UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC., D/B/A/ BFI NEWBY ISLAND RECYCLERY,	)	
Employer,	)	Case 32-RC-109684
and	)	
FPR-II, LLC, D/B/A LEADPOINT BUSINESS SERVICES,	)	
Employer,	)	
and	)	
SANITARY TRUCK DRIVERS AND HELPERS LOCAL 350, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	)	
Petitioner.	)	

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL RESTAURANT ASSOCIATION, AND NATIONAL WASTE & RECYCLING ASSOCIATION

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I. INTEREST OF AMICI

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributing more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Restaurant Association ("NRA") is the leading business association for the restaurant and food service industry. The industry is comprised of 990,000 restaurant and food service outlets employing 13.5 million people. The food service industry is the nation's second largest private-sector employer, employing approximately 10 percent of the U.S. workforce.

The National Waste and Recycling Association ("NW&RA") is the national trade association that represents the private sector waste and recycling service industry. NW&RA members conduct business in all 50 states and include companies that collect and manage garbage, recycling and medical waste; equipment manufacturers and distributors; and a variety of other service providers.

Together members of the NAM, NRA and NW&RA ("Amici") employ nearly a quarter of the entire United States workforce. The diverse members of Amici represents tens of thousands of employers who have substantive experience with staffing agencies, temporary employees and contingent workforces. These employers have spent several decades conforming

their regulations, policies and practices to, and complying with, the joint employer standards set forth by the National Labor Relations Board ("Board").

As employers under the National Labor Relations Act ("Act"), Amici and their members have a profound interest in national labor policy in general and interpretation of the Act, including the joint employer doctrine, specifically.

II. ISSUE PRESENTED

On April 30, 2014, the Board issued an order in the instant case granting review of the Acting Regional Director's Decision and Direction of Election, stating that substantial issues warrant review of the current joint employer standard as articulated in the Board's decisions in *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984).

Prior to *TLI* and *Laerco*, the Board and some Circuit Courts occasionally blurred the concepts of "single employer" and "joint employer" when deciding whether a company had engaged in unfair labor practices through its dealings with employees of a contracted staffing agency. The Third Circuit, in *NLRB v. Browning-Ferris Industries, Inc.*, 691 F.2d 1117, 1122-23 (3d Cir. 1982), crystalized the differences between these similar but distinct concepts, noting the following:

> A "single employer" relationship exists where two nominally separate entities are part of a single integrated enterprise so that, for all purposes, there is in fact a "single employer." ... Thus, the "single employer" standard is relevant to the determination that "separate corporations are not what they appear to be, that in truth they are but divisions or departments of a single enterprise. ... In contrast, 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."

By sometimes interchanging these two standards, and the distinct tests developed by the U.S. Supreme Court to aid in deciding if the contractual relationship subjected the company to Section 2(2) of the Act, the Board and some courts unnecessarily sowed confusion among employees, unions, and companies that utilized staffing agency employees in their workplace.

In *Browning-Ferris Industries, Inc.* , the Third Circuit held that the appropriate standard for determining whether a company and a staffing agency are joint employers was set out by the Supreme Court in *Boire v. Greyhound Corp.*, 376 U.S. 473, 84 S. Ct. 894, 11 L. Ed. 2d 849 (1964). "Thus, the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment." *Browning-Ferris Industries, Inc.* at 1123. In doing so, the Third Circuit specifically rejected the standard set out by the Supreme Court in *Radio Union v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256, 85 S. Ct. 876, 13 L. Ed. 2d 789 (1965) and rearticulated by the Board in *Parklane Hosiery Co., Inc.*, 203 NLRB 597, 612 (1973). "It is significant that when the Supreme Court decided *Radio Union*, it discussed the Board's four factor 'single employer' standard, which ultimately found expression again in *Parklane*. ... Nowhere did the *Radio Union* Court mention *Boire* which was a 'joint employer' case. . . . Thus, we are left with the clear understanding that the Court in *Radio Union* was not concerned with a 'joint employer' standard."

Two years later, the Board in *TLI* and *Laerco* adopted the Third Circuit's holding. *TLI* at 798; *Laerco* at 325. The Board also expanded upon what it means for joint employers to "share or co-determine" matters that govern the essential terms and conditions of employment. "To establish joint employer status there must be a showing that the employer meaningfully affects

matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction." *TLI* at 798; *Laerco* at 325.

The Board clarified the 19-year-old definition of joint employer because of confusion in the labor relations landscape. In doing so, it established a standard that has provided both clarity and certainty for the last 30 years for employees, employers and unions. Accordingly, any change to the joint employer standard as articulated in *TLI* and *Laerco* will necessarily disrupt that stability.

Amici respectfully submit that the issue presented before the Board is whether there has been a substantial change in union and/or employer practices between the issuance of *TLI* and *Laerco* in 1984 and the present that warrants modifying or overturning the joint employer standard set forth in those decisions.

III. SUMMARY OF ARGUMENT

The undersigned Amici respectfully submit that the joint employer standard set forth in the Board's decisions in *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985) and *Laerco Transportation*, 269 NLRB 324 (1984) must be maintained. Any deviation from this standard would seriously and adversely affect the nation's manufacturing, restaurant, food servicing, and waste and recycling industries. The factual rationale in support of the present standard remains wholly unchanged. No new circumstances whatsoever have arisen since the issuance of *TLI* and *Laerco* that justify modifying or overturning these decisions. Quite simply, overturning the decisions would be a solution in search of a problem; indeed, a solution that would generate myriad problems for Amici and their members.

The *TLI* and *Laerco* standard adequately safeguards and promotes employee rights under the Act while also supporting labor stability. The Board's current joint employer doctrine also

promotes the rights of temporary employees under Section 7 of the Act to engage in meaningful bargaining with the employer—that is, the staffing agency—by ensuring that the company contracting with the staffing agency has ***no role*** in the bargaining process. Furthermore, the current standard ensures that the employee is treated fairly by the employer—again, the staffing agency—because the contracting company has ***no influence*** over the employee's terms and conditions of employment. This is central to the concept of the joint employer standard. Companies that seek to avoid joint employer status must avoid having any meaningful effect on the employee's hiring, firing, discipline, supervision and direction. The relative clarity and durability of the doctrine assures that contracting employers, staffing agencies and employees can conform to the Board's standard without unnecessary confusion and conflict.

Conversely, any change to the *TLI* and *Laerco* joint employer standard would have profound deleterious effects on a company's ability to use temporary employees, staffing agencies, leased employees or other contingent workers. This is particularly so for companies in Amici's industries, which rely on these contingent workers to supplement their own workforces. If the standard is changed, companies may find themselves held vicariously liable for violations of Section 7 of the Act for depriving a temporary employee's right to form a union and for violations of Section 8(a)(3) of the Act for unlawful discipline or discharge of a temporary employee that are ***committed by entities completely outside of their control.*** Additionally, if the staffing agency's employees are represented by a union, these companies may be unwittingly subjected to the staffing agency's collective bargaining obligations under Section 8(a)(5) of the Act. As a result, companies may be compelled to change their business models and terminate their contracts with staffing agencies because of their potential harmful and/or unpredictable ramifications.

Further, Petitioner has adduced absolutely no evidence that violations of the Act have proliferated in recent years involving companies contracting with third parties. Obviously, any revision to the current joint employer standard should be predicated on the fact that temporary employees are being deprived of their Section 7 rights by third-party companies. Revisions to a substantive 30-year standard should not be based merely on whim, caprice or an ostensible benefit to unions.

Nor has Petitioner shown that a split has developed among Circuit Courts as to the joint employer standard. Nor can it. Circuit Courts have consistently applied the joint employer concept as set forth in *TLI* and *Laerco* for nearly three decades. Without evidence of measurable changes in employment models, demonstrable increases in unfair labor practices by contracting companies, or irreconcilable splits in Circuit authority, there is no need for doctrinal change.

Moreover, Petitioner has utterly failed to enunciate a change of circumstances in the workplace environment sufficient to justify a change in the *TLI* and *Laerco* joint employer standard. Indeed, the use of temporary employees peaked in 2000, when they numbered 2.7 million and comprised two percent of the U.S. workforce. The ranks of temporary employees has thinned considerably since then; it has also diversified, with high-skill (generally non-union) occupations making up a larger share of employment and earning considerably more than those in 2000. Petitioner's argument, though still weak, may have had more salience 15 years ago, but now the argument is completely baseless. There simply is no compelling need to broach a change to the joint employee standard based on current economic factors.

Finally, were the Board nonetheless inclined to adopt a material change to the joint employer standard, Amici would submit that a change of such dramatic consequence would be more prudently effected through formal rulemaking rather than by adjudication. Section 6 of the

Act provides the Board the authority to promulgate rules under the Administrative Procedure Act. The rulemaking process would permit interested parties, of which there are undoubtedly thousands, an opportunity to submit written comments to the Board's proposed changes and to suggest alternatives before a 30-year standard is altered.

TLI and *Laerco* reasonably balance employee free choice and labor stability. They have provided guidance to all actions in the contingent workforce market for three decades. As such, the standard they set should remain undisturbed.

IV. ARGUMENT

A. The Current "Joint Employer" Standard Protects the Rights of Temporary Employees.

Petitioner's primary argument is that the *TLI* and *Laerco* joint employer standard should be broadened because it ostensibly prevents temporary employees of staffing agencies from bargaining with the company that, as a practical matter, determines the terms and conditions of their employment. There is no evidence whatsoever that the standard impinges on the Section 7 rights of temporary employees or that the standard permits the company, as a practical matter, to determine the terms and conditions of the temporary employees' employment. On the contrary, such evidence would violate the joint employer standard as it is ***currently*** expressed in *TLI* and *Laerco*.

The central purpose of the Act is "to protect and facilitate employees' opportunity to organize unions to represent them in collective bargaining negotiations." *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609, 113 L. Ed. 2d 675, 111 S. Ct. 1539 (1991). The heart of the Act is Section 7, which "grants employees the right to organize and form labor unions for the purpose of collective bargaining and other concerted activities." *Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F.3d 251, 255 (4th Cir. 1994). Section 7, however, makes no

reference to the role of the employer in this regard. Nor does it define what an employer is. Rather, Section 2(2) defines an employer as "any person acting as an agent of an employer, directly or indirectly ...." In fact, the Board has the duty of determining whether the relationship between certain parties constitutes an employer-employee relationship within the meaning of the Act. *Browning-Ferris Industries, Inc.*, 691 F.2d at 1121).

For the past 30 years, the Board has determined whether two parties are joint employers by applying the *TLI* and *Laerco* standard, which requires a detailed analysis of whether the alleged joint employers share the ability to control or co-determine essential terms and conditions of employment. *See Oakdale Care Center*, 343 NLRB 659, 662 (2004). Essential terms and conditions of employment are those involving such matters as hiring, firing, discipline, supervision, and direction of employees. *Laerco*, at 324. However, the joint employers' control over these employment matters must be ***direct*** and ***immediate***. *TLI*, at 198-99.

Petitioner provides no credible evidence whatsoever that the current joint-employer standard is insufficient to protect the rights of temporary workers from companies that contract with their employers, the staffing agencies. Rather, there is ample evidence to the contrary – that the *TLI* and *Laerco* standard does indeed protect the rights of temporary employees. *See Texas World Service Co. v. NLRB*, 928 F.2d 1426 (5th Cir. 1991) (affirming Board order that contractor and subcontractor were joint employers that engaged in unfair labor practices where the contractor directed union election strategy for subcontractor and influenced hiring and firing decisions); *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302 (1st Cir. 1993) (affirming Board order that company and staffing association were joint employers that violated Sections 8(a)(1) and (3) of the Act where company refused to accept employees and assumed supervision over the referred employees); *Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437

(D.C. Cir. 2004) (affirming Board order that distributor and driver staffing company were joint employers where distributor administered driver applicant road tests, interviewed driver applicants, prevented the hiring of applicants, selected and assigned employees to permanent routes, selected the vehicles they would use, directed them to make special deliveries, made other work assignments, and handled complaints about the drivers).

At the same time, the Board's application of the *TLI* and *Laerco* standard adequately and appropriately takes into account various day-to-day realities that are necessarily part of a workplace where a company employs both permanent workers and temporary workers. This provides a degree of reasonableness that allows companies to protect both the temporary employees as well as themselves. For instance, the present standard recognizes that "an employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contract at its facility so that it will be in a position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for." *Southern California Gas. Co.*, 302 NLRB 456 (1991) (finding no joint employer relationship even though parties' contract required temporary employees to do delineated tasks at certain times and required temporary agency to employ adequate number of trained personnel). Limited and routine supervision consisting of "directions of where to do a job rather than how to do the job and the manner in which to perform the work," is typically insufficient to create a joint employer relationship. *G. Wes Ltd. Co.*, 309 NLRB 225, 226 (1992); *Island Creek Coal Co.*, 279 NLRB 858, 864 (1986). *See also Local 254, Serv. Emps. Intern. Union*, AFL-CIO, 324 NLRB 743, 746-49 (1997) (no joint employer relationship where employer regularly directed maintenance employees to perform specific tasks at particular times but did not instruct employees how to perform their work).

And this is just so. The contemporary workplace is replete with multiple directory arrangements that fall far short of traditional notions of supervisory control. Such arrangements do not implicate Section 7 rights justifying a finding of joint employer status.

Yet, as demonstrated above, it is clear that anything more than nominal supervision will subject a company to joint employer status under the *TLI* and *Laerco* standard. Thus, the current standard promotes the rights of temporary employees under Section 7 of the Act because it sufficiently and appropriately limits the control a company may have over a temporary employee. A change to the 30-year standard would seriously disrupt workplace stability and predictability without yielding a commensurate scale of protections under Section 7. Accordingly, the standard should remain undisturbed.

B. Altering the *TLI* and *Laerco* Standard Will Subject Companies to Unmerited and Unexpected Liability.

Although the Board is not constrained by the doctrine of *stare decisis*, (*see NLRB v. Kostel Corp.*, 440 F.2d 347, 350 (7th Cir. 1971)), it should nonetheless consider how adopting a new joint employer standard may affect those parties who have relied on the current standard for decades. As Justice Louis Brandeis noted, "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."[1]

Since 1984, companies have comported themselves and organized their businesses on the basis of the *TLI* and *Laerco* standard. They did so based on the reasonable assumption that a standard that has been consistently applied for three decades without controversy would continue to be applied in the same manner going forward. Any change will jeopardize these companies

[1] *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S. Ct. 443, 447, 76 L. Ed. 815, 823 (1932) (overruled on other grounds) (Brandeis, dissenting).

and the current, stable environment in which contingent employees, unions and companies currently operate.

For example, the Board has held that when joint employer status is established between a company and a staffing agency, both entities may be liable for the unlawful discipline or discharge of the temporary employees under Section 8(a)(3). *Capitol EMI Music*, 311 NLRB 997 (1993). In addition, the Board has held that a joint employer company shares a staffing agency's duty to bargain with the agency's temporary employees and that it violates Section 8(a)(5) by refusing to do so over its decision to cancel the leasing agreement. *W.W. Grainger, Inc.*, 286 NLRB 94 (1987). As a remedy, the Board orders the company to bargain with the union as well as make whole those employees laid off as a result of the company's unlawful conduct by paying them back wages. *Id.* If the standard is changed, companies that would not be considered a joint employer under *TLI* and *Laerco* may inadvertently find themselves held vicariously liable for the actions of third parties they do not control. Although Amici maintain that *TLI* and *Laerco* are the proper standard, as Justice Brandeis wrote, "it is more important that the applicable rule of law be settled than that it be settled right." Amici submit that the joint employer doctrine is settled ***and*** it is "settled right."

C. There is No Legal Necessity to Alter the *TLI* and *Laerco* Standard.

Petitioner seeks to broaden the joint employer standard so that employees are not prevented from bargaining with the company that, as a practical matter, determines the terms and conditions of their employment. It does not, however, argue that there is a legal basis to reconsider *TLI* and *Laerco*. In fact, there is none.

Any revision to the current joint employer standard should be predicated on the fact that temporary employees are being deprived of their Section 7 rights by third-party companies.

Petitioner has adduced no proof this is the case. In fact, the Board has seen a sharp drop in the number of unfair labor charges and representation petitions being filed. In 2000, the Board received a combined total of 35,249 unfair labor charges and representation petitions. Ten years later, the number had dropped to 25,855. NLRB FY2009 Annual Report, p. 2, Chart 1. Thus, Petitioner seems to offer a solution to a problem that does not exist.

Furthermore, Petitioner has not shown that a split in authority has surfaced among the various Circuit Courts as to the joint employer standard sufficiently wide that the Board should step in to resolve it, as it had to in *TLI* and *Laerco*. Indeed there is ***no*** rift among the Circuits, which nearly universally hold that a "joint employer" relationship exists where two or more employers exert significant control over the same employees and share or co-determine those matters governing essential terms and conditions of employment. *See Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993); *SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 442-443 (2d Cir. 2011) (affirming Board's order there was insufficient evidence of control over hiring and firing decisions or work to establish were joint employers); *NLRB v. Browning-Ferris Industries, Inc.*, 691 F.2d 1117, 1122-23 (3d Cir. 1982)); *Mingo Logan Coal Co. v. NLRB*, 67 Fed. Appx. 178 (4th Cir. 2003) (affirming Board's order that company was joint employer where company directly supervised temporary employees, directed their hiring and firing, and involved itself in their discipline); *Texas World Service Co. v. NLRB*, 928 F.2d 1426, 1432 (5th Cir. 1991); *International Longshoremen's Assn., Local Union No. 1937 v. Norfolk Southern Corp.*, 927 F.2d 900, 902-903 (6th Cir. 1991) (company did not possesses sufficient control over the work of employees to qualify as a joint employer even though company owned the facility, paid staffing agency a management fee, paid all the operating costs, was kept advised as to staffing agency's labor negotiations, conducted time studies, and made recommendations as to temporary

workforce); *Truck Drivers, Oil Drivers v. NLRB*, 902 F.2d 37 (7th Cir. 1990) (affirming Board's decision that shipper was not joint employer where shipper did not hire and fire the drivers, never participated in grievance proceedings initiated by any driver, and did not exercise any control over the drivers' compensation); *NLRB v. C.R. Adams Trucking, Inc.*, 718 F.2d 869, 870-871 (8th Cir. 1983) (enforcing Board's order that trucking company and dump truck owner were joint employers because trucking company had control over the use of the truck owner's truck and it hired, supervised, and reprimanded the drivers); *Tanforan Park Food Purveyors Council v. NLRB*, 656 F.2d 1358, 1360-1361 (9th Cir. 1981) (holding petitioners were joint employers because they both had control over employment conditions governed by the collective bargaining agreement); and *Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 440-441 (D.C. Cir. 2004). Accordingly, without evidence that there is an increase in violations involving temporary employees' Section 7 rights or a divide in Circuit Courts on the standard defining joint employers, the current standards should not be modified.

D. There is No Change in the Workplace Environment to Justify Changing the Joint Employer Standard.

Petitioner argues that the joint employer standard must be broadened because of the evolving workplace where companies are now able to insulate themselves from collective bargaining obligations by hiring temporary employees through staffing agencies. This argument suffers from several infirmities.

The most significant defect is that the argument is wholly detached from whether the putative employer actually controls employees' wages, hours, terms and conditions of employment. It presumes that the use of temporary employees and staffing agencies is somehow an attempt to evade operation of the Act. If so, one would expect a steady incline in temporary employee use. But the reality is that companies are relying on *fewer* temporary employees today

than they did 15 years ago. Tian Luo, "The Expanding Role of Temporary Help Services from 1990 to 2008," Monthly Labor Review, Bureau of Labor Statistics, August 2010. By 1990, there were roughly 1 million temporary employees, accounting for 1 percent of total employment. *Id.* That figure ballooned to 2.7 million in 2000, comprising 2 percent of U.S. employees. *Id.* Since then, the use of temporary employees has fluctuated because of the recessions in 2000 and 2007. *Id.* As of 2008, there were fewer temporary employees than a decade earlier. *Id.*

The point here is that the number and percentages of temporary employees and staffing services in any given snapshot in time will ***necessarily*** fluctuate because of normal market forces unrelated to collective bargaining. There may be fewer temporary employees tomorrow than today and there may be more next year than last year. The joint employer doctrine, however, should not be a function of temporal workforce percentages. Nor should it change based on variations in such percentages. Rather, the doctrine should be a clear, stable standard based on whether a putative employer has a meaningful effect on an employee's hiring, firing, discipline, supervision, and direction, i.e., whether the employer controls or co-determines the essential terms and conditions of employment. In other words, the standard should be consistent with and effectuate the purpose of the Act. The *TLI* and *Laerco* standard is so consistent.

Petitioner's argument also glosses over the fact that the face of temporary "employees" has changed. Temporary work has shifted away from lower-skilled and lower paying jobs to more highly-skilled, higher paying staffing positions frequently falling outside the confines of Section 2(3) of the Act. Tian Luo, "The Expanding Role of Temporary Help Services From 1990 to 2008." Monthly Labor Review, Bureau of Labor Statistics, Aug. 2010. Petitioner's request to change the "joint employer" standard misses the trajectory of the present day

workforce. They have not shown a substantial change in the current workforce environment that would justify a change to *TLI* and *Laerco*.

Finally, Amici submit that, as set forth in the preceding sections, Petitioner's argument is devoid of a practical, rational, or legal basis. There is no evidence employees' Section 7 rights have been compromised or are in greater jeopardy than when the *TLI* and *Laerco* standard was enunciated. There is no evidence that the current joint employer doctrine does not adequately capture those acting as statutory employers under the Act. There is no evidence of a conflict in the Circuits or irreconcilable Board decisions since the *TLI* and *Laerco* standard emerged. In the absence of such evidence and rationale, Petitioner's argument devolves into mere unalloyed pleading for more union members.

E. A Change to the Current Joint Employer Standard Would Seriously and Adversely Affect Each of Amici's Industries.

As noted above, the business models of Amici's respective industries rely to an appreciable extent on legal and regulatory certainty. Companies within those industries have developed operational practices and procedures in reliance on the present joint employer standard. Changing the standard to create a legal fiction that a host facility is the "employer" of another wholly independent company's employees—whose employees it does not hire, supervise, discipline, discharge, or pay—will disrupt operations, likely increase costs, and impair Amici's members' ability to respond to changing market conditions and demands.

1. Manufacturing.

Thousands of manufacturers, large and small, across the country utilize staffing agencies and contingent employees to supplement operations and perform tasks both integral and ancillary to the company's core business. The nature of the arrangements vary substantially, depending upon the discrete operational requirements of a given manufacturer. Some of the arrangements

involve the manufacturer's supervision not at all; some a bit more, but sporadically and inconsequentially; while others may be so intertwined as to "co-determine . . . the essential terms and conditions of employment" with the staffing agency. *Laerco* at 325. In each instance, the manufacturer makes a reasoned decision on how much control it needs or wants to exercise, and does so with a full understanding of the ramifications of such control under the Act.

Many, if not most, manufacturers enter into agreements with temporary or leased staffing agencies that contain detailed provisions regarding hiring, firing, discipline, wages, assignment, transfers, overtime, training and other terms and conditions of employment. These agreements are drafted, in part, with the current joint employer doctrine in mind. More importantly, the operational arrangements were developed for purposes of productivity, profitability, and labor (and labor law) certainty and stability. Any change to the joint employer doctrine would adversely and unpredictably affect each of the foregoing factors.

Equally problematic is the effect an expansive indirect control standard would have on the contractor/subcontractor relationship, potentially rendering many, if not most, contractor/subcontractor arrangements "joint employer" relationships. This would severely impair the manufacturing industry, as a substantial percentage of manufacturers contract with third parties to perform a wide variety of functions such as design, molding, set-up, fabrication and assembly. In fact, any given manufactured product may involve the efforts and input of ***several*** contracting entities. Were the Board to adopt a joint employer standard more expansive than the current one, some or all of such subcontractors could be considered joint employers—a catastrophically unmanageable result that would not only severely impair the manufacturing industry, but generate confusion, interminable litigation, and do violence to labor stability and employees' Section 7 rights.

2. Restaurant and Food Service.

For many of the same reasons noted above, a change in the 30-year joint employer standard would disrupt the nation's restaurant and food service industry. Because of its labor-intensive nature, the business models of the restaurant and food service industry, as much as any other industry, are critically dependent on labor stability and certainty. At the same time, the industry requires a fair degree of flexibility to adapt to emerging trends. A change to the joint employer doctrine would upset that stability and reduce flexibility—harming the industry without enhancing employee Section 7 rights.

This is particularly true in the franchise context. A model franchisor often provides considerable business guidance and resources to its franchisees in order to help the franchise flourish and succeed while maintaining the franchisor's standards and enhancing its brand. This works to the advantage of all involved, including employees who benefit from that success.

The resources and guidance provided by franchisors, however, do not result in control of the franchisee employees' wages, hours, terms or conditions of employment; they do not amount to codetermination of the essential aspects of employment. They have little if any bearing on employees' Section 7 rights. Consequently, it would be wholly contrary to the Act to extend joint employer status to such arrangement.

Expanding the joint employer standard to the franchisor/franchisee model likely would prompt franchisors to abandon the model to the detriment of franchisees and their employees. Expanding this standard would also compromise the ability of others in the restaurant and food services industry to operate their businesses and provide employment opportunities in a stable, predictable environment.

3. Waste and Recycling.

Although waste companies use contractors in a number of areas, Browning-Ferris involved a recycling facility in California. The increased demand for waste diversion and recycling has spurred solid waste and recycling companies to increase the development of modern, state-of-the-art material recovery facilities ("MRF's") to process recyclables into useable commodities. This has required significant capital expenditures on new land and equipment. NW&RA estimates the waste and recycling industry has spent more than $1 billion on recycling infrastructure over the past decade. The national rate of recycling has increased from 16 percent to 35 percent between 1990 and 2012. http://www.epa.gov/osw/nonhaz/municipal/pubs/2012_msw_fs.pdf (Figure 2), reflecting the strong commitment of the waste and recycling industry to its customers and state and local governmental recycling goals. *See e.g.*, http://waste360.com/business/meeting-florida-s-aggressive-recycling-goals (Florida establishes 75 percent recycling goal by 2020).

There are hundreds of MRFs throughout the United States, and many of them operate similarly to the Newby Island Recyclery. MRF owners often use contract workers to sort materials or perform other tasks. These contract workers are typically supervised by the contractor, not the MRF owner. The contractor performs a wide variety of tasks relating to those workers that an employer performs for its employees, including training, drug testing, payroll, discipline and insurance coverage. These long-term relationships would be severely disrupted by a change in the joint employer standard.

Furthermore, the impact of any deviation from the current joint employer standard would affect other waste industry operations and lines of business. For example, some companies use contract workers to perform tasks in geographic locations where they do not have a permanent presence. The primary waste company sets particular requirements specifying the number of

hauls, the times they occur, and the rates that will be paid; all of those contractual restrictions will affect the subcontractor's employees' terms and conditions of employment. It would be unreasonable for the Board to deem the primary waste company to be a joint employer of the subcontractor's employees, given that they are only indirectly and marginally affecting the other's employees. Indeed, the subcontractor's employees would likely have hundreds of other customers on their daily routes, and construing them to be jointly employed by the primary waste company simply because they service a single customer is both unreasonable and nonsensical.[2]

Imposing some sort of "indirect control" test would render it virtually impossible for companies to determine whether they might be deemed a joint employer under the Act by a regional director – who has broad discretion to make such determinations—and, under the Board's proposed election's rules, the primary waste company would have no automatic right to appeal the regional director's determinations. This could potentially cripple a business' operation, as the only means to challenge the regional director's decision would be to refuse to bargain with the union if it becomes the certified representative of the employees. That refusal to bargain would be followed by years of litigation—all the while subjecting any change the primary waste company makes to employment terms to charges of unfair labor practices and potential work stoppages. Put simply, the "indirect control" standard will damage the stability of collective bargaining relationships and economic efficiency—in order to solve a supposed problem for which no empirical evidence even exists.

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[2] Subcontracting waste hauling is particularly prevalent in New York City, where haulers in one borough frequently subcontract customers located in another borough to another hauler. Such subcontracting activity is specifically authorized by City law and requires approval of a City agency.
http://www.nyc.gov/html/bic/downloads/pdf/applications/twc_subcontract_application_2012.pdf
The majority of the licensed waste haulers in New York City are unionized.
http://www.cbcny.org/sites/default/files/REPORT_GarbageFacts_05222014.pdf at 3.

F. The Standard Petitioner Seeks Would Require an Abdication of the Board's Responsibility Under the Act.

Petitioner argues that the Board's standard for determining joint employer status should be reconsidered. The standard Petitioner advocates is, however, a vague, expansive, and conclusory standard designed to find any relationship involving leased or other contingent labor arrangements to be one of joint employment. Were the Board to adopt such an "indirect control" standard it would, in effect, be abdicating its statutory responsibility to ensure its decisions "are rationally based on articulated facts...", not "conclusory rationales." *NLRB v. Yeshiva University*, 442 U.S. 672, 691 (1980).

While the Board's interpretations of the Act are entitled to deference, the Supreme Court has made clear that the Board's resolution of cases before it must be based on reasonable interpretations of law *and* the facts before it. In *NLRB v. Yeshiva University, supra*, the Supreme Court reviewed the Board's determination of whether university faculty fell within the Act's judicially created exclusion for managerial employees. Rather than base its decision on whether the faculty at issue actually performed managerial functions, the Board relied on a ***general*** proposition that the managerial exclusion cannot be applied to professional employees in the university setting. *Id.* at 684. The Supreme Court affirmed the Court of Appeal's reversal of the Board's determination, finding that such a general proposition cannot stand in the absence of factual findings supporting the Board's analysis. Specifically, the Court stated:

> [T]he Board's opinion may be searched in vain for relevant findings of fact. The absence of factual analysis apparently reflects the Board's view that the managerial status of particular faculties may be decided on the basis of ***conclusory rationales*** rather than examination of the facts of each case ... As our decisions consistently show, we accord great respect to the expertise of the Board when its conclusions are rationally based on articulated facts and consistent with the Act. In this case, we hold that the Board's decision satisfies neither criterion.

Id. at 691 (emphasis added) (citations omitted).

Here, Petitioner asks the Board to adopt the same kind of blanket, conclusory standard to determine joint employer status which the Supreme Court struck down in *Yeshiva University*. Specifically, Petitioner requests the Board adopt an approach which would find joint employer status where the entity contracting for contingent labor exercises "indirect control" over the employees' wages and discipline, has contractual rights "to control some employment conditions" even if not exercised, is "necessary to meaningful collective bargaining," even if it plays no role in hiring, firing or directing employees, and where it is the ultimate source of the wages paid to the leased employees by the leasing contractor. (Petitioners Request For Review at 35).

Petitioner does not even attempt to apply this standard to the facts of the case. Accordingly, it is clear that what Petitioner seeks is a standard that makes the *existence* of a contractual relationship—whereby one entity contracts with another to provide leased or other contingent labor—a *per se* joint employer relationship, without regard to the actual exercise of control over terms and conditions of employment. As noted earlier, such an extraordinarily expansive standard would render even contractors/subcontractors joint employers when neither has determinative control or influence over the wages, hours, terms, or conditions of the other's employees. As *Yeshiva University* instructs, deciding cases through the application of such a conclusory rationale is wholly inconsistent with Board's statutory mandate.

This is particularly the case with respect to the joint employer analysis. In *Boire v. Greyhound Corp.* 376 U.S. 473 (1964), the Supreme Court specifically recognized that joint employer status is to be determined by the degree of control exercised by a party over the work of employees. *Id.* at 481. This determination, the Court stated, is "essentially a factual issue." *Id.* As described above, the current test utilized by the Board involves consideration of the many

indicia of control. It is undoubtedly in keeping with the Board's mandate to determine the level of control exercised by a putative employer on the basis of the facts of each case. Application of the vague, conclusory standard advocated by Petitioner would, on the other hand, be wholly inconsistent with that mandate.

The change proposed by Petitioner would have a substantial impact on a significant cohort of the nation's employers. Thus, a changed standard of sweeping application—if it were to be changed at all—is more prudentially the subject of rulemaking under Section 6 of the Act rather than the narrow evidentiary confines of an adjudicatory proceeding.[3] See *NLRB v. Wyman – Gordon Co.*, 394 U.S. 759, 764 (1969) ("The rule-making provisions of the Act, which the Board would avoid, are designed to assure fairness and mature consideration of rules of general application. They may not be avoided by the process of making rules in the course of adjudicatory proceedings" (citations omitted)).

For the reasons set for throughout the brief, however, Amici emphasize that the joint employer doctrine should not be changed, whether by adjudication ***or*** rulemaking.

Accordingly, the Board should leave the well-defined, well known test for joint employer status in its current form.

V.

3 A change in the amount joint employer doctrine, for example, may have unintentional downstream effects on single employer, alter ego, and ally doctrines.

VI. CONCLUSION

For the foregoing reasons, Amici respectfully submit that *TLI* and *Laerco's* joint employer standard should not be modified or overturned.

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