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-IL, D/B/A LEADPOINT BUSINESS SERVICES, Employer, and SANITARY TRUCK DRIVERS AND HELPERS LOCAL 350, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Petitioner.	Case 32-RC-109684

AMICUS BRIEF OF RETAIL LITIGATION CENTER, INC.

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PRELIMINARY STATEMENT

This *amicus* brief, submitted on behalf of the Retail Litigation Center, Inc., responds to the National Labor Relations Board's ("NLRB" or "the Board") May 12, 2014 Notice and Invitation to File Briefs and addresses the following issue:

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

For the reasons discussed below, the Board should reaffirm the existing joint-employer standard, which looks at facts that demonstrate direct control, and reject the Union's attempt to replace it with an unwieldy joint-employer analysis that is based on an amorphous indirect control or "industrial realities" test.

STATEMENT OF INTEREST

The Retail Litigation Center, Inc. ("the RLC") is a public policy organization that identifies and engages in legal proceedings involving important issues that affect the retail industry. Its members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts and federal agencies with retail-industry perspectives on important legal issues and to highlight the potential industry-wide consequences of significant pending cases.

The joint-employer issue that the National Labor Relations Board has invited *amici* to address—whether the existing joint-employer standard should be retained—is of particular importance to the RLC and its members, most, if not all, of which are subject

to the jurisdiction of the National Labor Relations Act ("NLRA" or "the Act"). Retailers nationwide routinely contract with third party companies for a variety of commercial reasons, such as to provide delivery or logistics operators, supply temporary or seasonal employees, or to staff specific service functions, such as cleaning or security..

Just like any other type of employer, a retailer must have the right to determine how to run its business. A retailer must be free to decide, for example, that its core competencies are merchandising and selling, and that it does not want to be in the delivery business. There are legitimate reasons why it might prefer a fixed-price contract with a third-party to carry out deliveries and to take the associated business risks (which, presumably, the third-party is more competent to manage).

The Union's proposal would be harmful to the retail industry because it would find joint-employer status any time a retailer instructed a third party as to the retailer's requirements for the delivery of goods or services under a routine, arm's length commercial contract. For example, a retailer might contract with a logistics company to deliver goods sold by the retailer. In such a situation, the retailer might reserve the right to establish the time of delivery, or own the trucks used for those deliveries, or reserve the right to bar specific drivers from making the retailer's deliveries. The Union would have the Board find joint-employer status in such instances. But these are terms and conditions of a contract between two business owners and should be negotiated between the two businesses without conferring joint employer status on the contractor. How those terms and conditions affect the employees of each business, on the other hand, is for each business owner to negotiate with its own employees.

The existing joint-employment standard—which focuses on who directly controls the employment relationship—has provided certainty and predictability to retailers for more than 30 years. Any effort by the Board to upend that standard is of significant interest to the RLC.

SUMMARY OF ARGUMENT

The Board should affirm the existing joint-employer standard. The workable and sensible current standard not only effectuates the NLRA's purposes, but has proven effective for more than 30 years.

The existing joint-employer standard, which was adopted in *TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transportation*, 269 NLRB 324 (1984), affords retailers the ability to assess business risks up front and to determine which aspects of their businesses they want to manage themselves and which aspects they wish to pay others to do. Under that standard, which the current Board endorsed and applied as recently as four months ago,[1] the Board examines whether an entity directly controls a third-party's employees. It allows employers to contract at arm's length for services without fear of being liable for the acts of its contractor.

Changing the focus of the existing joint-employer standard from the entity that is in direct control of the employment relationship to either the amorphous "industrial realities" test or the expansive "indirect control" test proposed by the Union would introduce great uncertainty into contractual relationships with third-parties. The

[1] *See Am. Fed'n of Teachers N.M.*, 360 NLRB No. 59, slip op. (Feb. 28, 2014).

"industrial realities" test is simply unworkable: it asks whether the totality of the circumstances makes an entity a "necessary party" to the collective bargaining process, but fails to provide a framework for answering that question. The "indirect control" test contravenes the purpose of the Act because it would find joint-employer status outside of the statutory employer/employee relationship. Both standards ultimately undermine retailers' lawful and legitimate ability to contract with third-parties.

There is nothing new or novel about the types of relationships that the Union suggests should now be deemed joint employment. Indeed, those relationships existed prior to *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1984), and they exist in virtually all organizations. Imposing an obligation on retailers to recognize and bargain with employees who are hired, fired, paid, and supervised by their third-party contractors would improperly expand the reach of the joint-employer standard far beyond Congress's intent.

ARGUMENT

I. The Board Should Affirm the Existing, Straightforward, Joint-Employer Standard, Which Effectuates the NLRA's Purposes and Is Supported by Thirty Years of Precedent.

There is no reason to adopt a new joint-employer standard. The Board's existing standard is straightforward and effectuates the purposes of the NLRA. Moreover, the existing standard, which has been in place for over thirty years, has proven to be workable, effective, and fair. Abandoning this established and reasoned standard would bring about a new era of legal uncertainty, particularly in the retail industry, where companies regularly make the business judgment to contract out to third-parties for

services. The Board should unequivocally reject the Union's invitation to change the existing joint-employer standard.

A. The Board's Standard Effectuates the Purposes of the Act.

The Board's continual focus on direct control over the terms and conditions of employment serves the purposes of the NLRA and conforms to congressional intent far better than the standards proposed by the Union. Both the legislative history of the Taft-Hartley Amendments and the NLRA itself are clear that a putative joint-employer must maintain and exercise "direct control" over a co-employer's employees.

There is no question that Congress enacted the Taft-Hartley Amendments to the Act in 1947[2] in part to repudiate the Board's adoption of the Supreme Court's overly broad definition of "employee" in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). The House Committee Report's explicit criticism underscores the importance of maintaining a joint-employer standard that focuses on the exercise of "direct control" over a co-employer's employees:

> An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, *with the exception of members of the National Labor Relations Board*, means someone who works for another for hire . . . . "Employees" work for wages or salaries *under direct supervision*.

H.R. Rep. No. 245, 80th Cong., 1st Sess. at 18 (1947) (emphasis added).

[2] Labor Management Relations Act, 1947, Pub. L. No. 80-101, 61 Stat. 136-62 (codified as amended in sections of 29 U.S.C. Chap. 7).

Even those who have more recently sought to broaden the definition of "employee" under the Act recognize that such direct supervision is necessary. As former Board Member Craig Becker acknowledged, "direct supervision constitutes the *sine qua non* of employment regulated by the law." *Labor Law Outside the Employment Relation*, 74 Tex. L. Rev. 1527, 1539 (1996) (internal quotation marks omitted). The critical inquiry in the joint-employer context, therefore, must be whether an entity directly affects essential terms and conditions of an individual's employment.

This analysis strongly supports the direct control focus of the Board's existing joint-employer standard. *See Cont'l Winding Co.*, 305 NLRB 122 (1991) (finding joint-employer status where putative joint-employer directed and supervised its co-employer's employees on a daily basis); *see also Am. Air Filter Co.*, 258 NLRB 49 (1981) (finding that American Air Filter was a joint-employer because it directed its co-employer's employees on a day to day basis and constantly supervised their performance). The whole purpose of labor relations law, as former Member Becker explained, is to regulate the employment relationship. Craig Becker, *Labor Law Outside the Employment Relation*, 74 Tex. L. Rev. at 1540. Ensuring that, as a pre-condition to joint-employer status, a retailer maintains "direct control" of, or "meaningfully affects," essential terms and conditions of employment is thus directly in line with the overarching purpose of the Act.

B. The Board's Standard is Straightforward.

The Board's test for determining a joint-employer relationship properly and consistently focuses upon who controls the employment relationship. As stated by the

Third Circuit in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, and repeatedly reaffirmed by the Board, the essential test for governing a joint-employer relationship "is rather a matter of determining which of two, or whether both, respondents control, in the capacity of employer, the labor relations of a given group of workers." *Id.* at 1122-23 (citing *NLRB v. Condenser Corp. of Am.*, 128 F.2d 67, 72 (3d Cir. 1942). As explained by the Third Circuit:

> [The] joint-employer concept does not depend upon the existence of a single integrated enterprise . . . . Rather, a finding that companies are joint-employers assumes in the first instance that companies are what they appear to be – independent legal entities that have merely historically chosen to handle jointly . . . important aspects of their employer-employee relationship.

Id. at 1122 (internal quotation marks omitted). Accordingly, instead of considering whether two entities have engaged in arm's length transactions, the Board has found joint-employers *only* where two or more separate business entities share or co-determine those matters governing the essential terms and conditions of employment. *Id.* at 1123.

The Board's reliance on a test that meaningfully affects matters relating to the employment relationship, such as hiring, firing, discipline, supervision, and direction, has provided certainty and predictability to retailers that frequently engage with third-party contractors. *See Riverdale Nursing Home, Inc.*, 317 NLRB 881, 882 (1995); *H.S. Care, LLC*, 343 NLRB 659 (2004). Reaffirming the existing joint-employer standard will ensure that only those retailers that affect third-party employees' essential terms and conditions of employment can be found to be joint-employers.

C. The Board's Standard Calls For a Manageable and Accurate Inquiry.

The Board's existing fact-based approach should not be replaced with the Union's proposed conglomeration of several different standards.[3] The existing standard ensures that the Board will only find joint-employer status where a putative joint-employer actually directs and meaningfully controls its co-employer's employees. In those instances, the putative co-employer truly is a "necessary party" to the collective bargaining process.

Decisions since *Browning-Ferris Industries* illustrate that the Board considers whether a putative joint-employer exercises "ultimate authority" or "sufficient control" over its putative co-employer's employees' "essential terms and conditions of employment."[4] This fact-specific approach makes the most sense. Unlike the Union's amorphous "industrial realities" test or "indirect control" test, the Board's existing standard is straightforward to apply. Further, it is both "logical and functional." *See Browning-Ferris Indus.*, 691 F.2d at 1124 .

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[3] Tellingly, the Union's brief does not explicitly advocate for one particular standard over another. Rather, the Union's brief merely recites several rarely-used standards from old Board cases. *See* Pet'r's Req.for Review at 35.

[4] *See, e.g., Laerco Transp.,* 269 NLRB 324 (no joint-employer status where supervision was "minimal" and entity did not hire or fire other entity's employees); *TLI, Inc.*, 271 NLRB 798 (no joint employer where entity did not hire, fire, or discipline employees and only engaged in routine supervision); *Quantum Res. Corp.*, 305 NLRB 759 (1991) (joint-employer status existed where entity had considerable direct involvement in daily supervision of other entity's employees); *Pac. Mut. Door Co.*, 278 NLRB 854 (1986) (joint-employer status found where entity fired employees, trained employees, and dictated hours of work).

The existing standard is especially important in the retail industry. For example, retailers routinely make the business judgment to engage logistics operators to operate their warehouses efficiently or to allow employees of service vendors (such as food services or janitorial employees) to work in their facilities. Neither the logistics operators nor the vendors are the retailers' employees because the retailers do not meaningfully direct their work or their terms or conditions of employment. This distinction, which effectuates the purpose of the Act, provides retailers with a much higher degree of predictability than the Union's proposals.

D. The Board's Standard Provides Consistency and Predictability.

The existing standard has persisted through numerous different Boards and administrations for a simple reason: It works.

The Union cites former Member Liebman's concurrence in *Airborne Freight Co.*, 338 NLRB 597 (2002) to argue that the Board should abandon its precedent here. *See* Pet'r's Req. for Review at 35. The Board, however, soundly rejected former Member Liebman's recommendation in that case: *Id*. at 35.

> Simply put, the Board's test for determining whether two separate entities should be considered to be joint employers with respect to a specific group of employees has been a matter of settled law for approximately twenty years. . . . Thus, approximately 20 years ago, the Board, with court approval, abandoned its previous test in this area, which had focused on a putative joint-employer's *indirect control* over matters relating to the employment relationship . . . . We would not disturb settled law.

Airborne Freight Co., 338 NLRB at 598 n.1. Clearly, the Board has recognized that the prior test using an "indirect control" standard was unworkable and that the current test is

the better standard. This continues to be the case today. *See, e.g.*, *Aim Royal Insulation, Inc.*, 358 NLRB No. 91, slip op. (July 30, 2012); *Flagstaff Med. Ctr., Inc.*, 357 NLRB No. 65, slip op. (Aug. 26, 2011); *Cont'l Winding Co.*, 305 NLRB 122; *Laerco Transp.*, 269 NLRB 324; *TLI, Inc.*, 271 NLRB 798; *Browning-Ferris Indus.*, 691 F.2d at 1124; *Am. Air Filter Co.*, 258 NLRB 49.

The Board regularly engages in this type of fact-based inquiry. The Board not only examines factual circumstances to determine joint-employer status, but also to determine alter-ego status and single-employer status. The Board and its Regional Directors examine factual circumstances to make unit determinations, such as in this case. *See NLRB Casehandling Manual*, Part Two at 11080-11124 (Aug. 2007) (discussion of Regional Determination procedures). Likewise, in the retail context, the Board would consider whether a retailer hires, fires, disciplines, or supervises a third party logistics operators' employees in making a joint-employer determination. This fact-based type of inquiry is what the Board, the regional directors, and administrative law judges do routinely. Accordingly, the existing standard, which decides joint-employer status based on facts, should not be replaced with the cumbersome analysis proposed by the Union.

II. The Union's Proposal Would Be Unwieldy and Contrary to the Act.

The Union argues in its Request for Review that the Board's existing joint-employer standard should be broadened significantly. According to the Union, joint-employer status should be found in a myriad of circumstances, such as (i) where a putative joint-employer exercises "indirect control" over its contractor's wages, (ii) where "industrial realities" dictate that a putative joint-employer is a "necessary party to

meaningful collective bargaining," even where that putative joint-employer does not hire, fire, or supervise employees, or (iii) where the putative joint-employer is the source of any wage increases that could be negotiated for the contractor's employees. *See* Pet'r's Req. for Review at 35. The Union thus seeks a return to the discarded standards previously elucidated in *Hoskins Ready-Mix Concrete, Inc.*, 161 NLRB 1492 (1966) ("indirect control" test and "ultimate source of wages" test) and *Jewell Smokeless Coal Corp.*, 170 NLRB 392 (1968), *enf'd* 435 F.2d 1270 (4th Cir. 1970).

The Union's proposals create unnecessary ambiguity for all employers, particularly those in the retail industry. First, those proposals replace relative certainty with vague subjectivity. Retailers could not reliably predict who their statutory employees were until the issue was litigated. Second, the Union's proposals contravene legislative intent and undermine, rather than promote, the purposes of the Act. Third, the Unions proposals would harm a retailer's ability to contract. For all of these reasons, the Board should reject the Union's invitation to change the current joint-employer standard.

A. Retailers Could Not Reliably Identify Statutory Employees.

The Union's Request for Review argues that the Board should find joint-employer status where the putative joint-employer exercised "indirect control" over its co-employers' employees or where "industrial realities" dictate that a putative joint-employer is a necessary party to "meaningful" collective bargaining. Petitioner's Request for Review at 35 (citing *Airborne Freight Co.*, 338 NLRB 597 (Liebman, concurring); *Floyd Epperson*, 202 NLRB 23 (1973), *enf'd* 491 F.2d 1390 (6th Cir. 1974)); *see also Hoskins Ready-Mix Concrete, Inc.*, 161 NLRB 1492 (Board found joint-

employer status where entity exercised "indirect control" over subcontractor employees' wages). For many reasons, this should not be the law.

The Union relies primarily on former Member Liebman's concurrence in *Airborne Freight Co.*, 338 NLRB 597, to support its argument that the Board should adopt the "indirect control" joint-employer analysis. Pet'r's Req. for Review at 35. Former Member Liebman's concurrence contended that joint-employer status should not be limited to instances where a putative joint-employer exercises direct control over "hiring, firing, discipline, supervision and direction," but instead should include circumstances where an entity exercises "indirect control" over its putative joint-employer's employees, such as where an entity sets delivery times for its putative joint-employer's drivers or where the contracting employer sets the number of employees to be leased from the contractor. *Airborne Freight Co.*, 338 NLRB at 598 (Liebman, concurring).

As illustrated by facts from cases cited by both the Union's brief and former Member Liebman's concurrence in *Airborne Freight Co*, the "indirect control" test is simply untenable. For example, the Board's conclusion in *Floyd Epperson* that Floyd Epperson and United Dairy Farmers, Inc. were joint-employers relied heavily on evidence of direct control with some minor indicia of "indirect" control that would not have affected the outcome of the Board's decision if they had not been present. 202 NLRB 23. The facts supporting direct control included the following: United, through Armstrong ("the boss" of Epperson's drivers), established drivers' work schedules and had the authority to change the drivers' assignments, select routes, and generally supervise the drivers in the course of their employment. On these facts alone, United

would qualify under the current joint-employer standard as a joint employer of Epperson's drivers.

The "indirect control" facts noted by the Board were that Epperson increased his drivers' wages after United gave Epperson a raise and that Epperson "felt" he needed to replace a driver on a route assignment after United merely complained that the driver had been late (but did not direct his removal). Similarly, in *Hoskins Ready-Mix Concrete, Inc.*, 161 NLRB 1492, another case relied upon by the Union, the Board determined that Hoskins Ready-Mix Concrete, Inc. and General Portland Cement Company were joint-employers using "indirect control" type factors. *Id.* at 1493. The Board reasoned in *Hoskins* that, since General was obligated to reimburse Hoskins for payroll expenses, any wage increases to Hoskins' employees were being indirectly supplied by General. *Id*.

Former Member Liebman's and the Union's undue focus on these "wages and discipline" facts in support of an "indirect control" rule illustrates the impossiblity of such a standard in the real world. Under such a standard, any change in the business parties' arm's length relationship could be subjectively alleged to affect supplier employer's employees. The Union's proposed standard would result in virtually all contractual relationships involving the delivery of labor creating joint employment. That cannot and has never been the law under any labor and employment law standard.

The "indirect control" standard would hamstring retailers that wish to contract with third parties for services. Under the "indirect control" test, a retailer could not reward a contractor for a job well-done with a pay increase or a bonus. If the contractor passed any of that bonus along to its employees, the retailer could be deemed to be a

joint-employer, despite lacking the ability to hire, fire, or discipline the contractor's employees. Further, the "indirect control" test would preclude a retailer from exercising any sort of quality control. The retailer is contracting for services; it must be able to ensure that those services are being performed to specifications. Lastly, a retailer must have the ability to provide basic direction to a contractor without being deemed a joint-employer. Under the Union's "indirect control" standard, a retailer could be deemed a joint-employer if it directed its contractor's driving assignments or directed a contractor to make deliveries at a certain time. This simply cannot be the state of the law.

As an alternative to the "indirect control" standard, the Union argues that the Board's joint-employer standard should consider the "industrial realities" of a particular commercial relationship. According to that argument, where an entity is a "necessary party to meaningful collective bargaining," that entity should be deemed a joint-employer, regardless of whether that entity has played any role in the hiring, firing, or supervision of employees. Pet'r's Req. for Review at 35, citing *Jewell Smokeless Coal Corp.*, 170 NLRB 392. Such a test would expand the joint-employer standard to include entities that do not, in any meaningful sense, employ a group of workers.

The Union's Request for Review also cites *Jewell Smokeless Coal Corp.*, 170 NLRB 392, for the proposition that the Board should consider the "industrial realities" when assessing a potential joint-employer relationship. Pet'r's Req. for Review at 35. Tellingly, the Union fails to explain how such a test would work in practice. To make matters worse, *Jewell Smokeless Coal Corp.* itself provides little helpful guidance.

In *Jewell Smokeless Coal,* the Board determined that Jewell was a joint-employer with the mining operators on its property. The Board noted that Jewell regularly inspected the mines. Further, the ownership of the coal and the mines was at all times vested in Jewell. Accordingly, the Board determined that Jewell and its operators were joint-employers:

> [C]onsidering the industrial realities of the coal mining industry, the conclusion is inescapable that Jewell is a necessary party to meaningful collective bargaining . . . .

170 NLRB at 393.

The *Jewell Smokeless Coal* decision conflicts directly with both contemporaneous and more recent Board decisions, further demonstrating the inherent impracticality of the "industrial realities" test. *See Hychem Constructors, Inc.*, 169 NLRB 274, 276 (1968) (no joint-employer relationship even though contractor required subcontracted employees to observe plant safety rules because "[t]he promulgation of such rules, which seek to insure safety and security, is a natural concomitant of the right of any property owner or occupant to protect his premises"); *S. Cal. Gas Co.*, 302 NLRB 456 (1991) (a contractor will not be found to be a joint-employer with a subcontractor merely because the contractor ensures that it is receiving the services it has contracted for); *Martiki Coal Corp.*, 315 NLRB 476 (1994) (owner of coal mine ceased being joint-employer after stopping daily supervision of operators' miners). The "industrial realities" test, which has been disparately applied to reach different outcomes under virtually identical factual

circumstances, is thus a standard in search of a uniform definition. . *Compare Jewell Smokeless Coal Corp.,* 170 NLRB 392 *with Hychem Constructors, Inc.*, 169 NLRB 274.[5]

The Union's proposed standards offer no certainty in the joint-employer analysis. Under those standards, a business that does not exercise any control over essential terms and conditions of employment can still be found to be a joint-employer. And a business's lack of direct control over employees would be of no moment. This cannot be, and should not be, the law. A business would have no way of knowing it was a statutory "employer" until after the issue was litigated. This cannot and does not effectuate the Act's purpose of regulating the employment relationship between employees and their *statutory employer*. The Board should reject the Union's proposed tests.

B. The Union's Proposal Conflicts With the Act's Plain Text and Congressional Intent.

Both the "indirect control" test and the "industrial realities" test directly conflict with the language of the Act and the intent of Congress. Both the text and legislative

[5] Professor Harper's version of the "industrial realities" test illustrates its folly. *See* Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B.C. L. Rev. 329 (1998). Professor Harper, cited by Member Liebman's concurrence in *Airborne Freight*, 338 NLRB 597, 599 (2002) (Liebman, concurring), would find joint-employer status where a firm provides "significant capital directly made productive by the employees' work." 39 B.C. L. Rev. at 348. This expansive test would consider a retailer that contracts with a staffing agency to supply seasonal employees to be a joint-employer, even if the staffing agency is the sole supervisor of those employees. Professor Harper's test would also find that a retailer that allows vendors to spend time working in its stores is a joint-employer, even if the retailer itself does not pay, train, or supervise the vendors' employees. Whether or not the entity in question meaningfully affects an employee's essential terms and conditions of employment is immaterial under this approach. The Act, as currently written, does not allow for this type of joint-employer standard.

history of the Act repeatedly extoll the importance of an employer's direct control over its employees. By its plain terms, § 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to engage in collective bargaining with the representative of "his employees." 29 U.S.C. § 158(a)(5). *See also* H.R. Rep. No. 245, 80th Cong., 1st Sess. at 18 (Section I.A., *supra* at 5). Employees, then, must necessarily be direct hires of a particular employer to compel the employer to recognize and bargain collectively with them. "From the right of *direct control* . . . originate employer obligations." Craig Becker, *Labor Law Outside the Employment Relation*, 74 Tex. L. Rev. at 1540 (emphasis added). An entity that is alleged to exercise only indirect control over a group of employees under either of the Union's proposed theories should not be saddled with this Act's collective bargaining obligations.

The existing standard, consistent with both the plain language of the Act and its legislative history, examines whether a contracting employer directly affects a subcontractor's employees' essential terms and conditions of employment. *See TLI, Inc.*, 271 NLRB at 798-99 (the putative joint-employer's control over employment matters must be direct and immediate). It should not be discarded in favor of ill-defined tests that are clearly contrary to Congress's intent and the plain language of the Act.

C. The Union's Proposals Would Impair Retailers' Ability To Contract At Arm's Length.

The Union's proposals should also be rejected as a matter of public policy because they would inappropriately constrict an entity's ability to contract freely with other entities for services. Consider the Board's decision in *Jewell Smokeless Coal Corp*., 170

NLRB 392. As discussed above, the Board determined that Jewell was a joint-employer based almost exclusively on the fact that mine operators worked on its property. It was immaterial that Jewell did not hire, fire, or discipline the mine-operators' employees. Rather, the Board held that since the mine operators contracted with Jewell to work on Jewell's property and sold any mined coal to Jewell, Jewell was a joint-employer.[6]

A retailer or any other business that engages a contractor for services should not be deemed a joint-employer simply because the contractor's employees provide services on the business's property or the business provides some basic direction to the contractor. A business must have the ability to convey its basic expectations as to how a service should be performed. Such basic direction, which has been termed "minimal" by the Board, cannot support a finding of joint-employer status. *See Laerco Transp.*, 269 NLRB at 325 (minimal, routine supervision or direction by business will not support joint-employer finding).

[6] Changing the standard for determining joint employer status would also undermine the rationale for the Board's decision in *N.Y. N.Y. Hotel & Casino*, 356 NLRB No. 119, slip op. (Mar. 25, 2011), *enf'd* 676 F.3d 193 (D.C. Cir. 2012), where the Board held that a property owner could not prohibit contractor employees from distributing literature. The Board emphasized that an owner does not need to rely on its property rights to exclude contractor employees as trespassers because it can take direct action, or action through the contractor, to control their conduct. For example, the Board said that the owner can do any of the following: require them to submit to drug testing and comply with its safety rules; prevent them from engaging in improper conduct; give them instructions through the contractor's supervisors; and direct the contractor to remove them from the premises. But all of these actions would be used as evidence of joint employer status under the revised standard under consideration in this case.

Importantly, retailers often hire contractors because they have made a reasoned business judgment that the contractor can perform a function more efficiently than the business itself. When a function, such as logistics, is outside of an entity's core competency, the entity should be able to reach out to an expert for services without adopting responsibility for the contractor's employees by the mere fact that the business and the contractor have entered into an agreement and reserved the right to specify a term, such as the time of delivery. Nor should the contractor be injected into the middle of a collective bargaining relationship in an area outside of its competence and in which it can have no reasonable impact.

As another example, a retailer may contract with a software firm to build a complex, proprietary software application. In addition to payments for services rendered, the contract may include performance incentives and provisions whereby the software company agrees to dedicate a core group of employees to provide training and ongoing support for the software after the rollout. Such contracts commonly provide that the retailer can request that the software company remove any given employee of the software company from its account and that any on-site representatives of the software company must abide by safety, security, and confidentiality protocols. These are basic terms of a business contract, not an employment relationship. The retailer should not be required to bargain with the representatives of the software company when it has already determined that it does not have the expertise to manage this type of work.

The mere fact that a new business contract with a janitorial company allows the janitorial company to hire additional employees and pay higher wages should likewise

not require a retailer to bargain with the contractor's employees. The funds for wage increases always are indirectly derived from a company's sales. The retailer should not be required to renegotiate that arm's length contract at the whim of the contractor's employees.

If the Board were to adopt the standards proposed by the Union, retailers and other businesses that contract with third parties for services could face collective bargaining obligations regardless of whether their actions have any direct effect on an employee's essential terms and conditions of employment. As a result, retailers might hesitate to contract with third parties for services because they could never be certain whether they would be found to be joint-employers; this uncertainty would have a chilling effect on commerce. The Board should refuse to adopt a standard that would unnecessarily restrict the freedom to contract.

CONCLUSION

The Board's existing standard is a consistent, fact-based inquiry that affords predictability in establishing and assessing employment and commercial relationships to all of the stakeholders under the Act (employers, employees, labor organizations, and the Board itself). Indeed, the existing standard is the very type of detailed, factual standard on which the Board traditionally relies in administering and enforcing the Act. Hearing officers, administrative law judges, and regional staff routinely employ this type of objective analysis to assess supervisory status, appropriateness of bargaining units and other issues. The Board uses these types of tests and inquiries because they work. And the existing joint-employer test works, too.

The Retail Litigation Center and its members have relied upon the existing standard for three decades when making business judgments concerning whether to engage outside contractors to perform work. Businesses, including retailers, must be allowed to make reasoned judgments as to what is most efficient for them to undertake, and also what is most efficient for them to contract out.

For all of the foregoing reasons, the Board should reaffirm its existing joint-employer standard and reject the Union's proposals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 2014, a copy of the foregoing **Amicus Brief** was served on the following persons, addressed to them at the following addresses:

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