UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

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

Case 32-RC-109684

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

Petitioner.

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICUS CURIAE*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The Service Employees International Union ("SEIU") submits this amicus brief in response to the Board's May 12, 2014 request for interested parties' views on the proper standard for determining when an entity is a joint "employer" under Section 2(2) of the Act.[1] For the reasons stated below, SEIU urges the Board to return to standard set forth by the Third Circuit in *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.,* 691 F.2d 1117 (3d Cir. 1982), enfg. 259 NLRB 148 (1981), and adopted by the Board in *Laerco Transportation,* 269 NLRB 324, 325 (1984).[2] That standard asks whether the alleged joint employer "has retained for itself sufficient control o[ver] the terms and conditions of employment of the [affected] employees" to enable that entity to "share or co-determine . . . matters governing the essential terms and conditions of [those employees'] employment."[3]

When properly applied, the *Browning-Ferris* standard – a variant of the common law right-to-control test articulated in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) – furthers the Act's fundamental purposes and provides the Board with sufficient flexibility to implement the Act's definition of "employer" in a reasoned, practical manner that reflects the changing economic realities of the modern American workplace.

The Board should reject the holdings of cases such as *In Re Airborne Freight Co. (Airborne Express),* 338 NLRB 597, 597 fn.1 (2002) which give lip service to that standard but misapply it by requiring proof that the alleged joint employer in fact exercised "direct and immediate" control over terms and conditions of employment. Consistent with the language and

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[1] 29 U.S.C. §152(2).
[2] While the Board adopted the *Browning-Ferris* test in *Laerco,* as explained below, it applied it too narrowly, disregarding evidence that the alleged joint employer did, in fact, co-determine matters governing essential terms and conditions.
[3] *Browning-Ferris*, 691 F.2d at 1123.

policies of the Act and the well-established body of law under the NLRA and other common law-based statutes, the Board should instead reaffirm that an entity is a joint employer as long it retains contractual or other *authority* to influence the essential terms and conditions of the affected workers' employment, either directly (through economic or operational controls or through a supervisor's workplace directives) or indirectly (through a contractor or agent who interacts regularly with the workers).

Several factors have been found to be particularly relevant to that right-to-control inquiry, including whether the alleged joint employer has the power (directly or indirectly) to control the employees' compensation, determine their work schedules, effect removal of employees from their place of employment, supervise employees, or terminate the employees position, or the contract with the entity that directly employs that person, on short notice.[4] Also relevant is the functional relationship between the alleged joint employer and the affected workers. Crucial to each of these factors is the need for a pragmatic inquiry into the alleged joint employer's power to affect workplace rights and responsibilities: for it is the right to control, and not any particular implementation of that right, that should determine whether that entity should be deemed to be an "employer" with collective bargaining obligations. Any inquiry into who should participate as an "employer" in collective bargaining must focus on which entities possess sufficient authority meaningfully to affect the terms and conditions of the workers' employment. Those are the entities that need to be at the table for the bargaining relationship to further the statutory purposes of the Act.

[4] See, e.g *Torres-Lopez v. May*, 111 F.3d 633, 639-640 (9th Cir. 1997); *Bonnette v. California Health & Welfare Agency,* 704 F.2d 1465, 1470 (9th Cir.1983); *Antenor v. D & S Farms*, 88 F.3d 925, 931-932 (11th Cir. 1996) (citing *Aimable v. Long & Scott Farms, Inc.,* 20 F.3d 434 (11th Cir. 1994)).

SEIU represents workers, and helps workers organize, in several of the fastest-growing and most quickly evolving industries in this country. This brief describes how companies have structured their workplace relationships in three of those industries: health care, property services, and fast food. These three industries illustrate the economic realities of the fragmented or "fissured" modern American workplace, in which companies often respond to increased competitive pressures by contracting out segments of their workforce in an effort to drive down labor costs and perhaps to avoid legal responsibility for workplace compliance.[5] As these illustrations will demonstrate, the purposes and policies of the Act can be meaningfully preserved only by returning to the *Browning-Ferris* standard and applying it properly with regard to the pragmatic realties of the contemporary workplace.

INTEREST OF AMICUS CURIAE

SEIU is one of the largest unions in North America, representing over 2.2 million men and women who work in health care, property services, and public employment. SEIU also actively supports ongoing organizing efforts by fast food workers throughout the United States. SEIU submits this brief to share its experiences in those industries and to provide guidance to the Board by explaining how the joint employer standard can be applied in a manner that properly reflects the language and purposes of the Act in the context of the modern American workplace.

THE TWENTY-FIRST CENTURY AMERICAN WORKFORCE

During the first part of the 20th Century, most employment relationships involved a single business and its direct employees, with few workers performing services for more than

[5] The "fissured workplace" is a term coined by David Weil, head of the Department of Labor's Wage and Hour Division, to describe the transformation where "like a rock with a fracture that deepens and spreads with time, the workplace over the past three decades has fissured." DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 7 (Harvard Univ. Press, 2014) [hereinafter THE FISSURED WORKPLACE].

one "employer" at a time. Increasingly, however, employment relationships have become "fissured," in the sense that companies have transferred responsibility for supervising their workers to growing networks comprising smaller business units, each with a discrete function to perform with a select group of employees.[6]

Companies at the bottom in these fissured employment structures often have low barriers to entry (because they frequently do not own their own real estate, and may not even own their own capital equipment) and they face intense competitive pressure in bidding for this contracting-out work against other similar, often fungible, companies. The inevitable result is a "race to the bottom" that is reflected in low wages, poor or no benefits, limited job security, and all too often, legal corner-cutting. The advantages to the companies at the top of this structure are obvious, because these arrangements allow them to keep labor costs low, to increase operational flexibility (because they can simply tell their contractors how many employees they want at any particular time instead of keeping them on permanent payroll), and perhaps to shield themselves from legal liability. At the same time, though, those companies – who we will sometimes refer to as the joint employer or the "lead firm" – are often loath to sacrifice the control they previously exercised over their employees. Thus, although they may transfer those employees to the payroll of another company, lead firms often retain contractual authority to control the operational parameters of those workers' employment.

Congress has long recognized that workers' ability to engage in meaningful collective bargaining – which includes the ability to bargain with the entity or entities that hold the actual economic reins controlling a given workplace – is an essential tool for obtaining competitive wage rates. That is why, beginning with the Norris-LaGuardia Act in 1932 and continuing with

[6] David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience,* 22 ECON. & LABOUR RELATIONS REV. 33, 36 (2011).

the National Labor Relations Act in 1936, the cornerstone of federal labor policy has been the guarantee that workers can engage in concerted activity for their mutual aid and protection, including the right to bargain collectively with each entity that has the power to determine the terms and conditions of employment as their "employer." If workers are not able to bargain with the companies that possess the ultimate authority to provide increased wages and benefits, better work schedules, protection from arbitrary discipline and the like, they will be deprived of the true protections of the Act and will find themselves vulnerable to exploitation, depressed working conditions, and declining wages. The Act's purposes can only be furthered by recognizing – as the Board has recognized in the past – that each entity with the power to control essential terms and conditions of employment, whether directly or indirectly, is a joint "employer" that can be compelled to engage in good faith collective bargaining.

1. Health Care

SEIU is the largest healthcare union in North America with over 1.1 million members, including nurses, home care workers, dietary aides, and non-clinical service workers.[7] Many SEIU healthcare members work in large hospitals. Others work in skilled nursing facilities (such as nursing homes and long-term care, hospice, and mental health centers) or provide in-home care. In each of these settings, the lead firms have increasingly chosen to outsource key components of their business operations to increase flexibility, cut labor costs, and avoid legal compliance obligations.[8] The dramatic trend toward increased outsourcing in the healthcare industry has completely transformed traditional employer-employee relationships, with few

[7] SEIU HEALTHCARE, http://www.seiu.org/seiuhealthcare.

[8] George Erickcek, Susan Houseman, & Arne Kalleberg, *The Effects of Temporary Services and Contracting Out on Low Skilled Workers: Evidence from Auto Suppliers, Hospitals, and Public Schools* 3 (Upjohn Inst. Working Paper No. 03-90, 2002).

hospitals currently acknowledging themselves as the accountable "employer" of many, if not most, of the individual employees working in their facilities.[9]

Outsourcing efforts in the healthcare sector historically focused on the most labor-intensive, non-clinical services, such as laundry, housekeeping, and food services. Given the hard reality that labor costs constitute ninety percent of the cost of cleaning a healthcare facility,[10] it should not be surprising that approximately one-third of American hospitals outsource cleaning services that were previously performed in-house.[11] In recent years, the trend has accelerated and spread to other labor-intensive services, including health information technology, call centers, human resources, patient care services, emergency room management, equipment maintenance, cardiovascular perfusion, and diabetes treatment.[12] Hospitals also now regularly outsource their benefits and administration processes,[13] and even the management of their non-clinical services, with the result that some hospitals retain line employees on their payroll but subcontract management responsibility and labor law compliance obligations for these employees to outside companies.

The trend toward increased outsourcing is even greater for skilled nursing facilities ("SNFs"), which often outsource medical care as well as non-clinical services.[14] A study

[9] See THE FISSURED WORKPLACE, supra note 5 at 188. ("[T]he nature of the relationship between the parties to a subcontracting relationship affects the apportionment of liability.")
[10] DAN ZUBERI, CLEANING UP: HOW HOSPITAL OUTSOURCING IS HURTING WORKERS AND ENDANGERING PATIENTS 37 (Cornell Univ. 2013).
[11] Id. at 13.
[12] Kevin D. Lyles, Shawn C. Helms & Ashley Lykins, JONES DAY, *Healthcare Outsourcing Overview: Staying Focused in Uncertain Times,* 7 AMERICAN HEALTH LAWYERS ASSN. at 1 (2010).
[13] Id. (Almost half of hospitals outsource part of their benefits and administration processes).
[14] DONALD PRYOR & ERIKA ROSENBERG, CTR. FOR GOVERNMENTAL RESEARCH, THE FUTURE OF COUNTY NURSING HOMES IN NYS 67 ("[A]bout half" of nursing homes outside New York City outsource a portion of their dietary/food services, "more than a third" outsource some portion of

conducted in New York State, for example, found that two-thirds of county nursing homes outside New York City contract out at least some of their therapists, physical therapists, and occupational therapist aides.[15] "Well over half" of the facilities encompassed by that study contracted out at least some medical services.[16]

Subcontracting and outsourcing is equally pervasive in the home care industry, which with over two million workers is the fastest growing sector of the American economy.[17] While many home health aides work in private homes or for small businesses and are compensated through Medicaid and Medicare, it has become increasingly common for home health care services to be provided by for-profit franchises and "registries," who are among the worst offenders in misclassifying workers as independent contractors when instead they function as statutory "employees" under almost all state and federal employment laws.[18]

It would be one thing if the lead firms in the healthcare industry ceded all control over their workers at the same time they contracted-out those workers' employment. If that were the common practice, no significant issue of joint employment would arise. The practical reality, though, is that complexity and risk involved in providing quality health care creates a powerful incentive for health organizations to retain significant control over their outsourced employees' terms and conditions of employment in order to ensure quality patient care, uniformity of treatment, and protection of their healthcare "brands."[19] Even when contract workers perform the

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their laundry services, and "about five" of the thirty-some homes outsource a portion of their maintenance and housekeeping.).

[15] Id. at 66.

[16] Ibid.

[17] CATHERINE RUCKELSHAUS, REBECCA SMITH, SARAH LEBERSTEIN, & EUNICE CHO, NAT'L EMP'T LAW PROJECT, WHO'S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK, 12 (May 2014).

[18] Id. at 13.

[19] See THE FISSURED WORKPLACE, supra note 5 at 12.

work, the facilities themselves often dictate the required procedures for cleaning rooms, transporting patients, transcribing medical records, and so forth.[20]

In order to comply with state and federal regulations, hospitals, SNFs and home care agencies must maintain detailed (and consistent) facility-wide standards.[21] These standards cover such topics as cleanliness, infection control, nutrition, waste disposal, security, clinical care, and patient satisfaction – as well as internal corporate policies – and the contractors who directly employ the workers governed by these standards are obligated to follow them all. This means the healthcare organizations are in a position to, and often do, dictate their contract employees' schedules and determine what they wear, where they work, when they have access to their workplace, how they carry out their job functions, and what tools they use to perform their jobs. In many instances, the healthcare organization also provide the workers' job supplies – another factor often deemed relevant to the joint employer inquiry. Further, contract workers often work side-by-side with direct-hire workers in hospitals and SNFs, which can require the healthcare organization's own managers to be the ones supervising those contract workers in the performance of their work.

Just as significant to the joint employer inquiry in the healthcare industry is the healthcare organizations' right to control the wages of outsourced workers. Because cost control is one of

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[20] Healthcare publications, consultants, and management-side law firms encourage healthcare executives to maintain a certain level of control over outsourced employees, while noting the resulting risk of being deemed a joint employer. See Jamie Oh, *9 Thoughts on Outsourcing: When to Outsource and How to Do It Successfully*, BECKERS HOSP. REV. (Oct. 15, 2010), http://www.beckershospitalreview.com/hospital-management-administration/9-thoughts-on-outsourcing-when-to-outsource-and-how-to-do-it-successfully.html; see also JEFFREY I. KOHN, APARNA JOSHI, AND RACHEL L. SCHY, O'MELVENY & MYERS LLP, STRATEGIES FOR REDUCING LABOR COSTS – INDEPENDENT CONTRACTORS, TEMPORARY STAFFING AGENCIES, OUTSOURCING: AT WHAT POINT DO YOU BECOME JOINT EMPLOYER?, *available at http://www.omm.com/files/upload/Strategies_for_Reducing_Labor_Costs.pdf.*

[21] See id. at 9; see also Oh, supra note 15; THE FISSURED WORKPLACE, supra note 5at 12.

the principal factors that drive outsourcing, healthcare organizations often face compelling economic incentives to favor contractors who keep labor costs down.[22] To cite just one example, when the University of Pittsburgh Medical Center's Altoona facility outsourced medical transcription services while continuing to use the same individual transcriptionists who they employed directly prior to outsourcing, those transcriptionists saw their wages slashed by up to fifty percent even though their volume of work remained constant.[23]

In sum, health care organizations retain substantial direct and indirect control over the essential terms and conditions of their contract workers, even in circumstances where they outsource the work of those workers to another corporate entity.

2. Property Services

SEIU affiliates represent over 200,000 workers in the property services industry. The largest groups of these SEIU-represented property service workers are commercial office cleaners and security officers. Both types of jobs are highly labor intensive. [24] Contractors in these industries compete for business largely on the basis of price, and labor costs are often the most significant component of that price. [25] Barriers to entry are low due to the minimal capital investment required.[26] As a result, these industries are highly competitive, and contractors face enormous pressures to keep labor costs low. [27]

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[22] RUCKELSHAUS ET AL., supra note 17 at 27.
[23] Id. at 13.
[24] See CTR. FOR COMPETITIVE ANALYSIS, THE U.S. BUILDING MAINTENANCE AND SERVICE INDUSTRY: NATIONAL TRENDS AND CHARACTERISTICS 4 (Aug. 2000); ROGER WALDINGER ET AL., LEWIS CTR. FOR REGIONAL POLICY STUDIES, HELOTS NO MORE: A CASE STUDY OF THE JUSTICE FOR JANITORS CAMPAIGN IN LOS ANGELES 3 (Apr. 1996); Christopher L. Erickson et al., *Justice for Janitors in Los Angeles: Three Rounds of Negotiations*, 40:3 BRITISH J. OF INDUS. RELATIONS 543, 545 (2002).
[25] See CTR. FOR COMPETITIVE ANALYSIS, supra note 24 at 3.
[26] Ibid.
[27] Ibid.

Most SEIU cleaners and security officers work in large commercial office buildings owned by well-financed corporate entities, sometimes worth hundreds of millions of dollars. In negotiations between building owners and their cleaning contractors, significant bargaining power rests with the building owners. [28]

The contract relationships between building owners (who are the lead firms in this industry) and their cleaning contractors are typically fixed-price agreements for relatively short time periods that are subject to termination upon thirty to ninety days' notice – meaning the contractor (and its employees) have little job security, but work at the will of the building owner"[29] Because so much of the price factor in an office cleaning contract is based on the costs of labor (and because there is so little room for profit), a contractor who wants to – or feels pressure to – raise the rates for its cleaners usually cannot do so without the permission of the lead firm.[30] Thus, whether or not the building owner participates directly in any negotiations with its cleaners or their representatives, their presence is always felt – because no meaningful change can be negotiated without the approval of the company that controls the purse strings. That is why in the janitorial and security industries, building owners have the real power, which they often exercise, to co-determine the workplace wages of workers who provide services in their buildings.

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[28] Erickson et al., supra note 24, at 545.

[29] ABM Industries, Inc., a janitorial and security contractor, described these contract relationships in the 10-K report it filed with the Securities and Exchange Commission ("SEC"). ABM reported that its janitorial contracts are generally for a fixed price, while its security contracts are generally based on actual hours of service. ABM INDUSTRIES INC., 2013 FORM 10-K (Oct. 13, 2013) .

[30] See, e.g., *Serv. Employees Int'l Union Local 525, AFL-CIO (General Maintenance Co.),* 329 NLRB 638, 658 (1999) (janitorial service contract provided that it could be "reopened for renegotiations in the event of a 'change in union scale'").

Building owners do not hesitate to change contractors on short notice, as their contracts typically allow. [31] The consequence of such unilateral termination on the contractors' workers is immediate and direct. Even where the new contractor retains the existing workforce, that is rarely a foregone conclusion, and new contractors may refuse to hire their predecessor's employees – particular if they were unionized.[32]

Building owners in this industry often share or co-determine other essential terms and conditions as well. In the office cleaning industry, there is rarely enough work to go around. As a result, in non-union markets where no bargaining agreement exists, commercial cleaning companies typically hire part-time employees who may work only four hours per night. These restrictions on the cleaners' earning capacity is often a source of conflict, as it was when the janitors in Houston organized in 2006, in part around the issue of unduly short work schedules. The cleaning contractors in that circumstance made clear they could not agree to the union's demand for more hours without first obtaining the consent of the building owners, who had the *right* to control the number of hours worked by its contractors' cleaners (and who did not want the cleaners to start work until most of the tenants had left for the day, and did not want to keep the air conditioning running longer than necessary).

Not only do the building owners, as the lead firms in this industry, routinely determine the start and end times for cleaners, but they determine what holidays their cleaners may enjoy. If a building owner decides its building is open on Martin Luther King, Jr. Day, there is nothing the workers can do in bargaining with the cleaning contractor that could possiblY change that.

In both the commercial cleaning and commercial security officer industries, individual workers generally work at a single location. It is common for a new contractor to draw its

[31] WALDINGER ET AL., supra note 24, at 3.
[32] Id. at 4

employee pool from those who worked at that same location for a predecessor contractor – and this continuity of employment, with a stable group of contract workers, is another hallmark of a joint employment relationship under the Act.[33] So is the joint employer relationship in this industry frequently shown by the fact that cleaners are generally assigned to specific buildings, and they usually do not move from building to building where the contractor may have other cleaning contracts. Nor do cleaners generally start their day at the contracting company's offices. instead, they customarily commute directly to the worksite to which they were assigned.

Lead firms often retain the right to approve new hires and to remove workers from the premises when their performance is unsatisfactory. When a building owner instructs a contractor to remove a worker from a building (which they almost uniformly have the contractual right to do), the designated worker will necessarily experience a material change in working conditions, even if the contractor does not actually fire that worker (because, among other reasons, the worker will lose the seniority built up on that building, and therefore be more susceptible to worse job assignments, fewer layoff protections, and less flexible vacation schedules).

Further, qualifications often vary from site to site for security officers. As a result, it may take more than a month for a worker to find a new placement after being removed from a building at the building owner's request. In many cases, particularly in the suburbs, the contractor may not have another nearby site to transfer the worker to. Since many low wage workers do not have cars, they cannot accept transfers unless they can find public transportation to the new site.

[33] See, e.g., *TCB Sys., Inc.,* 355 NLRB 883, 890 (2010) (crediting testimony that cleaning contractor manager said it was "'common for them to keep everybody when they took over an account,'" but they 'might weed out a couple of people at the insistence of the client.'").

After the first few days on the job, commercial cleaners do not need to be told how to do the work. Instead, supervision involves inspection of work that has already been done. Sometimes, the contractors inspect the work themselves. At other times, the lead firm conducts its own inspection and reports shortcomings to the contractor or directly to the employees. On a daily basis, those lead firms make special requests (*e.g.* asking a worker to clean up a spill). These instructions are sometimes given directly to workers, and other times conveyed through the contractor's supervisor.

Property services building owners also control other working conditions. The mechanism that workers use to clock in typically varies from building to building and depends upon the lead firm rather than its contractor. The facilities that workers are allowed to use for breaks or changing also depend upon the building owner rather than the contractor. If there is a dress code, that dress code may be established by the building owner, not the contractor. For example, commercial office building clients typically require security officers to wear jackets and ties rather than a police-style uniform. Security officers also generally use the lead firm's computer system in order to control access to the building.

In short, in the property services industry, lead firms can and often do play a major role in directly and indirectly co-determining many, if not most, of the essential terms and conditions of employment for contracted cleaners and security officers.

3. Fast Food Franchises

Multinational fast food corporations such as McDonald's, Domino's, Burger King, and Wendy's, avoid the obligations associated with directly employing the vast majority of people who prepare and serve their food despite collectively controlling tens of thousands of restaurants worldwide. Fast food corporations directly own or operate some of their restaurants, but they generally license food preparation and customer experiences through "business format" franchise agreements.[34] Business format franchising has grown substantially in the U.S. in the last decade, and it continues to grow on a global scale – both in the range of industries using the model and in the percentage of the workforce employed in franchise operations.[35] Under this business model, the owner of a franchise system (the franchisor) enters into an agreement with another person or organization (the franchisee) granting the franchisee a fixed-term license to use its systems, brand, and other intellectual property to operate a business in a particular area. The "brand" is key, and uniformity of product and operations is essential to those companies' goal of making their customers feel comfortable while maximizing productivity, workplace efficiency, and profit. A Whopper is a Whopper is a Whopper, and customer loyalty depends on successfully creating a customer experience that is the same in Duluth as it is in Denver or Detroit. The franchisor teaches the franchisee the entire business format, agreeing to provide support through training, operating manuals, and communications; in return, the franchisee agrees to abide by the system and pay an initial fee and ongoing fees (royalties) to the franchisor.[36] Sophisticated management systems are in place to ensure that the brand is maintained and protected.

Although fast-food franchises are independently owned, they often function as little more than capital investors without meaningful control over their restaurant's business plans or the

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[34] In their respective 2013 Form 10-K filings with the Security and Exchange Commission, each of these companies report that worldwide: McDonald's operates 6,000 (18%) of its over 33,000 restaurants; Dominos operates 388 (4%) of its 10,255 restaurants; Burger King operates 52 (.4%) of its 13,667 restaurants; and Wendy's operates 1,183 (18%) of its 6,557 restaurants. See MCDONALD'S CORPORATION, 2013 FORM 10-K (Dec. 31, 2013); DOMINOS PIZZA INC., 2013 FORM 10-K (Dec. 30, 2013) ; BURGER KING HOLDINGS INC., 2013 FORM 10-K (Dec. 31, 2013); THE WENDYS CO., 2013 FORM 10-K (Dec. 30, 2013) .

[35] See, e.g., *Top Global Franchises 2014,* FRANCHISE DIRECT, http://www.franchisedirect.com/information/top100globalfranchises2014top100overview/?r=4271.

[36] See Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts,* 42 STAN. L. REV. 927, 933-34 (1990).

most essential terms and conditions of their workers' employment. Legal economist Professor Gillian Hadfield found in her extensive research on franchisor-franchisee relationships that while individual franchisee owners do obtain "ownership" through their capital investments, in many industries (including fast-food), the more sophisticated corporate franchisor retains almost unrestricted control over actual business operation – using the threat of non-renewal as the stick, and the opportunity to invest in new franchises as the carrot, to ensure full compliance with their rigorous operational requirements.[37]

The key to the fast-food giants' successful business model is comprehensive, top-down operational control over the ostensibly "outsourced" services provided by the franchisee's employees. Controlling the details of those fast-food workers' terms and conditions of employment (and not just the *right* to control) is crucial to that model, because true uniformity and consistency of experience cannot be achieved without dictating the minute details of all food preparation, service, and customer interactions – all of which are performed by the franchisees' staff. The standard McDonald's Franchise Agreement, for example, makes clear that if the franchisees and their employees do not fully adhere to the entire "McDonald's System," they risk termination (and certainly, non-renewal):

> 12. Compliance With Entire System. Franchisee acknowledges that every component of the McDonald's System is important to McDonald's and to the operation of the Restaurant as a McDonald's restaurant....Franchisee shall comply with the entire McDonald's System, including but not limited to…
>
> (a) Operate the Restaurant in a clean, wholesome manner in compliance with prescribed standards of Quality, Service, and Cleanliness; comply with all business policies, practices, and procedures imposed by McDonald's;[38]

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[37] See id. at 931-32, 991.

[38] See McDonald's Franchise Disclosure Document, Exhibit B, page 11, which can be accessed on the website of the Minnesota Department of Commerce at https://www.cards.commerce.state.mn.us/CARDS/. The requirement to operate a restaurant according to the standards of "Quality Service and Cleanliness" ("QSC") seems innocuous until

This full-compliance obligation is not unique to McDonald's franchise agreements.[39] The workday reality for millions of employees in franchised fast-food restaurants is that the franchisors deliver a fully integrated "system" that requires adherence to regimented scripts dictating all methods and manner of work. Those front-line employees provide their labor under inescapable observation while sophisticated computer systems enable the franchisors to conduct real-time monitoring of sales, staffing, income, and labor costs – and to demand changes when the numbers fall below a prescribed level. Individual franchise operators, therefore, have little autonomy in setting or controlling workplace conditions. Indeed, *any* violation of *any* term of the franchise contract, including violation of the lengthy operations manuals, can constitute a material breach of the agreement and a basis for termination or non-renewal.[40]

In the fast-food industry, franchisors engage in ongoing monitoring of their franchisees' operations to ensure compliance with all corporate requirements. This occurs not only through continuous monitoring of sales and staffing, but also by using "consultants" to conduct regular on-site inspections to critique and improve operations at each franchisee restaurant. These consultants conduct both scheduled and unannounced site visits to serve as the franchisor's on-the-ground monitors.[41] Their evaluations include extensive "suggestions" for improvement, and

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it is understood that the latest edition of the "QSC Playbook," setting forth McDonald's expectations for QSC, is in fact a treatise containing countless specific directives and tools required of a franchisee in order to achieve compliance with just its QSC obligations. Moreover, the "service" obligations encompassed by QSC extend to the minutia of how to fold a customer bag and the exact words to use when greeting a customer.

[39] See Hadfield, supra note 36, at 940-44, (finding that 76% of contracts surveyed required a franchisee to agree that any contractual violation constitutes a "material breach" with 68% of contracts giving only a 10-day grace period for curing a default).

[40] See id. at 944.

[41] While routine inspections are often anticipated and highly structured events where every aspect of a franchise outlet is reviewed and graded by a consultant, frequent unannounced corporate visits or mystery shoppers are common practice in many chains.

the franchisors retain the contractual right to terminate the franchise agreement if the results are not satisfactory.[42] Individual employees whose performance is criticized by the franchisor's consultant may be disciplined, re-trained or fired.

Franchisors increasingly use technology to conduct real-time monitoring and to maintain their brands' service as well, and this technology provides them complete access to all store-level data, including labor information.[43] Computer systems collect information on each store's operations, including the exact time the restaurant opens and closes, when each employee is clocked in and out, what food is ordered, sold, and at what times of day, etc. These systems often include embedded "tools" that store managers must use to make staffing decisions, to assign employees to particular tasks within the store, and to operate payroll, monitor sales, and control labor costs. Many computer systems direct the managers to add or subtract crew members by the hour (or lesser increments) based on real-time sales data, in order to staff according to corporate standards and maximize efficiencies to generate higher revenue and profits.[44]

These comprehensive regimes of operational uniformity and monitoring systems significantly affect the working conditions of all franchise employees, directly and indirectly, as they dictate the number of workers required to do the job, the manner and speed of the performance of every work task, the equipment and supplies used on the job, the manner in

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42 See Hadfield, supra note 36 at 971-92; see also P. Steinberg & G. Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 PENN ST. L. REV. 105, 148 (2004).

[43] Because controlling labor costs is an area over which a franchisee ostensibly has some control, there is incentive for the individual franchisee to: (1) "free-ride" the franchisor's system by reducing staff to save money which impacts sacrosanct corporate service times or (2) violate wage and hour laws in order to turn a profit. To counteract the impulse to free-ride the system, corporations of late are able to monitor mandated staffing levels through required use of their computer systems.

[44] Some employers use sophisticated software to schedule workers for unpredictable shifts that can be as short as 2-3 hours based on sales projections or the weather. See Steven Greenhouse, *A Part Time Life as Hours Shrink and Shift for American Workers,* NY TIMES (Oct. 28, 2012).

which equipment is used, employee grooming/uniform standards, etc. The franchisors also control the economics of each franchise owner's business by: requiring a royalty fee based on a percentage of revenue; choosing restaurant locations (and in the case of McDonald's, actually serving as landlord, because franchisees cannot own their own property); requiring participation in advertising programs; compelling product promotions (whether profitable or not); requiring costly upgrades to restaurant equipment and fixtures; establishing the supply chain and forcing the use of select vendors/suppliers; dictating menu price points and menu offerings; and prescribing store hours. This near-complete control has the practical, and very real, effect of stripping the franchisees of any meaningful opportunity to determine the terms and conditions of their workers' employment, except at the margins.

ARGUMENT

1. The Board Should Return to the *Browning-Ferris* Standard, As Properly Applied

In determining whether a particular entity or individual is a joint "employer" under Section 2(2) of the NLRA,[45] there is no need for the Board to invent a new standard. Instead, the Board should return to the standard in *NLRB v. Browning-Ferris Indus. of Pennsylvania., Inc.,* 691 F.2d 1117, 1123 (3d Cir. 1982), enfg. 259 NLRB 148 (1981), a standard the Board has never rejected or disavowed, which asks whether the alleged joint employer "has retained for itself sufficient control o[ver] the terms and conditions of employment of the [affected] employees" to enable it to "share or co-determine . . . matters governing the essential terms and conditions of [those employees'] employment."

This formulation, and consistent variations, has been widely accepted by the Board and

[45] 29 U.S.C. §152(2).

the appellate courts.[46] Too often, though, the Board has misapplied this standard by ignoring or downplaying facts demonstrating the alleged joint employer's power to co-determine essential terms and conditions of employment, or by requiring proof of direct control instead of more broadly inquiring into the right to control as a matter of economic reality.[47]

In *Airborne Express,* 338 NLRB at 597 fn.1, the Board declared that the focus should be on "whether a putative direct employer's control over employment matters is direct and immediate."[48] The Board should overrule *Airborne Express* to the extent it requires evidence of "direct and immediate" control. As long as an entity has the power to meaningfully affect the terms and conditions of employment of the workers who provide its services, it should make no difference whether it exercises that power or not, or whether it acts directly or through an intermediary.[49] Indeed, the clear language of the definition of employer in Section 2(2) contemplates that an employer may act indirectly, including through an agent, since the term

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[46] See supra note 4 and accompanying text.

[47] The Board's current approach to joint employment suffers from the same problem the Supreme Court identified in *Allentown Mack Sales & Services v. NLRB,* 522 U.S. 359 (1998): the Board applies the words in its test in a way that is at odds with their ordinary meaning. In *Allentown Mack,* the Board purported to allow employers to withdraw recognition when they harbored a "reasonable doubt" that the Union no longer enjoyed majority support. But, instead of giving "doubt" its ordinary meaning of "uncertainty," the Board required employers to produce enough evidence to support a belief that the union had actually lost majority support. The Supreme Court overturned the Board's decision in *Allentown Mack* based on its finding that the Board imposed "evidentiary demands that go beyond the substantive standard the Board purports to apply." Id. at 368.

[48] The Board majority in *Airborne Express* asserted that this focus on "direct and immediate" control had been "settled law for approximately 20 years," (citing *TLI Inc.,* 271 NLRB 798 (1984)). However, *TLI* did not provide for this limitation, nor did it purport to overturn precedent regarding the joint employer test, much less provide a rationale for doing so. Moreover, as described throughout this brief, the Board's case law was not consistent even during that 20 year period, with the Board at times relying on factors demonstrating indirect control.

[49] See *Floyd Epperson,* 202 NLRB 23 (1973) (dairy farm was deemed joint employer of outsourced drivers based in large part on its indirect control over wages and discipline); see also, *Anderson v. Pac. Mar. Ass'n*, 336 F.3d 924, 932 (9th Cir. 2003)*; EEOC v. Pacific Mar. Ass'n,* 351 F.3d 1270, 1274 (9th Cir. 2003).

employer "includes any person acting as an agent of an employer, directly or indirectly."[50] In addition, where a lead firm has the power to effectively control essential terms and conditions of employment, it should not matter that the firm has not exercised such power.[51]

In *NLRB v. Town & Country Electric, Inc.,* 516 U.S. 85, 90 (1995), the Supreme Court recognized that in determining the meaning of terms in the Act, "Congress likely intended an understanding of labor relations to guide the Act's application." The Court also made clear that the Board should interpret these statutory terms "consistent with several of the Act's purposes."[52] One of the core purposes of the Act is to "encourag[e] the practice and procedure of collective bargaining,"[53] – which of course anticipates meaningful, good faith bargaining. Nothing in the text of the Act, or in its underlying policies, limits the bargaining obligation only to entities that exercise "direct and immediate" control. To the contrary, the Act's policy of promoting collective bargaining is best served by defining "employer" to include any entity that has the power to materially affect the terms of a worker's employment because, after all, successful collective bargaining anticipates the participation of such crucial decision-makers.

2. Any Entity that Has the Authority to Meaningfully Affect Essential Terms and Conditions of Employment is a Joint "Employer"

As demonstrated by the employment structures in the health care, property services, and fast food industries described above, it is common for two or more companies to share the power to determine, or co-determine essential terms and conditions of employment: including compensation, work schedules, discipline (both by setting rules and enforcing them), job

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[50] 29 U.S.C. §152(2).
[51] See *Jewel Tea Co.,* 162 NLRB 509, 510 (1966) ("[T]he license agreements here involved expressly give Jewel Tea the power to control effectively the hire, discharge, wages, hours, terms and other conditions of employment of employees of the two licensees in dispute. That the licensor has not exercised such power is not material…").
[52] *Town & Country Electric, Inc.,* 516 U.S. at 86 (1995).
[53] 29 U.S.C. §151.

security, work location, and job duties. In reaffirming the *Browning-Ferris* standard, the Board should clarify that the "essential" terms and conditions of employment go beyond the core elements of hiring, firing, discipline, and supervision, and more broadly encompass any aspect of the employer-employee relationship that has a significant impact on where, when, and how the employee performs. For example, if a lead firm can dictate *where* an employee works (*i.e.,* not on that employer's premises), or *when* the employee works (by limiting work to four-hour shifts or by requiring reduced staffing when labor costs exceed a specific percentage of product sales), that should be just as relevant to the joint-employer inquiry as whether the lead firm dictates a particular wage rate (or range) or provides (or withholds) particular job benefits.[54]

Below, we address several factors relevant to this joint-employer inquiry, based on the extensive case law that has developed under other common-law statutes and amici's experience in how joint employer relationships are structured in the real world. Although courts and agencies have considered a broad range of factors in assessing whether an entity has sufficient power to control the manner and means of employment to be deemed an "employer," the factors we focus on below are whether the lead firm has authority: 1) to place practical limits on employee compensation; 2) to exercise control over employee work schedules; 3) to effect the removal of employees from their place of employment; 4) to supervise the employees, directly or indirectly; and 5) to terminate the employee's position, or the contract with the entity that directly employs that employee, on short notice.[55] We also explain why, consistent with the

[54] In *Pitney Bowes, Inc.,* 312 NLRB 386, 386 fn.1 (1993), Member Raudabaugh suggested that the joint employment inquiry should involve consideration of all terms and conditions, not just "essential" ones. SEIU has no objection to the term "essential," though, as long it is broadly construed to encompass all material employment conditions over which labor and management can reasonably be expected to bargain – which is, of course, the point of the inquiry into whether a particular entity should be present at the bargaining table.

[55] See supra note 4 and accompanying text.

Act's purposes, the Board should focus on the right to control rather than the actual exercise of control (or any supposed business justifications for retaining that right to control).

a. The Right to Control Compensation

As the Board has sometimes recognized, when a lead firm includes an hourly labor cost in its service contracts, it thereby controls the compensation of its contractor's employees.[56] The same principle applies in many cost-plus or fixed-price contractors, even those that do not expressly set forth an hourly wage rate, if the contracts provide such a low margin for profit, and anticipate labor costs being such a high percentage of the contract price (as in the cleaning industry, for example), that the contract price effectively dictates the wage rate. Where the effect of the lead firm's hard contract bargaining is to directly or indirectly impose a ceiling on the funds available to pay employee wages, that is a strong indicator of a joint-employer relationship.[57] Similarly, in the fast-food industry, a franchisee may not be able to agree to wage increases unless the franchisee is able to renegotiate the terms of its agreement with the franchisor. In these circumstances, the direct employer has little ability to pay higher wages without the agreement of the lead firm – and a re-structuring of those companies' own contract terms. In industries like those described above, where the lead firm is principally purchasing labor (or, as in fast food, a pervasively controlled workplace), the case for finding a joint employment relationship is particularly strong.

[56] See, e.g., *Windemuller Elec, Inc.,* 306 NLRB 664, 666 (1992) (because the contractor billed "on the basis of labor supplied, at an hourly rate, depending on the employee's qualifications," the lead firm through its contract "limited and substantially determined" those employees' wages); *Mingo Logan Coal Co.,* 336 NLRB 83, 95 (2001) (lead firm "effectually controlled the compensation" of its contractor's employees by limiting reimbursement to certain hourly rates).

[57] The Board acknowledged as much in *Hoffman Sec. Ltd.,* 315 NLRB 275, 276 (1994) where it held that a union representing contracted-out receptionists at a hospital had a right to obtain a copy of the service contract because "[t]he amount of money [Hoffman] was being paid for the receptionists' services and the benefits afforded them under the contract obviously places some constraints on what [Hoffman] can afford to pay these employees."

b. The Right to Control Work Schedules

Apart from wages, having an adequate and predictable work schedule is one of the most important issues for workers. Workers who do not have full-time work often want more hours; workers also want pre-determined schedules that enable them to plan their non-work obligations. Many workers can only work traditional daytime hours because of family responsibilities or other constraints; others may prefer evening or night shifts. The ability of a lead firm to determine such work-schedule issues is another factor that should bear on its joint-employer status.

The Board has recognized the significance of control over work hours as a factor in determining joint employment in several cases, but its analysis has not been consistent.[58] Because hours are an essential term of employment, the fact that a building owner determines that office cleaning may only be performed between 8:00 P.M. and midnight, or that a fast food franchisor requires its franchisees to change work schedules on the fly to prevent labor costs from exceeding a specified percentage of real-time food sales, should be a significant factor in determining joint-employer status and the duty to bargain over those requirements and restrictions.

c. The Right to Control Which Employees May Work On Site

It is well-established that a lead firm's ability to impose discipline for violation of workplace rules supports a joint-employer finding.[59] The Board should similarly hold that a controlling entity's ability to require the removal of a particular worker from its workplace also

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[58] Compare *D & S Leasing, Inc.,* 299 NLRB 658, 672 (1990) ("Perhaps the two most important terms of conditions of employment from the employee's viewpoint are wages and hours of employment") with *Serv. Employees Int'l Union Local 254 (Women & Infants Hospital),* 324 NLRB 743, 749 (1997) (finding that recurring direction of cleaning employees by college personnel was not a "dispositive factor.").

[59] See, e.g., *Capitol EMI Music,* 311 NLRB 997, 1000 fn.22 (1993).

affects the workers' "essential terms and conditions" of employment for joint-employer purposes.[60] Even if the worker is eligible for transfer to a different location, the worker will necessarily experience a substantial change in working conditions. Where an entity retains the authority to remove employees from their sole or primary place of employment, the Board should find that this fact strongly supports a joint employer determination.

d. The Right to Control the Manner and Extent of Supervision

The easiest case for finding joint-employer status is when the lead firm's managers tell the affected employees how to perform their work, monitor their compliance, and criticize or discipline them when they perform inadequately. Given the economic realities of the modern workplace and the pragmatic inquiry required by the Act, it should not be necessary to find that a lead firm's power to supervise was directly exercised in order to find joint-employer status. In many industries, after all, even the direct employer's supervisors rarely engage in such on-the-job supervision.[61] In the fast-food industry, franchisees' employees *are* frequently supervised by the franchisor, as when a "consultant" or "mystery shopper" criticizes an employee for the way

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[60] See, e.g., *D & F Industries, Inc.,* 339 NLRB 618, 640 fn.7 (2003) (lead firm's right to select employees of temporary staffing agency for layoff was of the "utmost significance" in supporting joint-employer finding, even though they remained eligible for other staffing agency assignments, because they had "no prospect of returning to work at a … D&F facility"); *Holyoke Visiting Nurses Assn,* 310 NLRB 684, 686 (1993), enfd.*,* 11 F.3d 302 (1st Cir. 1993) (visiting nurse association jointly employed nurses hired by staffing agency where it "had the right to refuse to accept the services of employees it did not want, and could effectively recommend the removal of such employees from its premises"); but see *Southern California Gas Co.,* 302 NLRB 456, 462 (1991) (characterizing removal as "merely… the exercise of the right of an owner or occupant to protect his premises").

[61] See, e.g., *FedEx Home Delivery v. NLRB,* 563 F.3d 492, 497 (D.C. Cir. 2009) (quoting Second Restatement of Agency) (a "full-time cook is regarded as a servant and not an independent contractor although it is understood that the employer will exercise no control over the cooking."); *Holyoke Visiting Nurses Assn. v. NLRB,* 11 F.3d 302, 307 (1st Cir. 1993) (the fact that most professional employees do not need to be told how to do their jobs "does not negate the power of supervision and direction…").

he places hamburgers on the grill or because she takes too long getting a customer's order. In the commercial cleaning industry such supervision is rarely necessary, except perhaps for an employee's first few days on the job, as most supervision takes the form of after-the-fact inspections that identify whether there were any deficiencies in the work. In considering this factor in the context of a particular case, the Board's evaluation must be situational, focusing on the nature of the particular workplace and what types and levels of supervision are regularly and customarily required, and how much supervision (and by whom) is reasonably necessary to ensure full compliance with the lead firm's operational requirements.

While direct supervision is an obvious indicator of joint-employer status, it should be sufficient to find that the lead firm has retained substantial input into determining what tasks should be performed by a contractor's (or franchisee's) workers and in what manner, regardless of how it conveys that determination. For instance, in the fast-food industry, franchisors commonly micro-manage to the extent of dictating how workers must greet customers, how they must fold bags, and how many hamburgers should be placed on the grill in a single hand movement. The fact that the franchisor requires its franchisees to relay these detailed instructions on its behalf (*i.e.,* indirectly rather than directly) should make little difference in determining who controls those instructions.

e. The Right to Control Contract Termination on Short Notice

One feature common to joint-employer relationships in the industries described above is the ability of the lead firms to terminate their service contracts on short notice. The Board has previously recognized that the ability to terminate a contract at will is an important factor evidencing the right to control.[62] The right to control that results from the ability to terminate a contract on short notice is powerful, and is another critical factor that should bear on any inquiry into a lead firm's joint employment status.

f. The Right to Control, Not Exercise of Control, is the Status that Matters

In many cases where joint employment is at issue, the lead firm's contract reserves its right to control certain aspects of the contractors' employment relations, but does not require the lead firm to exercise that control if it is satisfied with the contractor's compliant performance. For example, the contract may entitle the lead firm to approve new hires, to discharge undesirable employees, or to enforce compliance with its own detailed workplace rules.

For many years, the Board's joint-employment inquiry appropriately focused on the contractual right of control rather than the exercise of that right.[63] That is what the overwhelming weight of appellate authority does as well.[64] More recently, however, the Board has shifted its focus, so it "does not merely rely on the existence of such contractual provisions, but rather looks to the actual practice of the parties."[65] That cannot be right, given the purposes of the Act. If a lead firm retains veto power over new hires, it should not be necessary to prove that it had

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[62] See, e.g., *Jewell Smokeless Coal Corp.,* 170 NLRB 392, 393 (1968); *H.F. Wilcox Oil and Gas Co.,* 28 NLRB 79, 90 (1940) (finding the right to terminate the contract at any time to be the "most important" joint employment factor); *Serv. Employees Int'l Union Local 87 (Trinity Maintenance)*, 312 NLRB 715, 753 fn.113 (1993) (noting testimony by property manager that if janitorial contractor refused to remove an individual janitor at his request, the "ultimate sanction . . . is not to renew the building maintenance contract."); see also *Indus. Pers. Corp. v. NLRB,* 657 F.2d 226, 229 (8th Cir. 1981) (enforcing ruling that tire manufacturer jointly employed its contractor's drivers based in part on finding that it "presumably has some control over [the driver's] wages since it can rescind the [service] contract on thirty days' notice."). But see *Chesapeake Foods,* 287 NLRB 405, 413 (1987) (reversing ALJ's finding of joint employment, even though chicken processor retained "unfettered power to terminate, in whole or in part, the employment of an entire crew" of chicken catchers).

[63] See, e.g., *Jewel Tea Co.,* 162 NLRB 508, 510 (1966); *Hoskins Ready-Mix Concrete, Inc.,* 161 NLRB 1492, 1493 fn.2 (1966); *Bethlehem-Fairfield Shipyard Inc.,* 53 NLRB 1428, 1431 (1943).

[64] See supra note 4 and accompanying text.

[65] *AM Prop.,* 350 NLRB at 1000.

occasion to actually exercise that power. If it reserves the power to modify workplace rules, monitor workplace compliance, establish standards for employee drug-testing or other screening, or terminate a contract on short-notice, it should not matter to the ultimate inquiry whether the threat of enforcement alone was sufficient to secure compliance. "[W]ith respect to supervisory status, the rule is clearly established in Board precedent that *possession* of authority consistent with any of the indicia of Section 2(11), not the exercise of that authority is the evidentiary touchstone."[66] There is no reason why the Board should follow a different approach in determining joint employer status.

Finally, the Board should consider evidence that a lead firm shares or co-determines essential terms and conditions even if the firm is acting to comply with government regulations as long as the firm has discretion as to how to implement the government regulations. As the Board has found in the context of the duty to bargain,[67] where a lead firm has a choice in how to implement a government regulation such choices should be considered as evidence of control over workers' terms and conditions.

3. Consistent Application of the *Browning-Ferris* Standard Will Provide Certainty to Workplace Participants and Will Further the Purposes of the Act

SEIU's review of the Board's previous joint employment decisions suggests that the confusion over the proper test results more from the Board's inconsistent application of the applicable principles than from its articulation of those principles. A more consistent application of the *Browning-Ferris* standard going forward will provide useful guidance and certainty as to the factors determining when a lead firm has the duty to bargain under the Act. By focusing on

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[66] *Allstate Ins. Co.,* 332 NLRB 759, 760 (2000) (emphasis added).
[67] *Watsonville Newspapers, LLC,* 327 NLRB 957 (1999) (finding that employer was not unilaterally privileged to impose a rule in order to qualify employees for Fair Labor Standards Act overtime requirements where the employer had other options to comply with law).

whether the alleged joint employer maintains the *right* to control essential terms and conditions, rather than on how frequently that right may have been exercised, the Board will no longer have to struggle to decide how much weight to give to a finding that there was a single instance where an entity had exercised a certain right.[68] In addition, by removing the requirement that supervision be "direct and immediate," the Board will no longer struggle to balance cases where there is extensive evidence of control over certain essential terms and conditions, but minimal evidence of *direct* supervision, and the NLRA test will remain sufficiently flexible to respond to the changing realities of the modern American workplace.

[68] See, e.g., *AM Prop.,* 350 NLRB at 1001 (giving "little weight" to finding that building owner "affected the hire, wages, and benefits" of one employee).

CONCLUSION

The Board should give the words in its long-settled joint employment test their plain meaning and find that an entity is a joint employer if, as a matter of economic reality, it has the right to share or co-determine essential terms and conditions of its workers' employment, either directly or indirectly.

Respectfully Submitted,

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THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CERTIFICATE OF SERVICE OF BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AS AMICUS CURIAE

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