ignored all evidence of "indirect" control. But the common law supports the Board's holding that evidence of indirect control of terms and conditions of employment is relevant to the joint employer inquiry.[6]

[6] The Board's imposition of this limitation on the evidence considered was adopted without explanation of its deviation from precedent, without reasoning or citation to common law sources, and merely via citation to a Board decision that did not contain any such explicit holding. *Airborne Express*, 338 NLRB 597, 597 n. 1 (2002), which introduced the "direct and immediate" limitation in a footnote, citing only the Board's own prior decision in *TLI*, 271 NLRB at 798-99, which did not use that language at all.

The Supreme Court has indicated that it is the amount of control and not whether it is exercised directly or indirectly that is critical to the joint-employer analysis. In *Boire*, the Court described the standard as "whether [the alleged joint employer] possessed sufficient indicia of control to be an 'employer.'" 376 U.S. at 481. This Court has also considered a putative employer's indirect control to be relevant to establishing an employment relationship. In *Al-Saffy*, this Court cited evidence that officials of the Department of State had recommended the dismissal of the plaintiff to the Department of Agriculture in reversing the lower court's grant of summary judgment, indicating the evidence was relevant to whether State was his joint employer. 827 F.3d at 97-98. The mere interposing of a layer of supervision to relay instructions to supplied employees surely cannot insulate the controlling entity from the responsibilities of being an employer. "Otherwise, an employer who exercises actual control could avoid . . . liability by hiding behind another entity." *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 415 (4th Cir. 2015).[7]

The Board, therefore, properly considered evidence of BFI's indirect control. The Board reasoned, "[i]n this case, for instance, BFI communicated

[7] Consideration of indirect control is consistent with the statutory definition of supervisors. NLRA section 2(11) defines a supervisor to include "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, . . . *or effectively to recommend such action*." 29 U.S.C. § 152(11) (emphasis added).

precise directives regarding employee work performance through Leadpoint's supervisors. We see no reason why this obvious form of control of employees by BFI should be discounted merely because it was exercised via the supplier rather than directly." JA-384.

The record evidence establishes BFI's extensive indirect control over the Leadpoint-supplied employees. BFI trains Leadpoint supervisors. JA-144-145. BFI's indirect control continues on a daily basis. Before each shift, a BFI shift supervisor meets with Leadpoint's on-site manager, shift supervisor, and leads to present and coordinate the day's operating plan. JA-373. BFI's shift supervisors use these meetings to advise Leadpoint supervisors of the specific tasks to be completed by Leadpoint-supplied employees during the shift. *Id.* BFI supervisors maintain continuous oversight of Leadpoint-supplied employees. JA-387. BFI supervisors are present in the sorting area throughout the work day. JA-124, 156-157, 169. BFI supervisors maintain constant contact via walkie-talkie with the BFI operators running the production lines who monitor Leadpoint-supplied employees' work at all times, and, BFI supervisors communicate throughout the day with Leadpoint supervisors over BFI-provided walkie-talkies, discussing matters such as quality problems, cleaning needs, job performance defects, the need to move sorters from one stream to another, and overtime requirements. JA-116-117 (one BFI supervisor estimated he spends 40% of his day communicating

with Leadpoint supervisors), 140, 145-146, 150, 253.

BFI demanded the dismissal of specific Leadpoint-supplied employees, and they were dismissed. Although Leadpoint investigated each matter, BFI had an unqualified right to "discontinue the use of any personnel." Several courts of appeal have affirmed the relevance of this form of control. *See Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 216 (3d Cir. 2015) (finding putative joint employer had "ultimate control" over whether plaintiff was permitted to work at its store as it "had the power to demand a replacement from [temporary agency] and to prevent the ejected employee from returning to the store."); *Butler*, 793 F.3d at 415 (finding manufacturer was joint employer with staffing agency in part because it exercised "effective control" by requesting that agency dismiss employees which agency did).

Consistent with the common law, the Board found these facts probative of joint employment.

II. The Uncontested Evidence of BFI's Control Over the Leadpoint-Supplied Employees' Terms and Conditions of Employment Supports the Board's Conclusion that BFI Is a Joint Employer

As we explained in Section I above, the Board's holding in this case squared the Board's joint-employer inquiry with the common law requirement to consider "the total factual context." *United Insurance*, 390 U.S. at 258. The Board's conclusion that BFI is a joint employer "is based on a full assessment of the facts .

. . that reveals multiple examples of reserved, direct, and indirect control over Leadpoint employees." JA-384-385. Thus, the Board did not base its holding solely on evidence of reserved control, "limited and routine" control, or indirect control. *See* JA-386-388.

Importantly, BFI does not contest *any* of the Board's factual findings or the propriety of its consideration of any of the forms of control relied on by the Board, other than the three forms of control identified above which BFI argues are wholly irrelevant to joint employer status.[8] BFI does not seriously argue that it is not a joint employer based solely on uncontested forms of control. In fact, BFI does not make a serious attempt to argue that it is not a joint employer under the Board's prior jurisprudence. The perfunctory one and one-half page argument at pages 56-57 of BFI's Brief suggests that the Board relied exclusively on the "cost-plus

[8] Microsoft, in its Amicus Brief, makes an argument concerning a form of control not at issue in this case. Microsoft represents that, for reasons of social responsibility, it requires vendors and suppliers to provide paid leave. Microsoft Br. at 2-3. It then suggests it may discontinue the policy if it would result in Microsoft being found to be a joint employer. But even if Microsoft's across-the-board, socially motivated policy can be analogized to any of the control exercised by BFI over employees working in its facility, Petitioner BFI has made no such argument here or before the Board. BFI does not contest the relevance of its imposition of specific terms and conditions of employment on the Leadpoint-supplied employees, for example, its placing a cap on their wage rate and a limit on their tenure at its facility. For this reason, the concern raised by Microsoft in its Brief is not before the Court. Moreover, Microsoft's argument illustrates the flaw in BFI's and its amici's arguments – they all wrongly suggest that the Board held that a single factor was or might be determinative of joint employer status when, in fact, the Board applied the traditional multi-factor test.

nature of the contract," "purported indirect control over Leadpoint's employees," and attempts "to ensure compliance with applicable laws and safety standards." Pet. Br. at 56-57. Even a cursory reading of the Board's decision demonstrates it was based on numerous additional uncontested findings. For this reason alone, this Court should deny the petition for review.

Nonetheless, the Board found that BFI exercised significant, direct control over three categories of terms and conditions of employment of the Leadpoint-supplied employees.

In the area of "supervision, direction of work, and hours," the Board found it to be of "particular importance" that BFI exercises "unilateral control over the speed of the streams" on which the Leadpoint employees work. JA-386. Because BFI establishes the location of the work stations on each stream, determines how many employees would work at each station, and establishes productivity standards, JA-373, BFI exercises direct and ongoing control over the most basic working condition of the Leadpoint-supplied employees – the speed and quantity of their work. During each shift, BFI alone determines and adjusts the employees' work load, increasing it or decreasing it at will. If employees have difficulty, only BFI can respond by adjusting the speed of the stream or the angle of the screens. JA-373. The evidence established Leadpoint plays no role in establishing the employees' workload and is powerless to adjust it up or down.

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

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

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

In fact, the record indicates that the speed of the line was a source of conflict between the Leadpoint-supplied employees and BFI. JA-373. On occasion, Leadpoint-supplied employees would utilize emergency measures to stop a stream in order to meet BFI's production standards. BFI instructed the employees not to do so "on multiple occasions" and directed them to simply work more efficiently. JA-373, 387. If the employer that controls the speed of the line has no duty to bargain with employees, the Act's purpose of preserving industrial peace will be frustrated because employees who engage in strikes or other protests concerning "the speed of the conveyor . . . [are] engaged in quintessentially protected

concerted activity." *Greater Omaha Packing Co*., 360 NLRB No. 62, slip op. at 1 n. 3 (2014), *enf'd in relevant part*, 790 F. 3d 816, 820-22 (8th Cir. 2015).

Both Leadpoint and the Leadpoint-supplied employees are powerless to adjust the employees' workload in response to BFI's unilateral changes in the speed of the line by adding employees. BFI unilaterally "specifies the number of workers that it requires." JA-387. The record includes an email from BFI's Operation Manager Keck instructing Leadpoint to reduce the headcount on a certain line by two per shift, stating that "[t]his staffing change is effective immediately." JA-373; JA-32. When asked why this change was made, BFI's Manager stated, "Because in my observation the cost benefit of the additional two people on that presort line didn't weigh out. And that we could get cost savings without losing productivity by removing two people off that sort line." JA-97-98.

The Board has held that staffing levels are mandatory subjects of bargaining. *St. Anthony Hospital Systems*, 319 NLRB 46, 50 (1995) (duty to bargain over staffing policy as they may result in decision "to continue doing the same work [but] with fewer employees"). Only BFI can bargain with the Leadpoint-supplied employees about this core condition of employment.

In addition, the Board found that BFI directly codetermines Leadpoint-supplied employees' hours by unilaterally setting the start and stop time of each shift, unilaterally deciding when the lines stop so that employees may take breaks,

how long those breaks last, and unilaterally determines when overtime is required. JA-387. These are clearly terms and conditions of employment over which an employer has a duty to bargain. *See Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965) ("the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain"). Leadpoint plays no role in setting the employees' regular hours, or times or lengths of breaks and cannot make decisions about when employees take their break or when they work overtime. Thus, Leadpoint alone could not fully bargain with the employees about these terms of employment.

Several courts have held that this form of control over work hours is evidence of joint employer status. In *Browning-Ferris*, the Third Circuit considered it relevant that "BFI established the work hours of the drivers, determining when the two shifts it established would start and end" even though the drivers' brokers "schedule the drivers for particular shifts." 691 F.2d at 1120, 1124-25. In *Int'l Union, United Govt. Security Officers of America v. Clark*, the district court found it relevant that the user employer could "alter the daily assignments of [employees], requiring the contractors to shift personnel from one duty station to another or assign them special projects" even though "[t]he

contractors will decide *which* individual [employee] will, for example, perform overtime or shift duty stations." 2006 U.S. Dist. LEXIS 64449, *26-27 n. 10 (D.D.C. 2006). *Compare C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 859 (D.C. Cir. 1995) (putative employer did not exercise sufficient control because drivers themselves "decide . . . when to take a break, and . . . when to start and stop work.").

In the area of "wages," the Board found that BFI codetermined Leadpoint-supplied employees' wages by barring Leadpoint from paying wages higher than those BFI pays its conceded employees, thereby imposing a cap on wages. JA-387.

In the area of "hiring, firing, and discipline," the Board found that BFI codetermined who would be hired by establishing qualifications for Leadpoint-supplied employees, including that they "meet or exceed [BFI's] own standard selection procedures and tests, pass a drug test, and not have been deemed ineligible for rehire" by BFI. JA-386. BFI also placed a cap on employees' tenure, providing they may work at its facility for no more than six months. JA-19.

The Board also considered other factors relevant under the *Restatement* § 220, comment h. Specifically, the Board found that the Leadpoint-supplied employees provided services to BFI for extended periods of time with regular hours, that the employees performed work that was part of BFI's regular business, that BFI supplied all the tools and instruments of work, that the work was on

premises owned and controlled by BFI, and that the work did not require a high level of skill. JA-386 n. 96. The Board found that the facts here:

> closely resembles the situation addressed in ***Restatement Second)*** Sec. 220, comment l, which explains that where "work is done upon the premises of the employer with his machinery by workmen who agree to obey general rules for the regulation of the conduct of employees, the inference is strong that such workmen are the servants of the owner." [JA-386 n. 96.]

See also Restatement §220, illustration 9 (coal mine owner that provides "the larger units of machinery and the means of ingress and egress" is employer of miners as well as miners' assistants); *Butler*, 793 F.3d at 415.[9]

The Board relied on all of these uncontested findings in concluding that BFI is a joint employer of the Leadpoint-supplied employees. Setting aside the three contested categories of evidence, BFI does not contest any of the factual findings described in this section or their relevance to its status as a joint employer. These facts alone are sufficient to support the Board's conclusion that BFI is a joint employer and this Court should dismiss the petition for review on this basis alone.

[9] This Court has held that "the Board may legitimately consider whether a worker plays an essential role in a company's business [in deciding if an employment relationship exists], presumably because the company more likely than not would want to exercise control over such important personnel." *Aurora Packing Co. v. NLRB*, 904 F.2d 73, 76 (D.C. Cir. 1990). *Aurora Packing* makes clear that that fact "alone" is not "decisive in distinguishing between employees and independent contractors," 904 F.2d at 76, and here the Board relies on many other forms of evidence of BFI's control.

III. Evidence of Direct Control Over the Manner and Means of Employees' Performance is Not Essential to the Conclusion that BFI is a Joint Employer of the Conceded Employees

BFI and its amici argue that rather than the multi-factor test followed by the Board, consistent with the common law and Supreme Court precedent, the "essential requirement is 'direct supervision'." Pet. Br. at 11-12, 46 ("the *sine qua non* of an NLRA employment relationship made authoritative by Congress is control over 'physical conduct in the performance of the service'"). That is clearly not the law as demonstrated above in Sections I and II, and is contrary to long accepted principles of joint employment.

A simple example demonstrates BFI's error. If a hospital contracts with an agency to supply nurses, but directs their work through hospital supervisors while the agency establishes their wages and benefits, the hospital and the agency are joint employers because they "share or codetermine matters governing the essential terms and conditions of employment" even though the agency does not engage in *any* "direct supervision." The Board as well as federal and state courts have uniformly held that such labor supply agencies are joint employers despite not exercising "control over 'physical conduct in the performance of the service.'" *See, e.g.*, *Manpower, Inc.*, 164 NLRB 287, 287-88 (1967); *Reynolds v. CSX Transportation, Inc.*, 115 F.3d 860, 869 n.12 (11th Cir. 1997).

BFI suggests that the Taft-Hartley Act's insertion of the exclusion of "independent contractors" from Section 2(3)'s definition of "employee" should be read as congressional endorsement of a narrowing of the traditional common law definition of employee to require direct supervision. Pet. Br., pp. 21-26. But Taft-Hartley merely inserted a surgical amendment that excised independent contractors from the NLRA and did not otherwise reorder the common law test. Indeed, Taft-Hartley did not change the definition of "employee" itself, a point unequivocally stated in the Senate Report: "Employees. This definition follows that contained in the Wagner Act except that the following categories are specifically excluded: Supervisors, Independent Contractors… ." Congressional Record, Senate, June 6, 1947, at page 1567 of Complete Legislative History of the Labor Management Relations Act, 1947, Printed for the Subcommittee on Labor, United States Senate, U.S., Governmental Printing Office, 1974. The legislative history further affirms Congress' intent to leave unmodified the common law approach to defining the term "employee." Congressional Record, June 5, 1947, *Id*. at p. 1537 ("The legal effect of the amendment is therefore merely to make it clear that . . . the term is not meant to embrace persons outside that category under the general principles of the law of agency.")

Thus, BFI's contention that "the essential requirement is 'direct supervision'" is simply wrong. The Board properly considered control of all terms

and conditions of employment, including, but not limited to, control of the manner and means of performance.

IV. BFI and Its Amici Overstate the Implications of the Board's Holding for the Application of the Joint Employer Doctrine and the Implications of Joint Employer Status

BFI and its amici argue that the Board's holding will vastly expand the categories of economic relationships in which parties will be found to be joint employers. But its holding suggests nothing of the kind:

> The dissent is simply wrong when it insists that today's decision "fundamentally alters the law" with regard to the employment relationships that may arise under various legal relationships between different entities: "lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer." None of those situations are before us today, and we decline the dissent's implicit invitation to address the facts in every hypothetical situation in which the Board might be called on to make a joint-employer determination. JA-388 n. 120.

Specifically, the Board's holding does not make all purchasers of services joint employers: "mere 'service under an agreement to accomplish results or to use care and skill in accomplishing results' is not evidence of an employment, or joint-employment relationship." JA-380 (*quoting Restatement* § 220, comment e); *see also* JA-384. As we demonstrate above, the Board's holding is based on far more than the fact that BFI entered into a contract with Leadpoint to perform a service.

The *only* legal consequence of the Board's decision is that BFI has a duty to bargain with the jointly employed employees concerning those terms and condition

of employment over which BFI has control. JA-384; JA-425-426. Nevertheless, BFI and its amici exaggerate the legal consequences in an effort to convince this Court that the holding will "eviscerate" "contractor and other service arrangements." Pet. Br. at 40. That is plainly not the case.

In fact, parties to many of the relationships BFI and its amici argue would be 'eviscerated' have already been held to be joint employers in many circumstances, *e.g.*, clients and temporary agencies, health care providers and nurse staffing agencies. *See, e.g.*, *Manpower*, 164 NLRB at 287-88; *Reynolds*, 115 F.3d at 869 n.12.[10]

Joint employer status has hardly "eviscerated" these industries, particularly the temporary service industry, which has grown exponentially despite the fact that agencies operating in the industry and their customers are almost always joint employers of the temporary employees. *See* EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms at Coverage Issues, Introduction (Dec 3, 1997), available at https://www.eeoc.gov/policy/docs/conting.html (100%

[10] Thus, one amicus argues that the Board's decision will result in hospitals being found to be joint employers along with nurse staffing agencies which "is of particular concern in the healthcare field." Associated Builders and Contractors and American Hospital Association Brief at 17-18. But health care providers have long been held to be joint employers with such staffing agencies. *See, e.g.*, *Oakwood Care Center*, 343 NLRB 659, 659 (2004) ("no dispute that" employees supplied to Care Center by a "personnel staffing agency" are "jointly employed employees").

increase in employment by staffing firms since 1991).

To parry one example of BFI's and its amici's misstatements of the consequences of joint employer status, the Board does *not* hold one joint employer vicariously liable for unfair labor practices committed by another joint employer. In fact, the Board has made clear that such liability will not be imposed in a "case . . . where one joint employer merely supplies employees to its coemployer and otherwise takes no part in the daily direction of the employees, does not participate in their oversight, and has no representatives at the worksite." *Capitol EMI Music, Inc*., 311 NLRB 997, 1000 (1993). In that "situation," the Board recognizes, "joint employers are not in a position that would allow them to learn, even with the expenditure of reasonable efforts, of their coemployer's unilateral unlawful actions." *Id*. Even here, where Leadpoint does not simply supply employees and BFI takes part in "daily direction" and "participate[s] in their oversight" there is no strict or vicarious liability. Rather, the Board will "find both joint employers liable for" the unlawful act of one "only when the record permits an inference (1) that the nonacting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons and (2) that the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it." *Id*.

Fundamentally, BFI's and its amici's grievance is not with the Board's

decision to again consider all relevant evidence of joint employment, but is with the concept of joint employment itself. But the concept itself is not, and could not be, at issue here.

V. The Board's Test is Not Vague or Unworkable

Finally, BFI and its amici argue that the Board has adopted a new test that is vague and unworkable. But, as explained above, the Board has not altered the traditional test, but merely corrected its previous and unexplained exclusion of evidence relevant to the application of the test.

The test remains a multi-factor test and, like all such tests, can be difficult to apply in close cases. Indeed, the Supreme Court has acknowledged that there are "innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor." *United Insurance*, 390 U.S. at 258. "[I]n such situations . . . there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id*.

The Board's correction of its jurisprudence to insure the consideration of all relevant evidence has not rendered the traditional test any more "difficult" to apply.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for review and grant the cross-petition for enforcement of the Board's order.

Dated at Oakland, California,
this 15th day of November, 2016

Respectfully submitted,

By: /s/ Susan K. Garea

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CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Susan K. Garea, counsel for Intervenor, International Brotherhood of Teamsters Local 350, and a member of the Bar of this Court, certify pursuant to Federal Rule of Appellate Procedure 32(a)(2) that the foregoing brief of Intervenor, International Brotherhood of Teamsters Local 350, contains 8722 words of proportionately spaced, 14-point typeface, and the word processing system used was Microsoft Word 2010.

Dated at Oakland, California,
this 15th day of November, 2016

/s/ Susan K. Garea
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CERTIFICATE OF SERVICE

I, Susan K. Garea, counsel for Intervenor, International Brotherhood of Teamsters Local 350, and a member of the Bar of this Court, certify that on November 15, 2016, I caused a copy of the attached Brief of Intervenor, International Brotherhood of Teamsters Local 350, to be electronically filed 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. I further certify that all parties required to be served will be served by the appellate CM/ECF system.

Dated at Oakland, California,
this 15th day of November, 2016

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