Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery and FPR-II, LLC d/b/a Leadpoint Business Services, *and* Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters. Cases 32–CA–160759 and 32–RC–109684

July 29, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

This test-of-certification proceeding is before the National Labor Relations Board[1] on remand from the United States Court of Appeals for the District of Columbia Circuit.[2] This case follows from the Board's announcement in the underlying representation case, *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015) (*Browning-Ferris*), of a new joint-employer standard that the *Browning-Ferris* majority retroactively applied to conclude that BFI Newby Island Recyclery (BFI) and Leadpoint Business Services (Leadpoint) were joint employers of the Leadpoint employees in the petitioned-for unit.[3] The court affirmed in part and reversed in part the Board's decision and remanded the case with directions to clarify the new standard and how it was applied to the facts of this case. The court further suggested that the Board should "keep in mind" that retroactive application of a rearticulated new test might be inappropriate in the circumstances of this case. 911 F.3d at 1222. Consistent with this admonition, we find no need to clarify and refine the joint-employer standard announced in the Board's original representation-case decision. Upon careful consideration, we find that retroactive application of any clarified variant of the new joint-employer standard in this case would be manifestly unjust. We therefore vacate our prior Decision and Order in the Section 8(a)(5) test-of-certification proceeding, dismiss the complaint in that case, reopen the underlying representation case, and amend the Certification of Representative to remove BFI as a joint employer.

I. BACKGROUND

On August 16, 2013, the Acting Regional Director for Region 32 issued a Decision and Direction of Election wherein he found that BFI did not jointly employ Leadpoint's employees and directed an election in the following unit:

> All full time and regular part-time employees employed by FPR-II, LLC, d/b/a Leadpoint Business Services at the facility located at 1601 Dixon Landing Rd., Milpitas California; excluding employees currently covered by collective bargaining agreements, office clerical employees, guards, and supervisors as defined in the Act.

The Union filed a timely request for review of the decision not to include BFI as a joint employer of the Leadpoint employees. On April 25, 2014, while the request for review was pending before the Board, the election was held, and the ballots were impounded pending the Board's ruling.

On August 27, 2015, the Board reversed the Acting Regional Director's decision. *Browning-Ferris*, 362 NLRB at 1599–1619. In so doing, the Board overruled cases holding that an entity must exercise *direct-and-immediate* control over essential terms and conditions of employment of another entity's employees in order to be a joint employer under the Act.[4] Id. at 1599–1600, 1604, 1606–1614 (emphasis added). In place of the direct-and-immediate control test, the Board adopted a new two-step test. Id. at 1599–1600, 1613–1614. Under this test, the Board would first determine "whether there is a common-law employment relationship with the employees in question." Id. at 1600. Second, "[i]f this common-law employment

[1] Member Emanuel is a member of the panel but did not participate in this decision on the merits. Accordingly, the Charging Party's motion to recuse Member Emanuel is denied as moot, without addressing its merits.

In *New Process Steel v. NLRB*, 560 U.S. 674 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum when one of the panel members has recused himself. Under the Court's reading of the Act, "the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified." *New Process Steel*, 560 U.S. at 688; see also, e.g., *NLRB v. New Vista Nursing & Rehabilitation*, 870 F.3d 113, 127–128 (3d Cir. 2017); *D. R. Horton, Inc.*, 357 NLRB 2277, 2277 fn. 1 (2012), enfd. in relevant part 737 F.3d 344 (5th Cir. 2013); *1621 Route 22 West Operating Co.*, 357 NLRB 1866, 1866 fn.1 (2011), enfd. 725 Fed. Appx. 129 (3d Cir. 2018).

[2] *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018). Subsequent to the court's decision, the Board notified the parties to this proceeding that it had accepted the court's remand and invited them to file statements of position. Respondent Browning-Ferris, the General Counsel, and the Charging Party each filed a statement of position. The Charging Party also filed a motion to strike the General Counsel's statement. The motion is denied. We note that our conclusion that the new joint-employer standard should not have been applied to BFI Newby Island Recyclery retroactively is not based on any of the General Counsel's arguments challenging the substantive validity of that standard.

[3] The Board has since issued a final rule that reinstated and clarified the joint-employer standard in place prior to *Browning-Ferris*. Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11184 (Feb. 26, 2020). The final rule, which applies only prospectively from its effective date of April 28, 2020, does not control this proceeding.

[4] See, e.g., *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985); *Laerco Transportation*, 269 NLRB 324 (1984).

relationship exists, the inquiry would then turn to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." Id. For both parts of the test, the Board substantially redefined the nature of employer control required to prove joint-employer status, holding that indirect or unexercised contractually reserved control could alone be dispositive. Id. at 1600, 1613–1614. Applying its new joint-employer standard retroactively to the facts at hand, the Board concluded that BFI and Leadpoint were joint employers of the petitioned-for employees and directed the Regional Director for Region 32 to open and count the ballots and issue the appropriate certification.

On September 14, 2015, after the ballots revealed that a majority of voters had opted for union representation, the Regional Director issued a Certification of Representative. Consistent with the Board's decision, the unit description in the Certification of Representative was amended, postelection, to add BFI as a joint employer:

> All full time and regular part-time employees employed by FPR-II, LLC d/b/a Leadpoint Business Services and Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery, joint employers, at the facility located at 1601 Dixon Landing Road, Milpitas, California; excluding employees currently covered by collective-bargaining agreements, office clerical employees, guards and supervisors as defined in the Act.

BFI thereafter refused to recognize and bargain with the Union. On January 12, 2016, the Board granted the General Counsel's motion for summary judgment, found that the refusal to bargain violated Section 8(a)(5) and (1) of the Act, and ordered BFI to bargain with the Union. *Browning-Ferris Industries of California, Inc.*, 363 NLRB No. 95 (2016). BFI refused to comply with the Board's Order and filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit. The Board filed a cross-application for enforcement.

On December 28, 2018, the court granted BFI's petition for review in part, denied the Board's cross-application for enforcement, and remanded this proceeding to the Board. *Browning-Ferris Industries of California*, 911 F.3d at 1200. Reviewing the Board's new joint-employer standard, the court agreed with the Board that unexercised reserved control and indirect control can be relevant factors in determining whether an additional entity is a common-law joint employer. However, the court did not address whether such evidence can have conclusive weight. See id. at 1209–1213, 1216–1221. Further, the court found that the Board erred in analyzing whether BFI had indirect control over Leadpoint's employees. The court found that the Board "fail[ed] to distinguish evidence of indirect control that bears on workers' essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting." Id. at 1216. Even if the Board had sufficiently explained its finding that BFI was a joint employer at common law, the court added, the Board failed to apply the second step of its standard, which asks whether the entity has "sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." Id. at 1221–1222 (quoting *Browning-Ferris*, 362 NLRB at 1600).

The court then addressed the possibility that the Board's retroactive application of its new standard to BFI was manifestly unjust:

> Because we conclude that the Board insufficiently explained the scope of the indirect-control element's operation and how a properly limited test would apply in this case, it would be premature for us to decide Browning-Ferris's challenge to the Board's retroactive application of its test. We do not know whether, under a properly articulated and cabined test of indirect control, Browning-Ferris will still be found to be a joint employer. In addition, the lawfulness of the retroactive application of a new decision cannot be evaluated reliably without knowing with more precision what that new test is and how far it departs (or does not) from reasonable, settled expectations.
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> Nevertheless, we note that the Board in this case "carefully examined three decades of its precedents," "concluded that the joint-employer standard they reflected required 'direct and immediate' control," and "[t]hereafter . . . forthrightly overruled those cases and set forth . . . 'a new rule.'" [*NLRB v.*] *CNN America*, 865 F.3d [740,] 749–750 [(D.C. Cir. 2017)] (quoting *Browning-Ferris*, 362 [NLRB at 1600]). In rearticulating its joint-employer test on remand, then, the Board should keep in mind that while retroactive application may be "appropriate for new applications of [existing] law," it may be unwarranted or unjust "when there is a substitution of new law for old law that was reasonably clear," and on which employers may have relied in organizing their business relationships. *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (alteration in original; internal quotation marks omitted) (quoting *Public Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996)); cf. *American Tel. & Tel. Co. v. FCC*, 454 F.3d 329, 333–334 (D.C. Cir. 2006) (finding retroactive application "not manifestly unjust" where the agency's previous rulings "reflect[ed] a highly fact-

specific, case-by-case style of adjudication" that did not establish "a clear rule of law exempting" certain conduct).

Id. at 1222. Similarly, Judge Randolph, writing in dissent, warned about retroactive application: "On remand and in light of what the Board learned during the rulemaking, the Board might reconsider that aspect of its decision. Case law in this circuit . . . strongly suggests that it should." Id. at 1225.

II. ANALYSIS

In its position statement, BFI first and foremost contends that this case should be dismissed on the basis that retroactively applying the new joint-employer standard was inequitable. We find merit in this contention.

The Board majority in the original *Browning-Ferris* decision offered no more explanation for applying its new standard retroactively than to state summarily that "[t]he Board's established presumption in representation cases like this one is to apply a new rule retroactively." 362 NLRB at 1600 (citing *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011)). In *UGL-UNICCO*, however, the Board explained that although there is a presumption that new rules will be applied retroactively, the presumption "is overcome . . . where retroactivity will have ill effects that outweigh the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." 357 NLRB at 808 fn. 28 (quoting *Crown Bolt, Inc.*, 343 NLRB 776, 779 (2004)) (internal quotation marks omitted). In light of the court's expressed concerns, which we accept as the law of the case, we now reconsider the retroactivity issue and find that any presumption favoring retroactive application in this case is significantly outweighed by its potential ill effects.

In determining whether to apply a change in law retroactively, the Board balances any ill effects of retroactivity against "'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). In other words, the Board will apply a new rule "to the parties in the case in which the new rule is announced and to parties in other cases pending at the time so long as [retroactivity] does not work a manifest injustice." Id. (internal quotations omitted). In determining whether retroactive application will work a manifest injustice, the Board typically considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application. Id. Here, however, we do not write on a blank slate. We are guided in our retroactivity analysis by the court's decision, which is law of the case. And the court clearly emphasized the centrality of reliance interests to the retroactivity determination, stating that retroactive application "may be unwarranted or unjust when there is a substitution of new law for old law that was reasonably clear, and on which employers may have relied in organizing their business relationships." *Browning-Ferris Industries of California*, 911 F.3d at 1222 (internal quotation marks omitted).

As the court noted, the Board majority in the underlying representation case decision acknowledged and expressly overruled three decades of Board precedent requiring proof of direct and immediate control by one employer over another employer's employees in order to establish a joint-employer relationship. Absent that showing of direct and immediate control, proof of indirect and/or unexercised reserved control, regardless of the nature of such control or to what terms and conditions of employment it applied, would not warrant finding a joint-employer relationship for purposes of the National Labor Relations Act under pre–*Browning-Ferris* precedent.

In other words, for at least 30 years preceding the Board's 2015 decision in the underlying representation case, there was a clear rule of law requiring proof of direct and immediate control under the applicable joint-employer test. It is reasonable to assume that parties would rely on this law when organizing their business relationships. Indeed, numerous comments filed in our recent joint-employer rulemaking proceeding made abundantly clear that many businesses did rely on that legal standard and that the new standard adopted in the 2015 decision would substantially affect reasonable, settled expectations for relationships established on the basis of the prior standard.

Although the court's remand sought clarification and redress of two critical shortcomings in the Board's discussion of its new joint-employer standard, we find there is no variation or explanation of that standard that would not incorporate its substantial departure from the prior direct and immediate control legal standard. Retroactive application of that new standard would mean that entities such as BFI would be suddenly confronted with the new reality that preexisting business relationships with other entities, such as Leadpoint—relationships formed in reliance on a decades-old direct-and-immediate-control standard for determining joint-employer status—thrust upon them unanticipated and unintended duties and liabilities under the Act. In accord with the legal principles cited by the court in its remand opinion, such a change represents a substitution of "new law for old law that was reasonably clear." 911 F.3d at 1222 (internal citations omitted). As such, it would be manifestly unjust to fail to give BFI and

similarly affected businesses reasonable warning before imposing such significant new duties and liabilities.

Also counseling against retroactive application of the *Browning-Ferris* standard in this case is the fact that the election was held, and the employees voted, on the basis that Leadpoint was the sole employer, not BFI and Leadpoint as joint employers. The Board has refused to give effect to election results where the election was held on the premise that a joint-employer relationship existed, and the Board later reversed that finding. *H&W Motor Express*, 271 NLRB 466 (1984) ("As the employees herein cast their ballots based on the Regional Director's finding that a joint employer relationship existed, we direct that the impounded ballots be discarded and that a new election be conducted should the Petitioner desire to proceed to an election."). Here, the reverse situation exists, but the principles stated in *H&W Motor Express* militate against retroactivity all the same with respect to imposition of a bargaining obligation on BFI when the employees here cast their ballots on the assumption that a joint-employer relationship did not exist.

Accordingly, we conclude that the new joint-employer test announced in the underlying representation case should not have been applied in this litigation to determine whether BFI was a joint employer. The joint-employer issue must be resolved under the prior longstanding standard requiring proof of direct and immediate control. The Acting Regional Director applied that standard in his Decision and Direction of Election and found that BFI was not a joint employer of Leadpoint's employees. As the dissenting opinion in the subsequent Board case noted, "the majority does not argue that the Regional Director erred in making this finding." 362 NLRB at 1634 fn. 60. We agree and now affirm the Acting Regional Director's finding that BFI is not a joint employer as dispositive of the joint-employer issue in the present unfair labor practice case. Based on that finding, BFI did not violate Section 8(a)(5) by refusing to bargain with the Union. We will vacate the prior Decision and Order and dismiss the complaint in that proceeding. We will also reopen Case 32–RC–109684 for the limited purpose of amending the Certification of Representative to remove BFI as a joint employer, which restores the unit description to the language in place at the time that the employees voted.

ORDER

IT IS ORDERED that the Board's prior Decision and Order in Case 32–CA–160759, reported at 363 NLRB No. 95, is vacated and the complaint is dismissed.

IT IS FURTHER ORDERED that Case 32–RC–109684 is reopened and the Certification of Representative issued on September 14, 2015, is amended as follows:

> **UNIT:** All full time and regular part-time employees employed by FPR-II, LLC, d/b/a Leadpoint Business Services at the facility located at 1601 Dixon Landing Rd., Milpitas California; excluding employees currently covered by collective bargaining agreements, office clerical employees, guards, and supervisors as defined in the Act.

Dated, Washington, D.C. July 29, 2020

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD